

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

**(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)**

**CRIMINAL APPEAL NO. 285 OF 2016**

**JUMA MAKOYE @ JUMA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)**

**(Makani, J.)**

**Dated the 3<sup>rd</sup> day of June, 2016**

**in**

**DC. Criminal Appeal No. 125 of 2015**

.....

**JUDGMENT OF THE COURT**

**4<sup>th</sup> & 7<sup>th</sup> September, 2018**

**LILA, J.A.:**

The District Court of Bariadi which is within Shinyanga Region convicted the appellant with two offences; namely **burglary** and **stealing** and sentenced him to serve twenty (20) and fourteen (14) years jail terms, respectively . It was ordered that the sentences were to run consecutively and the recovered properties be returned to the owner. The High Court (Makani, J.) upheld the District Court findings on first appeal. He has, further, pursued his right of appeal to the Court, in this second appeal.

In his Memorandum of appeal, the appellant has brought to the fore three grounds aimed at impugning the concurrent findings of the two courts below.

At the hearing of the appeal, the appellant appeared in person without any legal representation while the respondent Republic was represented by Miss Margareth Ndaweka, learned Senior State Attorney, who was assisted by Mr. Shaban Juma Massanja, learned State Attorney.

At the commencement of the hearing, we directed the learned Senior State Attorney to, first, address us on whether the charge on which the appellant was convicted was proper. We were so prompted by the appellant's complaint in ground (3) of appeal which is to this effect:-

*"(3) That my lord Justice there is full of doubt in proceeding of the trial since the incidence reported to the police station, because the caution statement from the police officer that written (sic) in the police form number two(PF 2A) shows that I was (sic) committed the offence under section 296(b) of the penal code, while in the charge sheet shows that I was (sic) committed the offence under section 294(1) code (sic) which I was not charged with, thus this contradictions of sections of the law lender unfairly trial and ferial (sic) to make defense to what I was charged with."*

Miss Ndaweka was not hesitant to concede that, indeed, the charge was fatally defective. She, in the first place, said even assuming that the structure broken into was a building, still the charge would be fatally defective on account of the offence having been predicated under section 294(a)(2) which does not exist instead of section 294(1)(a) and (2) of the Penal Code, Cap. 16 R. E. 2002 (the Penal Code). That aside, she also argued that the particulars of the offence for the first count clearly indicate that it was the shop which was broken into and not a building. In the circumstances, she insisted, the proper charging provision ought to have been section 296(a) instead of section 294(1)(a) and (2) of the penal Code. In respect of the second count, Miss Ndaweka was also quick to attack the charge on the basis that the particulars thereof explains that after the shop was broken the listed items were taken away. That, she added, amounted to theft under section 265 of the Penal Code. Section 269 of the Penal Code cited in the charge was not applicable, she argued. She concluded by stating that the appellant was thereby prejudiced and hence not fairly tried.

Finally, the learned Senior State Attorney urged the Court to allow the appeal, quash the conviction and set aside the sentence and set the appellant free.

The appellant, a layperson, could not grasp the gist of the issue under discussion. He rested his hope in the Court to determine the matter but in the end he prayed to be freed.

For a better appreciation of the learned Senior State Attorney's arguments, we find it prudent to quote, in whole, the charge that initiated the criminal proceedings against the appellant. It is framed in the following manner:-

**"CHARGE**

**1ST COUNT:**

**OFFENCE, SECTION AND LAW:** *Burglary c/s 294(a)(2) of the penal code Cap. 16 R.E. 2002.*

**PARTICULARS OF OFFENCE:** *That **JUMA S/O MAKOYE @ JUMA S/O IBRAHIM** is charged on 10<sup>th</sup> day of June, 2013 at 23:00hrs in Bariadi Town centre within the District of Bariadi and Shinyanga Region willfully and unlawfully did break and enter the shop of one **KUNDI D/O MPELWA** with intent to commit an offence there in.*

**2<sup>nd</sup> COUNT:**

**OFFENCE, SECTION AND LAW:** *Theft c/s 258(1)(2) (a) and 269 of the penal code Cap. 16 R.E 2002.*

**PARTICULARS OF OFFENCE:** that **JUMA S/O MAKOYE @ JUMA S/O IBRAHIM** is charged on 10<sup>th</sup> day of June 2013 at about 23:00hrs in Bariadi Town centre within the District of Bariadi in Shinyanga Region after break and enter the said Shop did steal One dozen of Grand malt-Drink Tshs 18,000/=, A bag valued Tshs 60,000/=, Bottles of Perfumes Valued Tshs 87,500/=, One Solex Lock Valued Tshs. 7,000/=, Perfumed Soap One Dozen Valued Tshs 12,000/=, Pink Lotion 6PC Valued Tshs 6,000/=, One Movit Lotion Tshs 3,500/=, One Afo-gei Valued Tshs 1,000/= and Cash Money Tshs 160,000/=, Total Value Tshs 355,000/= The property of **KUNDI D/O MPELWA.**

