IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 258 OF 2017

(ORIGINATING FROM CRIMINAL CASE NO 217 OF 2015 FROM ILALA DISTRICT COURT IN DAR ES SALAAM BY HON KIYOJA, RESIDENT MAGISTRATE)

1.WILLIAM S/O CHARLES MAOPE .....1st APPELLANT

2.SAID SALUM .....2nd APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

MAGOIGA, J.

The appellants hereinabove were charged in the District Court of Ilala in Dar es salaam city on two counts of conspiracy contrary to section 384 and stealing contrary to sections 258 and 256 (a) all of the Penal Code, Cap 16 (R.E. 2002). The appellants were convicted and sentenced to seven years' imprisonment for the first count and five years' imprisonment on the second count. The sentences to run concurrently. Aggrieved by both convictions and sentences, the appellants have come to this court to contest their innocence.

The facts of the case are that on unknown dates and times at Ilala District within Dar es salaam region the appellants did conspire to commit an offence of stealing. On 19th day of August 2015 did steal a motor vehicle with registration number T. 312 BBP make Toyota sprinter valued at Tshs 7,000,000/= the property of Grace Liberatus Kessy. Investigations were

done and eventually the appellant were arrested, prosecuted and convicted as charged, hence this appeal.

The appellant has preferred 12 grounds of appeal as follows: the first appellant filed 7 grounds of appeal and the second appellant filed 5 grounds of appeal. When this appeal was called for hearing the appellants were present in person, unrepresented and were ready for hearing. The respondent, Republic was represented by Ms. Selina Kapange, learned State Attorney and was ready for hearing. The learned State Attorney informed the court that she does not support conviction and sentence.

Upon that information, the appellants jointly deferred their submission until the learned State Attorney finish submitting and they will make their submission after the State Attorney finish. The learned State Attorney submitted that she doesn't support conviction because the evidence tendered and the charge sheet are at variance. She noted, this is incurable irregularity on the case for the republic. The learned State Attorney went on submitting that the evidence on record, in particular, that of PW1 was that, PW1 entered into agreement with the first appellant and same was reduced into writing and was admitted as exhibit P1. They agreed, among others, that PW 1 was to be paid tsh 90000/= in a month but later they changed to 50000/=. This piece of evidence, according to learned State Attorney, shows the first appellant was employees of the PW1 and, if anything went wrong then the proper offence to be levelled against the first appellant was stealing by agent contrary to section 273 (b) of the Penal Code, Cap 16 (R.E.2002). As an officer of the court and for the interest of justice, she pointed out that this irregularity cannot be cure under section 388 of the Criminal Procedure Act, cap 20 (R.E. 2002). She cited the cases of MAREKANO RAMADHAN V. REPUBLIC, CRIMINAL APPEAL NO 251 OF 2014 (UNREPORTED)ARUSHA, (CAT) and MUSA MWAIKUNDA V. REPUBLIC [1996] TLR 387, where it was held in both cases that where there is a variance between charge and evidence the trial is fatal. That being the position of the law she invited this court to declare the proceedings and judgement a nullity and allow the appeal and set the appellant free.

The appellants when invited to submit any thing to their appeal both had nothing to add and subscribed to the State Attorney submission and prayed

their appeal to be allowed and set free. That marked the end of hearing of this appeal.

I have looked into the charge sheet the subject of conviction and sentence and the evidence on record with a legal mind and eye, I must say that it is my considered opinion that the trial court was not justified to enter conviction on such glaring irregularity. There is no dispute that the evidence on record was proving stealing by agent and not that of stealing. These I must say are two distinct offences and they attract difference punishment. It is therefore clear that the offence of stealing was not proved at all. The evidence that the trial court used to mount conviction was proving a different offence. In the case of BAKARI OMARI@LUPANDE V. REPUBLIC, CRIMINAL APPEAL NO 130 OF 2006 (UNREPORTED) DODOMA, (CAT), it was held that where the evidence on record do not prove a charge at issue is a fatal misdirection that cannot left to mount conviction. It is on the same vein I agree as correctly submitted by the learned State Attorney that this irregularity suffices to dispose this appeal without going into the details of other grounds.

However, in the course of going through the record I noted another incurable irregularity which I wish to point out here. At the trial court criminal case no 217 of 2015 was first preside over by hon HAMDUNI, learned Resident Magistrate as from 23/09/2015 and he recorded the evidence of PW1 on 02/12/2015, that of PW2 on 11/05/2016. It is on record that the first trial learned magistrate was transferred and the matter placed before hon KIOJA, learned Resident Magistrate for continuation of hearing. Unfortunately, the second trial magistrate did not at all address his legal mind to the mandatory provisions of section 214 (2) (a) of the Criminal Procedure Act, Cap 20 (R.E.2002) immediately he took over the matter. It is obvious that failure to address the accused of the statutory rights render the entire proceedings from where he started a nullity and a conviction cannot stand on some nullity proceedings. The court of appeal has on a number of cases declare the proceedings a nullity and proceed to quash conviction ensued therefrom. In the case of ELISAMIA ONESMO V. THE REPUBLIC, CRIMINAL APPEAL NO 160 OF 2005(UNREPORTED) ARUSHA, (CAT), the court of appeal discussed

the effect of not complying with the mandatory provisions of section 214 (2) (a) of the CPA, referring and quoting its earlier decisions and eventually held that:

" finally, the court found that non-compliyance was a fundamental irregularity"

It is from the above two noted irregularities that am constrained to hold as I do here that the trial of the appellants and subsequent conviction was tainted for the reasons demonstrated above. On that vein and under the powers conferred to this court under the provisions of section 366 (1) (a) (i) of the CPA declare the trial proceedings a nullity. Subsequently, set aside the conviction and sentence meted out against the appellants.

Given the circumstances of this case, it is imperative not to order a retrial as that will amount to allowing the Republic to fill in the gapes and will definitely prejudice the appellants. That said and done, I order immediate release of the appellants from prison unless held otherwise for another lawful cause.

It is ordered.

Dated at Dar es salaam this day of 14th day of June, 2018.

S.M. MAGOIGA,

JUDGE.

14/06/2018