

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 189 OF 2021

MARWA STEPHEN SHIRATI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate’s Court of Dar es
Salaam at Kisutu in Criminal Case No. 104 of 2016)**

JUDGMENT

12th and 27th April, 2022

KISANYA, J.:

The appellant, Marwa Stephen Shirati was charged with–seventeen (17) counts of obtaining money by false pretence. All counts were preferred under section 302 of the Penal Code [Cap. 16, R.E. 2002, now, R. E. 2019]. The particulars of the offence were to the effect that, on diverse dates and months between 2008 and 2010, at Africa sana area within Kinondoni District in Dar es Salaam Region, with intent to defraud, the appellant being the chairman and vice chairman of the Vision SACCOS Ltd, obtained monies from 17 persons (henceforth “the victims”) by false pretence that he would provide 5% interest after every five weeks of any deposited amount to Vision SACCOS. The amount of money alleged to have been defrauded was TZS

5,000,000 from Ezekiel Gerald Ndowo (1st count); TZS 6,500,000 from Jeremia Martin Munisi (2nd count); TZS 10,000,000 from Erickson Elieneza Martin Munisi (3rd count); TZS 20,000,000 from Danile Abuduel Longway (4th count); TZS 2,650,000 from George Mwinami (5th count); TZS 1,750,000 from Celestine Jacob Jaka (6th count); TZS 9,027,500 from Yasin Athuman Majimoto (7th count); TZS 3,055,000 from Anastazia Pius Temu (8th count); TZS 5,000,000 from Shukuru Ezekiel Vahaya (9th count); TZS 3,000,000 from Mary Albert Sway (10th count); TZS 8,500,000 from Lawrencia Maxwell (11th count); TZS 3,800,000 from Beatrice Mlekwa (12th count); TZS 12,000,000 from Apaikundi Nkya (13th count); TZS 15,000,000 from Wilbforce Reuben Sengela (14th count); TZS 5,000,000 from Friday Mwakyusa (15th count); TZS 7,000,000 from Adelita Elias Nyiti (16th count); and TZS 2,800,000 from Cecilia Pius Temu (17th count);

In order to prove its case, the prosecution called nine witnesses (PW1 to PW9) and tendered a total of 16 documentary evidence (Exhibits P1 to P16). All witnesses called by the prosecution are the victims of the crime laid against the appellant. Each witness testified to have joined Vision SACCOS after being persuaded that he or she would be paid 5% of the money invested or deposited with the SACCOS. It was further testified by each of

witness the money deposited into Vision SACCOSS had not been repaid. However, some of them admitted to have been paid interest.

The appellant distanced himself from the offence preferred against him. He admitted being the chairman of Vision SACCOS which was duly registered. It was also his defense that the victims were required to forward the matter to the registrar of cooperative societies for settlement. He admitted further that the victims had deposited their respective money with Vision SACCOSS and contended that their claims would be paid.

Upon full trial, the trial court convicted the appellant in respect of all counts and sentenced him to five years imprisonment. In addition, the appellant was ordered to pay compensation to 17 victims.

In this appeal, the appellant has raised six grounds of appeal challenging the decision of the trial court. Having examined the grounds, I have decided to deal with 1st ground of appeal, which in my view, has the effect of disposing of the matter without necessarily dealing with other grounds. The said ground reads:

"That, the learned trial magistrate erred in both law and fact to convict and sentence the appellant based (sic) on a charge which was defective."

At the hearing of this appeal, the appellant appeared in person. On the other side, the respondent was represented by Ms. Angelina Nchalla, learned State Attorney. The appellant submitted extensively on all grounds of appeal. However, as stated earlier, I will deal with the above named ground.

Submitting in support of that ground, the appellant argued that there is variance between the particulars of offence and evidence adduced by the prosecution. He pointed out that the charge sheet shows that the offence was committed at Africa sana area while the evidence adduced by PW1, PW3 and PW4 suggest that the offence was committed at Makumbusho area, Kijitonyama area and that the remaining witnesses did not name the place where the offence was committed.

According to the appellant, another variance was related to the time of committing the offence. He contended that the witness did not give evidence to prove that the offence was committed on the dates, month and year indicated in the charge sheet.

The appellant went on to contend that another variance was in respect of the amount of money involved in each count. It was his submission that the adduced evidence did not match with the amount stated in the charge sheet and that evidence to prove some counts was not given.

The appellant referred the Court to the case of **Mohamed Mtowu vs R**, Criminal Appeal No. 228 of 2018, **Deogratias Philip and Another vs R**, Criminal Appeal No. 326 of 2017 and **Nkanze vs R** [1992] TLR 213.

Responding, Ms Nchalla supported the appeal. She was in agreement with the appellant that the charge sheet and evidence adduced during the trial were at variance in respect of money involved and the place where the offence was committed. The learned State Attorney contended that some victims named in the charge sheet did not testify before the trial court. Making reference to the decision of this Court (Kulita, J) in the case of **Akida Yusuph vs R**, Criminal Appeal No. 286 of 2018, she argued that the prosecution case was proved.

Having gone through the charge sheet and evidence on record, I agree with the appellant and the learned Senior State Attorney that the charge

sheet and evidence produced by the prosecution are at variance as indicated hereunder.

One, as indicated earlier, the charge sheet has 17 counts. Each count names the victim of the offence of obtaining money by false pretence. It also shows the amount of money alleged to have been defrauded from each victim. In that regard, the prosecution was expected to parade each victim to prove how he or she was defrauded by the appellant. However, only four victims (PW7, PW2, PW8 and PW6) in the 2nd, 4th, 14th and 15th counts testified before the trial court. The victims named in the remaining counts were not marshaled. In other words, the prosecution did not produce evidence to prove the 1st, 3rd, 6th, 7th, 8th, 9th, 10, 11th, 12th, 13th, 16th and 17th counts. As if that was not enough, the prosecution called five victims who were not named in the charge sheet. These are Laetare Furani Ephairm (PW3), Daimon Daniel Masao (PW4), Doris Philipo (PW5) and Catherimo Mwakyusa (PW9) who do not feature in the charge sheet.

Two, PW7, PW2, PW8 and PW6 are the victims named in the 2nd, 4th, 14th and 15th counts. However, as rightly argued by the appellant and Ms. Nchalla, their respective evidence and charge sheet are at variance in respect

of the amount of money alleged to have been defrauded by the appellant as follows:-

- (a) While the 2nd count shows that TZS 6,500,000 was deposited in Vision SACCOS by PW7, PW7 testified that he deposited TZS 7,830,000. Such evidence is supported by Exhibit P10.
- (b) While the 4th count indicates that PW2 deposited TZS 20,000,000 his evidence and Exhibits P2 and P3 suggest that the amount of money involved is TZS 20,380,000.
- (c) Whereas the amount of involved in 14th count is TZS 15,000,000, evidence adduced by PW8 shows that the amount of deposited is Tshs 1, 850,000.
- (d) It is reflected in 15th count that TZS 5,000,000 was deposited by PW6 whose evidence and Exhibit P9 are to the effect that the amount paid is TZS 5,500,000.

Three, another variance is in respect of the place where the offence was committed. As stated earlier, the particulars of the offence shows that the offence was committed at Africa sana area within Kinondoni District in Dar es Salaam Region. However, PW7 and PW8 whose names appear in the

charge sheet testified that Vision SACCOS's office is located at Makumbusho area. On their part, PW3 and PW4 deposed that the office were located at Kijitonyama. In any case, none of the witnesses testified that the offence was committed at Africa sana area as indicated in the charge sheet.

In view of the demonstrated variance between the charge sheet and prosecution evidence the prosecution was expected to make use of section 234 (1) of the CPA by praying to amend the charge sheet. The said provision reads:-

"Where in any stage of the trial it appears to the court that the charge sheet is defective; either in substance or in form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or additional of new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merit of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this sub section shall be made upon such terms as the court shall seem just"

In terms of the settled law, failure to amend the charge sheet is fatal and prejudices the appellant. In that regard, such anomaly leads to negative

implication on the prosecution case. There is a plethora of authorities on that stance. Apart from the above cases cited by the appellant and Ms. Nchalla, this position was stated in the case of **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2015 the Court observed as follows:

"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."

In yet another case of **Issa Mwanjiku @ White vs Republic**, Criminal Appeal No. 175 of 2018 (all unreported), the Court of Appeal had this to say on the issue under consideration.

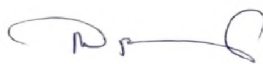
"We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard"

Guided by the above position of law, I agree with both parties that the counts preferred against the appellants were not proved due to the above

stated variance between the charge sheet and evidence. This is so when it is considered that the prosecution did not pray to amend the charge sheet. Considering that a charge sheet is a foundation of every criminal case which forms the basis of the case, this ground suffices to dispose of the appeal at hand.

All said and done, the appeal is allowed. In consequence, the conviction is hereby quashed, and sentence and compensation order set aside. It is ordered further that the appellant be released forthwith from custody unless held for other lawful cause. The victims may wish to take civil measure against the appellant and/or Vision SACCOS Ltd.

DATED at DAR ES SALAAM this 27th day of April, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered this 27th day of April, 2022 in the presence of the appellant and Ms. Angelina Nchalla, learned Senior Sate Attorney for the respondent.



S.E. Kisanya
JUDGE
27/04/2022