

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT SUB REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 66 OF 2022

*(Originating from the decision of the District Court of Kalambo at Matai in
Criminal Case No. 58 of 2022)*

BONIPHACE ^S/O TOYOTA @ JAILOS 1ST APPELLANT

KULWA ^S/O GUTA @ NANGI 2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

1st March, 2023 & 21st June, 2023

MRISHA, J.

In the District Court of Kalambo at Matai (the trial court) both appellants **Boniphace Toyota@ Jaiilos** and **Kulwa Guta@ Nangi** were charged with two counts, one is Conspiracy to commit an offence contrary to section 384 of the Penal Code CAP 16 R.E. 2019 and the second count is

Unlawfully possession of Witchcraft Instrument contrary to section 3(b), (e) and 5(1) of the Witchcraft Act No. 18 of 1998 R.E. 2019.

The particulars of the first count were that on 2nd day of June, 2022 at Kaluko Village within Kalambo District in Rukwa Region the appellants did conspire to commit an offence. In the second count it was alleged that on 2nd day of June, 2022 at Kaluko Village within Kalambo District in Rukwa Region the appellants were found in unlawfully possession of witchcraft instrument to wit local medicine and on 3rd day of June, 2022 both appellants were arraigned before the trial court, charged was read over and fully explained to the appellants who pleaded guilty to the 1st count; this led to a reading of facts of the case.

After that both appellants were found guilty in respect of the 1st count, convicted on their own plea of guilty and sentenced to serve four years (4) in prison. The appellants were aggrieved by both convictions and sentences passed by the trial court; thus, appellants lodged the present appeal armed with five grounds of appeal as follows: -

- 1. That, the appellants did not commit the serious offence as established by the crown prosecution side,*

2. *That, the offence with which the appellants were charged with was not proved beyond reasonable doubts as required by standard law,*
3. *That, the trial Magistrates' Court was totally wrong in law and fact by convicting and sentencing the appellants relying on plea of guilty of the appellants without taking into consideration that the caution statement of the first appellants/accused were not tendered as exhibit before the court,*
4. *That, the trial Magistrates' Court was totally wrong in law and fact by convicting and sentence the appellants relying on plea of guilty for the appellants without taking into consideration that it was the appellants first time to stand before the court,*
5. *That, the charge against the appellants was not read twice and explained correctly in order to make the court to satisfy itself if the appellants understood what they plea before the court.*

During the hearing of this appeal both appellants stood unrepresented, while the respondent Republic was represented by Mr. Simon Perez, learned Senior State Attorney.

Submitting in support of their grounds appeal both appellants simply implored this court to adopt their grounds of appeal as their submission in chief and proceed to allow their appeal, quash the trial court's conviction and set aside sentences passed against them so that they get out of the prison bars.

On the prosecution Republic, Mr. Perez submitted by stated that after going through the grounds of appeal, proceedings and sentence; he supports the present appeal particularly on ground five. He contended that there are three issues on ground five which led him to support the appeal.

First issue is that the charge sheet on the 1st count is defective on the particulars of the offence. The particulars of the offence of the 1st count mentioned that on the 2nd day of June, 2022 at Kaluko village within Kalambo District in Rukwa Region the appellants did conspire to commit an offence, but the said particulars do not expressly mention the offence which they conspired to commit. This is contrary to provisions of section

135 of the Criminal Procedure Act, Cap 20 R.E. 2022 which state clearly that the particulars of the offence must state the offence committed by the accused person(s).

Turning to the second issue, Mr. Perez submitted that the pleas of the appellants are equivocal; this is shown in at page 1 and 2 of the court proceedings. When the charge read over to them, they pleaded as follows:-

"Ni kweli tulikula njama kutenda kosa"

In English the phrase literally means, *"it is true that we conspired to commit offence"*. Therefore, the plea of the appellants is equivocal and cannot be used to convict the accused.

Lastly, the third issue is the offence which was read during the preliminary hearing, was conspiracy to commit witchcraft acts without valid licenses. Mr. Perez contended that the offence mentioned does not exist in our law books; hence the Witchcraft Act prohibits all acts or activities of witchcraft.

Additionally, the learned Senior State Attorney submitted that the provisions of section 360 of the Criminal Procedure Act, Cap 20 R.E. 2022 prohibit the appeal against conviction on a plea of guilty, except to the

extent of punishment and illegality of sentence. To bolster his argument, he referred the case of **Laurent Mpinga v. Republic** [1983] TLR 196 in which the Court of Appeal provided the criteria a plea of guilty can be accepted. Basing on the above decision, Mr. Perez prayed this court to quash the conviction and sentence and set them free.

Having carefully considered the submissions made by both parties and perused the trial court's records; let me proceed with the determination of the merit of this appeal. There is no doubt that the prosecution Republic supports the appeal on ground five by considering three issues for determination. On that note my task will be to determine whether there were such irregularities and if so, whether the same have occasioned miscarriage of justice.

I have taken one regard to the submission by the learned Senior State Attorney. Regarding the first issue of ground five of appeal relied upon in supporting the appeal; there is no dispute that the appellants were jointly charged.

The charge sheet contains two counts namely conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16 R.E. 2019 and

Unlawfully Possession of Witchcraft Instrument contrary to section 3(b)(e) and 5(1) of the Witchcraft Act No. 18 of 1998 R.E. 2019; the appellants pleaded guilty on the 1st count. The particulars of the offence on the 1st count, as stated in the charge sheet, are that: -

"...Kulwa Guta@ Nangi, Boniphace Toyota@Jalios, Benson Nyansio@ Maembe and Jesta Ayamu in 2nd day of June, 2022 at Kaluko village within Kalambo District in Rukwa Region did conspire to commit an offence..."

Indeed, I have consulted section 135 of the Criminal Procedure Act, Cap 20 R.E. 2019 which provides the manner in which the charge sheet is to be framed. I am inclined with the argument of the Learned Senior State Attorney on this point, whereas I note that the particulars of the offence on the 1st count do not expressly mention the specific offence that the appellants conspired to commit. This stance was reiterated in the case of **Charles Makapi v Republic**, Criminal Appeal No. 85 of 2012 (unreported) *where the Court stated as hereunder: -*

*"Section 135 of the CPA imposes a mandatory requirement that a charge sheet **must describe the offence and make reference to***

the section and the law creating the offence". [Emphasis added]

In the case at hand, the appellants were charged with conspiracy to commit the offence, but such alleged offence was not expressly mentioned in the particulars of the offence; this is fatal. This position was stated in the case of **Isidori Patrice v Republic**, Criminal Appeal No. 224 of the 2007 CAT (unreported) where the Court stated as hereunder:

"A charge which does not disclose any offence in the particulars of offence is manifestly wrong and cannot be cured under section 388 of the Criminal Procedure Act, 1985".

The omission of disclose offence in the particulars of offence cannot be cured under section 388 of the Criminal Procedure Act, hence the omission rendered to failure and miscarriage of justice on the part of the appellants herein.

The second issue for determination is whether the conviction was based on an equivocal plea. In the case of **Keneth Manda v Republic** [1993] TLR. 107 the Court held that:

"An accused person can only be convicted on his plea of guilty if his plea is unequivocal. That is where it is ascertained that he has accepted as correct facts which constitute all the ingredients of the offence".

Assessing the plea of guilty by the appellants as found on the record of trial court's proceedings (page 1 and 2), it appears that when they were requested to plea, the appellants pleaded guilty to the charge. In their own words they were quoted to have said that: -

1st Accused: 1st count: "Ni kweli tulikula njama kutenda kosa"

2nd Accused: 1st count: "Ni kweli tulikula njama kutenda kosa"

This was followed by a narration of facts by the prosecution to the appellants and the appellants are recorded to have admitted to all the facts. In the circumstances, I must agree with Mr. Perez that the appellants' plea was equivocal. The facts read to them did not disclose all the necessary ingredients of the offence charged. Therefore, the pleas taken by the trial court are equivocal.

Regarding the third issue, Mr. Perez contended that he does not support the conviction in respect of the facts read to the appellants did not

constitute the offence which exists in our law books. For ease of reference let me reproduce the same as hereunder: -

"1st accused and 2nd accused did conspire to commit Witchcraft activities without a valid license".

I have taxed my mind to examine the Witchcraft Act in order to find out if it creates the offence of "committing witchcraft activities without a valid license". What I have observed therein is that the said law does not create such kind of offence; the preamble of that Principal Legislation reveals that the gist of its enactment is to prohibit all exercise of witchcraft, possession and supply of instruments of witchcraft, and advice as to the use of witchcraft under the Act. In my view allowing the person to conduct witchcraft activities by having license would be contrary to objective of the enactment of the said law.

It is a trite law that a person cannot be charged and convicted of the offence which does not exist. Hence basing on the reasons which I have assigned above, I am inclined with the position of the learned Senior State Attorney that the appellants were wrongly charged and convicted with the offence which does not exist in our Penal laws.

Since in the circumstance of this case a retrial may not be appropriate; I hereby quash the conviction against both Appellants and set aside the sentence that was imposed on them by the trial court. The appellants should be released immediately unless otherwise held for another lawful offence.

Order accordingly.


A.A. MRISHA
JUDGE
21.06.2023

Dated at Sumbawanga this 21st Day of June, 2023.




A.A. MRISHA
JUDGE
21.06.2023

Date - 21/06/2023

Coram - Hon. M.S. Kasonde, DR

1st Appellant - Present in person

2nd Appellant - Present in person

Respondent - Mr. Mwakibolwa David, State Attorney

B/C - Kawawa

Mr. Mwakibolwa David, State Attorney for respondent: I am assisted by Mr. Neema Nyagawa State Attorney. This matter comes for judgment today and we are ready.

1st Appellant: I am prepared

2nd Appellant: Me too

**M.S Kasonde
Deputy Registrar
21/06/2023**

Court: Judgment delivered this 21st day of June, 2023 in the presence of Mr. Mwakibolwa, State Attorney being assisted by Ms. Neema Nyagawa, State Attorney for the Respondent and in the presence of both appellants.



M.S Kasonde
Deputy Registrar
21/06/2023

Right of appeal to the Court of Appeal fully explained.



M.S Kasonde
Deputy Registrar
21/06/2023