

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 124 OF 2018

*(Appeal from the decision of the RMs Court of Mbeya at Mbeya in  
Criminal Case No. 99 of 2017)*

**M/S NATIONAL MICROFINANCE BANK @ NMB.....APPELLANT**

**VERSUS**

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


**JUDGEMENT**

*Date of Last Order : 16/06/2020*

*Date of Judgement: 03/08/2020*

**MONGELLA, J.**

The appellant herein was arraigned in the RMs Court of Mbeya in Criminal Case No. 124 of 2018. He faced two counts to wit: one, engaging an unregistered firm/person contrary to section 22 (4) of the Contractors Registration Act, No. 17 of 1997 as amended by Act No. 15 of 2008; and two, failure to comply with notice of closure contrary to section 35A (1) and (2) of the Contractors Registration Act No. 17 of 1997 as amended by Act No. 15 of 2008. The trial court convicted the appellant on the offences charged and sentenced him to a fine of T.shs. 4,000,000/- or to a term of three years imprisonment for each count. Aggrieved by this decision he appealed to this Court.



The appellant enjoyed legal services of Mr. Baraka Mbwilo, learned advocate while the respondent was represented by Ms. Hannarose Kasambala, learned state attorney. The appeal was argued by written submissions. In his petition of appeal, the Appellant raised four grounds but I shall deal with only one ground, being ground three, for reasons that shall be apparent later in this judgment.

In this third ground, the appellant claims that the charge upon which the appellant was convicted and sentenced was defective. In his submission in chief, Mr. Mbwilo argued that the defect is based on the fact that the time and place of commission of the offence stated in the charge differs from the one stated by the prosecution witnesses during their testimonies on trial. He submitted that this defect was pointed out at the trial court during final submissions but the trial court never bothered to consider the same. With regard to the place of commission of the offence, Mr. Mbwilo argued that the charge states in both counts that the offence was committed through various branches in Mbeya Region. He argued that NMB has many branches in Mbeya region including Mbalizi road, Usongwe-Mbalizi, Mwanjelwa, Uyole, Tukuyu and more others, thus the charge ought to have stated the exact place where the appellant was found engaging MS Kilongos General Supply and M/S Fire Safety Engineering Company and disobeyed the notice issued to him.

With regard to time of commission of the offence, Mr. Mbwilo pointed the discrepancy on the testimony of the prosecution witnesses and the time stated in the charge. He submitted that while PW2 mentioned that construction work was done on 06<sup>th</sup> April 2017, the charge indicates that it

was 3<sup>rd</sup> April 2017. He added that while PW2 stated that he served notice on 3<sup>rd</sup> April 2017, the charge on the third count states that the order was disobeyed on 3<sup>rd</sup> April 2017. PW1 did not state anything regarding time.

Considering these discrepancies he argued that it is trite law that the accused must be made aware of the offence he is facing with regard to the time and place of the incidence so that he is able to marshal his evidence. To bolster his argument he referred to the case of **Simon Abonyo v. Republic**, Criminal Appeal No. 144 of 2005 (CAT at Mwanza, unreported) and that of **Abdallah Juma Said v. Republic**, Criminal Appeal No. 63 of 2014 (HC at Mtwara, unreported). He took cognizance of recent decisions that ruled that the issue of time is not fatal, but argued that the place is still crucial to be mentioned in the particulars of the offence. Citing the case of **Peter Ndiema & Another v. Republic**, Criminal Appeal No. 469 of 2015 (CAT at Mwanza, unreported) he argued that the Courts have been insisting that it is important for particulars of the charge to be compatible with the evidence adduced by the prosecution witnesses to establish commission of the offence. This is for the purpose of ensuring fair trial to the accused by enabling him to prepare his defence.

On her part, Ms. Kasambala supported this ground of appeal. She reiterated the discrepancies as submitted by Mr. Mbwilo in his submission. She added that section 234 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019 allows a charge to be amended where there are defects, however she stated that the court record does not show any amendment being done by the prosecution, meaning that the charge remained defective. She argued that the failure to amend the charge is incurably defective.




She cited the case of **Hussein Ramadhani v. Republic**, Criminal Appeal No. 195 of 2015 (CAT at Mbeya, unreported) whereby while quoting the case of **Masasi Mathias v. Republic**, Criminal Appeal No. 274 of 2009 (unreported), the Court stated:

*"The record of appeal does not reflect that there was any amendment to the charge sheet in compliance with section 234 (1) of the Criminal Procedure Act. We are therefore of a considered opinion that the charge in the second count remains defective. In the event, we are constrained to allow the appeal on the 2<sup>nd</sup> count having found that the same is defective."*

With the above submission, she prayed for the appellant to be set free.

