IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 165 OF 2019

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS_____APPELLANT

VERSUS

1. MATEGWA PAULO ITEMBE_____1ST RESPONDENT

2. FRANK MICHAEL HAMIS_____2ND RESPONDENT

3. PAULO JUMBE MKAMA@ WHITE_____3RD RESPONDENT

4. TUMAINI BENESTA NYAMBABI_____4TH RESPONDENT

(Arising from the decision and orders of the district court of Tarime at Tarime Hon. Siliti RM in criminal case no 151 of 2019 dated 13.08.2019)

EX PARTE JUDGEMENT

Date of last order: 30.06.2020
Date of judgment: 03.07.2020

GALEBA, J.

This appeal arises from the decision and orders of the district court of Tarime sitting in criminal case no 151 of 2019 in which the respondents were jointly charged with the offence of breaking into a building and committing an offence therein contrary to **section 296(a) of the Penal Code [Cap 16 RE 2002] (the Penal Code).**

The facts leading to the arrest of the respondents and their prosecution were that on 28.02.2019 together with **ROSE RYOBA MNANKA,** to whom this appeal does not relate, during the daytime at Mwangaza street in Tarime township in Mara region, they broke into a shop owned by **SWAUMU RAJABU** and stole the following twelve categories of items and shop merchandize. ***One*** various clothes valued at Tshs. 10,250,000/=, ***two,*** 50 pieces of perfumes valued at Tshs 150,000/=, ***three,*** seven balls valued at Tshs 600,000/=, ***four,*** 150 pieces of shin gun valued at Tshs 500,000/=, ***five,*** 150 pieces of shorts valued at Tshs 500,000/=, ***six,*** 8 pieces of waving valued at Tshs 800,000/=, ***seven,*** 1 dozen of referee flags valued at Tshs 300,000/=, ***eight,*** 20 whistle blowers valued at Tshs 200,000/=, ***nine,*** 300 pairs of open shoes valued at Tshs 500,000/=, ***ten,*** female jewelries valued at Tshs 600,000/=, ***eleven***, 15 pieces of female hair cosmetics valued at Tshs 500,000/= and ***twelve,*** they stole also 20 pairs of shoes valued at Tshs 950,000/=. The total value for all the stolen properties according to the prosecution was Tshs 15,850,000/=.

The case was filed in court and the accused persons denied the charge. As the matter was being mentioned

in court but before the investigation was yet to be completed, on 29.04.2019, the prosecution, under **section 98(a) of the Criminal Procedure Act [Cap 20 RE 2002] (the CPA),** prayed to withdraw the charge against **ROSE RYOBA MNANKA** who was the 2nd accused person. As that prayer was granted the case against her was dropped and the prosecution was from then progressed against only four accused persons.

To prove the case against the remaining four respondents, the prosecution called the following five witnesses; **PW1, SWAUMU RAJABU, PW2, KHAMIS TITO, PW3, EDWARD THOMAS MACHERA, PW4, SELEMAN MOHAMED** and **PW5, INSPECTOR NSHASHI BURUBE**. At the end of the prosecution case, under **section 230 of the CPA**, the trial court acquitted two more accused persons. It acquitted **MATEGWA PAULO ITEMBE** and **FRANK MICHAEL HAMIS** who were the 1st and 3rd accused respectively, for reasons that the evidence of the prosecution did not establish a ***prima facie*** case against them sufficient to enable the court to require the said accused persons to defend the case. The court made orders that the trial would continue against only **PAULO JUMBE MKAMA** and **TUMAINI BENESTA NYAMBABI** who were the 4th and 5th accused persons.

The case was heard against the two accused persons who are the 4th and 5th respondents in this appeal and at the end of the trial still the court found even these two accused persons innocent of the offence and like the previous three accused person, it acquitted them as well. The appellant was aggrieved by the decision of the trial court and it filed the present appeal, predicating it on 3 substantive grounds of appeal. At the moment this court will not get into the grounds for reasons that shall become apparent in this judgment.

When I was preparing for hearing this appeal something struck me on the charge sheet upon which the district court based the impugned trial. What was noted was that the charge had only a provision creating the offence of breaking into a building and committing an offence therein but it did not have a section punishing the offender, should a conviction be is achieved. For ease of appreciation of the point, the charge sheet which initiated criminal case no 151 of 2019 in the district court is reproduced bellow;

"IN THE DISTRICT COURT OF TARIME DISTRICT

AT TARIME
CRIMINAL CASE NO 151 OF 2019
REPUBLIC VERSUS
1. **MATEGWA S/O PAULO ITEMBE**
2. **ROSE D/O RYOBA MNANKA**
3. **FRANK S/O MICHAEL HAMIS**
4. **PAULO S/O JUMBE MKAMA WHITE**
5. **TUMAINI S/O BENESTA NYAMBABI**

CHARGE

STATEMENT OF OFFENCE

Breaking into building and committing an offence c/s 296(a) of the Penal Code [Cap 16 RE 2002]

PARTICULARS OF OFFENCE

MATEGWA S/O PAULO ITEMBE, ROSE D/O RYOBA MNANKA, FRANK S/O MICHAEL HAMIS, PAULO S/O JUMBE MKAMA WHITE *and* ***TUMAINI S/O BENESTA NYAMBABI on 28th day of February 2019 during daytime at Mwangaza Street within Tarime District in Mara Region did break and enter the shop and steal various clothes valued at Tshs. 10,250,000/=, 50 pieces of perfumes valued at Tshs 150,000/=, seven balls valued at Tshs 600,000/=, 150 pieces of shin gun valued at Tshs 500,000/=, 150 pieces of shorts valued at Tshs 500,000/=, 8 pieces of waving valued at Tshs 800,000/=, 1 dozen of referee flags valued at Tshs 300,000/=, 20 whistle blowers valued at Tshs 200,000/=, 300 pairs of open shoes valued at Tshs 500,000/=, female jewelries valued at Tshs 600,000/=, 15 pieces of female hair cosmetics valued at Tshs 500,000/= and 20 pairs of shoes valued at Tshs 950,000/= all total valued at Tshs 15,850,000/= the properties of one SWAUMU D/O RAJABU.***

Date at Tarime this 08th day of April 2019
Sgd
PUBLIC PROSECUTOR"

That is the charge subject of the court's inquiry. In the statement of offence, the section providing for the punishment was not included. When the appeal came up for hearing on 30.06.2020, I made orders that the appeal shall proceed ***ex parte*** as the respondents had notice of the hearing after service by publication. I put the above query to Mr. Nchanila who submitted briefly that, the

omission to cite the sentencing provision was not fatal and it did not occasion any injustice. He submitted that the issue was just of wrong citation which is a curable irregularity, citing **CRIMINAL APPEAL NO 448 OF 2016 BETWEEN JOSEPH YOMBO VERSUS REPUBLIC CA MTR (UNREPORTED).** He moved the court to hold that the charge upon which the respondents were charged was a valid charge. I will start with the law which was cited in the charge sheet; it is ***section 296(a) of the Penal Code [Cap 16 RE 2002] (the Penal Code)*** and it provides as follows;

> ***296. Any person who–***
> ***(a)breaks and enters a school house, shop, warehouse, store, workshop, garage, office or counting house, or a building which is adjacent to a dwelling house and occupied with it but is not part of it, or any building used as a place of worship and commits an offence therein;***

That is the law under which the charge was framed. A closer review of it reveals that even that subsection itself sounds incomplete and as one completes reading it; still a vacuum is felt at the very end begging for completeness. That aside, the question that this ruling needs to answer, is could a charge citing a section creating the offence while omitting to cite a provision sentencing the offender, form a valid basis for a criminal case?

This being a common law jurisdiction, I will go by the doctrine of precedent obtaining in this country. In **CRIMINAL APPEAL NO 351 OF 2017; JONAS NGOLIDA VERSUS THE REPUBLIC (UNREPORTED),** the Court of Appeal facing a similar problem, speaking through **JUMA CJ** held at page 15 as follows;

> ***"We think, charge sheets must make correct reference to the provisions creating not only offences, but also the punishment that is to follow should the accused person be convicted. In other words, an offence is unlawful act or omission that is punishable. An offence is not complete without punishment."***

Another decision of the Court of Appeal in the same respect is **CRIMINAL APPEAL NO 66 OF 2017; MUSSA NURU SAGUTI VERSUS THE REPUBLIC CA (UNREPORTED)** wherein at pages 12 to 13 that Court stated that such a charge is defective and provided for the consequences. It held;

> ***"As the prosecution failed to indicate the sentencing provision in the charge, it could not have been rectified and relied on at the time of giving antecedents and pronouncing the sentence on the appellant. Hence, in the totality of what we have endeavored to demonstrate, we find that the proceedings and judgments of trial court and the High Court were a nullity...As to the way forward, we are of the considered view that since the charge sheet was incurably defective, there is no charge upon which the Court could order a retrial against the appellant. Consequently, we order that the appellant be released from custody unless held for other lawful reasons."***

Other decisions making it necessary to include both provisions creating the offence and punishing its breach in charge sheets are; **CRIMINAL APPEAL NO 110 OF 2016; SAID HUSSEIN VERSUS THE REPUBLIC (UNREPORTED),**

CRIMINAL APPEAL NO 144 OF 2008; SIMBA NYANGURA VERSUS THE REPUBLIC (UNREPORTED) and **CRIMINAL APPEAL NO 376 OF 2016; DEOGRATIUS VICENT VERSUS THE REPUBLIC (UNREPORTED)** all by the court of appeal.

The decision of the Court of Appeal in **JOSEPH YOMBO VERSUS REPUBLIC** (supra) cited by Mr. Nchanila is clearly distinguishable. ***First*** in **JOSEPH YOMBO** case both the section creating the offence and that punishing the offender (section 86(1) and 86 (2) (c) (iii) of **the Wildlife Conservation Act No. 5 of 2009 (the WCA)**) respectively were cited in the charge sheet, only that the provision punishing the breach was not the exact applicable section. In this case however, the sentencing section was not cited at all in the formal charge. ***Secondly,*** in **JOSEPH YOMBO** case the sentencing provision which was not cited [section 86 (2) (c)(iii) of the WCA] and that which was cited in error [section 86 (2)(b) of the WCA] both provide for one common sentence of 20 years imprisonment. Which means the accused in that case knew the offence and the corresponding punishment although the punishment was provided under different sections of law. In which case it is correct, for the Court of Appeal to have held as Mr. Nchanila submitted that the

error did not occasion any injustice to the appellant in that case, because in any event, he knew of the 20 years imprisonment. That however is not the case in the matter from which this appeal arises.

The charge that commenced the challenged proceedings could have been a proper and valid charge and a trial based on it would have been competent had it complied with both subsection (a) and subsection (b) of section 296 of the Penal Code but not subsection (a) alone. The complete package would have been to add the following section 296(b) of the Penal Code, which provides as follows;

> ***"296 Any person who–***
> ***(a) ...***
>
> ***(b) having committed an offence in any building referred to in paragraph (a) breaks out of the building, is guilty of an offence and is liable to imprisonment for ten years."***

As such the accused persons would have been put to notice not only of the offence but also of the imprisonment of 10 years should they be convicted, but that was not the case. It is immaterial that they were acquitted, the point is, was the trial challenged a valid trial or it was a nullity. If the latter is the case, like I am about to rule, that no competent trial took place in the

lower court from which a valid appeal may have been commenced.

Based on the above discussion, under the provisions of section 373(1)(a) of the Criminal Procedure Act [Cap RE 2019], this court quashes the proceedings and nullifies the judgment of the trial court in criminal case no 151 of 2019 because, both the proceedings and the judgment sprung from a defective charge.

Consequent to the above finding, this appeal collapses on its own because no competent appeal could arise from a void judgment.

DATED at MUSOMA this 3rd July 2020

Z. N. Galeba
JUDGE
03.07.2020

Court; This judgment has been delivered today the 3rd July 2020 in the absence of parties but with leave not to enter appearance.

Z. N. Galeba
JUDGE
03.07.2020