

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

**CONSOLIDATED CRIMINAL REVISION NOS. 5875, 5876, 5877, 5878, 5879,
5880 & 5893 OF 2024**

(Originates from Kalambo District Court in Criminal Conf. Nos. 5599, 5600, 5601, 5605, 5606 & 5593 of 2024, Original Criminal Cases No. 19, 20, 21, 22, 23, 24 and 25 of 2024 at Matai Primary Court at Kalambo District)

ISACK SIMON CHIZU 1ST APPLICANT
MESHACK ISACK YONA 2ND APPLICANT
YONA SIMON @ CHIZU 3RD APPLICANT
ABINIEL ISAYA @ CHIZU 4TH APPLICANT
JOSHUA MESHACK 5TH APPLICANT
JOBO SIMON 6TH APPLICANT
EFESO PETER 7TH APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

01/03/2024 & 05/03/2024

JUDGMENT

MWENEMPAZI, J.

The applicants herein named were charged in the Matai Primary Court at Kalambo District each with the offence of disobeying lawful order contrary to section 124 of the Penal Code, [Cap 16 R.E 2022] read together with section 8(1) (d) and (3) of the Law of the Child, [Cap 13 R.E 2019].

It was alleged by the prosecution that on the 18th day of February, 2024 the applicants who were accused persons in the trial court intentionally did disobey lawful order by denying their children to be immunized by measles, vaccination.

According to the facts, the exercise was being done by the medical team led by one Rajabu Kwata, whose position could not be effectively stated in the facts.

It is clear that the charges against the applicants in this application were read over and explained to the accused persons (the applicants) who, all of them, admitted to have denied their children to be administered with measles immunization, an exercise which was being conducted nationwide by the Ministry of Health.

The applicants denied their children to receive measles vaccination based on religious beliefs. That their religion prohibit introduction of external substances into their bodies. The applicant profess to be members of Watch Tower religious denomination.

After the cases against them were heard each was convicted and sentenced to serve a term of one year in prison. The files were immediately on the 26th

February, 2024 remitted to the District Court for confirmation of sentence, whereby the sentences for each of the accused were confirmed.

The events narrated herein above caught the attention of the Public through Independent Television (ITV) and disseminated to our knowledge. This court therefore called the records of trial and District Court for inspection under section 30 of the Magistrates Courts Act, [Cap 11 R.E 2019]. Upon satisfying myself that there was a need to examine the propriety of the proceedings and the conviction entered by the trial court, a revision file was opened and the District Registrar engaged the TLS for their legal opinion on behalf of the applicants and the NPS for the complainant Rajabu Kwata.

The application was heard on the 29/02/2024 whereby for the complainant who is the respondent herein was absent but on his behalf appeared Godliver Shiyo, Mathias Joseph, Jackson Komba and Frank Mwigune, learned State Attorneys and the applicants were present and for the applicants appeared Mr. Peter Kamyalile, Neema Charles, Samwel Kipasha, Veronica Mwanicheta, Kurwa Ngunga and Lucy Sigula learned Advocates. Ms. Godliver Shiyo, State Attorney submitted on behalf of the team representing the Respondent and Mr. Peter Kamyalile, Advocate submitted on behalf of the applicant.

Ms. Godliver Shiyo, State Attorney submitted commencing with the prayer to consolidated the files for each applicant into one case as the scenario facts and law and even the date of event were similar for all of the applicants. That was also not objected to by Mr. Peter Kamyalile, learned advocate for the applicants. Thus, all applications were consolidated into criminal revision.

On the substantive part of the case, the learned state attorney submitted that they have gone through the charge sheet, proceedings and confirmation order of the District. In their opinion, the cases against the applicants were not conducted in a fair and just way. There was no fair trial to the accused persons. She submitted that they have arrived at the said conclusion after looking at the charge sheet. The same was defective.

In the Primary Court, each applicants was charged with the offence of disobedience of lawful order contrary to section 124 of the Penal Code, [Cap 16 R.E 2022] read together with section 8(1) (d) of the Law of the Child, [Cap 13 R.E 2019]. In the charge sheets, especially, particulars of the offence, the learned state attorney submitted that they have observed that the particulars of the offence have not disclosed the ingredients of the

offence the applicants were charged with. The particulars did not disclose important information pertaining to the charge as is provided for under section 132 of the Criminal Procedure Act, [Cap 20 R.E 2022].

The charge ought to have disclosed the lawful order given to the applicants, the person who issued the said order, and whether the person giving an order had necessary power and authority to issue the said order and how the accused/applicants disobeyed the said order.

She submitted that, in the charge sheet it is simply stated that the accused person each denied that their children should not be immunized by measles vaccination. The charge did not say who is Rajabu Kwata mentioned as the complainant and whether he had authority to issue an order. The learned State Attorney submitted that they believed the deficiency would be cured by the evidence, but after perusing the proceedings, there was no evidence tendered to cure. Hence, the charge could not be cured.

It is their submission that although the applicants admitted to the charge; they were deprived of necessary information to prepare for their defence. She prayed this court to find that all the proceedings were a nullity. The counsel referred the case of **Hamis Mohamed Mtou vrs. Republic,**

Criminal Appeal No. 228 of 2019, Court of Appeal of Tanzania at Dar es salaam where it was held that where the particulars do not disclose ingredients of the offence it renders the trial to be a nullity.

On the other side, Mr. Kamyalile Advocate, for the applicants supported the position opined by Ms. Godliver Shiyu, learned State Attorney. He prayed to add that; One, there was no any lawful order which was issued to the applicants. For the position he cited the case of **Abdallah Yusuph vrs. Republic [1976]** LRT 57 where it was held:

"Section 124 of the Penal Code Cap 16 must be interpreted restrictively to apply only to orders supported by specific legislation."

No order has been mentioned in the charge sheet, law nor evidence.

Also it is not clear when was the said order issued and who issued and what was that order. There was no evidence that the applicants were given an order and that they disobeyed. Therefore, he submitted that their opinion is that the trial was not a fair trial and that there was illegality and that all what was done is a nullity.

In the submission by counsels for the Respondent (Republic) and also for the applicant both side revolve around the complaint that the particulars of the charges against the accused (applicants herein) did not disclose the ingredients of the offence of disobedience to the lawful order. The case of **Isidori Patrice vrs Republic** Criminal Appeal No. 224 of 2007 [2007] TZCAZ (30 October 2007] laid the principle which of necessity must be ~~observed when charging an accused person. In the case it was held:~~

*"It is now trite law that the particulars of the charge shall disclose the essential ingredients of the offence. This requirement hinges on the basic rules of Criminal law and evidence to the effect that the prosecution has to prove that the accused committed the **actus reus** of the offence charged with the necessary **mens rea**. Accordingly the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

The learned counsel for both sides have raised concerns, which are serious in nature that the particulars of the offence in the charges facing each of the accused (applicants herein) lacked in important facts as to disclose the nature of the offence they are charged with. The charges were under Section 124 of the Penal Code, [Cap 16 RE 2019]. In the case of **Kone Teto @ Kasaro and 5 others Vs. The Republic**, Criminal Appeal No. 144 of 2021, ~~High Court of Tanzania at Arusha, this court held that:~~

"...under section 124 of the Penal Code for a person to be found guilty of disobeying the lawful order, the following must be proved by the prosecution: -

- i. That the order disobeyed should be either an order warrant or command duly made, issued or given by the court, or*
- ii. The order given by the Public Officer or person acting in any public capacity who is duly authorized in that behalf to give such an order*
- iii. That, the order must be lawful".*

It has been submitted by both camps for applicants and for the respondent that the particulars of the charge did not disclose the order, who issued the same, whether he was a person in authority to issue, how the accused disobeyed to the said order. At this point an example would help create the picture of the argument presented. I will thus produce one charge which essentially is similar to other charge sheet for other applicants save for names.

"KOSA NA KIFUNGU CHA SHERIA:

KUTOTII AMRI HALALI KIFUNGU 124 CHA KANUNI ZA ADHABU SURA YA 16 YA MWAKA 2022 NA KIFUNGU CHA 8(1) (D) (3) CHA SHERIA YA MTOTO, SURA YA 13 YA MWAKA 2019.

MAELEZO YA KOSA: Wewe Joshua s/o Meshack unashitakiwa kuwa mnamo tarehe 18/02/2024 majira ya saa 09:00 alasiri huko katika kijiji cha Kalambo Mkoa wa Rukwa kwa makusudi bila halali ulikataa amri halali kwa kukataa mtoto wako asipewe chanjo ya surua aitwaye Joseph s/o Joshua mwenye umri na miaka mitatu (03)

iliyokuwa ikitolewa na RAJABU S/O KWATA huku ukijua kufanya hivyo ni kosa na kinyume cha taratibu na sheria za nchi hii".

Clearly, the particulars as produced in this charge sheet were reproduced in the charges against other accused persons (applicants herein); it is also obvious that it was not clear as to the nature of an order issued, who issued the same and how. The counsel for the Respondent cited the case of **Hamis Mohamed Mtou Vs. The Republic**, Criminal Appeal No. 228 of 2019, Court of Appeal of Tanzania at Dar es Salaam where the court held: -

"...every charge should contain a statement of the specific offence, describing it in a clear language together with the particulars of the offence so as to give an accused necessary and reasonable information and a clear picture of what he is being accused of so that he can properly prepare his defence".

In the holding above, the court referred also to the case of **Mussa Mwaikunda Vs. The Republic [2006] TLR 387** where the court succinctly held:

"It is always required that an accused must know the nature of the case facing him and this can be achieved if the charge discloses the essential elements of the offence charged".

When we refer back to the charge reproduced herein above, we can appreciate the concern of there being no sufficient particulars to disclose the offence for the accused to prepare their defence properly so. It is safe to agree with the learned counsels that the directives under section 132 of the Criminal Procedure Act were not followed. The section provides:

"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".

If I may repeat the obvious, in the circumstances of our case, the lawful order alleged to have been disobeyed was not disclosed, even the person who issued the same is not clearly described, and when and how he did.

Rajabu Kwatta in my understanding was administering measles vaccination. He did not give an order, although the accused (applicants herein) admitted to the charge, they only admitted to have denied their children to be vaccinated. This in my view attracts the question whether they were sufficiently educated to appreciate the urgency of the vaccine being administered and benefit they stand to enjoy as members of the Tanzania society.

I have read the record; the evidence tendered did not address the questions complained rendering the crucial information missing in the charges leveled against each applicant. I therefore agree with the conclusion by the counsels that the charge was fatally defective thus rendering the proceedings to be nullity.

Having so found, the question in the circumstance of our case is what should be the way forward. The record of the District Court of Kalambo District and trial court were called *suo moto* by this count following an alert to the public that the applicants have been convicted and sentenced for denying their children to be vaccinated on religious beliefs.

Section 30 (1) of the Magistrates Courts Act, Cap 11 RE 2019 provides that:

"30 (1) The High Court shall exercise general power of supervision over all courts in the exercise of their jurisdiction under this part, and may at anytime:-

- (a) Call for and inspect the record of any proceedings under this part in a district court or primary court and may examine the records or register thereof; or*
- (b) Direct any district court to call for and inspect the record of any proceedings of the primary court established in its district and to examine the records and registers thereof , in order to satisfy itself, or to ensure that such district court shall satisfy itself, as to the correctness, legality and propriety of any decision or order and as to the regularity on any proceedings therein; and may:-*
 - (i) Itself revise any such proceedings in a district court;*
 - (ii) Where it has exercised its appellate jurisdiction in relation to the proceedings which originated in a primary court between or against parties not all of who were parties to the appeal, itself revise such proceedings in the primary court; or*

(iii) *Direct the district court to revise any such proceedings in a primary court,*

And all such courts shall comply with such direction without undue delay."

In this case, the trial court after hearing the cases against the applicants found the accused (applicants) guilty, convicted and sentenced each to serve a term of twelve months imprisonment. The sentence exceeds six months, therefore must be confirmed by the District Court under item 7(1) (a) of the Third Schedule to the Magistrates Courts Act, [Cap 11 R.E 2019].

In this case, the case files were remitted to the District Court on the same day of 26th February, 2024 when the accused persons were convicted and sentenced. Obviously, the District Court wrongly confirmed the sentence meted to each accused person. The discussion on the propriety of the charges and finding made herein above are relevant in this situation.

In the case of **Republic Vrs. Abdallah Selemani [1983] TLR 215** this court dealt with the question whether the court can exercise its powers to confirm a sentence illegally imposed. It was held that: -

"The court's power of confirmation of the sentences can only be exercised in relation to sentences legally passed; an illegality cannot be confirmed"

In my understanding, confirmation of the sentence cannot be made by the magistrate in blindfold. He ought to have satisfy himself that, the conviction and sentence were legal by going through the law, proceedings and be satisfied that everything done in the trial court is in compliance to the law that is when the confirmation is made. I believe that is why item 7(3) of the third schedule empowers the magistrate to release the convict on bail pending confirmation of sentence. In the case of **Adelina Koku Anifa and Another Vrs. Byarugaba Alex**, Civil Appeal No. 46 of 2019, Court of Appeal of Tanzania at Bukoba, (Tanzilii) the court held that: -

"It is certain therefore, that where the lower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the law by the subordinate courts and or tribunals."

The above holding is an affirmation of the holding in the case of **B. 9532 Cpl. Edward Maluna Vrs. Republic**, Criminal Appeal No. 15 of 1989 (unreported) where the appellant did not appeal against conviction and the question was whether or not it was proper for the court to consider the propriety of the conviction. The court said it had power to do so and reasoned that: -

"Firstly, we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of the law and not a court of parties".

And in the case of **Marwa Mahende Vrs. Republic [1998] TLR 249** the court stated: -

"We think....the duty of the court is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below".

In any case, during exercise of its power of confirmation of the sentence, the district court ought to have scrutinized the proceedings to satisfy itself that the conviction and sentence were in accordance to the law. A similar situation occurred in the case of **Republic Vrs Abdallah Selemani** (*supra*) and the sentence was reduced.

I have already made a finding that the charge was fatally defective; hence, the applicants did not get a fair trial, rendering the whole of it a nullity. The applicants (accused in the trial court) pleaded to a fatally defective charge. In the case of **Paulo Kumburu Vrs. Republic**, Criminal Appeal No. 98 of 2026 (unreported) it was stated that: -

"Since in this case the charge sheet is incurably defective, implying that it is non – existent, the question of retrial does not arise".

In our case, therefore, the conviction and sentence came out of void trial, hence, confirmation was legally unfounded; the applicants are illegally imprisoned. The conviction is quashed, sentence set aside and I order for immediate release of the applicants from the prison unless they are being held for another lawful cause.

It is ordered accordingly.

Dated and signed at Sumbawanga this 05th day of March, 2024.

T. M. Mwenempazi

**T. M. MWENEMPAZI
JUDGE**

Judgment delivered in court in the presence of parties.



T. M. Mwenempazi

**T. M. MWENEMPAZI
JUDGE
05/03/2024**