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. 135 OF 2022

BAHATI DAVID KASEKE .... 1ST APPELLANT

THADEUS MCHILI @MALLYA .... 2ND 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. 192 of 2019)

JUDGMENT

11th October, 5th & 6th December, 2022

KISANYA, J.:

In the Resident Magistrate's Court of Dar es salaam at Kisutu, the appellants, Bahati David Kaseke and Thadeus Mchili @ Mallya and other three accused persons (who are not subject to this appeal) were charged with two counts. The appellants' co-accused were Julias Daid Mwakapola @ Juda, (1st accused), Leonard Mwambele (3rd accused) and Michael Peter Chuwa (4th accused).

In terms of the charge, the first count was conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap. 16, R.E. 2002 (now R.E. 2022). It was alleged that on 26th July, 2019, at unknown place, the appellant and other accused persons did conspire to commit the offence to wit, stealing. The second count was in respect of offence of stealing goods on transit, contrary to sections 265 and 269 (c) of the Penal Code (supra). It was stated

in the charge sheet that, on 26th July, 2019 at Buguruni Bakhresa area within Ilala District in Dar es Salaam Region, the appellants and other accused persons did steal 31 tons of wheat flour valued at Tshs 33,580,000/=, the property of Simon Kasoni @ Kizinga which was on transit from Dar es Salaam to Manyoni.

The trial court found both appellants and other accused persons guilty and convicted them with both counts on the basis of the evidence of the nine (9) witnesses and eleven (11) documentary evidence.

The factual background unveiled by the prosecution during trial recapitulated the evidence on record as follow: Simon Kasoni @ Kizinga (PW1) was a businessman based in Ukonga Dar es Salaam. On 26th July, 2022, he received an order of transporting wheat flour from Bakhresa factory at Buguruni. Since PW1 was outside Dar es Salaam, he instructed his assistant, Emmanuel Simon Kasoni (PW2) to supervise the loading of cargo to wit, 1240 bags of wheat flour (the goods) valued at 33,666,000/=. The st accused person was a driver of the vehicle with registration number T 958 BCS with trailer number T.683 CRA. He was engaged to transport the goods to Hamis Jackson (PW6) who was in Singida.

Thereafter, the cargo was loaded into the 1st accused's person vehicle, at the factory of Bhakhresa area. It turned out, that the goods were not transported to the intended destination, Manyoni Singida. PW1 reported the matter to Buguruni Police Station.

The 1st accused was arrested after two weeks. Upon being nterrogated, he named his accomplices. It turned out that the 1st appellant was the broker who sourced the 1st accused to transport the cargo, while the 2nd appellant was the owner of the store where the cargo was unloaded. On the other hand, the 4th accused person purchased the cargo from the 3rd accused who claimed to be the owner. It was the prosecution's case that the appellants and co-accused confessed to have committed the offence. It was further the evidence of PW1 that relatives of the 1st, 3rd 4th accused persons and appellant signed an agreement committing themselves to pay PW1, Tshs. 36,000,000 as value of the goods.

The trial proceeded in the absence of the 3rd accused who jumped bail. As for the appellants, 1st and 4th accused, they denied to have committed the offence laid against them.

In view the evidence presented before it, the trial court convicted the appellants and co-accused with both counts. It is on record that the 1st, 3rd and 4th accused were convicted in absentia after jumping bail.

In consequence, the appellants were sentenced to five years imprisonment for the first and second counts. It was ordered that the sentence would run concurrently. In addition, each appellant was ordered to pay Tshs. 6,600,000 as compensation. As for the 1st, 3rd and 4th accused, they were ordered to show cause, upon apprehension, as to why they should not be

sentenced to seven years imprisonment for the first count and seven years imprisonment for the second count.

In their attempt to justify their innocence, the appellants have lodged the present appeal challenging the conviction and sentence. Their petition of appeal has a total of eight grounds of appeal which can be paraphrased as follows: -

1. *That, the learned trial magistrate erred in law and facts to find that the count of conspiracy was proved by Exhibit P2 without considering that the said Exhibit was not signed by the appellants.*
2. *That, the learned trial magistrate erred in law and facts to convict the appellants while the charge sheet and evidence were at variance in respect of the ownership of the stolen goods.*
3. *That, the learned trial magistrate erred in law and facts to convict the appellants for the offence of stealing goods on transit which is not provided for in the cited provisions and that the appellants were sentenced under provisions of section 265 of the Penal Code which were not cited in the charge.*
4. *That, the learned trial magistrate erred in law and facts to convict the appellants while it was not proved that the appellants had knowledge that the alleged 1240 bags of wheat of flour had been stolen.*
5. *That, the learned trial magistrate erred in law and facts to convict the 2nd appellant on the ground that the cargo was unloaded at his store while the said cargo was*

unloaded in his absence and the owner of the cargo had all necessary documents.

6. *That, the learned trial magistrate erred in law and facts for failure to draw adverse inference to the prosecution for failure to call material witnesses.*
7. *That, the learned trial magistrate erred in law and facts for failure to believe or accept the evidence adduced by the appellants.*
8. *That the learned trial magistrate erred in law and facts to convict the appellants basing on the prosecution case which was not proved beyond reasonable doubts*.

When the appeal came up for hearing on 19th September, 2022, it was agreed that the appeal would be heard by way of written submissions. The Court issued the schedule within which parties were to file their respective written submissions. It turned out that the respondent filed the written submission outside the time ordered by the Court. On that account, the respondent's reply submissions were expunged from the record for having been filed in contravention of the Court's order. It was therefore, ordered that the judgment would be given basing on the written submission filed by the appellant.

In the course of composing the judgment, I found it necessary to recall the parties to address the Court on whether the cautioned statements (Exhibits P4, P8 and P5), Certificate of Seizure (Exhibit P6) and Delivery Notes and pay in slip (Exhibit P7 collectively) were admitted in accordance with the law.

At the hearing of the issue raised by the Court, the appellant appeared in person while the respondent was represented by Ms. Yasinta Peter learned advocate.

I have carefully considered the arguments advance by the appellants in the appeal and gone through the submissions by both parties on the issue raised by the Court.

I prefer to start with the third ground of appeal. It was the appellant's submission that the charge was defective. His submission was based on the ground that the provisions of section 258 and 269(c) of the Penal Code cited in the charge sheet do not create the offence of stealing goods on transit laid against them. The appellants submitted that section 258 of the Penal Code provides for definition of theft while section 269 (c) provides for the offence of stealing from the motor vehicle and not stealing goods on transit. It was the appellant's further argument that the trial court erred to sentence them under 265 of the Penal Code while they were not charged under that provision. The appellants went on contending that the trial court had ample time to order the prosecution to amend the charge. It was their further contention that they were subject to unfair trial due the prosecution's failure to amend the charge.

It is an elementary principle in criminal law that any trial is founded on the charge. The mode of framing the charge is stipulated under section 132 the CPA. It is a legal requirement that the charge must contain a statement of offence and specific particulars on the nature of the charged offence. See also

the case of **Abdul Mohamed Namwanga @ Madodo vs R**, Criminal Appeal No, 257 of 2020 in which the Court of Appeal held as follows:

> *"Section 132 of the CPA stipulates the contents of every charge or information. It states that every charge or information must contain a statement of the specific offence or offences charged as well as the particulars reasonably showing the nature of the offence or offences charged."*

In addition to the above cited provision, section 135(a) of the CPA requires the statement to be described together with the essential elements of the offence and reference to the section creating the offence. In the case of **Abdul Mohamed Namwanga @ Madodo** (supra), the Court of Appeal discussed the provisions of section 135(a)(ii) of the CPA in the following terms:

> *"We have supplied emphasis to section 135 (a) (ii) above to stress the peremptory requirement that the "statement of offence" in every charge or information must describe the offence concerned in ordinary language and, if the offence charged is one created by enactment, it must contain a reference to the section of the enactment creating the offence."*

Having explained the manner in which the charge must be framed, for clarity, I find it appropriate to reproduce the charge in respect of the second count:

"2ND COUNT

STATEMENT OF OFFENCE

STEALING GOODS ON TRANSIT*: contrary to section 258 and 269(c) of the Penal Code [Cap. 16, R.E. 2002]*

PARTICULARS OF OFFFENCE

JULIAS DAUDI @MWAKAPOLA @JUDA, BAHATI DAVID KASEKE, LEONARD MWAMBELE, MICHAEL PETER CHUWA AND THADEUS MCHILI @MALLYA *on 26th July, 2019 at Buguruni Bhakhesa area within Ilala District in Dar es Salaam Region, did steal 31 tone (sic) of wheat flour valued at Tshs 33,580,000/=, the property of Simon Kasoni @ Kizinga which was on transit from Dar es Salaam to Singida Manyoni."*

As it can be depicted from the above excerpt of the charge, the offence of stealing goods on transit was stated to have been preferred under sections 258 and 269(c) of the Penal Code. However, as rightly submitted by the appellants, none of the provisions cited in the charge sheet creates the offence of stealing goods on transit. This is so because section 258 of the Penal Code define the term theft. On the other hand, section 269(c) of the Penal Code provides for punishment of theft committed under circumstances where the property is stolen from any kind of vessel or vehicle or place of deposit.

It is also apparent that the charge sheet did not inform the appellants and other accused persons on whether the goods were stolen from the vessel or vehicle or place of deposit as required by section 269(c) of the Penal Code. I am aware that the evidence adduced by the prosecution indicated that the goods were stolen from the vehicle which was on transit to Manyoni. However,

I am of the considered view that, the foregoing defect might have led the appellants and other accused person not to appreciate the seriousness of the offence against them to been in a good position to prepare for their respective defence.

I also agree with the appellant that, had the prosecution sought leave of the trial court to amend the charge under section 234 (1) of the CPA, the said defect could have been rectified. Since this was not done, it is clear that the charge was defective thereby vitiating the proceedings of the trial court. Thus, defect rendered the proceedings and judgments of the trial courts a nullity.

As the above determination is sufficient to dispose of the appeal, I would have ordinarily ended here. However, before deciding on the recourse to be taken, I will address the issue raised by the court and the third ground of appeal.

As for the issue raised by the Court, the learned State Attorney conceded that some of the accused persons were not asked before admission of Exhibits P5 to P8. However, she was of the firm view that the omission did not cause failure of justice and thus, curable under section 388 of the CPA. Her argument was based on the contention that the accused person to whom the cautioned statement (Exhibit P4, P5 and P8) and certificate of seizure (Exhibit P6) and delivery notes (Exhibit P7) were tendered was asked to state whether he was objecting admission of the said exhibits. It was her further argument that the

said exhibits were read over to all accused persons and thus, required to cross-examine the witnesses who tendered the same. On the other hand, the 1st appellant had nothing to submit on the foresaid issue, whereas the 2nd appellant submitted that said exhibits were admitted in contravention of the law.

On my part, the law is settled that, a document forms part of the evidence after passing three stages namely, clearance for admission, admission in evidence and reading out after admission. This position was stated in the case of **Robinson Mwanjisi and 2 Others vs R** [2003] TLR 218, when the Court of Appeal held:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same"*

During the clearance stage, the trial court is expected to give the adverse party to comment on admission of the document sought to be tendered in evidence. It is on record that, only the 1st accused, 1st appellant and 2nd appellant were asked to state whether they had objection on their respective cautioned statements which were admitted Exhibits P4, P8 and P5. Further to this, no accused person other than the 4th accused person was called on to state whether he was objecting admission of the Certificate of Seizure (Exhibit P6) and Delivery Notes from Said Salim Bakhresa to Marco Jackson Welle of Manyoni and pay in slip (Exhibit P7 collectively). In view of the foresaid

anomaly, Exhibits P4, P5, P6, P7 and Exhibit P8 are hereby expunged from the record. It is clear that the said Exhibits were admitted in contravention of the law.

With regard to the second ground, the appellant contended the charge sheet and evidence were at variance. They submitted that the owner of the stolen cargo named in the charge sheet is Simon Kassoni Kizinga (PW1) while both PW1 and PW6 testified to be the owners of the same cargo. The appellant further contended that; the value of the stolen cargo stated in the charge sheet is Tshs. 33, 580,000 while PW1 and PW6 told the trial court that it was Tshs. 35,666,000/= and Tshs. 33,586,000 respectively. It was also submitted by the appellants that the charge sheet showed that the quantity of stolen cargo as 31 tons of wheat flour whereas PW6 testified that the quantity was 1240 bags of wheat flour.

In view of the said variance, the appellants argued that the ingredients of the offence of stealing was not proved. To support their arguments, the appellants cited the cases of **Mashala Njile vs R**, Criminal Appeal No. 179 of 2014, **Masasi Mathias vs R**., Criminal Appeal No. 274 of 2009 and **Zengo Mahema and 3 Others vs R**, Criminal Appeal No. 274 of 2009.

It is trite law that the offence of theft is proved by establishing, among others that, there was movable property and that the movable property belongs

to another person other than the accused. [See the case of **DPP vs Shishir Shyamsingh**, Criminal Appeal No. 141 of 2021 (unreported))

Having gone through the record, I entirely agree with the appellants that apart from the owner of the stolen cargo, the charge sheet and evidence are at variance on the stolen property.

It is discerned from the charge that the stolen goods belong to Simon Kassoni Kizinga (PW1). However, in terms of evidence of PW6 read and PW4 Said Omary Salum, the owner of stolen goods was PW6.–As for the stolen property, 31 tons of wheat flour valued at Tshs. 33,580,000 were stated in the charge sheet. But, the evidence of PW1 indicates the property stolen was 1240 bags of wheat flour valued at Tshs. 35,666,000/=. On the other hand, evidence of PW4 suggests that PW6's order from the industry was for 1200 bags of wheat flour, whereas PW6 stated to have bought 31 tons of wheat flour at Tshs. 33,566,000/. On his part, PW2 told the trial court the goods loaded in the 1st accused's vehicle were 1240 bags of wheat flour valued at Tshs. 33,000,000/.

In view of the settled law, the prosecution ought to have prayed to amend the charge sheet under section 234 of the CPA. The law is further settled that failure to amend the charge sheet renders the charge sheet unproved. See the cases of **Mashala Njile vs R**, Criminal Appeal No. 179 of 2014, **Masasi Mathias vs R.**, Criminal Appeal No. 274 of 2009, **Zengo Mahema and 3 Others vs R,** Criminal Appeal No. 274 of 2009 and **Issa Mwanjiku @ White**

vs Republic, Criminal Appeal No. 175 of 2018. In the latter case, the Court of Appeal underlined as follows:-

> *"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"*

In the light of the above stated position, the omission to amend the charge occasioned a miscarriage of justice and rendered the prosecution case on the second count not proved. In consequence, the first count on conspiracy to commit the offence was also not proved. This implies that, even if it is taken that the charge had no defect pointed afore, the charge levelled against the appellants was not proved.

In the event, I find merit in the appeal and allow it. Accordingly, the conviction is quashed and the sentence and compensation order are set aside. It is further ordered that the appellants be set free unless they are held for other lawful cause.

DATED at **DAR ES SALAAM** this **6th** day of **December, 2022.**

S.E. KISANYA

JUDGE