Given the submissions by both counsels as demonstrated above, there is no dispute that the charge is at variance with the evidence adduced. This touches a crucial point as to whether the prosecution case was proved beyond reasonable doubt. With regard to time of commission of the offence, the Court has treated the discrepancy between the information contained in the charge and that adduced by witnesses differently. In **Mathias Samwel v. Republic**, Criminal Appeal No. 271 of 2009 (CAT at Tabora, unreported) the Court held:

*"We are of the opinion that when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed by the accused by giving cogent evidence and proof to that effect. In the instance case, as demonstrated herein earlier, the prosecution has failed to prove beyond reasonable doubt that on such a date, time and place the appellant committed the offence of rape to PW2 as charged."*



In the above case the Court reverted to its previous decision in **Anania Turian v. Republic**, Criminal Appeal No. 195 of 2009 (CAT, unreported) in which it ruled that a conviction founded in the absence of evidence, by the prosecution, to prove that the charge against the appellant was committed on the date specified in the charge sheet, is wrong and untenable. See also a decision of this Court in **Abdallah Hamisi v. The Republic**, Criminal Appeal No. 189 of 2019 (HC at Mwanza, unreported). The Court of Appeal has however recently issued decisions with a different stand from the above decisions and particularly taking into consideration the provisions of section 234 (3) of the Criminal Procedure Act. In the case of **Abasi Makono v. The Republic**, Criminal Appeal No. 537 of 2016 (CAT at Arusha, unreported) the Court held:

*"We are in agreement with both parties that 19:00hours and 20:00hours were mentioned in the charge and the witnesses respectively as being the time of the incident. As correctly argued by the learned Senior State Attorney, we find this to be a minor and immaterial variance. As to the variance between the charge and evidence regarding the time of the commission of the offence, section 234 (3) of the CPA provides thus:*

*(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."*

In the above case the Court also referred to its previous decision in **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 in which

it treated the discrepancy between the time stated in the charge and that adduced by the witnesses to be immaterial. On the strength of these decisions and the provision of section 234 (3) of the CPA, I am of the considered view that the defect in the charge regarding time is not fatal and cannot vitiate the proceedings of the trial court as claimed by both counsels. In my view, such defect could be considered if the discrepancy involves a very long period of time.

On the other hand however, I agree with Mr. Mbwilo that the question of place of commission of the offence is crucial to be included in the particulars of the offence. My concern is basically on the second count which states"

#### **"STATEMENT OF THE OFFENCE**

*Failure to comply with Notice of closure contrary to section 35A (1) & (2) of the Contractors Registration Act No. 17/1997 as amended by Act No. 15/2008.*

#### **PARTICULARS OF THE OFFENCE**

*That M/s National Microfinance Bank Plc @ NMB is charged that on 03<sup>rd</sup> April, 2017 in Mbeya Region, deliberately failed to comply and/or disobeyed the Notice of closure of construction works (Stop order) known as serving and maintenance of portable fire extinguishers to NMB Branches in Mbeya region and continued to defy the Notice up to completion of the project."*

In my view, since the count talks of defying the notice and completing the project, it was imperative for it to specify as to which among the appellant's branches within Mbeya region did the appellant continue to implement its project on disobedience of the orders given. The law is

settled as to the particulars of the charge whereby it requires the particulars to be clear enough to enable the accused to understand the nature of offence he stands charged with and to prepare his defence. See: section 132 of the Criminal Procedure Act. This includes the place where the offence was committed. The failure to specify the place for the commission of the offence given the nature of allegations in the charge at hand deprived the appellant his right to fair trial. The defect also renders the prosecution to have failed to prove its case beyond reasonable doubt. See also: **Mathias Samwel** (supra) and **Abdallah Hamisi** (supra).

Having observed as hereinabove, I quash the judgment and proceedings of the trial court and set the appellant free.

Dated at Mbeya on this 03<sup>rd</sup> day of August 2020

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered at Mbeya through virtual court on this 03<sup>rd</sup> day of August 2020 in the presence of Ms. Sara Anesius, learned State Attorney for the respondent.



  
**L. M. MONGELLA**

**JUDGE**