

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 188 OF 2022

*(Appeal from the Judgment of the Ilala District Court by Hon. Laizer, RM
dated 11th February, 2021 in Criminal Case No. 643 of 2019)*

GOODLUCK PATRICE NGIMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

01/09/2023 to 13/10/2023

E.B. LUVANDA, J

Before the trial court, the Appellant was indicted for the offence of stealing by agent contrary to section 273 (b) of the Penal Code Cap 16 R.E. 2002, at the end of the trial, the Appellant was convicted and sentenced to five years imprisonment including an order for payment of compensation to Jumuiya ya Wakulima Zanzibar JUWA a sum of Tshs. 36,700,000/= for loss suffered.

In this Court, the Appellant raised a total of fifteen grounds to challenge the above verdict. However, for purpose of disposal of this appeal, I will reproduce ground number five and thirteen, thus: Five, the trial court erred in law and fact by holding that the prosecution proved their case disregarding contradiction between the charge sheet and evidence as to when the offence

was committed; Eleven, the trial court erred in law and fact in convicting and sentencing the Appellant by concluding that the prosecution side has proved the case beyond reasonable doubt without warning itself that the charge sheet was incurably defective.

In his argument, the Appellant combined ground number five and eleven above and argued them together. The Appellant submitted that the witness described the incident that happened from December, 2018 to 2019, while the information in the charge sheet and preliminary hearing are talking of the incident that took place in February, 2018. He cited the testimony of PW2 at page eighteen of the proceedings, who said in December 2018 is the exactly date the Appellant went to Unguja to introduce himself to JUWA, argued how he could commit the offence in February, 2018 prior meeting and introducing himself to JUWA. He submitted that PW2 said a meeting was convened on 05/01/2019 as per visitors took, argued goods were yet to be handed over, citing page nineteen and twenty of proceedings. He cited the testimony of PW2 and PW1 at pages eleven and twelve, that the complainant JUWA and the Accused (Appellant) entered into doing a business for juice and soda drinks almost Tshs. 36,700,000/= 5/03/2019 the Accused went to Comoro with juice and soda.

He submitted that the contract exhibit PW3A show that it was signed on 14/02/2019 between JUWA and Green Landers, arguing it create more doubts that a contract was signed one year after the Appellant had committed the offence. He submitted that the confusion offend the provision of section 132 Criminal Procedure Act, Cap 20 R.E. 2022. He submitted that the charge is fatally defective and incurable. He submitted that a charge sheet cannot be cured by retrial, arguing that this Court is tied to make decision based on the interest of justice for reason that the Appellant have successfully served the imposed sentence against him and finished before the appeal was decided. He cited the case of **Fatahel Manji vs. Republic** (1966) EA 343.

In reply to the fifth and thirteenth ground, the learned State Attorney submitted that the Appellant tend to waste the time of this Court since the charge sheet was proper and relate with the evidence adduced by the witnesses for the prosecution side. She submitted that there is no any contradictions on when the offence was committed, arguing the charge sheet reveal that the offence was committed in February, 2018 and PW1 at page eleven of proceedings, stated that he met the Appellant and made business arrangement in 2018. She cited the evidence of PW2 at page eighteen of the proceedings, stated that in December 2018 the Appellant

visited few groups of agriculture where he introduced himself as having a company transporting agricultural goods. She submitted that PW3 stated to had met the Appellant in December, 2018 at page twenty seven of proceedings. She submitted that there is no any contradictions, arguing it is not necessary for the offence to be committed in one month, as long as the witness testified in regard to the same year 2018 when the offence was committed.

On my part, I find merit on the ground number five and thirteen. The charge sheet in the particulars of offence depict the offence was committed on unknown date of February, 2018. An extract of certified copy from visitors book exhibit PP1 which was tendered by Pili Kashinje (PW2) indicate that the Appellant formerly visited at the office of JUWA on 16/01/2019, as also deposed by PW2. A business agreement between the complainant (JUWA) and the Appellant exhibit PW3A was executed on 14/02/2019, as also supported by the Appellant (DW1) on his defence. According to Japhet Mihayo (PW3) asserted that discussion and negotiation for doing business with the Appellant were convened and hold in December, 2018 at 10:00 hours.

Indeed the evidence of Aley Suleiman Abdallah (PW1) suggest that a consignment of juice and soda valued Tshs 37,700,000/= was handed over to the Appellant who departed to Comoro on 05/03/2019.

The cumulative of set of facts above, depict the cause of action arose after signing the business agreement exhibit PW3A on 14/02/2019 and implementation kickstart thereafter with eventuality of the Appellant's departure to Comoro on 05/03/2019. In that way, a charge sheet which depict the date of commission of offence to be in February, 2018 was at variance with the evidence adduced and tendered by prosecution witnesses. In fact, a charge sheet captured dates prior even pre contractual arrangements had commenced.

It is the law that when the charge sheet mention a specific time for commission of the offence, the evidence must be lead to prove that indeed the offence was committed on the date specified in the charge sheet. Short of that, the particular of offence, will be as good as having not been proved.

In the case of **Salum Rashid Chitende vs. Republic**, Criminal Appeal No. 204/2015 CAT it was established, I quote,

"When specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place"

For another thing, the charge sheet was also defective for failure to disclose necessary information on the particular of offence. As to the specific items or commodities which were entrusted to the Appellant. The particular of offence indicate that the Appellant committed stealing of different types of drinks. While the business agreement exhibit PW3A reveal it was juice and soda, on the other hand PW1 provided more description of goods or commodities handed over to the Appellant to be soda energy and mango juice which fact was supported by Juma Bakari Semgh (PW5), employee of the Appellant, that the Appellant was entrusted to Comoro drinks of Azam Mango and Azam Energy. Meanwhile PW2 added that it was 2498 cartons worth 36,7000,000/=.

Section 132 of Cap 20 (supra), provide, I quote,

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

In view of the above, a general statement which was referred in a charge sheet as "different types of drinks", it cannot be said that it complied with the provision above, which require disclosure of all necessary particulars as a matter giving reasonable information as to the nature of the offence charged. In fact, the omission might have prejudiced the Appellant in aligning his defence to the accusation levelled against him.

In the case of **Mussa Mwaikunda vs. Republic** [2006] TLR 387, it was held, I quote

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence"

In the case of **Kashima Mnadi vs. The Republic**, Criminal Appeal No. 78/2011, CAT at Dodoma, at pages 8 and 9, held, I quote,

"A charge which does not disclose an offence in the particulars of offence cannot be salvaged under section 388 of the Act...This ground which was raised by the Court was enough to dispose of the appeal."

The Appellant in his submission explained to have completed serving his jail term of five years meted to him by the trial court. In the circumstance mounting a retrial is quietly undesirable.

In therefore quash the conviction and set aside a sentence including an order of compensation. In lieu thereof, the complainant Jumuiya ya Wakulima Zanzibar (JUWA) will be at liberty to sue the Appellant the Appellant in civil suit for a breach of a business agreement exhibit PW3A or D1, where there is specific arbitration clause 8 (1) and (2) which require submission to the Arbitrator outside ordinary courts, in case of any dispute. The said clause provide, I quote,

"Ikiwa kutakuwa na mgogoro wowote uliotokea basi upande wowote ambao ambao utakuwa umeathirika na mgogoro huo utafungua mgogoro huo katika chombo chochote cha usuluhishi nje ya Mahakama ya Kisheria (yaani Arbitration) ambapo msuluhishi atatakiwa awe ni Mwanasheria mzoefu au/na Wakili au Jaji au Hakimu wa Mahakama ya Hakimu Mkazi mwenye uzoefu usiopungua miaka 10 kazini katika Mahakama amabyo pia inafanya kazi za Mahakama Kuu.

Therefore JUWA are at liberty to refer their dispute for breach of business agreement to the Arbitrator, to recover a loss of 36,700,000/= minus

3,181,000 paid, remained 33,519,000 principal sum plus 5,500,000/= for storage of goods, as asserted by PW1.

Appeal allowed.



E.B. LUVANDA
JUDGE
13/09/2023

Judgment delivered in the presence of the Appellant and Cathbert Mbilingi learned State Attorney for the Respondent.



E.B. LUVANDA
JUDGE
13/09/2023