

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 8 OF 2021

(Arising from Criminal Appeal No. 26 of 2018 at Bukoba District Court and Original Criminal Case No. 413 of 2018 at Bukoba Urban Primary Court)

AGNES ELIAS----- APPELLANT

VERSUS

DENIS SEBASTIAN-----1ST RESPONDENT

MJUNI BUBERWA-----2ND RESPONDENT

MARK ELIAS-----3RD RESPONDENT

TWAHA DAUDA-----4TH RESPONDENT

JUDGMENT

Date of last Order: 02.03.2022

Date of Judgment: 11.03.2022

Hon. A.E. Mwipopo, J.

The appellant herein namely Agnes Elias filed Criminal Case No. 413 of 2018 at Bukoba Urban Primary Court against respondents herein namely Denis Sebastian, Mjuni Buberwa, Mark Elias and Twaha Dauda. The appellant arraigned the respondents in the Primary Court for two offences, the first count being for the offence of house breaking contrary to section 294 (1) of the Penal Code, Cap.

16, R.E. 2002, and the second count is for the offence of stealing contrary to section 265 of the Penal Code, Cap. 16, R.E. 2002. It was alleged that the respondents on 12th April, 2018 at 12:30 hrs. in the afternoon at Butayaibaga within Bukoba Rural District in Kagera region unlawfully they did break into the house of Agnes Elias with the intention to commit the offence of stealing contrary to the law. Respondents after breaking and entering into the house of Agnes Elias unlawfully did steal shillings 700,000/= the property of one Agnes Elias. After hearing the complainant's and accused witnesses, the Primary Court acquitted all respondents in its judgment after it found that the complainant failed to prove the offences without doubts.

The appellant was aggrieved by the decision of Primary Court and unsuccessfully filed Criminal Appeal No. 26 of 2018 in the Bukoba District Court. The District Court did find that the trial Primary Court entertained and determined the case filed on the defective charge. For that reason, the District Court quashed the proceedings of the trial Primary Court and the appeal was dismissed for want of merits. The appellant once again was aggrieved by the decision of the District Court and filed the present appeal. The petition of appeal filed by the appellant has two grounds of appeal as provided hereunder:-

- 1. That, the Appellate Court erred in law by dismissing the appeal after finding the defects on the charge.*

2. That, the trial Court erred in law and facts by failure to analyze the adduced evidences and make a proper orders henceforth treating the matter as probate matter while the offence was factually proved to have existed.

When the appeal came for hearing both parties were represented. Mr. Victor Blasio, Advocate, appeared for the appellant, whereas, Mr. Gildon Mambo, Advocate, appeared for all respondents.

The counsel for the appellant commenced by submitting on the second ground of the appeal first. He said the 3rd respondent testimony is that as the administrator of the deceased estate he was doing his duty by opening the door of the said house which was occupied by the appellant. The way incident occurred proved that there was criminal offence which was committed. There is no dispute that the 3rd Respondent did break and entered in the house of the appellant and opened the door for other people to enter. The only issue to be determined is whether or not the breaking and entering was done with intention to commit the offence.

It was appellant's argument that the respective house is the house which the appellant was living with his deceased husband and their children. The appellant was not aware of the Probate Case which appointed the 3rd Respondent as it was instituted at Dar Es Salaam. The 3rd Respondent and other children of

the deceased had another house in the same area. The testimony of SM2 shows that the appellant was not home when they entered in the house. The offence of breaking the house and entering in the house was committed in the absence of the appellant. When the appellant arrived at the house the Respondent had already break in the house. The Respondent involved the village Chairman who knows the procedure of entering in the house of another person, but there is no evidence whatsoever to prove that the procedure was followed before the breaking and entering was done. The 3rd Respondent could have followed procedure to prove that the property in issue belongs to their father. He went on to say that the evidence of the appellant and that of SM2 proved that there was Tshs. 700,000/= in the envelop which was stolen during the incident. The Primary and District Court failed to evaluate this evidence hence reached a wrong decision.

In the first ground of appeal, the counsel for appellant said that the District Court dismissed the appeal as it held that the charge sheet was defective. The Respondent were charged under section 294 of the Penal Code and that subsection in the said section were not cited. This defects is curable as it was stated by Court of Appeal in the case of **Jamal Ally @ Salum v. Republic**, Criminal Appeal No. 32 of 2017, Court of Appeal of Tanzania at Mtwara, (unreported). In the cited case, the Court of Appeal was of the view that where the particulars of offence were clear and enabled the suspect to fully understand the nature and seriousness

of the offence he is tried for. For that reason he prayed for the court to find respondents guilty of the offence and to convict them according to the law.

In response, the counsel for the respondents submitted on the second ground of appeal that it is not disputed that the respondents did break the door lock on instruction of the 3rd Respondent who is the administrator of the late husband of the appellant. The late husband of the appellant is the father of the 3rd respondent. The respondents were charged for the offence of section 294 (1) of the Penal Code despite the failure of the charge to show the charge was under which subsection. The law requires the proof of intention in the commission of the offence. Respondents did break the lock without any intention of committing the offence. The respondents did break the door of the appellant but they never entered inside. Before the 3rd respondent did break the door to the room, he entered in the house through back door and opened the front door for other respondents to enter. Respondents did break the lock of the door to the room which was closed as they were told by the appellant that the key is lost.

He said that, the 3rd Respondent convened on clan meeting on 08/04/2018 but the appellant who was informed of the meeting did not attend. The clan members agreed that the 3rd Respondent has to enter into the house the appellant was living and enter into all rooms and if there is room which has no keys he has to break and enter. The clan member told the 3rd Respondent to inform and use

the village authority in the process. That is the reason the 4th respondent was involved. At the time they break the door lock the appellant and SM2 were present. After the door to the room was broken, the list of things which were in the room was recorded and it was tendered as exhibit in the Primary Court. Also, the letter inviting clan members for the meeting and the minutes of the clan meeting were tendered as Exhibit. These exhibits proved that the Respondents had no intention to commit the offence, it was the appellant who did not want the room to be opened. Thus, both court rightly held that there is no proof of the intention. The trial Primary Court never treated the case as probate matter.

On the proof of evidence of theft, the counsel for the respondents said that there is no evidence at all to prove the offence of theft. The appellant failed to establish that he had the amount of money stolen during the incident. The testimony of the appellant differs with that of SM2 on the place where the money was kept. The appellant said the money was in the middle mattress, but PW1 stated that the mattress was in the 1st mattress.

On the second ground of appeal, the counsel responded by stating that the charge was defective as it was held by the District Court. The charge contravene section 132 of the Penal Code which required the charge to specify specific offence the accused person is charged with. Section 294 has two offence in paragraph (a) and (b) which provides for the two different offences of breaking which are

committed differently. Failure to specifying the specific offence the respondents were charged with prejudiced them as they failed to prepare their defence. In the case of **Musa Nuru @ Saguti v. Republic**, Criminal Appeal No. 66 of 2017, Court of Appeal of Tanzania at Tanga, (Unreported), at page 10, the court held that failure to cite the appropriate provision left the suspects unaware of the charge he was facing.

In his rejoinder, the counsel for the appellant retaliated his submission in chief and said that the contradiction between appellant and SW2 testimonies on the place the money was kept is minor as they both testified that the money was in the mattress. He said that the charge sheet in the Primary Court is governed by paragraph 21 (1) of the third schedule to the Magistrates Court Act. Thus, the Primary Court has its own procedure of drafting charges. The counsel distinguished the cited case of **Musa Nuru @ Saguti v. Republic**, (Supra), that the punishment in the subsection in the cited case was different, but in this case the penalty in paragraph (a) and (b) of section 294 of the Penal Code are similar offence. The offence in section 294 (a) is for entering and in section 294 (b) is for breaking out of the building. Thus, the Respondents committed both offences.

From the submissions, the issue for determination is whether the the appeal has merits.

It is not disputed by both parties that the appellant instituted charges for two offences against respondents. The first offence is house breaking contrary to section 294 (1) of the Penal Code, Cap. 16, R.E. 2002, and the second offence is theft contrary to section 265 of the Penal Code, Cap. 16, R.E. 2002. The Primary Court in its decision acquitted all respondents on the ground that the same is Probate issue and not criminal matter. The appellant filed Criminal Appeal No. 26 of 2018 in the Bukoba District Court which was dismissed and the proceedings quashed on ground that the charge sheet was defective.

Starting with the determination of the first ground of appeal that the Appellate Court erred in law by dismissing the appeal after finding the defects on the charge, the appellant submitted that the omission to cite subsection in the said section is curable defects as the particulars of offence were clear and enabled respondents to fully understand the nature and seriousness of the offence they were charged with. In response, the counsel for the respondents said that the charge contravene section 132 of the Criminal Procedure Act, Cap. 20, R.E. 2002, which required the charge to specify specific offence the accused person is charged with. Section 294 (1) of Penal Code which the respondents were charged with in the first count has two offences in paragraph (a) and (b) which provides for the two different offences of house breaking which are committed differently. Failure

to specifying the specific offence the respondents were charged with prejudiced them as they failed to prepare their defence.

It is settled that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This was stated by the Court of Appeal in the case of **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014, Court of Appeal of Tanzania, at Bukoba, (Unreported), where it held that:-

"It is settled law that where the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence."

In the cited case of **Mussa Nuru @ Saguti v. The Republic**, (Supra), at page 10, the Court of Appeal held that indicating the specific provision of the law creating the offence and its punishment in the charge is very crucial.

It is the duty of the prosecution or the complainant in the case of primary Court to prove that the accused committed the unlawful act of the offence charged with the necessary intention if required. In the same spirit, the particulars of the offence must disclose essential facts of the offence and any intent specifically required by law. The purpose is to give the accused person a fair trial by enabling him to prepare his defence. This position was stated by the Court of Appeal in the case of **Isidori Patrice v. Republic**, Criminal Appeal No. 224 of 2007, Court of

Appeal of Tanzania, at Arusha, (Unreported). The Court of Appeal in the above cited case held that

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The Court was of similar position in **ABDALLA ALLY v. REPUBLIC**, Criminal Appeal No. 253 of 2013, (unreported), where the Court of Appeal observed as follows:

"The wrong and or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware that he was facing a serious charge of rape"

Charge Sheet is the foundation of any criminal charges facing an accused person in Court. It provides him with a road map of what to expect from the prosecution or complainant's witnesses during trial. This was the position stated by the Court of Appeal in the case of **Mathayo Kingu v. Republic**, Criminal Appeal No. 589 of 2015, Court of Appeal of Tanzania, at Dodoma, (Unreported). The Court of Appeal went on to hold at page 8 that:

"The important role of the charge sheet is to alert the accused person of the important elements of the offence he is facing."

As it was submitted by both counsels, the charge sheet was defective. Both counsels grounded their submissions in respect of this ground of appeal on the first count. The counsel for the appellant was of the view that the omission is curable and does not vitiate the proceedings. He also said that the charge in the Primary Court is governed by paragraph 21 (1) of the Primary Courts Criminal Procedure Code which is the third schedule to the Magistrate's Court Act, Cap. 11, R.E. 2002. In order to get a clear picture of the said defects in the charge sheet, let's look at the statement and particulars of the offence in the charge sheet. The same reads as follows hereunder:

"KOSA NA KIFUNGU CHA SHERIA: KUVUNJA NYUMBA MCHANA KWA NIA YA KUTENDA KOSA K/F 294 (1) KANUNI YA ADHABU, SURA YA 16, Kama Ilivyorejewa Mwaka 2002

MAELEZO YA KOSA: Wewe DENIS SEBASTIAN na wenzako watatu MJUNI BUBERWA, MARKO ELIAS NA TWAHA DAUDA wote kwa pamoja mnashitakiwa kuwa mnamo tarehe 12/04/2018 majira ya 12:30 hrs mchana huko maeneo ya kijiji cha Butayaibaga, kata ya Kanyengereko, Wilaya ya Bukoba Vijijini, Mkoa wa Kagera bila halali na kwa makusudi mlivunja nyumba ya AGNESS ELIAS kwa nia ya kutenda kosa huku mkijua kufanya hivyo ni kosa na ni kinyume cha sheria za nchi hii.

KOSA LA PILI: WIZI K/F 265 CHA KANUNI YA ADHABU, SURA YA 16, Kama Ilivyorejewa Mwaka 2002

MAELEZO YA KOSA: *Wewe DENIS SEBASTIAN na wenzako watatu wote kwa pamoja mnashitakiwa kuwa mnamo tarehe 12/04/2018 majira ya saa 12:30 hrs. mchana huko maeneo ya kijiji cha Butayaibaga, kata ya Kanyengereko, Wilaya ya Bukoba Vijijini, Mkoa wa Kagera bila halali na kwa makusudi mliiba pesa taslimu shilingi 700,000/= mali ya AGNESS ELIAS kitendo ambacho ni kosa na ni kinyume cha sheria za nchi hii."*

The above cited statement of the offence in the first count show that respondents were charged for the offence under section 294 (1) of the Penal Code. In the second count the statement of offence shows that he was charged under section 265 of the Penal Code. Section 294 (1) of the Penal Code has paragraph (a) and (b) which provides for different categories of the offence of house breaking. The offence under section 294 (1) (a) of Penal Code is for breaking and entering in a building and in section 294 (1) (b) is for breaking out of the building. Reading the particulars of the offence, the same does not disclose whether respondents did break and enter or break out of the appellant's house. Also, the said particulars of the first count does not disclose which respondents intended to commit an offence therein after breaking in or out of the house of the appellant. The counsel for the appellant was of the view that the charge in Primary Court needs no complications. But, reading the said paragraph 21 (1) of the third schedule to the Magistrate's Court Act it provides for how the charge in the Primary

Court is drawn. The paragraph 21 (1) (b) provides for the content of the charge.

The paragraph reads as follows:-

"21 (1)where –

(a); or

(b) any person is brought before a court under arrest, the magistrate shall enter the fact in the registers of the court and, in the case of any offence in respect of which primary courts have jurisdiction, open a case file and, unless a written charge is signed and presented by a police officer, drawn up and sign a charge with such particulars as are reasonably necessary to identify the offence or offences, including the law and the section, or other division thereof, under which the accused person is charged."

From the above cited paragraph, the drawn up charge in the Primary Court must contain such particulars as are reasonably necessary to identify the offence or offences, including the law and the section, or other division thereof, under which the accused person is charged. Thus, even paragraph 21 (1) of the third schedule to the Magistrate's Court Act provides that the charge must contain particulars necessary to identify the offence or offences including the law and section the accused person is charged with. Failure to identify the section the accused person is charged with renders the charge sheet defective. Thus, I find that the charge sheet was incurably defective. This vitiated the trial, the proceedings and the judgments of the trial Primary Court and where the trial was

heard in fully and witnesses testified, the accused person has to be discharge in order to prevent the prosecution or the complainant from filling gaps in their evidence if the trial will start afresh.

The Court of appeal was of the same position in the case of **Abdalla Ally v. Republic**, Criminal Appeal No. 25 of 2013, (Unreported), where it held that being found guilty on a defective charge, based on wrong and/ or non – existent provision of law, it cannot be said that the appellant was fairly tried. The remedy where the appellant was convicted for the fatally defective charge is to quash the conviction and set aside the sentence as it was held in the case of in **Jackson Venant v. Republic**, Criminal Appeal No. 118 of 2018, Court of Appeal of Tanzania at Bukoba (Unreported); and in **Kassimu Mohamed Seleman v. Republic**, Criminal Appeal No. 157 of 2017, Court of Appeal of Tanzania at Mtwara, (Unreported).

In the present case the respondents who were accused in the trial Primary Court were acquitted. The remedy in the circumstances is to quash the proceedings and the judgment of the trial Primary Court as it was held by the appellate District Court and the respondents to remain discharged for the offence.

Therefore, this appeal has no merits and I hereby dismiss it. The decision of the appellate District Court is upheld accordingly. The respondents have to remain discharged from the offence. It is so ordered.



A handwritten signature in black ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A.E. Mwipopo

Judge

11.03.2022

The Judgment was delivered today, this 11.03.2022 in chamber under the seal of this court in the presence of the Appellant, 4th Respondent and counsel for the Respondents who also hold brief for the counsel for the Appellant. The Right of Appeal explained.



A handwritten signature in black ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A. E. Mwipopo

Judge

11.03.2022