IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 255 OF 2020

(Appeal from the decision of the Resident Magistrates Court of Kisutu at Kisutu in Criminal Case No. 93 of 2016 before Hon. A.W. Mmbando, **SRM** dated 16/09/2020)

ALOYCE LUKULU MASANJA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

30th Aug, 2021 & 10th Sept, 2021.

E. E. KAKOLAKI J

The appellant in this appeal is aggrieved with both conviction and sentence on two counts of the offence of **Stealing by Person in Public Service;** Contrary to Sections 258, 265 and 270 of the Penal Code, [Cap. 16 R.E 2002], imposed on him by the Resident Magistrates Court of Kisutu at Kisutu in Criminal Case No. 93 of 2016 in its judgment handed down on 16/09/2020. Upon conviction he was sentenced to fourteen (14) years imprisonment on each count, the sentence running concurrently and ordered to pay compensation of the stolen money to victims of crime. In

his memorandum of appeal he has preferred twelve grounds of appeal which I am intending to reproduce in seriatim as raw as they are:

1. That the learned trial Senior Resident Magistrate erred in law and fact by convicting the Appellant based upon a defective charge sheet as:
   (a) The evidence on records is in variance with the particulars of the offence charged.
   (b) It does not disclose the names of the owner of the property believed to be stolen.
2. That the learned trial Senior Resident Magistrate erred in law and fact in failing:
   (a) To resolve the material contradictions and inconsistencies in the memorandum of fact and prosecution evidence adduced by the witness (PW2);
   (b) To observe the material contradictions and inconsistencies in the memorandum of fact and the prosecution evidence between PW1 and PW5 regarding modes of payment and amounts paid to RUBADA rendering their story to be highly improbable to the Appellant.
3. That the learned trial Senior Resident Magistrate erred in law and fact by convicting the Appellant in a case whereby the material witnesses from the Employer (RUBADA) and from the Banks (BARODA Bank and NMB Bank) were not summoned by the Prosecution to testify on fundamental facts regarding the transaction in disputes.

4. That the learned trial Senior Resident Magistrate erred in law and fact in convicting and sentencing the Appellant based on Exhibit PE7 (a statement of uncalled witness) while :
   (a) It was admitted unprocedural contrary to section 34B (2)(a) of the Evidence Act, [Cap. 6 R.E 2002].
   (b) It was not corroborated by the prosecution witness.
5. That the learned trial Senior Resident Magistrate erred in law and fact in convicting the Appellant based on Exhibits PE9 which its admissibility was not cleared during ruling of Prima facie or judgment as per holding of the Senior Resident Magistrate ruling overruling the objection of the same.
6. That the learned trial Senior Resident Magistrate erred in law and fact in convicting the Appellant based on the Exhibits PE1, PE2, PE9 and PE11 (Public documents) which were admitted unprocedural as the chain of custody was not established and proved contrary to section 85(2) of the Evidence Act, [Cap. 6 R.E 2002].
7. That the learned trial Senior Resident Magistrate erred in law and fact in convicting the Appellant relying on Exhibit 14 (a caution statement) while;
   (a) The Magistrate failed in her duty to warn the Appellant the dangers of not objecting to an incriminating evidence contrary to procedural law.
   (b) The Magistrate did not determine in her judgment whether the statement was a true and voluntary confession contrary to procedural law.

8. That the learned trial Senior Resident Magistrate erred in law and fact in convicting and sentencing the Appellant based on oral evidence of PW1 which was not corroborated, circumstantial and insufficient evidence contrary to procedural law.
9. That the learned trial Senior Resident Magistrate erred in law and fact in convicting Appellant by shifting the burden of proof from the prosecution to the Appellant in relation to testimony of witness PW1 and Exhibit PE1.
10. That the learned trial Senior Resident Magistrate erred in law and fact in convicting and sentencing the Appellant while the prosecution had not on the whole proved its case to the legal standard beyond reasonable doubt.
11. That the learned trial Senior Resident Magistrate erred in law and fact in sentencing the Appellant excessively contrary to section 170(1) of the Criminal Procedure Act, [Cap. 20 R.E 2002].
12. That the learned trial Senior Resident Magistrate erred in law and fact by failing to analyse and evaluate objectively the factual or points for determination in order to determine the worth, credibility or believability and significance of all prosecution witnesses in relation to the offence charged (counts) and also incomplete considered the defence case.

Briefly it was prosecution case on the first count that the appellant on diverse dates but between 1st and 10th of August 2010, within the City and Region of Dar es salaam being Acting Director General of Rufiji Basin Development Authority stole Tanzania shilling Fifty Million (Tshs.

50,000,000/=) which came into possession by virtue of his employment. On the second count it was alleged that between 10th and 30th of November, 2010 within the same place did steal Tanzania Shillings Thirty Six Million (Tshs. 36,000,000/= which also came into his possession by virtue of his employment. When called to plead to the charge, the appellant pleaded not guilty to both counts, the result of which moved the prosecution side to parade five (5) witnesses and tender fourteen (14) documentary exhibits in its bid to prove the case against him, while the appellant staged as sole defence witness producing no exhibit. Upon full trial the trial court was satisfied that the prosecution had proved its case against the appellant on both counts as a result found him guilty of the offence as charged, sentenced him to serve a custodial sentence of fourteen (14) years plus the order to compensate the victims of crime. The victims favoured by the compensation order were the investor companies namely G.K Farms/Vita Grain and FJS African Starch Development Company Limited to the tune of Tshs. 50,000,000/= and Tshs. 36,000,000/= respectively. It was further ordered that should the appellant (convict) fail to implement the order then his properties be sold to compensate the victims. Aggrieved with that decision the appellant is before this court trying to convince it that he was wrongly convicted and sentenced as afore indicated in his grounds of appeal.

At the hearing both parties were represented and the hearing proceeded viva voce. The appellant hired the services of Mr. Nehemiah Nkoko assisted by Mr. Elia Mwingira both learned advocates while the respondent was defended by Mr. Adolf Kisima learned State Attorney. I should state from

the outset that this appeal is resisted by the respondent who responded almost to all grounds of appeal as argued on by Mr. Nkoko. In considering the merits or demerits of the appeal I am not intending to reproduce all of the submissions as done by the parties as I will be summarising them in the due course of this judgment. To start with the first ground on complaint of defectiveness of the charge sheet which appears to me to be raising a point of law, Mr. Nkoko submitted that, the charge under which the appellant's conviction is premised is defective for contravening the provisions of sections 132 and 135 of the Criminal Procedure Act, [Cap. 20 R.E 2019] (CPA), something which renders the entire proceedings before the trial court a nullity as well as the decision thereof. He said before the trial court the appellant faced two counts on the charge of Stealing by Person in Public Servant, Contrary to sections 258, 265 and 270 of the Penal Code,[Cap. 16 R.E 2002]. The court was told by the counsel that, the law is clear that when the person is charged with criminal offence the charge sheet must be clear on two things. **One**, must specify the section that creates the offence. **Secondly**, must specify the section that provides punishment. In this case he said the appellant was charged under section 258 of the Penal Code, which does not exist as there is neither subsection creating the offence alleged to be charged with nor one providing for sentence something which renders the charge defective as citation of subsections creating the offence and punishment is a must in any charge preferred under specific section which has subsection. To support his stance he referred the court to the case of **DPP Vs. Pirbaksh Asharaf and 10 Others**, Criminal Appeal No. 345 of 2017 (CAT-unreported) where

the Court of Appeal observed the omission to include a subsection to the section in which the appellant was charged with rendered the charge incurably defective.

On citation of sections 265 and 270 of the Penal Code in the same charge (count), Mr. Nkoko echoed the prosecution combined two sections in one offence the sections which preferred for two different offences of theft and Stealing by Person in Public Service as well as separate and distinct sentences. To him the lumping up of two separate and distinct offences in a single charge rendered the charge defective as it was stated in the case of **Pirbaksh Asharaf** (supra). Another defect in the charge Mr. Nkoko mentioned, was the failure of prosecution side to indicate the victim of the offence in the charge sheet so as to avail the appellant with sufficient information to prepare his effective defence. As it is the charge sheet which lay foundation of every criminal case, its defect prejudiced the appellant as he pleaded to the defective charge and failed to effectively prepare his defence for want of sufficient particulars of victims which he came to be aware of during the judgment when ordered to compensate them, Mr. Nkoko lamented. He therefore concluded the appellant was not accorded with a lawful and fair trial. To cement his stance the court was referred to the case of **Deogratius Philipo and Another Vs. R**, Criminal Appeal No, 326 of 2017 (CAT-unreported) and prayed to allow the appeal on that ground only by quashing the trial court proceedings and conviction against the appellant and set aside the sentence and compensation order, hence discharge the appellant forthwith.

In riposte Mr. Kisima for the respondent on the first ground of appeal while admitting that the charge was defective submitted, the citation of sections 258, 265 and 270 of the Penal Code in the same charge (count) was not fatal as the anomaly could be cured under section 388 of the CPA since it occasioned no injustice to the appellant. As regard to the omission to mention the victims of the offence he countered, that was not a necessary ingredient of the offence in the charge of Stealing by Person in Public Service as what was important for appellant to know is the fact that he obtained the alleged money by using his position. In rejoinder submission Mr. Mwingira for the appellant had nothing material to add on this ground apart from reiterating the submissions in chief made by Mr. Nkoko and the prayers thereto.

I have dispassionately followed the rival arguments of both parties on this ground of appeal as well as perusing the charge sheet, trial court proceedings and the impugned judgment. It is the law that, a charge is a foundation of every criminal trial. So the trial court is duty bound to make sure that the charge presented before it during admission stage is competent for being drawn in compliance with the law as any omission at that stage might render the entire proceedings and final verdict a nullity if the prosecution fails to amend the said charge in the course of trial under section 134 of the CPA. The importance of having a sound charge at the admission stage was observed by the Court of Appeal in the case of **Deogratius Philipo** (supra) when stated:

> *"It need not be overemphasized that* ***the charge is a foundation of a criminal trial****. Hence,* ***any court admitting***

the charge from the prosecution must ensure that it is drawn in compliance with the law." *(Emphasis supplied)*

In this case it is the appellant complaint that, the charge infracted the provisions of sections 132 and 135 of the CPA, thus rendered defective, while the respondent is resisting contending the infraction if any is not fatal and is curable under section 388 of the CPA. For easy of follow up of both parties submissions I find it apposite to quote the two sections which give light on how the charge should be drawn and its contents. Section 132 of the CPA provides:

> *132. 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.*** *(Emphasis supplied).*

And section 135(a)(ii) and (iii) of the CPA reads:

> *135. The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section—*

(a) (ii) the statement of offence ***shall describe the offence*** *shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and,* ***if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;***

(iii) after the statement of the offence, ***particulars of such offence shall be set out in ordinary language,*** *in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required; (Emphasis supplied)*

What is discerned from the above provisions is that every charge must contain a statement of specific offence with which the accused is facing, reference to the section of the enactment creating the offence where the offence is created by enactment and particulars of an offence in unambiguous language so as to avail the accused with necessary and sufficient information as well as a clear picture of his accusations so that he can be in a position to properly prepare his defence.

The complained of charge bore three sections in each count. In order to appreciate the gist of appellant's complaint I quote the first count which is similar in contents with the second count save for the dates of the

commission of the offence and the amount of money alleged stolen which is Tshs. 36,000,000/=. It reads:

1ST COUNT

STATEMENT OF OFFENCE

STEALING BY PERSON IN PUBLIC SERVICE, *Contrary to section 258, 265 and 270 of the Penal Code, [Cap. 16 2002].*

PARTICULARS OF OFFENCE

ALLOYCE LUKULU MASANJA *on diverse dates between 1st and 10th August, 2010 within the City and Region of Dar es salaam, being Acting Director General of Rufiji Basin Development Authority stole Tanzania Shillings Fifty Million (Tshs. 50,000,000/=) which came into his possession by virtue of his employment.*

A glance of an eye to the above cited provisions of the law and part of the charge sheet drives me to embrace Mr. Nkoko's submission that the appellant was charged under defective charge for three reasons. **One**, the use of section 258 of the Penal Code in the charge which defines "theft" without citation of the subsection describing circumstances under which the offence was committed under sections 265 or 270 of the Penal Code rendered the charge bad in law for violating the provision of section 135(a)(iii) of the CPA, requiring the charge to contain a reference to the section of the enactment creating the offence. Section 258(1) and (2) of Penal Code provides different circumstances under which the offence of theft can be committed as referred hereunder:

258.-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; or

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner,

Secondly, the charge lumped up two different sections creating two separate and distinct offences of Theft (stealing) under section 265 and Stealing by Person in Public Service under section 270 both under the Penal Code, which offences are also providing for different sentences of

seven (7) and fourteen (14) years imprisonment respectively. Section 265 of the Penal Code reads:

