

**“ORIGINAL”**

**IN THE HIGH COURT OF TANZANIA  
DODOMA DISTRICT REGISTRY  
AT DODOMA**

**CRIMINAL APPELLATE JURISDICTION**

**PC CRIMINAL APPEAL NO. 17 OF 2016**

*(From the District Court of SINGIDA*

*Criminal Appeal No. 11 of 2016 original Criminal Case No. 37 of 2016,  
Ikungi Primary Court)*

**GERARD MHAMI.....APPELLANT**

**VERSUS**

**AMIN ABDALLAH..... RESPONDENT**

**JUDGEMENT**

**18<sup>TH</sup> AUGUST 2017**

**Mansoor, J:**

Gerald Mhami was charged with the offence of obstructing the officer from doing his work c/s 12 (1) (e) and Section 13 of the By-laws of the Ikungi District Council 2014 “Sheria Ndogo ya Wilaya ya Ikungi ya Mwaka 2014, and for mobilizing people



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not to pay taxes c/s 12 (1) (c) and 13 of the bye laws of the Ikungi District Council, “Sheria Ndogo ya Halmashauri ya Wilaya ya Ikungi”. The Primary Court sentenced him to six months imprisonment. The Appellant was aggrieved with the conviction and sentence, he appealed to the District Court of Singida, and he was granted bail pending the appeal. At the District Court, the Appellant raised four grounds of appeal as follows:

1. that the Trial Court erred in law and fact for convicting the appellant on the non-existing law;
2. that the Trial Court erred in law and fact for convicting on the offence which was not committed;
3. That the Trial Court erred in law and in fact for failure to evaluate evidence before it.
4. The Trial Court erred in law and in fact for failure to observe the provisions of Section 7 (1) (2) of the Magistrate Court’s Act, Cap 11 R: E 2002.



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On the Judgment of the District Court, the Court did not make any findings with regards to the first ground of appeal. The District Court Magistrate acknowledged that there were some errors in the proceedings and judgment of the Primary Court, however he/she dismissed the appeal on the ground of section 37 (2) of the Magistrate Courts Act, Cap 11 R: E 2002 which provides that no decision or order of a Primary Court or District court shall be reversed or altered on account of commission or irregularity in the complaint unless such error, commission or irregularity, has in fact occasioned failure of justice.

The Appellant was aggrieved by the decision of the District Court, he made the second appeal before this Court raising six grounds of appeal, as follows:

1. The First Appellate court erred in law for upholding the decision of the Trial Court even after discovering that the appellant was charged with the offence, and convicted under the non-existing law.



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2. The First Appellate Court erred in law for upholding the decision of the Trial Court even after discovering that the Trial Court contravened the provisions of section 7 (1) (2) and item 37 (2) of Part VI of the Second Schedule of the Magistrate Court Act, Cap 11 R:E 2002;
3. Both the First Appellate Court and the Trial Court erred in law for convicting the Appellant on the offence which was not committed by him as per the law referred in his conviction;
4. The First Appellate Court erred in law for wrong interpretation of section 37 (2) of the Magistrates Court's Act, Cap 11 R:e 2002;
5. That the First Appellate Court erred in law and fact for deciding the matter as if it is a Civil Appeal, and as a result dismissing the Appeal with costs;
6. That both Courts erred in law and fact for failure to evaluate evidence.



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Counsel Fred Kalonga who was representing the Appellant combined the 1<sup>st</sup> and 3<sup>rd</sup> ground, and said the Appellant was charged and convicted under Sheria Ndogo Za Halmshauri ya Wilaya ya Ikungi of 2014. He said this piece of subsidiary legislation does not exist; it was never enacted by the Ikungi District Council. The law that exists is “Sheria Ndogo za Ada na Ushuru za Hamashauri ya Wilaya ya Ikungi, 2014 GN No. 213 of July 2014. He referred the Court to the case of **Isidori Patrice vs. R, Criminal Appeal No. 224 of 2007** Court of Appeal sitting at Arusha, at page 11 of the **Isidori case**, the Justices of the Court of Appeal observed the following:

*“It is a mandatory statutory 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 : See section 132 of the Act. 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*



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*criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defense, must allege the essential facts of the offence and any intent specifically required by law. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed; they must be included in the particulars of the offence.”*

The Respondent was represented by Sarara State Attorney, who in his submissions he purposely avoided to cite the full citation of the law but insisted that GN No. 213 of 2014 dated 11 July 2014 exists, and that the Appellant was charged under the said GN, the bye laws that exist. He said the particulars of the charge were elaborative, and the Appellant understood the charge, and that is why he offered his defense. He said the charge was not defective, thus the case of Isidori



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cited by the Counsel for the Appellant is irrelevant in the present appeal.

As held in the Isidori's case, the failure to give proper description of the law in the charge sheet renders the charge defective and affects the competency of the Court to hear and determine the case which in fact was brought before it. A Court cannot be competent to hear and determine the prosecution is case if the charge before it is defective. The charge sheet should have cited the correct bylaws. It is the charge and the law cited in the charge sheet that makes the learned Magistrate able to determine whether he/she is competent or whether the court has jurisdiction to entertain the prosecution's case and for that purpose to determine sentence to be given. The Magistrate should have satisfied himself/herself on the correctness of the law cited in the charge sheet, and as soon as he/she decided that the law did not exist, and no valid sentence could be given , the Court became incompetent to proceed with the matter.

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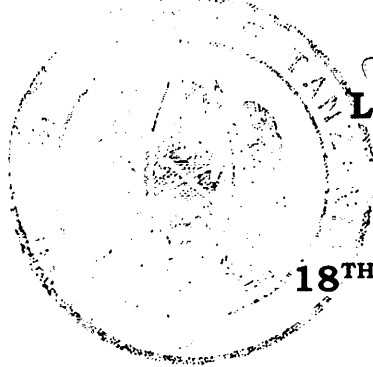
In my view the absence of citation of the proper law in the charge sheet cannot be regarded as a mere technical defect or omission or a mere technical irregularity. The bye law in question was obviously enacted for the purpose of collecting levy for the District. Since the law cited in the Charge Sheet did not exist, and the sentence imposed to the Appellant also cannot be presumed to exist. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or courts. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and can be faced with a severe punishment affecting his entire life, thus prosecution cannot possibly undo the harm which may have been done by the initiation of prosecution with a wrong charge under the wrong law. In the opinion of this Court the error, or irregularity in charge sheet for the prosecution mentioning the non-existing law has occasioned failure of justice, and for that reasons the 1<sup>st</sup> and 3<sup>rd</sup> ground of appeal succeeds.



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I shall not determine the other grounds of appeal raised, since these two grounds sufficed to allow the appeal and quashed and set aside the conviction and sentence.

Based on the above the conviction and sentence passed by the Ikungi Primary Court is hereby quashed and set aside. The Appellant is set free unless lawfully detained for any other lawful cause.

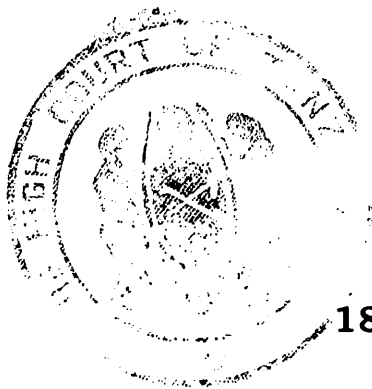


**L. MANSOOR**

**JUDGE**

**18<sup>TH</sup> AUGUST 2017**

Judgement delivered in Court today in the presence of the Appellant, Ms. Magiri, State Attorney for the Respondent Republic and Ms. A. Mwaka the Court Clerk.



**L. MANSOOR**

**JUDGE**

**18<sup>th</sup> AUGUST 2017**