

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 12 OF 2012

NAZARENO KIHAGAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Kihyo, J.)

Dated the 15th day of February, 2013

in

Criminal Appeal No. 12 of 2012

JUDGMENT OF THE COURT

2nd & 4th day of August, 2016

MJASIRI, J.A.:

In the District Court of Iringa District, the appellant Nazareno Kihaga was charged of malicious damage to property contrary to section 326 of the Penal Code. He was found guilty as charged and was accordingly convicted. He was sentenced to pay a fine of Three Hundred Thousand Shillings (300,000/=) or twenty four (24) months imprisonment in default. He was also ordered to pay the complainant Three Million Six Hundred Fifty

Three Thousand Four Hundred (3,653,400/=) as compensation for the damaged property.

The background to this case is that the appellant sold to the complainant a house situated at Dodoma Road for Twenty Million Shillings, (20,000,000/=). Subsequent to that, there was a complaint that the appellant destroyed the said property by partially demolishing it, causing a loss of Shs. 3,653,400/=. It was alleged by the prosecution that on April 18, 2011 on or about 8:00 hours at Mwang'inge area within the Municipality of Iringa, in Iringa Region the appellant willfully destroyed the house of Bruno s/o Mahinya.

The appellant completely denied the charged. According to him the house he was trying to demolish was his property as there were two houses situated on the plot, where the complainant had bought a house.

At the hearing of the appeal the appellant was unrepresented and had to fend for himself as his lawyer Mr. Onesmo Francis, learned advocate was ill. The respondent Republic was represented by Mr. Aristarick Mwinyiheri learned State Attorney.

The appellant presented a two (2) point memorandum of appeal which is reproduced as under:-

1. *The appellate court erred in law for failure to address and take into consideration that the accused was charged with the non existing provision of the law, i.e. section 326 of the Penal Code Cap 16 R.E. 2002.*
2. *The appellate Court erred in law for failure to address the alteration of the charge made by the trial magistrate during the writing of the judgment which was the basis for the appellant's conviction, sentence and compensation order on malicious damage to property without affording the appellant a new chance to plead to the altered charge.*

Mr. Mwinyiheri did not support the conviction. In relation to the first ground of appeal on the non-existent charge, he readily conceded that the charge was defective. However he argued that there is no law which states that the case would fail if a charge is defective. He submitted that it all depends on the nature of the case and whether the appellant was prejudiced or not. He stated that there were other procedural irregularities in the case and the appellant cannot be said to have had a fair trial. He

made reference to **Charles Mlande v Republic**, Criminal Appeal No. 270 of 2013 CAT (unreported).

In relation to the second ground, on the amendment of the charge by the trial magistrate at the time he was composing the judgment, the learned State Attorney contended that the trial magistrate did nothing wrong, all that he did was to correct the defect in the judgment and it did not affect the rest of the proceedings. Upon further consideration, he submitted that the appellant had a right to be informed. He therefore did not have a fair trial.

The appellant being without legal representation simply agreed with the learned State Attorney. He left the matter in the hands of the Court.

Section 326 of the Penal Code under which the appellant was charged is non-existent. Section 326(1) of the Penal Code provides as under:-

- (1) Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years.*

The charge sheet did not specify the particulars of the offence as it was based on a non-existent provision of the law. The trial magistrate when composing the judgment unilaterally amended the charge without advising the appellant. The High Court did not address this anomaly. The charge is obviously defective and the defect is not curable under section 388 (i) of the Criminal Procedure Act (The CPA).

The law is settled. Failure to cite the relevant provision of the law is fatal. Section 135 (a) (ii) of the CPA clearly outlines how a statement of offence should be framed. It provides as follows:-

*"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and **if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.**"*

[Emphasis provided].

In **Charles Mlande v Republic**, Criminal Appeal No. 270 of 2013 CAT (Unreported), this Court made reference to the case of **Abdalla Ally v Republic**, Criminal Appeal No. 235 of 2013 CAT (unreported) where it was held as follows:-

"...being found guilty on a defective charge based on a wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the court below..... In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. The wrong or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred left the appellant unaware that he was facing a serious charge of rape..."

Similar observations were made by the Court in **Marekano Ramadhani v Republic**, Criminal Appeal No. 202 of 2013, **Kastory Lugongo v Republic**, Criminal Appeal No. 251 of 2014 and **David Halinga v Republic**, Criminal Appeal No. 12 of 2015, CAT (all unreported).

In the above mentioned cases the Court held that the defective charge sheet unduly prejudiced the respective appellants. We are of the same view. In the instant case the situation is much worse and the appellant was highly prejudiced. The trial magistrate when composing the judgment unilaterally and without informing the parties took it upon himself to *perfect* the charge, by inserting the relevant provision of the law, that is section 326 (1) of the Penal Code. This move was highly irregular, and denied the appellant the right to properly defend himself on the charge he was facing. The appellant cannot therefore be said to have received a fair trial which is his constitutional right as provided under section 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

In view of the position stated hereinabove, we are of the considered view that the defective charge unduly prejudiced the appellant.

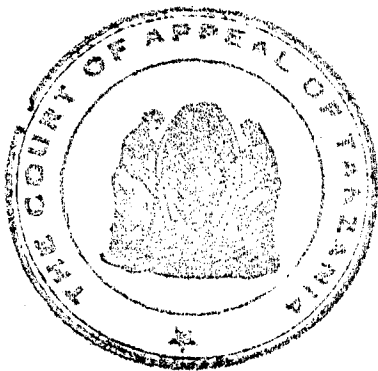
We would also like to mention in passing that the complaint which led to the appellant being charged seems to be that of a civil nature and should have been made in a civil claim rather than in criminal proceedings.

Given the circumstances, the conviction and sentence of the appellant cannot be sustained in view of the defective charge and the methodology used by the trial magistrate in amending the defective charge.

In the result we hereby allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant, that is a fine of Shs. 300,000/= and the compensation order of Shs 3,653,400/=

Order accordingly.

DATED at IRINGA this 3rd day of August, 2016.




S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

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


B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL