

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**CRIMINAL APPEAL NO. 47 OF 2019**

*(Arising from the Judgment of the District Court of Tabora at Tabora Hon. J. Rushwela (RM) in Criminal Case No. 28 of 2018)*

**MASHAKA MUSA@ JUMANNE.....APPELLANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**KIHWELO, J.**

The Judgment in this matter was reserved by my late brother, Bongole, J, who unfortunately did not live to compose it. Sadly, the record has been re-assigned to me.

The background hereof is that the appellant was arraigned before the District Court of Tabora where he was charged with and convicted of the offence of Breaking into a building and committing an offence contrary to section 296 of the Penal Code [Cap. 16 R.E 2002] (Henceforth "the Penal Code").

The background to this appeal is as follows. The appellant on 6<sup>th</sup> February 2018 during night time at Salmin Street, Chemchem Ward within the Municipality of Tabora, did break the shop of one Anania Japhet @Huruma and committed an offence. It was further alleged that the appellant on the same day 6<sup>th</sup> February 2018 at night hours at Salmin Street Tabora Municipality having broken into the shop of Anania Japhet @Huruma stole a parcel of plastic bag wealthy Tshs. 3,237,000.00 being the property of Anania Japhet @Huruma. At the end of the trial he was convicted on the first count of breaking into the building and committing an offence and sentenced to serve three years in prison.

Aggrieved by that decision, the appellant filed an appeal before this Court. In his petition of appeal, the appellant raised nine grounds of appeal. However, for a reason that will be apparent shortly, I shall not reproduce the said grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, fended for himself whereas the respondent Republic was represented by Mr. Innocent Rweyemamu, Learned State Attorney. When he stood to argue his appeal, the appellant adopted his grounds of appeal and had nothing else to add. In his submission, Mr. Rweyemamu began by expressing the respondent's stance that it was supporting the appeal. In his brief submission, the learned State Attorney raised two points which were the basis of supporting the appeal. Mr. Rweyemamu argued that the charge against the appellant was defective. He said that the provision of section 258(2) of the penal code cited has subsections which were not

specifically cited and therefore the appellant did not know the nature of the offence with which he was charged.

Traversing the evidence that was led to prove the case by the prosecution witnesses, Mr. Rweyemamu went further to submit that there was a variance between the charge and the evidence presented before the court and specifically he referred to the second count in which it was stated that the appellant stole a parcel of plastic bag valued at Tshs. 3,277,000.00 but the evidence of PW1 and PW2 referred to clothes and not parcel of plastic bag. He strenuously argued that what was in the charge sheet was never supported by the evidence presented before the court and therefore he submitted that the prosecution did not prove the charge against the appellant beyond reasonable doubt.

On my part I agree entirely with the learned State Attorney that the charge sheet is defective. The learned State Attorney submitted correctly, that the charge sheet lacks the necessary particulars to enable the appellant to give his defence. The charge sheet had to be drawn in compliance with the law in particular sections 132 and 135 (a) of the Criminal Procedure Act [Cap. 20 R.E 2002] (Henceforth "the CPA") and the second schedule to the CPA which provides the mode in which offences are to be charged. As to what a charge sheet should contain, paragraph (a) (i) and (ii) states very clearly that a charge sheet should describe the offence and should make references to the section of the law creating the offence. In the instant case under scrutiny the charge sheet reads;

**OFFENCE SECTION AND LAW: STEALING**, Contrary to Section 258(1)(2) AND SECTION 256 of the Penal Code [CAP 16 R.E 2002]

I have no hesitation in view of the circumstances of the present appeal that the prosecution did not squarely abide to the provisions of section 135(a)(ii) of the CPA when it presented the charge sheet at the trial District Court.

Unfortunately, with due respect, the learned trial Resident Magistrate did not also exercise care and close scrutiny when he admitted the charge sheet which was defective before he assumed the trial of the case. This is despite the fact that the original charge sheet was substituted on 15<sup>th</sup> March 2018.

Having carefully considered the evidence on record, I am of the settled view that an appropriate charge against the appellant ought to have been laid under paragraph (a) of section 158 (2). It has been authoritatively stated by some legal sages that, the principle has always been that an accused person must know the nature of the charge of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. This was celebrated in the famous case of **Isidori Patrice v. The Republic**, Criminal Appeal No. 224 of 2007 (Unreported).

I am decidedly at one with the learned State Attorney's submission that the appellant was not properly tried for and rightly convicted in view of the glaring defect in the charge which cannot be cured under section 338 of the CPA. This position has long been settled by the Court of Appeal in number of cases and to mention a few is **Nelson Mang'ati v. The Republic**, Criminal Appeal No. 346 of 2017 (unreported), **Abdallah Ally v. The Republic**, Criminal Appeal No. 253 of 2003 (unreported) and **Antidius Augustine v. The Republic**, Criminal Appeal No. 89 of 2017

(unreported). It is pertinent to refer to what the Court of Appeal observed in the case of **Abdallah Ally** and **Antidius Augustine** which was quoted with approval from the case of **Mang'ati** (supra) in which the Court observed that:

*"...being found guilty on defective charge based on a wrong and/or non-existent provision of law, it cannot be said that the appellant was fairly tried in the court below. In view of the foregoing shortcoming, it is evident that the appellant did not receive a fair trial in court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge is preferred, left the appellant unaware that he was facing a serious charge of rape."*

I think the issue of failure by the prosecution to prove the case beyond any reasonable doubt, need not detain me. Having found that the charge sheet was incurably defective in the first place trying to address that other issue will be an exercise in futility.

All said, I allow this appeal for the reason given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.



A handwritten signature in blue ink, appearing to read "P. F. Kihwelo", written over a horizontal line.

**P. F. KIHWELO**

**JUDGE**

**10/12/2020**

Judgment to be delivered by the Deputy Registrar on a date to be fixed.



*[Handwritten signature in blue ink]*

**P. F. KIHWELO**

**JUDGE**

**10/12/2020**

**Court:** Judgment delivered this 17<sup>th</sup> day of December 2020 in the presence of the appellant but in absence of the Respondent.

Right of appeal explained fully.



**B.R. NYAKI**

**DEPUTY REGISTRAR**

**17/12/2020**

