

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.**

CRIMINAL APPEAL NO. 2 OF 2022

(Originating from the District Court of Hanang District Court, at Katesh, Criminal Case No. 110 of 2020)

BENJAMIN MATHAYO APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

16th & 27th May 2022

Masara, J.

In the District Court of Hanang ("the trial court"), **Benjamin Mathayo** ("the Appellant") and Abdul Shaban Rajabu @White stood charged of the offence of Breaking a Building and Committing an Offence, contrary to Section 296(a) of the Penal Code, Cap. 16 [R.E 2019]. After hearing, the trial court found the Appellant guilty of the offence charged. He was convicted and sentenced to serve eight (8) years custodial sentence. His co-accused was found not guilty, hence acquitted. Aggrieved by both conviction and sentence imposed on him, the Appellant has preferred this appeal on six grounds. For reasons to be apparent hereunder, I will not reproduce them.

Facts leading to the Appellant's conviction and sentence can be summarised as follows: During the trial, the prosecution evidence was premised on the evidence of the complainant, **Samwel Mussa** (PW1). He testified that on 02/12/2020 at about 01:00hrs, while sleeping in his house at Gehandu village, he was phoned by his sister, **Selina Mussa** (PW2), who informed him that his shop had been broken into and some items stolen therefrom. PW1 immediately responded and went to the crime scene. On reaching there, PW2 informed him that she suspected the bandits to be on a motorcycle that could be seen heading to Katesh town. PW1, accompanied by one Paschal, followed the said motorcycle. On reaching at Ming'onyi village, they found the motorcycle which had some of his stolen items. They intercepted the motorcycle and knocked it down. The motorcycle was being ridden by two unidentified people. After being knocked down, the two culprits ran away leaving behind the motorcycle and the stolen items. PW1 and his colleague raised alarm whereby villagers came there to assist. They seized the motorcycle make Kinglion with registration number MC 392 CGR, bags of maize, rice and sugar. The matter was reported at the police station who conducted investigation and arrested the two accused persons.

Another witness was a Police Officer, No. E 1112 D/SGT John (PW3), who informed the trial court that on 03/12/2020 he was assigned the case file to investigate. He began by inquiring the owner of the motorcycle that was seized with the stolen items. He found out that the owner of the motorcycle was the second accused, Abdul Shaban Rajab. After arresting him, the said Abdul Shaban Rajab admitted to be the owner of the seized motorcycle. He told PW3 that on the material date he rented the motor cycle to the Appellant. PW3 further stated that after being arrested, the Appellant recorded his statement admitting to have committed the offence. The Appellant is said to have mentioned Abdul Shaban Rajabu as his accomplice in the commission of the offence. Thereafter PW3 prepared the case file and the accused persons were arraigned in court.

In his defence, the Appellant retracted the alleged confession and denied involvement in the commission of the offence. He raised a defence of *alibi*. He testified that on 2nd 12/2020 he had travelled to Arusha along with DW2 to pay a visit to his uncle. That he returned on 09/12/2020. He went on to state that on 11/12/2020 while at his home, the 2nd accused warned him to leave a certain woman. The next day, the 2nd accused came riding a bodaboda whereupon he arrested him and took him to the police station. At the police station, he informed the police officers that it was

the Appellant who was involved in the theft. According to the Appellant, he knew nothing about the alleged theft. While at the police station, he was tortured and forced to record and sign a statement. On 21/12/2020, he was arraigned at the trial court. The Appellant summoned one witness; namely, **Rebecca Michael** (DW2) who testified that on 29/11/2020 they left Hanang for Arusha where they attended a burial ceremony of their uncle. That they returned to Katesh on 09/12/2020.

Abdul Shaban Rajab (DW3) testified that on the material date, the Appellant called him asking to lend his motorcycle intending to go to Nangwa. He promised to return it to him the next morning on a payment of TZS 5000/=. The next morning, at around 06:00hrs, the Appellant phoned him informing him that the motor cycle had been seized by villagers. DW3 reported the matter to the police station. The motorcycle and the other seized items were taken to the police station. DW3 was ordered to make sure that the Appellant was arrested. He managed to arrest the Appellant and took him to the police station. That on his arrest, the Appellant promised to mention DW3 as one of those involved in the theft. After a week, DW3 was called at the Police station where he was implicated in the case after being mentioned by the Appellant.

At the hearing of the appeal, the Appellant appeared in Court in person, unrepresented, and fended for himself while the Respondent was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was heard *viva voce*.

At the hearing of the appeal, the Appellant faulted the trial court's findings. In the Appellant's view, the evidence adduced and the exhibits tendered did not prove the offence against him beyond reasonable doubts. He also urged the Court to find out that the charge against him was defective and that his alleged confession should not have been relied upon.

On her part, the learned State Attorney supported the Appellant's appeal on the ground that the charge preferred against the Appellant at the trial court was defective. She urged that the Appellant was charged under section 296(a) of the Penal Code, but the evidence of PW1 and PW2 showed that the offence took place past midnight. That, the proper provision the Appellant was supposed to be charged with was section 294(1)(b) of the Penal Code. Ms Tusaje further stated that in addition to such defect, the charge was also defective for being duplex, in that two offences were lumped together in one count. The Appellant was charged with house breaking and theft but the charge proffered against him

combined both offences in one count. She maintained that there ought to have been two separate counts. In the circumstances, she was of the view that the conviction against the Appellant cannot be supported due to those apparent defects.

Having examined the grounds of appeal and the submissions of both sides, the issue is whether the Appellant's conviction and sentence were proper considering the defective nature of the charge against him.

At the outset, I wish to align myself with the learned State Attorney regarding the propriety of the charge against the Appellant. In their evidence, PW1 and PW2 testified that the offence took place on 02/12/2020 at 0100 hours. The relevant provision for an offence of house breaking that takes place at night is provided under section 194(1) (a) & (b) and (2) of the Penal Code, Cap. 16 [R.E 2019). Section 196(a), under which the Appellant was charged, relates to house breaking generally without specifying the time the offence is committed. Those are two distinct provisions, which also provide distinct punishments once the accused is found guilty. On that basis, the Appellant was charged under a wrong provision of the law, which renders the charge defective. Once

the charge is rendered defective, conviction of the accused cannot be sustained. Courts have stated so in a number of occasions.

In the case of **Alex Medard vs Republic, Criminal Appeal No. 571 of 2017** (unreported) the Court of Appeal quoted with approval its previous decision in the case of **Abdallah Ally vs Republic, Criminal Appeal No. 253 of 2013** (unreported), where it observed as follows:

"Being found guilty on a defective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried in the Courts below ... In view of the foregoing shortcomings, 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 was preferred, left the appellant unaware that he was facing a serious charge of rape ..."

In the present appeal, the Appellant was charged, tried and convicted under a wrong provision of the law. He was, therefore, prejudiced in the sense that he was not made aware of the nature of charges facing him so as to prepare an informed or rational defence. The trial was unfair. In this regard, the trial against him was a nullity.

Another issue regarding the charge is that it was duplex as it contained two offences in one count. Going by the trial court records, it is apparent that the Appellant was charged with two offences; namely, house breaking and theft. Surprisingly, the two offences were lumped into one

count instead of two separate counts, contrary to the principles of criminal justice. Such ailment renders the charge defective, as it was held in the case of **The Director of Public Prosecutions vs Pirbaksh Ashraf and Ten Others, Criminal Appeal No. 345 of 2017** (unreported), where the Court of Appeal in unambiguous words held that the anomaly renders the charge fatally defective. It held *inter alia* that:

"In both cases, the reason given was that an accused person must know the specific charge (offence) he is facing so that he can prepare his focused defence which, in the event of a duplex charge, cannot be accomplished."

I subscribe to the position of the law above. Since the offences of house breaking and theft were predicated in the same count instead of two separate counts, the charge was defective for being duplex. The Appellant did not make an informed defence; thus, the trial was vitiated.

For the above reasons, the charge against the Appellant was fatally defective in both form and substance. Conviction cannot be sustained in the circumstances. In that sense, the ground regarding competence of the charge sufficiently disposes the appeal. I find no good grounds to traverse the other grounds of appeal, which challenged the evidence and the legality of the impugned decision.

In the event and for the reasons above, the appeal is hereby allowed in its entirety. The Appellant's conviction is quashed and the sentence set aside. I hereby order the Appellant's immediate release from prison unless he is otherwise lawfully held.

Order accordingly.




Y. B. Masara

JUDGE

27th May 2022