IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 92 OF 2019
(Originating from the District Court of Monduli, Economic Case No. 2 of 2018)

GOSHO GOROBANI @ BONGE JUMA ..... 1st APPELLANT

JOSEPH LEMKA @CHEKUU ..... 2nd APPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

3rd September & 6th November, 2020

Masara, J.

In the District Court of Monduli, the two Appellants jointly stood charged with the offence of Damaging Property which is Used for the Purpose of Providing Necessary Services, contrary to Paragraph 20(1)(2)(a) and (3)(f) of the First Schedule to the Economic and Organized Crimes Control Act, Cap. 200 [R.E 2002] read together with section 48(a) of the Roads Act, No. 13 of 2007. The Appellants denied commission of the offence. The trial District Court found them guilty and convicted each of them to serve a sentence of twenty (20) years in jail. The Appellants were aggrieved by both the conviction and sentence; thus, they have preferred an appeal to this Court on the following grounds:

a) *That, the trial Court erred in law and fact by convicting the Appellants basing on the defective charge sheet which has a mis-joinder of counts;*
b) *That, the trial Court erred in law and fact by convicting the Appellants while prosecution case was not proved beyond reasonable doubt;*

c) *That, the trial Court erred in law and fact by convicting the Appellants basing on contradictory evidence by the prosecution side;*
d) *That, the trial Court erred in law and fact by ignoring the Appellants' defence which was very strong; and*
e) *That, the trial Court erred in law and fact by admitting exhibits which were well objected by the Appellants during the trial.*

At the hearing of the appeal, the Appellants appeared in court in person unrepresented and fended for themselves while the Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was argued through written submissions.

Before canvassing what was argued by both parties in relation to this appeal, it is pertinent that I give brief facts leading to this appeal as can be deduced from the record of the trial Court.

It was the Prosecution's evidence at the trial that on 22/12/2017, PW5, F.8202 DC Seif, and his colleagues were on patrol between Duka Bovu and Makuyuni. While at Nanja, some car drivers on the highway stopped them and told them that there were people sabotaging the guard rails at Mbuyuni. PW5 and his colleagues headed at the scene where they found people on both sides of the road. Upon introducing themselves, those people started to run but they managed to apprehend the first Appellant. They called the OCD Monduli who sent a car which took the first Appellant to Monduli. PW5 and his colleagues proceeded with their patrol and they managed to arrest the second Appellant whom they took to Duka Bovu. PW4 and PW3 recorded confession statements of the first and second Appellants respectively on the

same day. In the statements, both Appellants admitted to have committed the offence and revealed where they had hidden the properties alleged to have been damaged.

On the same day, the Appellants were taken to the places where they alleged to have hidden the bolts and nuts by PW3 and PW4. PW1 and PW2 TANROADS employees, were also called there. The Appellants showed a sulphate bag in which they found 400 bolts and nuts unscrewed from the guide rails, 74 nuts and a spanner Number 30x32. PW1 prepared a valuation report, which was admitted as exhibit PE1. The confession statement of the second Appellant was admitted as exhibit PE2 while that of the first Appellant was admitted as exhibit PE5. PW3 also filled a certificate of seizure which was admitted as exhibit PE3. The 472 bolts and nuts, 11 nuts one spanner and two sulphate bags were admitted as exhibit PE4 collectively.

On his defence, the first Appellant denied involvement in the offence stating that the incident took place at night so there was no evidence to prove his arrest. He testified that he was horribly beaten to the extent of having his arm broken. He therefore signed the confession statement due to torture. His PF3 and X-ray print were admitted as exhibit DE1. He added that he was arrested in a certain bar at Duka Bovu. On his part, the second Appellant stated that he was not arrested at the scene, he was arrested at Majengo Arusha. DW2 added that he did not write any confession statement at the police.

Submitting in support of the appeal, the Appellants challenged the charge against them labelling it as defective. They contended that the charge shows that the crime was committed on separate dates, that is 14th December, 2017 and 22nd December, 2017 but the same was put in the same charge. They also allege that the offence was committed at two distinct places, Meserani and Mbuyuni Darajani but they were also put in the same count. They also complained that the charge did not state the number of nuts and bolts stolen and that those facts were only revealed at the hearing. It was the Appellants' submissions that they could not defend themselves properly due to that anomaly, adding that they were arrested at different places therefore it was not proper to charge them together. According to the Appellants that anomaly is incurable, therefore the conviction was unjust.

The Appellants submitted on the second and third grounds of appeal together, stating that according to the charge the offence was committed on 14th and 22nd December, 2017 while PW1 at page 10 of the proceedings stated that the letter was written to him by the OC-CID Monduli on 22/12/2017 requesting for valuation of the damaged guardrails. The Appellants' contention is that they were arrested on that very same day and at 10:00hrs to 14:00hrs they were still at the scene of crime. Since the request was made before their arrest, in that regard it was not connected to the alleged offence. Also, that PW2 testified that the Appellants were arrested with a sulphate bag with bolts and nuts but PW5, the arresting officer, stated that the Appellants were arrested with nothing, therefore the

bolts and nuts were not recovered from them and the seizure certificate was not properly prepared.

Another contradiction the Appellants pointed out is that the charge shows that they were arrested on 22/12/2017, and at the same time they were interrogated on that very same day from 07:45, which implies that they were interrogated before their arrest. The other concern is that the Appellants statements were recorded on the same day of their arrest in the morning hours while at the same time it was testified by PW2 that they were at the scene of crime with the Appellants from 10:00hrs and 14:00hrs. The Appellants challenged the testimony of PW5 who stated that at the time of their arrest they were caught standing on both sides of the road.

In their fourth ground of appeal, the Appellants contended that their defence was not considered by the court pointing out exhibit DE1 which shows that the first Appellant was injured at the time of interrogation but the same was not considered by the trial magistrate.

Substantiating the fifth ground of appeal, it was the Appellants' contention that their cautioned statements were not taken free and voluntarily as the room where they were taken had more than one police officer. They also contended that the statements were recorded outside the 4 hours' time prescribed by the law since the Appellants were arrested before 22/12/2017. It was their complaint that the first Appellant was injured when interrogated, concluding that the statements were to be rejected as they were not taken

voluntarily. The Appellants urged the Court to allow their appeal, quash and set aside the conviction and sentence met on them.

Ms Tusaje Samwel, on her part, supported the conviction and sentence against the Appellants. Regarding the charge, she was of the view that the wording of the charge shows that the offence was committed between 14th day of December and 22nd day of December, 2017; therefore, the charge was properly drafted. She added that the crime was committed on the road along Arusha Minjingu road at Meserani and Mbuyuni Darajani; thus,the offence was not committed on two different places as contended by the Appellants. The learned State Attorney cited section 133(1) of the Criminal Procedure Act, Cap 20 [R.E 2002] stating that the Appellants were charged on the same count because the charges are found on the same facts. She added that failure to state the number of nuts and bolts did not render the charge defective. It was the learned State Attorney's view that the prosecution evidence was never challenged by the Appellants by a way of cross examination. To support this argument, she cited the case of ***Nyerere Nyague Vs. Republic***, Criminal Appeal No. 67 of 2010 (unreported).

Submitting on the second and third grounds of appeal, Ms. Tusaje averred that the Prosecution proved the case beyond reasonable doubts through the testimonies of PW1, PW2, PW3, PW4 and PW5. In her view, there were no contradictions as PW2 found the accused already arrested. Ms Tusaje added that after being arrested by PW5, it was PW3 and PW4 who interrogated the Appellants and that the Appellants revealed where they had hidden the nuts

and bolts. She summed it up by saying that the Appellants' confession led to the discovery, citing the case of ***Mabala Masasi Vs. Republic,*** Criminal Appeal No. 161 of 2010 (unreported).

Submitting on the fourth ground, Ms Tusaje stated that the trial court considered the Appellant's defence and that the 1st Appellant's defence was rejected and reasons for the rejection were assigned. Therefore, the Appellants were convicted on the strength of evidence marshalled by the prosecution side.