> *265. Any person who steals anything capable of being stolen is guilty of theft, and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen, some other punishment is provided,* ***to imprisonment for seven years.*** *(Emphasis added).*

And section 270 of the Penal Code provides:

> *270. Where the offender is a person employed in the public service and the thing stolen is the property of the Republic or came into the possession of the offender by virtue of his employment,* ***he is liable to imprisonment for fourteen years.*** *(Emphasis added)*

What is deciphered from the two provisions cited above is that any charge preferred including both sections in a single count is bad in law and tantamount to duplicity of offences. I say is bad in law as it denies the accused with the right and opportunity to understand the nature of offence facing him amongst the two offences established under the two provisions of the law so that he can be in a position to enter a proper plea under the law. The Court of Appeal in the case of **Pirbaksh Asharaf** (supra) when deliberating on the issue of duplicity of offences in the charge had this to say:

*"**A charge is said to be duplex** if, for instance, **two distinct offences are contained in the same count, or where an actual offence is charged along with an attempt to convict on the same offence.** (See **Director of Public Prosecutions Vs. Morgan Mariki and Another**, Criminal Appeal No. 133 of 2013). It was also stated in the case of **Kauto Ally Vs. The Republic**,[1985]T.L.R 183 that:*

> ***"Lumping of separate and distinct offences in a single count may render a charge bad for duplicity."*** (Emphasis supplied)

Third and lastly is the omission by the prosecution to mention the victim(s) of crime in the particulars of offence in which Mr. Kisima is submitting the same is not necessary. I disagree with Mr. Kisima's submission as in any accusation of stealing someone's money or property the accused must be informed among other things the person with whom he is accused to have stolen money or property from so that he can either choose to plead guilty to the offence or prepare his defence properly. On that stance I shoulder up with Mr. Nkoko's submission and therefore hold that the shortfalls in the particulars of offence and other defects discussed above rendered the charge preferred against the appellant incurably defective and therefore it prejudiced him, as he was denied with an opportunity to enter a proper plea and prepare his defence soundly. Deliberating on the effect of the omission of the charge to contain sufficient particulars the Court of Appeal in the case of **Deogratius Philipo** (Supra) had this to say:

> ***"In law, where the statement or particulars of the offence are short of the requirements of the cited law the same render the charge fatally defective.*** *This position of the law was taken by this Court in the case of* ***Mussa Mwaikunda Vs. R*** *[2006] T.L.R 387,* ***Sylivester Albogast Vs. R****, Criminal Appeal No. 309 of 2015,* ***Maulid Ally Hassan Vs. R****, Criminal Appeal No. 439 of 2015,* ***Paulo Kumburu Vs. R*** *and* ***Antidius Augustine Vs. R****, Criminal Appeal No. 89 of 2017 (all unreported)." (Emphasis supplied)*

Having so found the last question for consideration before this court is what is the right course to be taken against the appellant? Since the appellant's conviction was premised on defective charge I hold the whole proceedings of the trial court was rendered a nullity. I would have ordered retrial of this case. However, since the charge that put into motion the criminal trial against the appellant has been rendered incurably defective, I hold to refer back the case to the Resident Magistrate Court of Dar es salaam at Kisutu for retrial will not be the right option for want of proper charge upon which trial can be conducted as it was held by the Court of Appeal in the case of **Paul Kumburu** (supra) as cited in the case of **Deogratius Philipo** (Supra) when faced with similar situation to the one at hand. The Court said:

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

Having so said and done this ground suffices to dispose of the appeal and I see no reason to proceed to the rest of the grounds. In the premises and for the fore stated reasons, law and authorities, I am of the finding that, this appeal is meritorious and the same is hereby allowed. The proceedings of the trial court are hereby quashed, sentence and compensation order meted on the appellant is set aside. This results into ordering immediate release of the appellant from prison forthwith unless otherwise lawfully held, which order I hereby issue.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of September, 2021.

E.E. KAKOLAKI

JUDGE

10/09/2021

Delivered at Dar es Salaam in chambers this 10th day of September, 2021 in the presence of Mr. Jackline Kulwa advocate for the appellant, the appellant in person, Mr. Adolf Kisima, State Attorney for the respondent and Ms. Monica Msuya, court clerk.

Right of appeal explained

E. E. KAKOLAKI

JUDGE

10/09/2021