

TANZANIA / JUDGMENT

20141020 TZHC Mbeya

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;J IN THE HIGH COURT OF TANZANIA ATMBEYA DC. CRIMINAL APP. NO. 2/2014 (From Rungwe District Court Criminal Case No. 178 of 2011) ALEX LUSEKELO APPELLANT VERSUS THE REPUBLIC ~ RESPONDENT

JUDGMENT

Date of Last order: 13/10/2014 Date of Judgment: 20/10/2014 A.F. Ngwala, J: This is an appeal from a conviction under Section 270 of the Penal Code, CAP. 16. R. E. 2002 for stealing by Public Servant. A sentence of six years imprisonment in respect of each of the seven counts to run simultaneously and an order to compensate the Rungwe District Council a sum of Tzs.6,530,750.00 was passed by the Senior Resident Magistrate, Rungwe. The memorandum of Appeal sets out a total of five grounds for appeal both of fact and law as follows:-]. The learned Trial Magistrate erred on convicting the Appellant with the offences charged, when the charge was defective. 1

2. The learned Trial Magistrate erred on basing the convictions on Exh.P2 purported Audit Report, when in actual fact that document is not worth the title.
3. The Judgment of the Trial Court did not meet the requirements of the Law.
4. The learned Trial Magistrate erred in the process of his evaluation of evidence on the record.
5. The learned Trial Magistrate erred on sentencing the Appellant to 6 years imprisonment for each count. The Appellant is represented by Senior Learned Counsel Mr. Mbise. Ms Mahundi; learned State Attorney represented for the Respondent at the hearing of the appeal. Mr. Mbise submitted in support of all the five Grounds of Appeal for the purpose of disposal of this appeal, I will only point his arguments for the 1st Ground of Appeal. Mr. Mbise contended that Section 270 of the Penal Code is a punishment Section. It does not create an offence so it was wrong for the prosecution side to prefer under Section 270 of the Penal Code alone. Mr. Mbise insisted that the counts against the accused person were framed wrongly in that the charges did not contain and specify in the charges or counts the necessary particulars of the offence, and all the necessary information and the essential elements of the offences and did not make reference to the section of the enactment creating the offence as required by Sections 132 and 135 (i), (ii) and (iii) of the Criminal

Procedure Code, CAP.

16. R.E. 2002. 2 In fortifying his arguments he cited to this Court the case of Mustafa s/o Saidi V. Republic (1969) HCD No. 146, in which it was held that it would be wrong in principle to apply curability provision of law especially when the prosecution had ample powers to frame the charge properly, and it is only fair to acquit the accused if the prosecution fails to discharge its statutory duty. In response to this, Ms Mahundi just stated that, on their part they did not support the appeal because it was not true that the charge was defective. The appellant was charged with stealing by Public Servant c/s 270 of the Penal Code. The statement of the offence and the particulars of the offence clearly stated the charge against the accused. When the charge was read to the accused, he pleaded not guilty, thus the Accused/ Appellant understood the charge that is why he pleaded not guilty. In Rejoinder Mr. Mbise stood to his guns by stating that the Section does not create the offence. He argued that the fact that the accused person had pleaded not guilty to the charge is not correct approach to the law because the Republic did not state the proper offence to the charge, and did not cite the proper section of the law on framing the charges against the accused person. On this, without hesitation, I tend to agree in toto with Mr. Mbise. I hold so because the provisions of Section 135 of the Criminal Procedure Act, CAP 20 provides in mandatory terms on the mode in which offences must be charged. In this particular appeal the provisions of Section 135 (a) (ii) are quite clear. For purposes of clarity this Section reads:- 3 "135. The following provisions of this section shall apply to all charges and, notwithstanding any rule of law or practice a charge or 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) (i) (ii) the statement of the 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". In this regard, I have no doubt that the accused was wrongly and illegally charged as the seven counts violated the mandatory statutory requirements of the cited provision under the Criminal Procedure Act, CAP. 20 R.E.2002. More so the contents of the judgments and the judgment was not in accordance with the provisions of Section 312 (i) of the CPA which requires that in the case of conviction the judgment must specify the offence under the Penal or other law which the accused person is convicted and the punishment. This provision reads in mandatory terms that:- "312 (i) in the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other 4 ' ; law under which, the accused person 1s convicted and the ; punishment to which he is sentenced". In this case the accused person was convicted under the wrong provision of the Penal Code which does not create the offence. This was not in line with what has been propounded by the Court of Appeal of Tanzania in the case of Musa s/o Mwichande versus Republic, Criminal Appeal No. 174/2004. The Court observed that:- "The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if the

charge discloses the essential elements of an offence". The court further observed that courts must meet the requirements of the law as it held:- "... it is useful to digress a bit and state here that there must be minimum standards which have to be complied with if an accused person is to undergo a fair trial". As the Mandatory Statutory requirements were not complied, there's _nothing this court can do except to allow this appeal. A. F. Ngwala Judge 20/10/2014 s

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