Regarding the fifth ground of appeal, it was Ms Tusaje's contention that having raised the objection to the admission of exhibits PE2 and PE5, the trial court conducted an inquiry and ruled that the cautioned statements of the Appellants were voluntary and the same were admitted as exhibits. She cited the case of ***Nyerere Nyague Vs. Republic*** (supra) and sections 57 and 58 of the Criminal Procedure Act. The learned State Attorney propounded that presence of another police officer in the interrogation room does not vitiate the statements. She argued that the statements were recorded within the four hours prescribed by the law. Basing on those arguments, Ms Tusaje implored the court to dismiss the appeal for lacking merit.

On rejoinder, the Appellants reiterated to their submission that the charge is defective and the case was not proved on the required standard. They cited the decision of the Court of Appeal in ***Mohamed Jabir Vs. Republic***.

Before I deal with the merit of the appeal, for the purpose of making the record clear, the Appellants in their grounds of appeal and their entire submissions made reference to Economic Case No. 5 of 2018 while the record shows that the case they appealed against is Economic Case No. 2 of 2018. However, this anomaly was not spotted by the learned State Attorney. Considering that there is no injustice occasioned, this Court having considered that the parties and the facts which are being contested are those found in Economic Case No. 2 of 2018, takes liberty to rectify the anomaly in the submissions and grounds of appeal filed by the Appellants so that they read Economic Case No. 2 of 2018 and not Economic Case No. 5 of 2018. This power is exercised under section 388 of the CPA.

I now turn to the merit of the appeal. I have carefully gone through the grounds of appeal, the lower court record and the written submissions filed by the rival parties in view of this appeal, the issues this court is enjoined to determine are; *whether the charge against the Appellants was defective*, *whether the confession statements of the Appellants were properly admitted in evidence* and *whether the prosecution proved the case on the required standards*.

Beginning with the first issue, it was the Appellants' complaint that the charge is defective for duplicity and mis-joinder of counts since the offence took place in two different dates and was committed on two different places, that is Meserani and Mbuyuni Darajani. Therefore, this prejudiced them as they failed to defend themselves properly. Ms. Tusaje on her part argued

that the charge shows that the offence was committed between on Duka Bovu-Minjingu road on 14th day of December and 22nd December, 2017 and not on distinct places and dates as adduced by the Appellants.

For clarity, it is imperative that the particulars of the charge are reproduced. They read:

> *"Gorosho Gorobani @Bonge Juma and Joseph Lemka* ***on or about 14th day of December 2017 and 22nd day of December, 2017*** *along Arusha-Minjingu road* ***at Meserani area and Mbuyuni Darajani*** *within Monduli District of Arusha Region, did damage guardrails by removing bolts and nuts valued at Tanzanian shillings ninety nine million nine hundred and eighteen thousand only (99,918,000/=), the act which contravenes the law."* (Emphasis added)

From the bolded words, the offence was committed either on or about 14th December and on 22nd December 2017. Further, the place where the offence took place appear vague. The words suggest that the offence took place in**"at Meserani area and Mbuyuni Darajani"** two different places. Probably the drafter of the charge meant to say that the offence took place between the 14th day of December and 22nd December, 2017 and that the offence occurred between Meserani area and Mbuyuni Darajani area. I do agree with the Appellants that the way the particulars of the offence was crafted, could be interpreted to mean that there were two distinct offences occurring on different dates and places.

Another complaint raised in connection with the charge is that the number of bolts and nuts stolen were not stated in the charge. The governing provision of what should be contained in a charge is section 135 of the CPA,

which requires only description of the subject matter, date and time of the offence. It is not possible for the charge to contain each and every information regarding the subject of the offence. I therefore subscribe to what the learned State Attorney submitted that failure to contain the number of bolts and nuts in the charge cannot render the charge defective.

I note that there is on record the evidence of PW2, Boniface Dominic, whose testimony was to the effect that on 14th December, 2017 he was informed by Leslaa Village chairman that guardrails had been stolen at Meserani. PW2 visited the place and found that it was true. On the same date PW2 reported the matter to Meserani Police station. He added that on 22nd December, 2017 he got information that there were culprits who were arrested at Mbuyuni unfixing nuts and bolts of the guard rails and he went at the scene. If this was the information that the Prosecution used to draft the charge, they definitely did not put it right. There was no evidence to connect the Appellants with the offence that was reported on the 14th December by the village chairman, whose evidence was not given. Had there been any such evidence, one would have said that the offence was continuing on several dates.

The law is settled that where the offence is committed in a sequence in the same transaction, it is charged together. Section 133(1) of the Criminal Procedure Act provides;

> *"(1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or*

if they form or are a part of, a series of offences of the same or a similar character."

From the wording of the provision above, the charge against the Appellants cannot be said to have been properly drafted. It was defective. In a number of authorities, courts have insisted that in order for a charge to be defective, it must have prejudiced the accused. In ***Jackson Venant Vs. Republic***, Criminal Appeal No. 118 of 2018 (unreported), the Court held;

> *"At this juncture, there is no dispute that the charge that was laid against the Appellant at the District Court at Ngara was defective. The issue which we need to resolve is* ***whether the said defect prejudiced the Appellant to the effect that there was no fair trial."*** (emphasis supplied)

See also ***Hussein Ramadhan Vs. Republic***, Criminal Appeal No. 195 of 2015 (unreported). In the case at hand, it cannot be said that the Appellants were not prejudiced by the drafting of the charge. They could not properly defend themselves as the definite date of the commission of the offence and the place where they were alleged to have committed the offence left a lot to be desired. It may be true that the offence took place between the two named places which are along the Arusha-Makuyuni Road, but that is not how the charge was drafted.

In ***Mussa Mwaikunda Vs. Republic*** [2006] TLR 387, the Court of Appeal stated the importance of showing all the elements of the offence in the charge to afford the accused a proper defence. The Court observed:

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence".*

The consequences of defects in the charge are well articulated in numerous decisions of the Court of Appeal. In the case of ***Jackson Venant Vs. Republic***, Criminal Appeal No. 118 of 2018 (Unreported), the Court of Appeal, while discussing consequences of a defective charge, had this to say:

> *"We need to emphasize that this Court has also held in many other cases depending on the circumstance like this one,* ***that the defects in the charge are incurable under section 388 of the CPA.*** *We wish to refer to the recent decision of this Court in* ***Joseph Paul @ Miwela v. The Republic,*** *Criminal Appeal No. 379 of 2016 at Iringa (unreported) in which a number of other decisions of the Court on similar position was referred to support the holding of the Court."* (Emphasis added)

From the decision cited above, defects in a charge cannot be cured under the omnibus section 388 of the Criminal Procedure Act. Such defects render a trial a nullity. The Court of Appeal in ***Aiex Medard Vs. R***, Criminal Appeal No. 571 of 2017 (Unreported) had this to say:

> *"As to whether the defective charge could be salvaged, we do not agree with Ms. Maswi's stance that the defect can be cured under section 388 of the CPA. To the contrary, we think, as was argued by Mr. Kabunga,* ***it cannot be cured as the appellant did not receive a fair trial.*** *This position was stated in a number of cases decided by this Court. Just to mention a few, they include Isdori Patrice v. Republic, Criminal Appeal No. 224 of 2007; Khatibu Khanga v. Republic, Criminal No. 290 of 2008; Joseph Paul @ Miwela v. Republic, Criminal Appeal No. 379 of 2016; Maulid Ally Hassan v. Republic, Criminal Appeal No. 439 of 2015 (all unreported); and Mussa Mwaikunda v Republic, [2006] TLR 387."*

I do hold that as far as the charge is concerned, the charge was defective. Consequently, the Appellant did not receive a fair trial. Their conviction and sentence cannot be sustained.

Having so held on the first ground of appeal, I see no need to deal with the rest of the grounds. Once a charge is found to be defective, the rest fall apart as they emanate from a nullity.

Consequently, I do find merit in the appeal. I allow it accordingly. In the circumstance of this case, a retrial may not be appropriate. I hereby quash the conviction against both Appellants and set aside the sentence. The Appellants should be released immediately unless otherwise held for another lawful offence.

It is so ordered.

Y. B. Masara

JUDGE

6th November, 2020