STATION: **BARIADI**

*Signed*

**DATE: 14/06/2013      PUBLIC PROSECUTOR"**

As can be gleaned, the particulars of both counts are explicitly clear that it was the shop which was alleged to have been broken into and thereafter an assortment of items listed therein taken away. We, like the learned Senior State Attorney, agree that section 294(a)(2) does not exist. We also agree with her that section 294 of the Penal Code upon which the

first count was predicated was inapplicable for obvious reasons that it only creates offences relating to the structure broken being a building, tent or vessel used as a human dwelling. That section, in very unambiguous terms, states as follows:-

*"(1) Any person who—*

*(a) **breaks and enters any building, tent or vessel used as a human dwelling** with intent to commit an offence therein; or*

*(b) N/A*

*(2) If an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years."*

[Emphasis added]

It is crystal clear that the above quoted section does not include a shop which, in the particulars of the offence, it was alleged that the appellant broke into and entered. The proper provision creating the offence of shop breaking is section 296(a) of the Penal Code which states as follows:-

*"Any person who -*

*(a) breaks and enters a school house, **shop**, warehouse, store, workshop, garage, office or counting house, or a building which is adjacent to a dwelling house and occupied with it but is not part*

*of it, or any building used as a place of worship and commits an offence therein;*

*(b) having committed an offence in any building referred to in paragraph (a) breaks out of the building,*

*is guilty of an offence and is liable to imprisonment for ten years.”[Emphasis added]*

In respect of the second count, we are in all fours with the learned Senior State Attorney that, theft occurring in the present circumstances is chargeable under section 265 of the Penal Code. The cited section 269 of the Penal Code applies in other situations listed therein such as stealing from a person or another, a dwelling house, a vessel, vehicle or place of deposit or where the thing stolen is attached to or forms part of a railway and lastly where the offender, in order to commit the offence, opens any locked room, box or other receptacle by means of a key or any other instrument. It is plain, therefore, that section 269 of the Penal Code does not, therefore, create an offence of stealing from a shop.

We wish to reiterate here that it is a principle of law that in any criminal proceedings it is the charge which lays a foundation of a trial. The principle has always been that an accused person must know the nature of the case he is facing. As such, the charge sheet must contain sufficient

information to enable the appellant to understand the nature of the charge he faces and what defence to put up. That is the spirit underlying the enactment of section 135 of the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA) which provides for the manner offences are to be charged. It imposes a mandatory requirement that a charge must describe the offence and make reference to the section of the enactment creating the offence. Section 135 (a) (ii) of the CPA 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 supplied]

Where it is found that the charge falls short of complying with the above provisions of the law, the Court has consistently held that the accused is prejudiced and hence the trial is unfair. To mention, just one, is



the case of **Abdalla Ally Vs. Republic**, Criminal Appeal No. 253 of 2013 (unreported). In that case the Court observed as follows:-

*"...being found guilty on a defective charge based on wrong and /or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the courts below..."*

In the matter under scrutiny, it is obvious that the appellant, in both counts, was charged, tried and convicted on wrong provisions of the law. He could not, in the circumstances, align his defence properly as there was confusion on which offence he was to defend himself between burglary and shop breaking. He was prejudiced and hence he was not fairly tried.

Regarding the way forward, we are agreed, as was the learned Senior State Attorney, that in the event of the foundation of trial having collapsed, then there is, practically, no charge in existence – see **Mayala Njigailele Vs. Republic**, Criminal Appeal No. 490 of 2015 (unreported).

This ground alone sufficiently disposes of the appeal. We will therefore not venture to determine other grounds of appeal, for, it will serve no useful purpose apart from being a mere academic exercise.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence handed down by the trial court and later not faulted by the first appellate court. The appellant Makoye Juma @ Juma to be released from prison forthwith unless held for any other lawful cause.

**DATED** at **TABORA** this 6<sup>th</sup> day of September, 2018.

K. M. MUSSA  
**JUSTICE OF APPEAL**

S. A. LILA  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

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

  
A. H. Msumi  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL (T)**