IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 421 OF 2016

JONATHAN GEORGE NJAMAS ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

AT Moshi District Registry)

(Sumari, J.)

dated the 26th September, 2016

in

DC Criminal Appeal No. 31 of 2016

REASONS FOR JUDGMENT

12th March & 2nd May, 2018

MWANGESI, J.A.:

At the conclusion of hearing the appeal of Jonathan George Njamas on the 12th day of March, 2018, we allowed the appeal. We quashed his conviction and set aside the sentence of imprisonment for five years, which was imposed on him by the trial court and confirmed by the first appellate Court. We however, reserved our reasons for so doing, which we now

proceed to do in terms of the provisions of Rule 39 (6) of the Court of Appeal Rules, 2009 (**the Rules**).

According to the charge that was laid at the door of the appellant on the 2nd day of April, 2014, he stood arraigned in the district court of Moshi for the offence of stealing contrary to the provisions of section 265 of the Penal Code Cap 16 R.E 2002, **(the Code).** It was the case for the prosecution that, at unknown day and time, the accused person did steal laminate measuring about 20 kilograms valued at TZs 1,000,000/=, the property of one Mega Trade Investment Limited.

When the charge was read over to the appellant, he protested his innocence and as a result, the prosecution paraded four witnesses to establish the guilt of the appellant. And, in his defence, the appellant placed reliance on his own testimony and did not summon any witness. At the end of the day after the learned trial resident magistrate had evaluated the evidence placed before her, was of the considered view that, the case against the appellant had sufficiently been established. The appellant was therefore, convicted of the charged offence and sentenced to serve a jail term of five years.

The findings and sentence of the trial court were challenged by the appellant through an appeal to the High Court vide Criminal Appeal No. 31 OF 2016. The same however, failed by being dismissed in its entirety in a decision of the High Court, that was handed down on the 29th day of September, 2016 upholding both the trial court's conviction and sentence.

The facts of the case in brief were to the effect that, on an unknown date in the month of November, 2011, the appellant stole kiroba original laminate paper, which was being used by Mega Trade Investment Limited to make kiroba bags, measuring about twenty kilograms. The said property was later found in the boot of KIMOTCO bus service during Police operation at Chang Bay Police barrier along Arusha to Moshi high way, while being transported from Arusha towards Dar es Salaam. After investigation, it was discovered that it was the appellant, who had stolen the said property and that, at the material time, he was transporting it to Dar es Salaam. He was thereafter arrested and arraigned for the offence of stealing and ultimately convicted and sentenced.

In the memorandum of appeal of the appellant that was lodged in Court on the 4th April, 2017, he listed about five grounds of appeal.

However, on the 7th March, 2018, he added other four additional grounds of appeal and thereby, making a total of about nine grounds of appeal. Nevertheless, on close scrutiny of the grounds of appeal, it was noted that, all grounds of appeal boil into mainly two complaints namely; **first,** that the evidence relied upon by the two lower courts to hold him culpable to the charged offence, was insufficient. And, **secondly** that the charge which was laid against him was defective.

When the appeal was called on for hearing before us on the 12th day of March, 2018, the appellant entered appearance in person legally unrepresented, and therefore, fended for himself whereas, the respondent/Republic was being advocated for by Ms Alice Mtenga learned State Attorney, who was assisted by Ms Ridhiki Mahanyu also learned State Attorney.

In his brief oral submission to amplify his grounds of appeal, the appellant argued that, the charge under which he stood arraigned for, was defective for failing to disclose the area where the offence was alleged to have been committed, and also for not disclosing the one who complained about the alleged theft. Furthermore, the appellant went on to argue, the

case was poorly investigated as the one who was arrested with the alleged stolen laminate, was never joined as an accused in the offence. He therefore urged the Court to find merit in his appeal, and as a result, his appeal be allowed, and he be set at liberty.

On her part, Ms Mtenga readily supported the appeal. In her submission in support of the one made by the appellant in regard to the defect on the charge sheet, she argued that, the charge was indeed defective for the reason that, the particulars of the offence did not disclose the date, time and place where the offence occurred. She submitted that, the same was in contravention of the stipulation under the provisions of section 132 of the Criminal Procedure Act, Cap 20 R.E 2002 (**the Criminal Procedure Act**), as well as the Schedule to the same Act, where a sample on how charges have to be drafted has been given. In her view, the failure to indicate the place where the offence occurred was a fatal irregularity, which vitiated the entire proceedings. In support to her averment, she referred us to the decision in the case of **Mwambeja Njera Vs Republic**, Criminal Appeal No. 109 of 2009 (unreported).

On the basis of the foregoing anomaly, the learned State Attorney argued that, the appellant did not get a fair trial for the reason that, with such defective charge, he could not properly prepare his defence. She thus implored the Court to invoke its revisional powers under the Appellate Jurisdiction Act, to quash the proceedings of both the trial court and that of the first appellate Court. The learned State Attorney was however, hesitant to pray for an order of retrial for the reason that, the evidence relied upon by the prosecution in prosecuting the case was so weak and therefore, did not justify any further trial of the appellant.

What stands for our deliberation in light of the foregoing, is whether the appellant in the matter at hand was properly charged before the trial court. To be in a better positon of deliberating the matter, we consider pertinent to reproduce the charge sheet that was laid at the door of the appellant *verbatim* as hereunder:

Statement of offence

Stealing contrary to section 265 of the Penal Code Cap 16 R.E 2002.

Particulars of offence

Jonathan George Njamas at unknown day and time did steal laminate measuring 20 kilograms valued at TZs 1,000,000/=the properties of one ***Mega Trade Investment Limited.***

And, the requirements for a properly drafted charge sheet are contained under the provisions of section 132 of the **Criminal Procedure Act,** where it has been stipulated that:

> *"Every charge or information shall contain, and shall be sufficient if contains, a statement of the specific offence or offences with which the accused person is charged together with* ***such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***
>
> [Emphasis supplied]

Our task therefore, is to appraise as to whether the particulars of the offence which the appellant stood charged with, did meet the requirements stipulated under section 132 of the **Criminal Procedure Act** quoted above**.** Our answer is in the negative. This is from the fact that, in the charge against the appellant, the time at which the offence was committed is unknown. Also the date on which the offence was committed was not

mentioned. And furthermore, the place where the offence was committed has not been indicated. Under such situation, it could not have been easy for the appellant to understand well the nature of the offence which he was charged with, so as to prepare his defence properly. It was stated by the Court in the case of **Isidori Patrice Vs Republic,** Criminal Appeal No. 224 of 2007 (unreported) that:

> *"It is a mandatory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with necessary mens rea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

In yet another recent decision of the Court in the case of **Mussa Mwaikunda Vs Republic** [2006] TLR 387, where the particulars of the offence in the charge were not elaborately stated, the Court reiterated its previous stance by stating that:

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence."*

Besides the instant case missing the requirements as held in the above cited cases, we have noted that, the failure to indicate the place where the offence was committed in the instant matter was even worse. This was from the fact that it did put into question even the territorial jurisdiction of the court which tried the case. For instance, according to the testimonies of Juma Ramadhani (PW3) and James Reuben Kimaro (PW4), they suggest that the offence of theft in the instant case was committed in Arusha. The same therefore, essentially, ousted the territorial jurisdiction of the district court of Moshi, which handled the case against the appellant.

Such an anomaly could have been easily detected with the indication of the place where the offence was committed in the particulars of the offence.

The totality of the foregoing moves us to subscribe to the views that was expressed by the learned State Attorney that, there was no fair trial to the appellant and that, the proceedings of the trial court as well as that of the first appellate Court cannot be left to stand. The subsequent question which we had to ask ourselves, is what should be the way forward following nullification of the proceedings of the lower courts.

It was earlier hinted above by the learned State Attorney, who was reluctant to pray for an order of retrial for the reason that, there was want of evidence to justify issuance of the order. A guideline as to when and where an order of retrial can be made was given by the erstwhile Court of Appeal for East Africa in the landmark case of **Fatehali Manji Vs Republic** [1966] EA 341 that:

> *"In general a retrial will 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 evidence or for purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court from which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interest of justice require."

Back to the case under discussion, it has been submitted by the learned State Attorney that, there was no strong evidence to implicate the appellant to the charged offence. We note from the record that, this was also the stance that was taken by the learned State Attorney in the first appellate Court, where she did also not support the conviction of the appellant. We squarely subscribe to the stance taken by the two learned State Attorneys that, there is no sufficient evidence to establish the commission by the appellant of the charged offence. Under the

circumstances, an order of retrial will serve no any useful purposes other than subjecting the appellant to unnecessary hardships. It was for these reasons that we quashed the proceedings and judgments of both the trial court and the first appellate under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002, and Rule 39 (6) of **the Rules**, set aside the sentence and ordered his immediate release from prison.

DATED at **ARUSHA** this 27th day of March, 2018.

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL