

TANZANIA / JUDGMENT

republic vs noel sijila others

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IN THE HIGH COURT OF TANZANIA DODOMA DISTRICT REGISTRY AT DODOMA CRIMINAL CONFIRMATION NO. 4 OF 2017 (Originating from the District Court of DODOMA Criminal Case No. 90 of 2017) THE REPUBLICORIGINAL PROSECUTOR VERSUS NOEL SIJILA JOHN CHAMENE PRISONERS MARILO BAMILA CO NFIR M ATIO N ORDER 14TM AUGUST 2017
Mansoor, J: This confirmation order is made pursuant to Section 170 of the Criminal Procedure Act. No. 20 R: E 2002, which provides as follows: 170.-(1) a subordinate court may, in the cases in which such sentences are authorized by law, passes any of the following sentences-

- (a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;
- (b) A fine not exceeding twenty million shillings; (C) subject to the provisions of the Corporal Punishment Act, corporal punishment;
- (2) Notwithstanding the provisions of subsection (1) - (a) a sentence of imprisonment-
 - (i) for a scheduled offence (as defined in subsection (5), which exceeds the minimum term of imprisonment prescribed in respect of it by the Minimum Sentences Act; (ii) For any other offence, which exceeds twelve months?
- (b) A sentence of corporal punishment which exceeds twelve strokes;
- (c) a sentence of a fine or for the payment of money (other than payment of compensation under the Minimum Sentences Act, which exceeds six thousand shillings, shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge: Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank.

- (3) The provisions of subsection (1) shall be without prejudice to the provisions of any written law authorizing a subordinate court to impose in relation to any offence specified in such written law, a sentence in excess of the sentences provided for in that subsection.
- (4) The provisions of subsection (2) shall apply in relation to a sentence of imprisonment whether such sentence is a substantive sentence of imprisonment in default of a payment of a fine or a combination of two sentences.
- (5) In this section "scheduled offence" shall have the meaning assigned to that expression by the Minimum Sentences Act.
- (6) The police officer in charge of a police station may, where he is satisfied that any person has committed an offence of which the penalty does not exceed two hundred thousand shillings by order under his hand compound such offence by requiring such person to make payment of a sum of money: Provided that-
 - (a) Such sum of money shall be half the maximum line provided for such offence;
 - (b) The power conferred by this subsection shall only be exercised where the person admits in writing that he has committed the offence; (c) the police officer shall issue to the person from whom he received such sum of money a receipt thereof. The three prisoners namely Noel Sijira, John Chamene and Marilo Bamila have been charged with the offence of Burglary c/s 294 (1) and (2) of the Penal Code. They have also been charged with the offence of stealing c/s 265 of the Penal Code, Cap 16 R: E 2002. The three prisoners have been tried by Mpwapwa District Court. The particulars of the offence were that on 15th day of March 2017 at about 02.30 hrs. at Visele Vetenary College, Mji Mpya Area within Mpwapwa District in Dodoma Region, they broke in and entered into a dormitory, with the intent to commit an offence. On the same date and at the same area, after breaking and entering the dormitory, they were alleged to have stolen one mobile phone make TECNO L8 Gold Color valued at THz 350,000, the property of one Harriett d/o Benjamin @ Kileo. The Trial Court found them guilty of the two counts and convicted them. The Trial Court sentenced them to five years imprisonment subject to confirmation by this Court. A person charged under Section 294 of the Penal Code is liable to imprisonment for fourteen years if charged under subsection 1 of Section 294, but if charged under subsection 2 of Section 294, he will be liable to imprisonment for 20 years. Subsection 1 is for housebreaking committed during the day, and subsection 2 is for burglary, committed at night. A person cannot be charged under both sub-section 1 and subsection 2 of section 294 of the Penal Code. This section provides a follows:
 - (1) Any person who-
 - (a) Breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or

- (b) Having entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it, Is guilty of housebreaking and is liable to imprisonment for fourteen years.
- (2) If an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years. The charge sheet shows that the accused persons/ prisoners have been charged under both subsection 1 and 2 of section 294 of the Penal Code. The charge sheet reads as follows: 1st COUNT FOR ALL ACCUSED STATEMENT OF OFFENCE: BURGLARY C/S 294 (1) (a) (2) of the Penal Code Cap 16 of the Laws (R: E 2002). The prisoners were charged with the offence of burglary but the particulars of the offence shows that it was housebreaking since the offence was committed at 2.30 hrs. day time. The offence of burglary has not been established since as alleged by the prosecution, the offence took place on the day on 15th March 2017 at 02.30 hrs. by breaking in the dormitories. It has not been properly stated whether 2.30 hrs. was at night or during the day. In any case, the person cannot be charged with housebreaking and burglary at the same time. The charge was therefore defective on the first count. . In the case of *Mussa Mwaikunda vs. R* (2006) TLR page 387, and also the case of *Isidori Patrice vs. R*, Criminal Appeal No. 224 of 2007 Court of Appeal sitting at Arusha, at page 11 of the Isidori case, the Justices of the Court of Appeal observed the following: "It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged : See section 132 of the Act It is now trite law that the particulars of the charge shall disclose the essential elements or 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 defense, must allege the essential facts of the offence and any intent specifically required by law. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed; they must be included in the particulars of the offence. It was important that the charge sheet should have indicated the time within which the offence was alleged to have been committed. The charge sheet should have been clear when it referred at 2.30 hrs. The charge sheet did not state whether 2.30 hrs. was at night or during the day. In the present case, it is plainly clear that, the particulars of the charge did not disclose the essential ingredients of the offence and the prisoners did not know the nature of the case facing them as the ingredients of the offence were not adequately disclosed to them on the charge sheet. It is trite law and as stated in the above cited cases that the particulars of the offence must be clear and must contain all the essential ingredients of the offence. As held in the *Mwaikunda's* case (supra), the charge which did not disclose the offence is defective and cannot be cured under Section 388 of the Criminal Procedure Act, Cap 20 R: E 2002. Under the powers conferred by this Court under section 373 (1)

- (a) read together with section 366 (1) (a) (i) of the Criminal Procedure Act, Cap 20 R: e 2002, since the charge on the first count is defective the conviction on the first charge of burglary is quashed and set aside. Regarding the second count of stealing c/s 265 of the Penal Code (supra), this section provides: S.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. The prisoners were charged with theft and burglary, thus they were charged with burglary, and thereby after the burglary they committed theft. The charge and conviction on burglary and housebreaking have been quashed and set aside. Since the two were connected, the entire case and the investigations were hinged on the two offences alleged to have been committed. When the investigators or police officers were investigating into the case they were investigation on the offence of burglary and of house- breaking and theft, thus the prosecution were trying to prove the two offences interchangeably. Since the first charge was found to be defective, the second charge of theft was only proved by PW1 Harriet Kileo, who actually did not prove theft but that the phone which belongs to her was found with the 3rd prisoner. The offence of theft was also not proved. I am unable to find a single circumstance consistent with the prosecution case that these three prisoners jointly stole the phone that belonged to PW 1 that might lead to further detection in connection with the case of house- breaking or burglar}7and theft committed at the dormitory. 11 The circumstances that have been established are in my opinion incapable of establishing the offence of stealing or theft. In the circumstances, and again under the powers conferred by this Court under section 373 (1) (a) read together with section 366 (1) (a) (i) of the Criminal Procedure Act, Cap 20 R:E 2002, the conviction on the 2nd count of stealing having not been mentioned in the judgment and not proved by the prosecution on the required standard of proof of beyond reasonable doubt is quashed and set aside. Having quashed the conviction, the sentence is not confirmed, and the prisoners be released from prison unless lawfully held for some other lawful causes. JUDGE 14th AUGUST 2017

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