IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 118 OF 2018

JACKSON VENANT.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Bongole, J.)

dated the 11th day of September, 2017

in

Criminal Case No. 288 of 2016

RULING OF THE COURT

21th & 30th August, 2018

WAMBALI, J.A:.

The appellant, Jackson Venant together with Cheye Francis @ Jipangile (not subject to this appeal) were charged before the District Court of Ngara with the offence of cattle theft contrary to section 268 of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code). The particulars that were laid in a charge indicated that the two persons jointly and together on 20th September, 2016 at about 09:00 hrs. at Mrusenyi - Rusomo within Ngara

District in Kagera Region stole 40 heads of cattle valued at Tshs. 28,000,000/= the property of one Adam Fred.

Following the said allegation, the trial was conducted and at the end it is only the appellant who was convicted and sentenced to five years imprisonment. The other accused, Cheye Francis @ Jipangile was found not guilty and was acquitted.

The appellant appealed against both conviction and sentence but he did not convince the High Court as his appeal was dismissed in its entirety.

It is against that background that the appellant preferred the present appeal with several complaints against the dismissal of his appeal by the High Court.

When the appeal was called on for hearing, Mr. Josephat Rweyemamu, learned advocate appeared for the appellant, while Ms. Chema Mbena Maswi, learned State Attorney appeared for the respondent, Republic.

We need to point out that before counsel were called upon to submit on the grounds of appeal lodged by the appellant, we required them to submit on whether the charge against the appellant was proper. The Court raised the matter ***suo motu*** in view of the fact that the charge against the

appellant was premised on section 268 of the Penal Code, while the said section has three subsections.

It is acknowledged that this matter did not surface in the High Court when the first appeal was heard.

Mr. Rweyemamu, learned advocate for the appellant in his response acknowledged that although the appellant who prepared the memorandum of appeal did not raise the issue of a defective charge, there is no doubt that the defect occasioned injustice on the part of the appellant as he did not know properly what offence he was facing. He argued further that in view of the ambiquity that was caused by referring the provision of section 268 generally without reference to the specific subsection, the appellant could not have defended himself properly. In the circumstance, Mr. Rweyemamu, learned advocate for the appellant urged the Court to nullify the proceedings and judgment and quash conviction and set aside the sentence of five years imprisonment as the same were a nullity due to a defective charge. He prayed further that the appellant be released from custody as the defect is not curable.

Ms. Maswi, in her response conceded that the charge that was laid against the appellant by the prosecution at the District Court of Ngara was

defective. However, she quickly submitted that the defect in the charge was not serious enough to warrant the Court to nullify the proceedings and judgment, quash conviction and set aside the sentence that was imposed to the appellant by the trial court. She firmly submitted that the said defect did not cause injustice on the appellant as he defended himself and thus he knew which offence he was charged with at the trial. The learned State Attorney insisted that the defect in the charge is curable under section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). She thus urged the Court to hold that the defect in the said charge could not have prejudiced the appellant in anyway and hear the appeal on merit as the Court has done in some appeals. At the permission of the Court, she later supplied two unreported decisions of this Court in 1. **Zabron Masunga** 2. **Dominic Matondo v. The Republic,** Criminal Appeal No. 232 of 2011 at Mwanza, and **Joseph Leko v. The Republic**, Criminal Appeal No. 124 of 2013 at Arusha (both unrepresented) to support her submission.

At this juncture, there is no dispute that the charge that was laid against the appellant at the District Court at Ngara was defective.

The issue which we need to resolve is whether the said defect prejudiced the appellant to the effect that there was no fair trial. In order

to appreciate the discussion and reasoning that will follow herein below, we are compelled to quote the provision of section 268 of the Penal Code in full thus:

> *"(1) If the thing stolen is any of the animals to which this section applies, the offender shall be liable to imprisonment for fifteen years.*
>
> *(2) where any person kills any animal to which this section applies with intent to steal its skin or carcas or any part of its skin or carcas he shall for the purpose of section 265 and this section, be deemed to have stolen the animal and shall be liable to be prosecuted against and punished accordingly.*
>
> *(3) This section applies to a horse, mare, gelding ass mule, camel, ostrich, bull cow, ox, ram, ewe, whether got or pig."*

We need not over emphasize that from the above quoted provision, it is clear that every subsection has its own purpose to serve despite the fact that the marginal note to the section concerns stealing certain animals.

Subsection (1) of section 268 of the Penal Code concerns stealing of any animal mentioned under subsection (3) and any person found guilty of the offence is liable to punishment for fifteen years.

On the other hand, subsection (2) of the same section concerns killing any animal mentioned in subsection 3 with intent to steal its skin or carcas or any part of its skin or carcas. This subsection must also be read together with section 265 of the Penal Code for the purpose of punishment which is seven years imprisonment for a person who is found guilty of the offence.

Taking into consideration the above observation, we have no hesitation to state that it cannot be said with certainty that the charge which was laid against the appellant under section 268 of the Penal Code generally was intended to be premised under which subsection of the said section.

The confusion in the charge which was defective can be seen even from the evidence and the defence which was tendered in Court. Indeed, the confusion is more apparent in the sentence which was imposed by the trial court. If the offence could have been placed under subsection (1) of

section 268 of the Penal Code, the punishment could have been different from the one which could have been imposed under subsection (2). It is on record that the appellant was sentenced to five years imprisonment. It is thus not clear whether in sentencing the appellant the learned trial Resident Magistrate acted under subsection (1) or (2) as the appellant was convicted under section 268 of the Penal Code generally.

In the circumstances of this case, we are of the considered opinion that the appellant was prejudiced during the trial and in his defence and therefore there was no fair trial. The defect in the charge was incurable in the circumstance of this case. In adopting this position we are mindful of the submission of the learned State Attorney for the respondent Republic which she made in reference to the decided appeals of this Court referred above on the effect of a defective charge. Indeed, she strongly argued that the defect is curable under section 388 of the CPA.

We nevertheless, with respect, think that the circumstances are different from the present appeal. Besides every case must be decided on its own merits. In the present appeal, we have found that the appellant was prejudiced, by the defective charge that resulted in the conviction and the sentence that was imposed. We therefore think that this is a proper

matter in which the Court has to hold that the defect in the charge was incurable.

We need to emphasize that this Court has also held in many other cases depending on the circumstance like this one, that the defects in the charge are incurable under section 388 of the CPA. We wish to refer to the recent decision of this Court in **Joseph Paul @ Miwela v. The Republic**, Criminal Appeal No. 379 of 2016 at Iringa (unreported) in which a number of other decisions of the Court on similar position was referred to support the holding of the Court.

It is in this regard that, with respect, we do not agree with the learned State Attorney for the respondent Republic that the defect of the charge in the present matter is curable.

We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have been committed must be mentioned and stated clearly in a charge. The charge therefore

must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged.

In the event, we exercise our powers of revision under section 4(2) of the Appellant Jurisdiction Act, Cap. 141 R.E. 2002 and nullify all the proceedings and judgment entered by the trial court and proceedings and judgment of the first appellant Court and quash the conviction. We also set aside the sentence of five years imprisonment that was imposed to the appellant. We accordingly order that the appellant be released from custody and be set free forthwith unless he is held for some other lawful cause. We so order.

DATED at **BUKOBA** this 29th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL