

TANZANIA / JUDGMENT

## OMARY OMARY NICHIO

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21 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB REGISTRY OF SHINYANGA) AT SHINYANGA CRIMINAL APPEAL NO. 22621OF 2024 (Arising from the Judgment of the District Court of Kahama at Kahama before Hon E.P KENTE -SRM, dated on 21st June 2023 in Criminal Case No. 317 of 2023) OMARY OMARY @ NICHIO.....1ST APPELLANT  
KHAMIS DOTTO @ KASEKO.....2ND APPELLANT BARAKA  
MALISELI.....3RD APPELLANT VERSUS THE  
REPUBLIC.....RESPONDENT

## JUDGMENT

1st& 11th October, 2024 MASSAM, J:. The appellants herein above were charged before the District Court of Kahama at Kahama with an offence of Stealing contrary to Section 258 (1) and 265 of the Penal Code Cap 16 R.E 2019. It was alleged that on 10th day September, 2023 during night hours at Tumaini village within Kahama District in Shinyanga Region did steal a motorbike registered MC 798 DHT valued at Tzs 2,400,0000/= the property of KANAI S/O TADEO. After the full trial, the appellant was found guilty with offence charged, convicted and sentenced to 4 years imprisonment. 1 Aggrieved therein, the appellant rightly lodged his appeal in this court with 5 grounds as follows; -

1. That, My lord the Trial Court Magistrate erred in law and facts the evidence was contradicting for the magistrate to warrant conviction on DW1 as PW3 (Detective Corporal said stated that on 11/09/2023 he was at his workplace and he received an information that a person with a stolen motorbike will arrive in Shinyanga and at 23000hrs PM that person arrived in Shinyanga with a stolen motorbike and he was heading to certain bar named THE DEEZ and PW3 arrested that person, thereafter they went to the Guest House named BUTOGWA where THEY FIND A STOLEN MOTOBIKE IN THE ROOM where they entered therein, but surprisingly Anna James( guest attendant) (PW6) she testified that on the same date DW1 went at the guest house and park the MOTORBIKE IN THE GUEST HOUSE COMPOUND and the next day the room was searched by police officers. See second paragraph of page 02 and first paragraph of page 05 of the copy of judgment, so which is which? Hence inconsistencies. 2

2. That, My Lord, The Trial Court Magistrate erred in law and fact to warrant conviction on an offence of stealing whilst the ingredients of the offence did not create the offence I was charged with.
3. That, My Lord, The Trial Court Magistrate did not consider my defence something bad in the eyes of law as every time they went to search, I was left outside and the prosecution side did not rebut that, hence procedurally irregularity.
4. That, My Lord, I was prosecuted unfairly as you can see that PP stated to the court of law that I was convicted in Shinyanga without proving with which offence, criminal case number, nor the sentence. Thus, Hearsay statement. 5. That, My Lord, The, trial court Magistrate erred in law by warranting conviction on me while the prosecution did not prove the case beyond the standard required by the law. During the hearing of this appeal, the same was argued orally and the appellant appeared in person unrepresented, while the respondent was represented by Mr. Saguya learned State Attorney. 3 Arguing, the appellant submitted that he appealed because the justice was not done to him by the trial court. He prayed this court to consider his 5 grounds of appeal. On the other side, Mr Saguya said that he will not submit on the issue of merit of the case because the records shows that there was three accused persons and 3rd accused person was found with no case to answer and he was discharged. Mr. Saguya added that, the copy of judgment shows that 1st and 2nd accused persons were found with case to answer, but trial magistrate did not say who was found guilty, convicted and sentenced. Therefore, the trial court did not comply with Section 312 (2) and (3) of CPA. Also, Mr. Saguya clarified that the said section directs that when the person is found guilty the court must mention the offence which accused was guilty and sentenced with, and if the court left him free the court must mention the offence which the court is left him free. Mr Saguya was of the view that the said judgment is contrary to Section 312 (2) and (3) of CPA and he prayed this case to be remitted to the trial court in order to show who was convicted or acquitted with which 4 offence because this case had two accused persons but the trial court was silence who was convicted and who was left free. Moreover, Mr. Saguya prayed to this court in composing the judgment to tell the whereabouts of the 2nd accused person and he prayed the same because of the strong evidence which was testified by the prosecution witness which connecting the 2nd accused and this appellant. In brief rejoinder, the appellant said he left to this court to decide what to do. Upon going through the entire records and carefully considered the submission from both sides, the main issue to be determined by this court is to whether the irregularities found in the judgment are fatal. Mr. Saguya said that, the trial records shows that there was three accused persons and the 3rd accused person was found with no case to answer and he was discharged while the 1st and 2nd accused were found with the case to answer. However, the trial court did not say who was found guilty, convicted and sentenced and therefore, contravene Section 312 (2) and (3) of CPA. 5 Also, Mr. Saguya prayed this case to be remitted to the trial court in order to show who was convicted or acquitted with which offence because this case had two accused persons but the trial court was silence who was convicted and who was left free. Moreover, Mr. Saguya prayed to this court in composing the judgment

to tell the whereabouts of the 2nd accused person and he prayed the same because of the strong evidence which was testified by the prosecution witness which connecting the 2nd accused and this appellant. Before I respond to this issue, let's me quote what happened in trial court regarding to case to answer, conviction and sentence. At page 5 & 6 of the typed judgment reads that; - "This marked the end of evidence from prosecution. The ruling of the court found but that a case to answer was made against the 1st and 2nd accused, the 3rd accused was found without a case to answer. He was discharged, addressed in terms of section 232 of the Criminal Procedure Act Cap 20 RE 2022, the first and second accused were affirmed and sworn, they presented their defence" At page 8 of the typed judgement at bottom reads that: "From the foregoing and considering the evidence on records I find the case against the accused to have been proved beyond reasonable doubt and as such, I find the accused guilty and proceed to convict him accordingly" E. P. KENTE Senior Resident Magistrate 21/6/2024 Moreover, at page 9 of the same typed judgment regarding to sentence reads that; - Sentence I have taken into account the prayers by prosecution and mitigation by the convict. I have taken into account the dictates of law creating the offence that is section 258 (1) and 265 of the Penal Code Cap 16 RE

2002. Balancing the equation, I sentenced the convict to serve four (4) years jail term. This will same purpose by determining the convict and others with similar mind not to commit offences of this nature in future. Section 265 and 258 (1) (2) of the Penal Code are strictly complied with. E. P. KENTE Senior Resident Magistrate 21/6/2024 Turn to the case at hand. I have gone through submission of both parties and the proceedings of the trial court. As I have above extracted 7 proceedings from the typed judgment. Indeed, the trial court did not say who was found guilty, convicted and sentenced between the 1st and 2nd accused. Moreover, the trial court records showed that the 3rd accused was discharged with no case to answer, while the 1st and 2nd accused had case to answer and they were accorded the right to defend their case but finally trial court did not say who was convicted or acquitted with which offence. It is trite law that once the accused is found guilty, sentence must always be preceded by conviction and relevant provisions of the law and should be indicated under the judgment. See the case of Mohamed Athuman Vs The Republic, Criminal Appeal No. 45 of 2015 (unreported). Reference can further be made to the court in the case of Amani Fungabikasi Vs 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 8 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). More over Section 312 (2) (3) of CPA, Cap 20 [R.E 2022] reads as follows;

- (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.
- (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty. (emphasis added) From the above authorities and in consideration of the submission of both parties. I agree with Mr. Saguya that the trial court did not say who was convicted or acquitted with which offence and this is contrary to section 312 (2) and (3) of the CPA and hence there was no valid judgment upon this court could uphold or dismiss. 9 In view of the aforesaid, I find and hold that irregularities found in judgment are fatal. I remit the case file to the trial court for proper re composition of the judgement. Thus, appellant one Omary Omary shall remain in custody unless otherwise decided to the contrary and arrest warrant be issued to Hamis Dotto and be arraigned before Kahama District Court for necessary orders. It so ordered. DATED at SHINYANGA this 11th day of October, 2024. R.B. Massam JUDGE 10
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Prepared on 14 October 2026 · Esheria