THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

DC. CRIMINAL APPEAL No. 68 OF 2019

(Arising from District Court of Mbarali at Rujewa, Criminal Case No.70 /2019)

SHIMBI SHIJA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order 16.12.2019

Date of Judgment: 21.02.2020

Dr. A. J. Mambi, J.

In the District Court of Mbarali at Mbarali, Mbeya Region, the appellant (**SHIMBI SHIJA)** was charged, with two Counts under the National Parks Act, Cap 282 [R.E.2002]. In the first count, he was charged of unlawfully entering the National Park c/s 21 (1) (2) of the National Parks Act while in the second count the appellant was charged with an offence of unlawfully introducing the animals to the National Parks c/s 17 (1) of the National Parks Act, Cap 282 [R.E.2002]. The prosecution facts allege that the accused/ appellant was arrested on the 22nd day of March 2019 grazing 728 cows at the Ruaha National Park. The accused/appellant was found guilty and

convicted accordingly. The accused was also sentenced to pay a fine of 200,000/= on the first count while on the second count he was ordered to pay 10,000 fine. The Trial court further made an order to confiscate all cattle of the accused/ appellant. The records show that the cattle were handed over to the appellant pending the determination of the matter.

Aggrieved, the appellant in a three memorandum advanced the following grounds:

1. That the District court erred in law and fact when it convicted the accused/ appellant without proof beyond reasonable doubt.
2. That the District court erred in law and fact when it convicted the appellant basing on the defective charge sheet.
3. That the District court erred in law and fact when it convicted the appellant without first reading charge sheet to the accused.
4. That the trial District Magistrate erred in law and fact when he imposed excessive sentence without assessing the factors
5. That the trial District Magistrate erred in law and fact when he convicted the appellant without considering his defence.

During hearing, all parties prayed to this court that the mater be disposed of by way of written submission and this court ordered parties to do as prayed. While the appellant was represented by the

learned Counsel Mr. Faraja, the respondent (Republic) was represented by the learned State Attorney Ms. Kilonzo.

In his submission, the appellant Counsel Mr. Faraja submitted that the trial court erred in law and fact to convict the appellant without proof by the prosecution beyond reasonable doubt. He argued that the provision of section 114 (1) of the Evidence Act Cap 6 (R.E 2002) provides a mandatory requirement for the prosecution to prove the case beyond reasonable doubt. He referred the decision of the court in **AHAMADA MUSSA NTIMBA AND MOHAMED KASHANGAKI V REPUBLIC (1998) T.L.R 268.** He submitted that while he evidence of DW1 and DW3 shows that they were arrested at Mwanjula but the evidence of PW3 testified that DWI and DW2 who were grazing appellant's cattle were caught in Mawale within Ruaha National Park. He contended that this show that the prosecution witness were not sure on the place where the appellant's cows were arrested. He referred the decisions of the court in **CHRISTIAN S/O KALE AND RWEKAZA S/O BENARD v REPUBLIC (1992) TLR 302** and **JOHN MAKOLOBELA KULWA & ERICK JUMA @TANGANYIKA V REPUBLIC, TLR 2002** at page 296 respectively.
The learned Counsel for the appellant Mr. Faraja disputed the charge sheet on the second count by arguing that the statement of offence of the 2nd Count in the substituted charge sheet did not mention the Appellant's name being the one who is charged for the unlawful entry into Ruaha National park. He argued that the statement of offence mentions the other different accused persons contrary to the names of the appellant. He was of the view that this

is inconsistence with the provision of Section 132 of the Criminal Procedure Act Chapter 20 [R.E 2002] which requires offences to be specified in charge with necessary particulars. That section is he referred reads as follows;

> *"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 nature of the offence charged."*

He referred the decisions of the court in **MOHAMED KAMINGO v R (1980) TLR 279** and **BALTAZAR GUSTAF & ANTONY ALPHONCE V R, CRIMINAL APPEAL NO. 266/2014 CAT (UNREPORTED)** respectively. He further argued that the prosecution failed to amend the charge sheet contrary to the law. He referred the decisions of the court in **HUSSEIN RAMADHANI VS THE REPUBLIC CRIMINAL APPEAL NO. 195 OF 2015** (Unreported).

The appellant counsel further submitted that the trial court erred in law and in fact by convicting the appellant without reading the charges after conducting preliminary hearing and before commencing trial contrary to section 192, 228 (1)(3) and 229(1) of Criminal Procedure Act, Cap 20 R.E 2002. He referred the decisions of the court in **EMMANUEL MALAHYA v REPUBLIC, CRIMINAL APPEAL NO.212/2014, CAT AT TABORA (Unreported)** and **CHEKO YAHYA v REPUBLIC, CRIMINAL APPEAL NO.179/2013, and CAT AT TABORA** respectively. He also referred the decisions of the court in **JOSEPH MBILINYI@SUGU AND EMMANUEL**

GODFREY MASONGA V REPUBLIC, CRIMINAL APPEAL NO.29/2018, HIGH COURT, MBEYA REGISTRY (unreported).

The appellant counsel further submitted that the trial court erred in law and in fact by failing to consider the appellant's defense. He argued that the appellant testified that he was not the one who was actually caught with those cattle as on the fateful day, the appellant was at Mahongole, his home place and not on the crime scene as alleged by prosecution. He referred the evidence of the appellant who testified that on 20.3.2019, his cattle were in the hands of his herdsmen; DW2 (Dotto Pawa) and DW3 (Weja Nguba) at Majula. He contended that DW1 never entered Ruaha and grazed 728 cows, but he was informed by his herdsmen that all the cows were been caught by PW1 and PW2, the Park rangers. He referred the decision of the court of Appellate Court in **JOHN MAKOLOBEKA KULWA & ERICK JUMA @TANGANYIKA V REPUBLIC, TLR 2002.**

Addressing other ground of appeal the appellant Counsel submitted that the trial Magistrate erred in law and in fact by sentencing the appellant excessive punishment without considering special facts that led her to pass such sentence. He argued that the trial court did not consider that DW1, the Appellant was the first offender to the offences, and he was not the one who was caught with his 728 cows at the National park. He referred the decisions of the court in **RAMADHANI MWENDA VS REPUBLIC (1989) TLR 3** and **RAMADHANI MWENDA VS REPUBLIC (1989) TLR 3** respectively.

The appellant counsel further submitted that the trial court erred in law and fact by admitting exhibit PE1 and Exhibit PE2 contrary to

the provisions pf the law. He referred page 5 of the trial court proceedings which show that before exhibit PE1 was admitted, the prosecution state Attorney prayed to tender it as an exhibit instead of the PW1 who was the one identified and filled that document.

In response, the respondent through his learned State Attorney Ms. S. Kalonzo submitted that the republic doesn't agree with the grounds of appeal as the prosecutions proved the case beyond reasonable doubt. She argued that the evidence shows that the appellant illegally entered and grazed his cattle at the National park contrary to the National Parks Act.

The learned State Attorney further submitted that the first ground of appeal has no merit. She argued that when the case was fixed for hearing the prosecution paraded three witnesses to establish the charges against the accused person (now the appellant). She referred the evidence of PW1 testified clearly that on the date of incident while with other six park rangers making patrol at Mawale within Ruaha National Park they saw mark of Cattle. She argued that PW1 and others followed it until they managed to find the Cattle. She argued that PWI assisted by pw2 observed the number of the cattle to be 728. She argued that having completed he filled a certificate of seizure which was admitted by the trial court as "PE1". She argued that The testimony of the last prosecution witness PW3 who tendered exhibit PE2 in court and testified to receive the coordinates from PW1 which helped him to prepare the said map also collaborates the evidences of PW1 and PW2.She referred the decision of the court in **SAID ALLY MTINDA Vs**

REPUBLIC Criminal Appeal No. 55 of 2012 AT Dodoma [Unreported] referring the decision in the case **SAMSON MATIGA Vs R, Criminal Appeal No. 205 of 2007 (Unreported).**

Responding to grounds number two and three, the learned State Attorney submitted that, the prosecution does not concede to the fact that the substituted charge was defective. She however admitted that it is true that the second count was not proper by mentioning the other persons different from the appellant and prayed to abandon it and be remained with the first count.

The learned State Attorney was of the view that the second count with different names did not prejudice the appellant in any way for he understood the first count and pleaded to it. She argued that the said defect is only limited to the second count and has nothing to make whole charge sheet as defective.

The learned State Attorney further submitted that during hearing on 02/04/2019 the State Attorney prayed to substitute the charge and the charge was read over the appellant. She argued that it is therefore unexpected for one to say the appellant was not aware of the charges against him when hearing of PW2 proceeds.

Responding to the fifth ground, the learned State Attorney submitted that the fifth ground appeal has no merit, as the judgment the trial Court is clear that the trial Court correctly evaluated and considered the appellant's defense a evidence. She argued that in testing whether the appellant defense of *alibi* was reliable the court casted doubt on the prosecution evidence adduced in Court. She averred that the Court reasoned that the

said defense did not follow the procedures under section 194(4) of the criminal Procedure Act [Cap 20 R.E 2002] neither witness nor exhibits was brought in Court by the appellant to support his alibi. She referred the decision of the court in ***ALI SAREHE MSUTA Vs R[1980]TLR1 and MWITA MHERE*** *and* ***IBRAHIM MHERE VS REUBLIC (2005)TLR 107*** respectively.

I have carefully perused and considered grounds of appeal, the evidence on record and submissions from both parties. However, while going through the trial records, I have come to learn that the proceedings at the trial court were tainted with irregularities some of which have also been observed by the appellant in his grounds of appeal. I will first address those irregularities that I have observed in the course of reading the trial records. The key irregularity that needs to be addressed by this court is based on the charge sheet and the way the trial court dealt with defence of the appellant (alibi). The other irregularity that I have observed is the way the appellant was convicted by the trial court. The main issue is whether these irregularities went to the root of the case and whether they are curable or not. I will start with the charge sheet. The appellant claimed that the charge sheet was defective as his name in one of the count did not appear and what appeared was the name of a different person. In other words, the appellant was claiming that he was charged under the wrong charge sheet.

The learned Counsel for the appellant Mr. Faraja disputed the charge sheet on the second count by arguing that the statement of

offence of the 2nd Count in the substituted charge sheet did not mention the Appellant's name being the one who is charged for the unlawful entry into Ruaha National park. He argued that the statement of offence mentions the other three different accused persons contrary to the names of appellant. He was of the view that this was inconsistence with the provision of Section 132 of the Criminal Procedure Act Chapter 20 [R.E 2002] which requires offences to be specified in charge with necessary particulars. The appellant counsel further submitted that the trial court erred in law and in fact by convicting the appellant without reading the charges after conducting preliminary hearing and before commencing trial contrary to section 192, 228 (1)(3) and 229(1) of Criminal Procedure Act, Cap 20 [R.E 2002].

On the other hand, the prosecution in their submission conceded such defectiveness and decided to abandon the second count of the charge against the appellant. I have gone through the charge sheet and found that the document on the second count does not implicate the appellant with the charges since his name is not mentioned. In my considered view since all counts were in the same charge sheet it means that if there is any omission or defectiveness on one of the count means that such charge sheet is defective since all counts for the statement under one charge sheet. If the prosecution could have observed that they could have amended the charge sheet at the trial court and remain with one count and such charge sheet must be read afresh to the accused. Failure to do so will imply the accused was charged with a defective charge sheet.

Even the prosecution in their submission admitted on the defectiveness of the charge sheet. I wish to quote the prosecution submission as follows:

> *"However it is true that* ***the second count by mention other person different from the appellant*** *and we pray to abandon it and be remained with the first count. It is our firm position that having the second count with different names did not prejudice the appellant in any way for he understood the first count and pleaded to it. The* ***said defect*** *is only limited to the second count and has nothing to make whole charge sheet as defective".*

I am of the considered view that the prosecution cannot abound on the account at appeal stage stage the information read to the accused at the trail court included all counts. Abandoning one count at the appeal stage implies amending the charge sheet or introducing the new charge sheet different from what was read to the accused at the trial court. This is as good as introducing the charge sheet which was never read to the accused/appellant at the trial court.

The law requires the charge sheet to be clear and indicate all necessary particulars of the accused charges citing relevant provisions of the law and it must be read on him. Failure to do so means that the charge sheet becomes defective. The Trial magistrate failed to observe such omission and irregularity and went on convicting and sentencing the appellant basing on a charge sheet that was not even read to him. Since the charge sheet that formed the accused conviction and sentence was not read to the

accused, I don't see any reasons for going into details to consider other issues related to the evidence. I wish at this juncture to highlight that, it is trait law that the prosecution facts and charge sheet must be read to the accused and he has to state if he admits all those essential elements of the offence charged. The magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty or not. The accused must also be informed the offence under which he is charged so that he can properly plea and defend himself basing on clear content of the charge sheet. Failure to meet such legal requirement will deny the accused right to defend his case and right to be heard. There are various authorities that have addressed an issue of plea and the requirement of reading the charge sheet to the accused. For instance in the case of ***Adan v Republic (1973) EA 445***, cited in the case of ***Khalid Athumani v. R, Criminal Appeal NO. 103 OF 2005***, (unreported), the court observed that:

> *"When a person is charged,* ***the charge and the particulars should be read out to him****, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements,* ***the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty****. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete,* ***should give the accused an opportunity to dispute or explain the facts or to add any relevant facts****. If the accused does not agree with the statement of facts or asserts additional*

facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

The court in similar situation in ***Abdallah Ally Vs The Republic*** (Criminal Appeal No 253 of 2013) observed and held that:-

"... being found guilty on a ***defective charge*** *based on wrong charge or 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.***

Reference cans also be made to the persuasive decision of the court in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162 where **Lord Denning L.J** observed and stated that:

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

This means that if the accused is charged under defective charge sheet or wrong offence and such charges are not read to him, as seen in our case, he will be denied right to know what evidence has been given and what statements have been made affecting him and this cans go to the root of the case by affecting his right to be heard as observed in the above case.

I entirely agree with the learned appellant Counsel that the trail Magistrate wrongly convicted the appellant on the defective charge sheet that was not even read to him.

In view of the above findings, I am of the settled mind that, failure for the prosecution to properly prepare the charge sheet and charge the appellant on a proper offence leaves doubt as to whether the appellant was availed the right to know the contents and particulars of this charges. As I observed earlier that, failure of the charge to name the accused person and mention someone else meant that the particulars of the offence fell short of giving reasonable information as to the nature of the offence charged as required by section132 of the Criminal Procedure Act, Cap 20. This means that the Trial Magistrate ought to note that any omission and doubts on the prosecution side should have benefited the accused person.

In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court. It is a general rule that, the accused person must be given the benefit of doubt as underscored by the court in the case of ***Director of Public Prosecutions v Elias Laurent Mkoba and Another [1990] TLR 115 (CA)***.

If the Magistrate had noted any anomaly on the charge sheet he could have directed the prosecution to make an amendment of the charge sheet under section 234 of the Criminal Prosecution Act, Cap 20 [R.E.002] as rightly cited by the appellant Counsel. Indeed

section 234 of the Criminal Prosecution Act, Cap 20 [R.E.002] provides that:

> *"(1) Where **at any stage** of a trial, it appears to the court that the charge is defective, either in substance or form, **the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case** unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*
>
> *(2) Subject to subsection (1), **where a charge is altered under that subsection–***
>
> *(a) **the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> *(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*
>
> *(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.*

(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof.

(4) Where an alteration of the charge is made under subsection (1) or there is a variance between the charge and the evidence as described in subsection (2) the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

(5) Where an alteration of the charge is made under subsection (1), the prosecution may demand that the witnesses or any of them be recalled and give their evidence afresh or be further examined by the prosecution and the court shall call such witness or witnesses

Unless the court, for reasons to be recorded in writing, considers that the application is made for the purpose of vexation, delay or defeating the ends of justice".

Reading between the lines on the above provision it is clear that if it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice. Indeed this can be made at any stage of a trial. The records show that there was a time the charge sheet was

amended by still it remained defective since it had one count that did not implicate the appellant and the appellant was charged and convicted with both two counts. This means the court contravened this section and caused injustice to the appellant. Convicting the accused based on defective charge in my view ends in defeating the end of justice. In my view the irregularities or omission that were not observed at the earliest stage also affected the appellant's plea since he was convicted on the charge that he did not plea. It should be noted that failure to properly name the appellant in the charge sheet is incurable irregularity which also renders the charge sheet defective. See ***NELSON MANGATI Vs REPUBLIC Criminal Appeal No. 346 of 2017(Unreported)*** . I also wish to refer the decision of the court in ***BALTAZAR GUSTAF & ANTONY ALPHONCE V R, CRIMINAL APPEAL NO. 266/2014 CAT (UNREPORTED)*** as also cited by the appellant Counsel where the court observed that:

> *"On our part, looking at the particulars of the offence, we entirely agree with the learned senior state attorney that* ***the name of the person against whom the gun/firearm was directed in order to steal and retain the stolen property is not mentioned. This means the particulars of offence in this case have failed to give reasonable information as to the nature of the offence charged against the appellants as required by s. 132 CPA. Failure of the charge to name the person threatened with a firearm meant that the particulars of the offence fell short of giving reasonable information as to the nature of the offence charged as required by s.132 of CPA***".(emphasis supplied with)

Indeed the position of the law and case laws are clear that it is the duty of the prosecution to file the charge correctly, those presiding over criminal trials should, at the commencement of the hearing make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not, the court should require that it be amended accordingly." It is thus that the prosecution and the trial court are duty bound in making sure that the charge against the accused is correct before the commencement of the hearing. See ***MOHAMED KAMINGO v R (1980) TLR 279.***

My observation is based on the fact that if the appellant pleaded on the content of the charge sheet that was first read to him but the magistrate convicted him on the different content of the charge sheet then that is fatal and bad in law. It is trait law that an accused has to state if he admits all those essential elements of the offence charged, the magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The Trial Magistrate was duty bound to comply with section 228 of the Criminal Procedure Act, Cap 20 [R.E.2002] which reads as follows:

> *"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) If the accused person admits the truth of the charge,* ***his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make***

an order against him, unless there appears to be sufficient cause to the contrary.

(3) ***If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***

(4) ***If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.***

5)(a) If the accused pleads–

(i) that he has been previously acquitted of the same offence; or

(ii) he has obtained a pardon at law for his offence, the court shall first try whether or not in fact such plea is true.

(b) If the court holds that the evidence adduced in support of such plea does not sustain the plea, or if it finds that such plea is false in fact, the accused person shall be required to plead to the charge.

(6) After the accused has pleaded to the charge read to him in court under this section, the court shall obtain from him his permanent address and shall record and keep it".

This means that the appellant was denied his right to know what evidence from the prosecution and what was the content on the statement has been made affecting him so that he can properly defend himself basing on the content of the charge sheet. This court can also borrow a leaf from the relevant persuasive decisions from other common law jurisdictions such as England. For instance **Lord Denning L.J**. in a persuasive decision of ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162. **Lord Denning L.J** observed and pointed out that:

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision made Appeal by the Court of Appeal in ***MEYYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was held that:

"In this country, natural justice is not merely principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part"

"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa

uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na ***haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

*"****....That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard,*** *because the violation is concerned to be a breach of natural justice."*

This means that if the accused is charged under non-existed content of the charge sheet is as good as saying he was convicted basing on defective charge sheet. This in my view will imply that he was denied right to know what evidence has been given and what

statements have been made affecting him and this can go to the root of the case by affecting his right to be heard as observed in the above cases I have cited.

Now if the accused was convicted basing on unread and improper charge, can it be said the accused received a fair trial?. The answer is obviously NO. My reasons are based on the fact that the trial magistrate misdirected herself and made a gross mistake by not complying with the provisions of the law. The learned State Attorney has also addressed this court to that such omission is curable by o abandon it. In my view since the omission of the provision of the law was the main basis of the offence and charge sheet, that omission is not curable at this stage. This could have been cured at the trial court by the court invoking section 234 of the Criminal Procedure Act, Cap 20 [R.E.2002].

Indeed the above omission on the defectiveness of the charge sheet can dispose of this matter. However, for the purposes of future references and even precedents I also wish to address other omissions I have observed. The appellant in his grounds appeal indicated that his defence of alibi ws not considered and the court mainly relied on the prosecution evidence. It appears even the prosecution admitted such claim in their submission. The prosecution in their submission are saying that and I quote:

> *"in testing whether the appellant reliable defense of alibi casted doubt on the prosecution evidence adduced in Court, the Court reasoned that the said defense did not follow the procedures under*

section 194(4) of the criminal Procedure Act [Cap 20 R.E 2002] neither witness nor exhibits was brought in Court by the appellant to support his ***alibi****".*

The above quotation from the prosecution submission implies that the trial magistrate did not consider the appellant defence since it was raised contrary to the provisions of the law. In my considered view, this was wrong since the court is duty bound to consider defence evidence whether properly raised or not. This in my view vitiated the justice on the part of the appellant. Worth noting that the alibi defence is raised by a suspect who states that he was not at the scene of the crime at the time the crime was alleged to have been committed. For more understanding of the alibi defence I wish to refer the case of ***Karanja v Republic [1983] KLR 501 [1976 – 1985] EA*** as found in the book titled *"Criminal law"*, 2015 at page 159 (by William Musyoka) where the court stated that the ***alibi*** is a Latin verb meaning 'elsewhere' or at another place. The accused ideally raises the defence when he says that he was at a place other than where the offence was committed at the time when the offence was committed. General, The court has the duty to consider an alibi defence where it is raised and the court need to evaluate the evidence presented in support of it before accepting or dismissing as failure to consider an alibi where properly raised may be fatal to the conviction. The Court in ***CHARLES S/O SAMSON V. THE REPUBLIC [1990] T.L.R. 39*** which held that:-

" The court is not exempt from the requirement to take into account the defense of alibi, where such a defense has not been disclosed by an accused person before the prosecution case closes its case"

The records show that the appellant raised the dfence of alibi but the magistrate simply ignored on the ground that such defence was not raised at the earlier stage. I wish to reproduce the wards of the magistrate in his judgment at page 4 as follows:

> *"the said defense did not follow the procedures under section 194(4) of the criminal Procedure Act [Cap 20 R.E 2002] neither witness nor exhibits was brought in Court by the appellant to support his alibi".*

Reading between the lines on the above paragraph it appears that the trial Magistrate did not considered the defence evidence and he was shifting the burden of prove from the prosecution to the defence which is contrary to the principles of the law. This means he convicted the appellant on the defence weakness contrary to the law. The Court in ***CHRISTIAN S/O KALE AND RWEKAZA S/O BENARD v REPUBLIC (1992) TLR 302*** as correctly cited by the appellant counsel observed that:

> *"an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution"*

The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state (See ***Ali Ahmed Saleh Amgara v R [1959] EA 654)***. The state indeed has the primary duty of proving that the accused has committed the *actus reus* elements of the offence charged, with the *mens rea* required for that offence. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts.

Indeed the appellant having raised the defence that he was not in the scene as he was somewhere else and he was not taking care of his cattle. In this regard, the trial court ought to have properly considered the appellant's evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. The law is clear that and it has occasionally held so by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment and proceedings it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This is bad in law is as it can lead to injustice to the other party that is the appellants in our case. Such omission had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court of Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence.

As correctly submitted by the learned State Attorney, failure to consider defence evidence denied the appellant their legal rights. Worth also referring the decision of the court that in ***Leonard Mwanashoka vs Republic Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in ***Leonard Mwanashoka vs Republic*** (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too.*** *It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment.

The other omission or irregularity I have observed is the way the appellant was convicted. I have perused the judgement of the trial court to satisfy myself if the appellants were properly convicted. It is clear from the record that the trial Magistrate did not enter the proper conviction though he entered a sentence. For instance the Judgment at page 5 shows that and I quote:

> ***"the accused person is convicted according to section 312 (2) of the Criminal Procedure Act, Cap. 20 (R. E. 2002)".***

Reading between the lines on the above quoted paragraph can it be said that the Magistrate convicted the accused persons/appellants? The answer is clearly NO since the above wordings were the last statement of the judgment and nothing else. As required by the law that once an accused is found guilty one would have expected the conviction and he must state the words that: ***"I convict the accused person under section....as charged".*** The Trial Magistrate having convicted the accused under the section which creates an offence he stand charged shall sentence him under the proper provision of the law. Failure to convict the accused is contrary to the law (section 235 of the CPA Cap 20) since the law provides for mandatory requirement for judgments to contain conviction and sentence. I wish to refer section 235 (1) of the CPA [Cap 20 R.E 2002]which provides as follows:-

*"the court having heard both the complainant and the accused person and their witnesses and evidence **shall convict** the accused and **pass sentence** upon or make an order against him according to law, or shall acquit him or shall dismiss the charge under section 38 of the Penal Code".(emphasis supplied with).*

The above provision of the law is very clear. In this regard, my mind directs me that the provision of the law mandatorily require any judgment must contain sentence after an accused is convicted and it must be reflected in the record. This was also observed in ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015 (unreported)***. The court of appeal in this case that is ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015***observed that:

*"Although there was a finding that the appellant was guilty was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by **conviction,** whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of the CPA (where there has been a trial)."(emphasis supplied with).*

Reference can further be made to the court in **Amani Fungabikasi V Republic,** criminal appeal No 270 of 2008 (unreported) where the court made similar observation. In this case the court said that;-

*"It was imperative upon the trial District Court to comply with the provision of **section 235 (1)** of the Act by convicting the appellant after the Magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt. **In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act was missing**. So, since there was no conviction entered in terms of section 235 (1) of the Act,*

there was no valid judgment upon the High Court could uphold or dismiss."(emphasis added).

Reference can also be made to section 312 of CPA, Cap 20 [R.E 2002] for content of judgment as follows:

"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and
superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.
(2) In the case of conviction the judgment ***shall*** *specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is* ***sentenced****". "(emphasis added).*

While I appreciate the decision of the Court of Appeal in ***IMAN CHARLES CHIMANGO Versus THE REPUBLIC (Un reported),****in Criminal Appeal Na. 382 of 2016* as cited by the prosecution, I am of the settled view that the decision of the court appeal addressed different scenario in our case. My interpretation from that decision is that if the magistrate uses the words **"the accused is found guilty as per charge sheets and convicted as charged",** then it will suffice to hold that the accused was convicted. However if the magistrate just say that "***the accused is convicted under sections 235 and 312 of CPA Cap 20"*** then the accused is not properly convicted. The best way is to mention the provision of the law under which the accused was charged or the magistrate can just say the accused is convicted as charged.

In the circumstances I am satisfied that the appellant's conviction and sentence was not properly done as the trial court failed to notice some irregularities which lead to injustice on the part of the accused who is now the appellant. Having established that in this case the trial magistrate has failed to comply with the requirements of proceedings and judgment writing that renders both the proceedings and judgment invalid, the question is, has such omission or irregularity occasioned into injustice to the accused appellants. The question at this juncture would now be, having observed such irregularities, would it proper for this court to order retrial or *trial de novo?*. There are various authorities that have underlined the principles and circumstance to guide court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

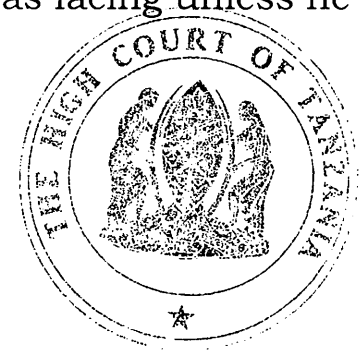
> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the***

interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person..."

I have no reason to depart from the above authorities and my hands are tied up since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to the accused person. In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to dos so, since doing so will in my view create more likelihood of causing an injustice to the accused person and I hold so. In terms of Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2002] it is the finding of this court that on the account of improper conviction and sentence that were also based on defective charge sheet, this court is satisfied that such errors, omissions or irregularities has in fact occasioned any failure of justice to the accused/appellant. Even if the court could have ordered retrial, there in my view is no valuable evidence that can be relied by the prosecution to prove the charges against the appellant beyond reasonable doubt. I don't see any need of discussing other grounds of appeal.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due the fact that the trail court failed to observe some legal principles on the detriment of the appellant. In this regard, I declare the trial proceedings, Judgment and any subsequent orders null and void.

In the circumstances, the conviction is quashed and the sentence is set aside and orders that the appellant be free from the charges he was facing unless he is otherwise charged with other charges.

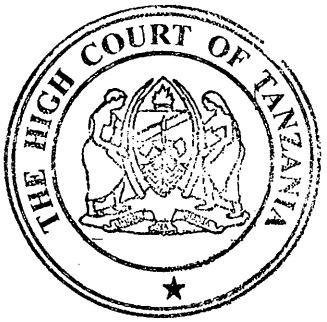


Dr. A. J. Mambi
Judge
21.02. 2020

Judgment delivered in Chambers this 21st day of February 2020 in presence of both parties.

Dr. A. J. Mambi
Judge
21.02. 2020

Right of appeal explained



Dr. A. J. Mambi
Judge
21.02. 2020