Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 176 OF 2003 – COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM. Coram: SAMATA C.J, MUNUO J.A, RUTAKANGWA J.A	**SULTAN $^{s}/_{o}$ MOHAMED VS THE REPUBLIC.** (Appeal from the decision of the High Court of Tanzania at Dar es Salaam. **HC Criminal Appeal No. 98 of 2002** (Kaganda, J)	Non-compliance with the provisions of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E 2002 is a fundamental irregularity which could have occasioned miscarriage of justice. The criteria for ordering a retrial is consistently restated in ➢ Shaban Madebe Vs The Republic, Criminal Appeal No.72 of 2002 (unreported) where in the Court cited several authorities namely:- Rex Vs Kija Sagida and 2 others Vol. 14 EACA 118 Rex Vs Dinu $^{d}/_{o}$ Sombi and 2 others Vol. 14 EACA 136, Rex Vs Vashanjee Liladhar Dossani Vol 13 EACA 150 Merali and others Vs (1971) HCD n.145 Ahamed Ali Dharamsi Sumar V.R 91964) EA 481, and Fatehali Maji Vs the Republic (1966) EA.343.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SAMATTA, C.J, MUNUO,J, A, AND RUTAKANGWA, J, A.)

CRIMINAL APPEAL NO. 176 OF 2003

SULTAN S/O MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at

Dar es Salaam)

(Kaganda J.)

Dated the 10th day of July, 2003

in

HC. Criminal Appeal No. 98 of 2002

JUDGEMENT OF THE COURT

27 November, 2006 & 31 January, 2007

MUNUO, J, A.:

This is a second appeal from Criminal Case No. 81 of 2002 in the District Court of Temeke at Temeke within Dar es Salaam Region in which the present appellant, Sultan Mohamed, was convicted of an unnatural offence c/s 154 (1) of the Penal Code, Cap 16 for sodomizing Awadhi s/o Charles, then aged 8 years. Challenging the conviction, the appellant lodged Criminal Appeal No. 98 of 2002 in the High Court of Tanzania at Dar es Salaam which appeal was dismissed by Kaganda, J. for lack of merit. Aggrieved, the appellant then preferred the present appeal.

One of the grounds of appeal is that the trial is invalid for non-compliance with provisions of Section 240 (3) of the Criminal

Procedure Act, Cap 20 R.E. 2002. The irregularity, the appellant contended, is incurable so the appeal should be allowed. He cited the case of Ally Choroko versus Republic, Criminal Appeal No. 23 of 1999 (CA) (unreported) in which the Court quashed the conviction on a similar ground.

Mrs Kabisa, learned Principal State Attorney, contended that the PF3, Exhibit P1, was admitted without any objection from the appellant so there was no need to call the doctor who prepared it to testify. In that regard, she contended, non-compliance with the provisions of section 240 (3) of the CPA did not cause injustice to the appellant so it was a minor curable defect.

We are of the settled view that the trial Court's omission to explain to the appellant his right to have the medical doctor who prepared the PF3, Exhibit P1, summoned to testify at the trial, was a fundamental irregularity which could have occasioned miscarriage of justice. We wish to quote Section 240 of Cap 20 verbatim:

240. (1) In any trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be received in evidence.

(2) The Court may presume that the signature to any such document is genuine and that the person signing the same held the office or had the qualifications which he purported to hold or to have when he so signed the same.

(3) When any such report is received in evidence, the court may, if it thinks fit, and shall if so requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report. **The court**

shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.

In this case, the trial magistrate did not comply with the above mandatory provisions of Section 240 (3) of the Criminal Procedure Act so the said omission incurably flawed the trial. We are of the considered view, nonetheless, that the evidence and circumstances of this case necessitate a retrial.

The criteria for ordering a retrial is consistently restated in – Shabani Madebe versus The Republic, Criminal Appeal No. 72 of 2002 (unreported) wherein the Court cited several authorities namely –

Rex versus Kija Sagida and 2 others Vol 14 EACA 118; Rex versus Dinu d/o Sombi and 2 others Vol 14 EACA 136; Rex versus Vashanjee Liladhar Dossani Vol 13 EACA 150; Merali and Others

versus Republic (1971) HCD n. 145; Ahamed Ali Dharamsi Sumar versus R (1964) E.A 481; and Fatehali Manji versus the Republic (1966) E.A. 343. The holding in the case of Fatehali Manji sums up the criteria for ordering a retrial by stating:

> In general, a retrial be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial……each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.

We are clear in our minds that the interests of justice require a retrial in the present case. We accordingly allow the appeal and order a retrial before another magistrate of competent jurisdiction.

DATED at DAR ES SALAAM this 18th day of December, 2006.

B. A. SAMATTA
CHIEF JUSTICE

E. N. MUNUO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR