IN HIGH THE COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 35 OF 2021

(Originating from Nachingwea District Court in Criminal Case No. 194 of 2019))

SALIMA SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

9/3 & 27/4/2022

LALTAIKA, J.

The appellant herein, **SALIMA SAID** (the appellant) was arraigned in the District Court of Nachingwea at Nachingwea (the trial court) charged with offence of aiding accused person to escape contrary to section 117(a) of the Penal Code [Cap 16 R.E 2002] now Revised Edition of 2019.

It was the prosecution's story that on the 28th day of August 2019 at 1800 hours at Boma Mashariki area within Nachingwea District in Lindi Region the appellant unlawfully did aid one **Athumani Manaki** hitherto accused of stealing with a police case number NAC/IR/1001/2019, but yet

to be arraigned in court, to escape. The escape took place when the escapee was on police bail.

When the charge was read over and explained to the appellant (then accused) she denied wrongdoing. The trial court proceeded to conduct a full trial. Having been convinced that the prosecution had left no stone unturned in proving the case, the learned Magistrate convicted the appellant as charged and sentenced her to pay a fine of TZS 500,000/= or two years imprisonment and to pay compensation of TZS 7,000,000/= to the complainant, a local cooperative commonly referred to as AMCOS [Agriculture and Marketing Cooperative Society] after completion of her sentence.

Aggrieved, the appellant has appealed to this court by way of a petition of appeal containing two grounds as reproduced hereunder:

1. *That the learned trial Magistrate erred in law and facts in convicting the appellant on the offence which does not exist in law*
2. *That the learned trial Magistrate erred in law and fact by ordering the appellant to pay compensation for the offence which was not tried and proved before a court of law.*

When the appeal was called on for hearing, the appellant was in court while enjoying skillful services of **Mr. Faraji Taratibu**, learned Advocate. The respondent Republic, on the other hand, enjoyed skillful advocacy of **Mr. Abdulrahman Mshamu, learned Senior State Attorney**.

Taking up the podium, Mr. Taratibu went straight to the first ground of appeal. He contended that the appellant had been charged with an offence denoted as "aiding an accused person to escape" under section 117A of the Penal Code Cap 16 RE 2019. He asserted that this offence was

existent in law, as he pointed out that the referenced provision pertained specifically to aiding prisoners to escape, not aiding accused individuals.

Upon scrutinizing the trial court judgment's pages 1, 2, and 6, as well as pages 7, 10, 13, 14, and 15 of the trial proceedings, Mr. Taratibu observed a lack of evidence indicating any prisoner's escape aid. Instead, he underscored that the situation revealed a breach of police bail conditions. Furthermore, he highlighted a lack of alignment between the trial evidence and the charges brought against the appellant. Notably, reasoned the learned Advocate, the trial magistrate and PW1 and PW2 failed to distinguish between **an accused person and a prisoner**, leading to incongruities between the charges and the evidence presented in support of the conviction. Consequently, Mr. Taratibu argued, the appellant's prosecution and conviction were erroneous, thereby resulting in a miscarriage of justice.

Mr. Taratibu proceeded to invoke section 132 of the **Criminal Procedure Act Cap 20 RE 2019** (the CPA) which mandates the inclusion of specific offence details in the charge, failing which the charge becomes defective. He contended that the charge against the appellant **was legally flawed** under this provision, thereby contravening section 132. Furthermore, he maintained that the defect could not be remedied under section 388(1) of the CPA, as it had caused a failure of justice of such magnitude as to render the entire decision illegal.

Asserting that the trial magistrate should have followed procedures applicable to individuals who absconded police bail, he referenced section 66(d) in conjunction with section 160(1) of the CPA. According to Mr. Taratibu, these provisions required summoning the appellant to justify the

non-forfeiture of her security, rather than merely charging her with a non-existent offence.

To buttress his argument, Mr. Taratibu referred this court to the case of **OSWALD ABUBAKAR MANGULA v. REPUBLIC [2000] TLR 271,** wherein it was held that a charge should only be laid against an accused person after the magistrate is satisfied that it encompasses a legally recognized offence. He noted that, as the charge sheet in this case did not outline a legally recognized offence, the proceedings in the District Court should be declared null and void.

Given the circumstances at hand, Mr. Taratibu entreated the court to declare the entire procedure null and void. Emphasizing the necessity to construe penal statutes with strictness due to their potentially severe implications for accused individuals, Mr. Taratibu said thoughtfully, the grave error committed by the trial court had irredeemably tainted the proceedings and inconvenienced his client.

The learned Advocate proceeded to address **the second ground of appeal,** emphasizing that the law stipulates that only the law itself can establish a crime and specify its corresponding penalty. He noted that this principle is rooted in the concept of legality, **as encapsulated in the Latin Maxim *"nullum crime sine lege"*** (no punishment without a law). According to Mr. Taratibu, in this case, the prosecutors defined the crime, and the trial magistrate proceeded to convict the appellant based on a non-existent offence. The trial magistrate then, averred Mr. Taratibu, directed the appellant to make compensation for a debt that had not been

substantiated in accordance with the law, in addition to imposing a fine under section 348(1) of the CPA, which the appellant duly paid.

The above scenario, Mr. Taratibu argued, amounts to a situation where the innocent appellant faced prosecution twice: firstly, under a charge for a non-existent offence, and secondly, under a charge that had not been subjected to a court trial. He petitioned the court to consider that the conviction and sentence were flawed, as they contradicted established legal principles and led to an injustice. Mr. Taratibu contended that these issues were beyond remedy and hence pleaded for them to be declared null and void.

Mr. Mshamu, the learned Senior State Attorney, responding to the grounds of appeal stated that on the side of the respondent, he wished to declare his support for the appeal. However, he expressed disagreement with all the grounds and reasons provided for the following explanations:

Mr. Mshamu stated that although he was in favor of the appeal, he disputed the claim that the offence does not exist. He argued that if that were the case, the court would not have accepted the charge. Mr. Mshamu's argument was based on the assertion that the learned counsel relied on the marginal note, which reads "aiding a prisoner to escape."

The learned Senior State Attorney emphasized that **marginal notes are not integral to the sections** and are intended solely for ease of reference. In this context, argued Mr. Mshamu confidently, when formulating a charge, it is unnecessary to utilize the wording found in the marginal note.

Mr. Mshamu justified the support for the appeal by referring to the cited section that states that anyone who aids a prisoner is subject to

prosecution. He pointed out the need to define the term "**prisoner**" and cited **Section 2 of the Prison Act Cap 58 RE 2019,** which defines a prisoner as someone detained in prison, whether under a sentence or as a remandee. He highlighted that the appellant had provided bail to an individual who was under police bail, not court bail. Consequently, Mr. Mshamu asserted, the term "prisoner" would not encompass that individual.

Mr. Mshamu emphasized further that errors in titles or quotations in charge sheets are remediable according to Section 388 of the Criminal Procedure Act (CPA). He stressed that the crucial factor in determining the adequacy of a charge lies in the particulars of the offence and how comprehensible they are to the accused. He referenced the case of **JAMALI ALLY SALUM VERSUS REPUBLIC CRIM APP 52 OF 2017** in which the Court of Appeal of Tanzania dealt with a similar charge issue of defectiveness of a charge. He noted that since the particulars were accurate, any error was correctable.

In this vein, Mr. Mshamu argued that the absence of the term "prisoner" in the charge sheet is remediable under Section 388. He emphasized that the offence indeed exists, as Section 117(a) addresses aiding a prisoner to escape. He clarified that he only concurred insofar as the individual who absconded bail was not confined in a prison.

Addressing the matter of police bails, Mr. Mshamu observed that the Criminal Procedure Act does not address police bails explicitly. This distinction is evident when comparing it to court bail, which is covered in Section 159(a) and (b) and further elaborated upon in Section 66(b).

However, argued Mr. Mshamu, these provisions fall short in relation to police bail, as Section 160(b) does not fully encompass it.

Mr. Mshamu contended that since any criminal offence is anchored in a charge sheet and the prosecution is tasked with substantiating the charge, the entirety of the proceedings demonstrates the prosecution's failure to prove the charge. This, he asserted, is the basis for his support of the appeal. He opined that the appellant should not have been convicted under this offence. Consequently, Mr. Mshamu reasoned, even the directive to pay compensation was erroneous. In conclusion, the Senior State Attorney reiterated his support for the appeal.

I **have meticulously examined the evidence** on record and thoroughly considered the arguments put forth by the respective parties in light of the grounds of appeal. I shall commence my deliberation by addressing the first ground of appeal. At the outset, I am inclined to concur with Mr. Taratibu's assertion that the appellant was convicted of an offence that, in fact, does not exist within the provisions of the Penal Code [Cap. 16 R.E. 2019]. The verbiage employed in the charge sheet presented and laid against the appellant reads as follows:

> *"Aiding Person to Escape contrary to section 117 (a) of the Penal Code Cap.16 [Cap. R.E. 2002]."*

Additionally, the particulars of the offence state:

> *"On the 28th day of August 2019 at 1800 hrs at Boma Mashariki area within Nachingwea District in Lindi Region, the accused unlawfully aided one Athumani Manaki to escape, who stands accused of Stealing NAC/IR/1001/2019 subsequent to police bail."*

In contradistinction, the wording of section 117 (a) of the Penal Code is couched in the following manner:

"A person who—
(a) aids a prisoner in escaping or attempting to escape from lawful custody."

Moreover, the marginal notes denote **"Aiding prisoners to escape."** An analysis of the marginal notes, as well as the substantive content of the statutory provision, unequivocally refers to an individual who is aided in escaping lawful custody being categorized as a prisoner and no other. As expounded by Mr. Mshamu, the interpretation of the term "prisoner" is elucidated under Section 2 of the Prisons Act, which stipulates:

"...means any person, whether convicted or not, under detention in any prison."

With a firm understanding of the term "prisoner," I am now compelled to ascertain whether the charge against the appellant and the evidence adduced by the trial court demonstrate that the individual aided in the escape was, indeed, a prisoner. The charge distinctly states the offence as aiding an accused person to escape contrary to section 117 (a) of the Penal Code. Likewise, the particulars assert that the appellant unlawfully aided the escape of Athumani Manaki, the accused in the case of Stealing NAC/IR/1001/2019, subsequent to police bail.

Given the significance of these critical components of the charge sheet, it is manifestly apparent that the aided escapee was not a prisoner but an individual accused of theft under case NAC/IR/1001/2019, who was in police custody. Further bolstering this observation, the testimony of PW1 and PW2 substantiates that the appellant secured the release of a relative named Athumani Manaki on police bail.

Consequently, the charging provision employed by the prosecution, as well as endorsed by the trial court in convicting the appellant, is bereft of legal existence. I, with due respect, differ from Mr. Mshamu's contention that the charge against the appellant can be rectified under section 388 of the CPA, for both the statement of the offence and the particulars thereof encompass erroneous language that runs counter to the statutory wording. On this basis, the case cited by the learned Senior State Attorney finds no application to the present matter due to the dissimilarity between the circumstances of the referred case and the case at hand.

Additionally, I am swayed by the arguments advanced by Mr. Taratibu, juxtaposed against the Court of Appeal's observation in the case of **OSWALD ABUBAKAR MANGULA V REPUBLIC** (supra), which asserts that the charge delineates an offence that lacks legal recognition and stands in contravention to the dictates of both the marginal notes and the statutory provisions.

It is pertinent to underscore that had the statement of the offence contained a misstatement divergent from the marginal note and the core tenets of the law and had the particulars of the offence correctly reflected the statutory wording, the erroneous phrasing in the statement of the offence **might have been amenable to remedy** under section 388 of the CPA, as advocated by Mr. Mshamu.

Turning to the second ground of appeal, I am unequivocally inclined to accede, without reservation, to the submissions made by both learned counsel, which posit that no charge was proffered against the appellant in relation to the offence that culminated in the directive for compensation to

the AMCOS. It remains an immutable truth that no penalty may be imposed in the absence of a pertinent law, as per the maxim ***"nullum crime sine lege."*** In regard to the present matter, it is abundantly evident that the learned trial Magistrate issued an order for the appellant to provide compensation for a debt that did not fall under the purview of section 117 (a) of the Penal Code.

Moreover, the debt in question was not proven before the court of law in accordance with the prescriptions of section 348(1) of the CPA, which mandates that evidence substantiating a compensation order against the convict must be presented. The trial court, therefore, exceeded its jurisdiction by entertaining a matter that had not been brought before it. The juxtaposition of these circumstances compels one to wonder how the trial court proceeded to issue a compensation order to the AMCOS while fully cognizant that such a matter lay beyond its jurisdiction.

In the upshot, it is patently clear that the two grounds of appeal are meritorious. Consequently, I allow the appeal. I annul the proceedings of the trial court, quash the conviction, and set aside the sentences and the order of compensation issued to the AMCOS.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
27.04.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 27th day of April 2022 in the presence of the Mr. Wilbroad Ndunguru, learned Senior State Attorney, Mr. Faraji Taratibu Counsel for the appellant and appellant.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
27.04.2022