

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 9 OF 2012

**1. ABDALLAH MOHAMED @ KILLO
2. SAID SHABANI
3. JUMA JAFARY** } **APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania at
Tanga)**

(Mussa, J.)

dated 3rd December, 2009

in

Criminal Appeal No. 31 of 2009

.....

JUDGMENT OF THE COURT

22 & 29 June, 2012

KIMARO, J.A.:

Hajee Safari Limited is a transport company. It has buses which ply between Handeni and Tanga. On 2nd February 2007 its bus left Tanga for Handeni at 11.00 am. According to the driver, when the bus reached an area known as Sindeni it was invaded by armed bandits. Giving an account

of how the incident occurred, PW1 said when he reached Sindeni, he saw big logs laid on the road. For him to proceed, he had to stop the bus and remove the logs. As he stopped the motor vehicle so that he could remove the logs, one person approached him and pointed a gun at him. The time was around 5.30 p.m. Then another person appeared at the door, also pointed a gun at him and ordered him to switch off the engine.

The bandits then searched PW1 and removed Tshs. 1,000,000/= from his pockets. He was then ordered to sleep under the seat. The other bandits continued to harass and rob from the other passengers. According to Rashidi Mabundo, PW2 who was the bus conductor, cash T. shillings 107, 000/= and his cellular phone was taken from his pockets by the bandits. The bandits ordered each of the passengers to descend from the bus and in that process, each one was searched. The bandits took from the passengers mobile telephones worth shillings 1, 500, 000/= and cash T. shillings 7, 199,400/- . The total value of the properties and cash taken in that banditry was T. shillings 8, 699,400/=.

After the bandits completed their criminal activity they ordered the passengers to board the bus and continue with their journey to their destination. The incident was reported at Police and efforts were made by both the Police at Korogwe and Handeni Police Station to trace the culprits.

The information to assist the Police to track the bandits and arrest them came from the passengers. PW2, the bus conductor, identified the 1st appellant as being one of the persons involved in the banditry. His evidence was that he boarded the bus at Korogwe and sat at the back seat. When the driver stopped the bus after seeing the road block, the 1st appellant moved to the door and opened it for the other bandits to get into the motor vehicle. PW2 said he also identified him in an identification parade conducted on 18th April, 2007.

No. E. 648 PC Estomee (PW3) a police constable who was stationed at Kabuku Police Station then, and Gulam Mohamed Nhindi (PW4), also, employed as a driver by Hajee Bus Safari but on that day he was travelling as a passenger, were also witnesses to the robbery. The evidence of PW3 in particular was that the bandits were armed with a gun, panga and

sticks. He was able to identify the 1st and 2nd appellants. He also testified that one of the bandits fired once to the top of the bus. PW4 was robbed a mobile phone, money and some documents in a porch.

PW5, P.C. Nzagalile of Handeni Police was on 26th February 2007 assigned to investigate the case. His testimony was that some of the passenger victims explained how the robbery was committed. He said the 2nd appellant was arrested by the police at Korogwe. He was found in possession of a mobile telephone, Nokia type, and black in colour. He was taken to Handeni and when he was interrogated about possession of the mobile telephone, he failed to account for it. On further interrogation, the second appellant admitted being involved in the robbery that was committed to the Hajee bus passengers and said that the mobile telephone that was found in his possession was his share in the criminal activity. PW2 was called and he managed to identify his mobile telephone. He managed to identify it by its serial number which was recorded in the telephone.

Further testimony of PW5 was that the 3rd appellant was arrested by the police at Mkata Village on 6/2/2007 because of suspicion which was prompted by the fact of his being found in possession of a mobile telephone which was not of his class. He was taken to Handeni Police station. The mobile phone was found not to belong to the 3rd appellant but to Gulam Mohamed (PW4). PW4 identified it by its description, the serial number, and the name on the profile which read J.LUIS Carlos. The 3rd appellant is also said to have admitted involvement in the commission of the offence.

S.P. Andrew Satta (PW7) was stationed at Police Handeni as the District Crimes Officer. He too explained how the investigations about the Hajee bus banditry revealed that the appellants were the ones involved in the commission of the offence. He said the appellants were identified by some of the passengers that they were seen at the scene of crime and were also found in possession of mobile telephones which were identified by the passengers who lawfully owned them.

With these facts the appellants were charged with two offences as follows:

"1st COUNT

OFFENCE AND SECTION OF THE LAW: CONSPRANCY TO COMMIT AN OFFENCE C/S 384 OF THE PENAL CODE CAP 16 R.E.2002.

PARTICULARS OF THE OFFENCE: ABDALLAH S/O MOHAMED @ KILIO. SAIDI SHABANI, JUMA S/O JAPHARY AND SAIDI S/O OMARY @ TEMBO and other persons not in court are jointly and together charged on 2nd day of February, 2007 at about 17.15 at Kwamatuku area within Handeni District in Tanga Region, conspired together to steal 15 cellular phones valued at TSHS 1,500,000/= CASH MONEY TSHS. 7,199, 400/= ALL VALUED AT TSHS. 5, 699, 000/= being property of passengers of bus No. T. 171 AEJ.

