

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 204 OF 2017

*(an appeal from the judgment of Kllombero District Court delivered by Hon.
Mashabara SRM on 4th May, 2017 in Criminal Case No. 92 of 2016)*

SALUM SHABAN SIMWICHE **APPELLANT**
VERSUS
THE REPUBLIC **RESPONDENT**

JUDGMENT

5th and 25th June, 2018

BANZI, J.:

offence of stealing by Kilombero at Ifakara, the appellant was charged with the offence of stealing by servant contrary to sections 271 and 258 of the Penal Code [Cap. 16 R.E. 2002]. He was convicted and sentenced to three (3) years imprisonment. In addition to the prison term he was ordered to pay Tshs.32,000,000/= to Kilombero District Council. Aggrieved with the decision, through the service of Advocate Edwin Enosy, the petition of appeal was filed comprising five grounds, but at the hearing, grounds number 4 and 5 were dropped and the three (3) remained grounds are as hereunder;

- 1. That, the trial Magistrate erred in law to convict and sentence the appellant basing on the fatally defective charge.*
- 2. That, the trial Magistrate erred in law and fact in conviction the appellant without sufficient evidence to ground conviction beyond reasonable doubt.*
- 3. That, the trial Magistrate erred in ~~law and fact~~ by crafting the proceedings and judgment ~~contrary to the law~~.*

Before embarking on the merit of the appeal, it is useful to reflect the factual background impelled the conviction of the appellant. In 2007, the appellant was employed by Kilombero District Council as Village Executive Officer. But later in 2012 he was promoted to Ward Executive Officer and he served Mkula Ward for six months and then he was transferred to Lumemo Ward up to 2015. Among his duties was collection of levy which was done through revenue collection/receipts books. Between 2013 and 2015, about fifteen 15 revenue collection receipt books were issued to the appellant by George Kibwana (PW2) in respect of Lumemo and Mkula Wards through counter folio book which was tendered and admitted as exhibit P1. After collection of levy, the appellant was supposed to deposit money and return the books to PW2 but he never did.

In April, 2015, an audit was conducted by Patrience Ntakwa (PW3). According to PW3 the audit revealed shortage of Tshs.32,000,000/= on the part of the appellant for failure to hand over collected levy and return revenue collection/receipt books. PW3 tendered the audit report which was admitted as exhibit P2. The appellant was arrested and formally charged before the court.

In his sworn defence, the appellant denied to steal the alleged amount and contended that, the prosecution witnesses failed to prove how he stole the alleged amount and insisted that the evidence against him was fabricated.

As pointed out earlier, the appellant had the service of the learned Advocate Mr. Edwin Enosy, whereas the respondent Republic was represented by Mr. Bryson Ngidi, the learned State Attorney.

In arguing ground number one, Mr. Edwin submitted that, the conviction of the appellant was based on the defective charge. He contended that, the appellant was charged with the offence of stealing by servant contrary to sections 271 and 258 of the Penal Code. According to him section 258 has 5 subsections but the prosecution failed to pinpoint under which

subsection the appellant was charged. Such failure offends section 135(a)(i)(ii) of the Criminal Procedure Act (CPA). To support his argument, he cited the case **Abdallah Ally v Republic**, Criminal Appeal No. 253 of 2013 CAT (unreported), whereby at page 13 the Court ruled on the importance of specifying charging provision of the law. The learned Advocate further submitted that, since the charge was ~~fatally defective~~, the appellant was prejudiced in defending himself hence his trial was not fairly conducted.

Coming to the second ground, Mr. Edwin submitted that, in criminal cases, the burden of proof always lies on the prosecution. He contended that, in the case at hand, the prosecution failed to prove its case beyond the required standard. All prosecution witnesses failed to prove beyond reasonable doubt how Tshs.32,000,000/= were stolen but they just testified that the appellant was given receipt books for collection of revenue. He further argued that, there was variance between charge and evidence in respect of stolen money as well as the place of incident. The charge shows Tshs.32,000,000/= were stolen at Lumemo Ward, while no evidence was adduced to substantiate the said amount. On the other hand, there is testimony showing that, the receipt books subject matter of the alleged offence was collected from Lumemo and Mkula Wards. He submitted that,

the prosecutions side were duty bound to prove what has been stated in the charge sheet, short of that it cannot be said that the case was proved beyond reasonable doubt. He referred the case of **Salum Rashid Chitende v Republic**, Criminal Appeal No. 204 of 2015 CAT (unreported).

On the last ground concerning crafting of proceedings and judgment contrary to the law, the learned Advocate submitted that, at page 28 of the proceedings when the matter came up for judgment the appellant was not convicted and the court jumped to mitigation and later passed the sentence. On the other hand, at page 5 of the judgment, the appellant was convicted without being sentenced. According to him the two anomalies offend section 235(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] as the section is couched in mandatory form that "..... *shall convict and pass sentence.....*" He concluded that, failure to enter conviction and pass the sentence is procedural irregularity which is not curable under section 388(1) of the CPA.

In that regard, he prayed for appeal to be allowed by quashing the conviction, setting aside the sentence and release of the appellant from prison since an order for re-trial will not save any purpose.

On his part, the learned State Attorney Mr. Bryson Ngidos did not support the conviction. He started by faulting the charge sheet which to his opinion was defective for wrong and/or non-citation of the section of the law on the statement of the offence. He argued that section 258 of the Penal Code has various subsections, hence citing section 258 without mentioning any of the subsection was fatal and renders the charge defective. He referred the case of **Shabani Masawila v Republic**, Criminal Appeal No. 358 of 2008 CAT (unreported) and **Abdallah Ally v Republic**, Criminal Appeal No. 253 of 2013 CAT (unreported) to support his argument.

Regarding ground number three, Mr. Ngidos submitted that, section 312(1)(2) of the CPA stipulates clearly how the presiding judge or magistrate shall construct the judgment. It is clearly stated under subsection (2) that in case of conviction, judgment shall specify the offence the accused is convicted and the punishment to which he is sentenced. He argued that, the trial court judgment does not contain punishment to which the appellant is sentenced. Having said that, he supported the appeal with all its prayers mentioned on the petition.

Starting with the charge sheet, it is evident from the record that the appellant was charged under sections 271 and 258 of the Penal Code.

However, section 258 has five (5) subsection, each stipulates different things. For instance, subsection (1) creates the offence of theft in general, and subsection (2) has five (5) categories of *mens rea* of theft. Citing section 258 alone without mentioning specific subsection which creates the offence, offends section 135(a)(ii) of the CPA which requires a statement of offence to have a correct reference of the section that creates the particular offence. The purpose of citing the correct section which creates the offence was discussed in the case of **Shabani Masawila v Republic**, Criminal Appeal No. 358 of 2008 CAT (unreported) where it was stated that;

"The reason for showing in the statement of offence a correct reference of the section which creates the particular offence is not farfetched. It is to enable the accused to understand the nature of the charge laid against him and prepare his defence. This would also minimize the chances of him/her being prejudiced."

Therefore, for offence of stealing by servant to be complete, the prosecution ought to have cited section 258(1) which creates the offence of stealing together with section 271. Hence failure to make reference to

subsection (1) of section 258 of the Penal Code [Cap. 16 R.E. 2002] renders the charge fatally defective.

So far as ground number two is concerned, I inclined to agree with Mr. Edwin that, there is variance between charge sheet and evidence. The charge sheet shows the stealing occurred at Lumemo Ward. But looking on the evidence of PW2 at page 9 to 10 among the receipts books issued to the appellant and never returned were of Mkula Ward, which were three books each worth Tshs.1,500,000/= and one book worth Tshs.10,000,000/=. In that regard, among the stolen amount of Tshs.32,000,000/= alleged to be stolen at Lumemo Ward as appeared on the charge sheet, were stolen at Mkula at the time the appellant was working there. It is the duty of prosecution to prove what has been stated in the charge, short of that is an irregularity which is not curable by section 388(1) of the CPA. This position was stated in the case of **Saium Rashid Chitende v Republic** (supra).

Apart from that, there are contradictions between PW1 and PW4 in respect of type of levy/revenue in which the appellant was supposed to collect. PW1 at page 7 testified that, the appellant was supposed to collect levies from the vehicles passed at Kilombero Gate. On the other hand, PW4 at page 17 stated that the appellant stole Tshs.32,000,000/= being "pesa za

uhuru" as he termed himself. It was the duty of the trial court to address there contradictions and resolve them. In the case of **Mohamed Said Matula v Republic** [1995] TLR 3 it was stated that;

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter".

Taking the prosecution evidence as a whole, was not sufficient to prove the case beyond reasonable doubt. Assuming the collected levy was out of vehicles passed at Kilombero gate as contended by PW1, in the absence of record showing the number of vehicles passing there for the stated period, the contention by PW1 becomes doubtful. The claim by PW1 that the appellant admitted the loss is not a conclusive proof of the offence of stealing. It is a settled principle that admission of loss does not amount to admission of theft. Refer the case of **Simon Kilowoko v Republic** [1989] TLR 159.

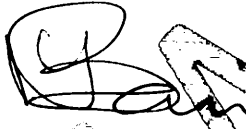
Turning to the last ground, I inclined to agree with both learned counsels that the judgment was constructed contrary to the provisions of section 312 of the CPA. For ease of reference, I find it prudent to reproduce section 312(2) which provides that;

"In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced". (emphasis is added).

In the view of above quoted provisions it goes without saying that, sentence is part of the judgment. Traversing the judgment of the trial court, there is nowhere you can find the sentence. Though the sentence is found in the proceedings but, since the section is couched in a mandatory language, the omission by the trial Magistrate was fatal and is not curable under section 388(1) of the CPA.

Having examined the shortfalls of the charge sheet, judgment and the evidence in general, it is quite clear that the prosecutions failed to prove

their case beyond reasonable doubt. In the upshot, I find the appellant's appeal with merit. Hence I allow the appeal, quash the conviction and set aside the sentence together with the compensation order of Tshs.32,000,000/=. I order the immediate release of the appellant from prison unless otherwise lawfully held.


I.K. BANZI
JUDGE
25/06/2018

Delivered this 25th day of June, 2018 in the presence of Bryson Ngidos the learned State Attorney for the respondent and the appellant in person.


I.K. BANZI
JUDGE
25/06/2018

Right of appeal explained.


I.K. BANZI
JUDGE
25/06/2018

