

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 37 OF 2017

MOHAMED S/O HASSAN@ KICHAMBIKEAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

MURUKE, J.

The appellant, Mohamed s/o Hassan @ Kichambike was charged and found in possession of offensive instruments contrary to Section 298 of the Penal Code, [Cap 16, R.E. 2002]. In the end was convicted on the offence of house breaking and sentenced to serve ten (10) years in prison. The appellant was aggrieved by the decision of the district court, hence appealed to this court advancing seven grounds as listed in the petition of appeal.

During hearing, the appellant requested the court to adopt his grounds of appeal as his submission. The Learned State Attorney, Debora Mushi by way of preliminary remarks alerted the court that, the charge sheet is defective for not mentioning the law in which the accused was charged. She stated that, the charge sheet should describe the offence and make reference to the law creating the offence. The defect cannot even be cured with

section 388(1) of the Criminal Procedure Act, Cap 20, R.E. 2002, therefore renders the trial nullity. She cited the case of **Mussa Ramadhani vs. Republic, Court of Appeal Criminal Appeal No. 388 of 2013**, where Mugasha, J.A. held that; charge sheet ought to have been framed according to section 135(a)(ii) of the Criminal Procedure Act (supra).

Also learned State Attorney cited the cases of Salum Ally M, Criminal appeal No. 220 of 2015, **Hamisi Yusufu Richard vs. Republic, Criminal Appeal 384 of 2016**, **Edward Thomas vs. Republic, Criminal Appeal No. 166/2017**, (both unreported) where this court held that; in order for the accused to receive a fair trial, a charge sheet must be drafted, according to the provision of law and must contain the following:

- i. Charge sheet drawn and signed by the Magistrate is offence known in law.*
- ii. It is an offence in which court has jurisdiction*
- iii. Must reflect the offence complained.*

On the issue of being found with offensive instrument, learned state attorney, Debora Mushi, submitted that this offence falls under section 5(a)(2) of Minimum Sentence Act, Cap 90, R.E, 2002. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company of one or more person immediately before or after the commission of robbery, he

warned, beat, struck or uses any material violence to a person, he shall be sentenced to imprisonment for a term not less than 30 years. In the case at hand the accused was sentenced for 10 years' imprisonment, thus, the sentence is a nullity for not following the requirement of the law.

Having considered the respective submissions by the appellant and the learned State Attorney, together with the trial Court records, the following are the deliberations of this Court in disposal. As submitted by the learned State Attorney, Debora Mushi, the charge sheet on the first count does not show provision of the law on which the offence is based. For clarity I wish to reproduce charge sheet on the first count.

1st COUNT

OFFENCE, SECTION AND LAW:- *Breaking in to store with intent to commit an offence c/s of the penal code cap 16 of the Laws Revised Edition of 2002.*

As correctly submitted by learned State Attorney that, Charge sheet must comply with **Section 135(a)(ii) of the Criminal Procedure Act** (supra) which read as follows;

(a)(i) N/A

(ii) 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;

In the case of **Juma Mohamed vs. Republic, Criminal Appeal No. 272 of 2011**, Court of Appeal (Arusha)(unreported) it was held that and I quote;

"that a statement of offence should describe the offence and should contain a reference to the section of the enactment creating the offence."

Also in the case of **Adam Rajabu vs. Republic, Criminal Appeal No. 369 of 2014**, Court of Appeal (Dodoma) (unreported) referring **the case of Isidori Patrice v. R, Criminal Appeal No. 224 of 2007** held that;

"There is no gainsaying that procedure requires that the particulars of the charge sheet disclose the essential elements or ingredients of the offence that an accused is accused of having committed."

Therefore, failure to show the section of the law in which the charge is based renders the charge sheet horrible defective to the extent that it cannot even be cured by **section 388 (1) of the Criminal Procedure Act(supra)**

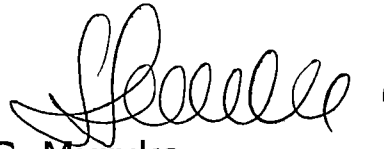
Regarding the sentence, I differ with learned State Attorney that, the trial was not bound to abide with section 5(a)(ii) of the Minimum Sentencing Act (supra) because section refers to the offensive instrument used immediately before and/ or after commission of robbery. In the matter at hand, the offensive instrument refers to the instrument used to break the store. Sentencing below the term specified in the sections creating offences is not fatal because those provision are just providing maximum of sentence. In the case of **Opoya v. Uganda (1967) E.A. 752 and Nyamhanga s/o Magesa Criminal Appeal No. 470 of 2015**, Court of Appeal, (Mwanza)(unreported) it was held that;

"where these words "...liable to imprisonment for life". are used in any particular provision providing for a punishment, the proper interpretation is that the court has discretion to pass a sentence which may be appropriate in the circumstances of that particular case."

Therefore, there was no problem for trial magistrate to impose the sentence of ten (10) years of imprisonment instead of 14 years as provided under section 297 of the Penal Code (supra). The only issue is that, the conviction was on defective charge. It is for the foregoing reasons, I allow the appeal. The conviction is quashed, part of un served sentence is set aside. Thus, order

the release of the appellant from prison, unless otherwise withheld with other offences.

It is so ordered.



Z. G. Muruke

JUDGE

03/04/2018

Judgment delivered in the presence of appellant in person, and Honorina Munishi for the respondent



Z. G. Muruke

JUDGE

03/4/2018