

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL 62 OF 2020

JUMA s/o MARWA @ CHACHA _____ **APPELLANT**

VERSUS

THE REPUBLIC _____ **RESPONDENT**

(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mugendi RM in economic case no 96 of 2018 dated 27.11.2018)

JUDGEMENT

3rd & 6th November 2020

GALEBA, J.

The appellant, **Juma s/o Marwa @ Chacha** together with **Marwa s/o Waitara @ Mete** who jumped bail and was therefore tried *in absentia*, were charged before the district court of Tarime in economic case no 96 of 2018 and were both found guilty for having violated various wildlife conservation laws. The two were charged on the 1st and 2nd counts for unlawful entry into the Serengeti National Park with a bush knife without any permit from the Director of Wildlife and in respect of the 3rd count they were alleged to have been found in unlawful possession of a fresh head of wildebeest, which is a government trophy contrary to law. In respect of the 1st two counts, the two were sentenced to six (6) months imprisonment or payment of Tshs 50,000/= on each count and on the 3rd, each was ordered to serve a term of 20 years in jail.



The appellant was dissatisfied with both conviction and the corresponding sentences, and to exhibit his grievance, he filed this appeal raising 5 grounds, which I will not discuss because when I was preparing for hearing of this appeal, I noted that although the charge sheet shows that the offences were committed on 01.12.2018, but the entire prosecution evidence shows that the offences were committed on 10.12.2018.

When the appeal came up for hearing virtually over video link, I drew the attention of Mr. Frank Nchanila to that anomaly and requested him to make submissions in that respect so that I could make a ruling on it before I could decide the fate of the appeal.

Mr. Nchanila admitted the anomaly but he was quick to add that, the defect was a curable error under **section 388(1) of the Criminal Procedure Act [Cap 20 RE 2019] (the CPA)**, because, he submitted there is no injustice which was occasioned to the appellant. He added that although the charge indicated that the offences were committed on 01.12.2018, but the appellant defended himself of the offences which were committed on 10.12.2018. Mr. Nchanila submitted that the appellant did not counter anything in the charge sheet. He finally prayed in the alternative that if the court will find that an injustice was occasioned, then it be pleased to order retrial, in order to afford the respondent to go and rectify the charge sheet for it to match the evidence. In supporting his point that the matter is curable under the law Mr. Nchanila supplied to the court, the

decision in **Damian Luhele v the Republic**, Criminal Appeal no 501 of 2007, where it was held that such a charge is curable under the provisions of section 234(3) of the CPA. The appellant being lay, there was nothing useful to the court that he submitted.

In the trial court, as indicated above, the case was commenced with a charge stating that the three (3) offences in the 1st, 2nd and 3rd counts were committed on 01.12.2018 but no evidence was led to prove that charge. Instead, the evidence of **PW1 JACOB BURA HEMA** and **PW2 EMMANUEL BWIRE WAMWILI** who allegedly arrested the appellant is to the effect that the appellant was arrested in the Serengeti National Park with the weapon and the government trophy on 10.12.2018. The issue before me is whether the error is a curable defect or it is not and the resultant consequences.

I will start with the decision cited by Mr. Nchanila. In **Damian Luhele v the Republic (supra)** which was decided on 01.03.2012, the court of appeal held that the variance in dates in the charge sheet and in the evidence is a curable defect under section 234(3) of the CPA; but in **Justine Mteule v the Republic**, Criminal Appeal no 482 of 2016 which was decided on 16.05.2019, the court of appeal disagreed with the high court which relied on section 234(3) of the CPA to cure the defect of the difference in dates. Section 234(3) of the CPA provides that;

"234 (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.

The court of appeal in the **Justine Mteule** (supra) case was of the view that what is mentioned in that subsection of section 234 of the CPA is the difference in time and not the difference in dates therefore it dismissed the reasoning of the high court for treating the difference in dates while what is provided for in the law is the time. The court stated at page 16;

"Therefore the situation is different in this case because, as also found by the learned first appellate judgment, the variance is in the dates of incidence of commission of an offence between what is in the charge sheet and the evidence on record by witnesses and not the time when the offence was committed."

This answers Mr. Nchanila's prayer who wanted this court to remit the matter to the trial court for the respondent to rectify the charge and retry the appellant, because what was different in the charge sheet and the evidence was not the time but the dates. Therefore the prayer of Mr. Nchanila to remit the matter to the trial court for retrial is refused going by the reasoning in **Justine Mteule v the Republic** (supra). I firmly hold that when a date of the offence as per the evidence is at variance with the date of commission of the offence as per the charge, the accused is denied of a full understanding of the nature of the case he is facing and that is both illegal and prejudicial to the accused's right to a fair hearing.



In **Mohamed Kaningu v Republic [1980] TLR 279** it was held that where a charge is drawn in such a way that the accused person cannot understand the nature of the case which he is to face, the same is defective and it cannot be cured under section 346 of the then Criminal Procedure Code, now Section 388 of the CPA.

The status of the conviction where one is convicted in respect of the charge with dates that are at variance with the evidence was clarified in the case of **DPP v Yussuf Mohammed Yussuf, Civil Appeal no 331 of 2014 (CA)** Dar es Salaam (unreported). In that case it was held that where there are inconsistencies in dates between the charge and the evidence, the conviction based on such evidence cannot stand. Following this position this court hereby quashes the appellant's conviction in the trial court.

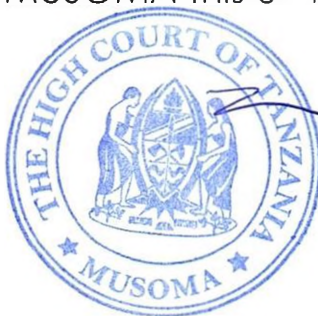
As for the sentence and the what should the court do with respect to the prisoner serving a sentence based on a charge with dates which were at variance with the evidence, in **Abel Masikiti v Republic, Criminal Appeal no 24 of 2015 (Unreported)** it was held that;

"in a number of cases in the past, this court held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."

Based on what was decided in the immediate preceding decision of the court of appeal, the sentence imposed upon the appellant is hereby set aside and he is acquitted of all the 3 counts in the charge at the trial court.

Finally, having quashed the conviction, set aside the sentence and acquitted the appellant of the charges leveled against him at the trial court, under section 373 of the CPA this court hereby revises the decision of the trial court and orders that the appellant, **MR. JUMA s/o MARWA @ CHACHA** be released forthwith from prison unless he is otherwise lawfully held.

DATED at MUSOMA this 6th November 2020



Z. N. Galeba
JUDGE
06.11.2020

Court; The respondent has a right of appeal to the Court of Appeal in 30 days.



Z. N. Galeba
JUDGE
06.11.2020