2ND COUNT:

OFFENCE SECTION AND LAW ARMED ROBBERY C/S 287A of the Penal Code Cap.16 R.E. as amended by Act No. 4 of 2004.

Particulars of the offence: That Abdallah S/O Mohamed @ Kilio, Said s/o Shabani , Juma S/O Japhary and Said S/O Omary @ Tembo and other persons not in court are jointly and together charged that on 2nd day of February 2007 at about 17.15 at Kwamatuku area within Handeni District in Tanga Region did steal 15 cellular phones of different types valued at T. Shs. 1,500,000/= cash T. Shs. 7, 199, 400/= being the properties of passengers of a bus no. 171 AED and immediately before and after such stealing threatened the said passengers by shooting a gun in the air in order to obtain and retain the stolen property.”

The trial court was satisfied that the evidence that was led by the prosecution proved both the charges against the three appellants. Each of the appellants was sentenced to five years imprisonment for the first count and thirty years imprisonment for the second count. Both sentences were ordered to run concurrently. The conviction of the appellants was based on evidence of identification and the doctrine of recent possession. The appellant’s first appeal to the High Court was sustained on the same ground, but the appeal by Said Omary @ Tembo who was charged as the fourth accused in the trial court was allowed because the evidence of

identification against him was found to have not eliminated likelihood of mistaken identity.

Still aggrieved, the appellants have filed this appeal, challenging the propriety of the High Court sustaining their conviction and sentence.

The appellants have filed a long joint memorandum of appeal which does not easily point out clearly the points of grievances. This however, is understandable. The appellants being lay men, with no expertise in legal matters cannot be expected to have done better if no assistance was rendered to them.

At the hearing of the appeal the appellants appeared in person. They had no advocate to defend them. The respondent /Republic was represented by Mr. Joseph Sebastian Pande, learned Senior State Attorney. He was assisted by Ms Maria Mdulugu. The appellants did not have any elaborations to give in respect of their grounds of appeal. They opted to hear the opinion of the respondent first.

The learned Senior State Attorney asked the Court to order a retrial because the charge that was preferred against the appellant was defective as it contravened sections 133(1) and (2) of the Criminal Procedure Act, CAP 20 R.E.2002. He said the charge was bad for duplicity for charging the appellant first with conspiracy to commit robbery contrary to 384 and at the same time charging them with the commission of the robbery itself. He said the ground of a defective charge was raised in the first appellate court but it was not dealt with. The learned Senior State Attorney said that the particulars of the charge show that several items were stolen from different passengers. These included cellular phones and cash. But the appellants were charged in one count without even specifying which particular passenger lost which item. He said this was not proper. He further submitted that although the charge sheet shows that eleven cellular phones were stolen, evidence was brought for only four cellular phones. Citing the case of **Salum Joseph @ Tito and Two Others V R**, Criminal Appeal No.131 (unreported) the learned Senior State Attorney requested the Court to order a retrial.

On our part we do not think that this case should detain us because the charge sheet is defective. It is an omnibus charge. Taking for instance the charge of robbery, it is alleged that eleven cellular phones were stolen from passengers without specifying which particular cellular phone was stolen from which particular passenger. The evidence that was led showed that the Hajee bus had several passengers travelling from Tanga to Handeni when it was invaded by the bandits. It was important for the charge sheet to specify the particular cellular phone which each of the 11 passengers lost.

Section 133(1) reads:

"Any offences may be charged together in the same charge or information if the offences charged are founded in the same facts or if they form or are a part of, a series of offences of the same or similar character."

Section 133(2) says:

"Where more than one offence is charged in a charge or information, a description of each offence charged shall be set out in a separate paragraph of the charge or information called a count."

In the case of **Salum Joseph and two others** (supra) a gang of robbers invaded a students' hostel at Mirembe Hospital, entered each room and stole various students properties, including cash money, food stuffs and clothes. The students who fell victims of the robbery were fifteen. The appellants were charged with a single charge of armed robbery involving all the fifteen students. The Court held that:

"As the facts giving the background to this appeal have amply shown, fifteen separate and distinct offences of robbery were committed on different persons, at different persons, at different times and places. Under the provisions of S. 133 (1) of the CPA since they were founded on the same facts,

they would appropriately have been subject of the same charge. However, the robbery which was committed on each individual person ought to have been a subject of a separate count as directed in section 133 (2). This requirement assumes a greater significance in cases of robbery under sections 285 and 286 of the Penal Code."

The rationale for charging an accused person with a specific charge lies in the principle of fair hearing. The accused person must know the specific charge he is facing so that he can prepare his defence. This cannot be accomplished where the accused person faces an omnibus charge like in this appeal. The appellants are alleged to have stolen 11 cellular phones from passengers who are not disclosed. In the case of **Kauto Ally V R**, [1985] T.L.R. 183 the Court held that lumping of separate and distinct offences in a single count may render a charge bad for duplicity.

In this case it is only five victims of the robbery who testified on what they lost in the robbery. Four of them said they were robbed cellular phones and cash. The rest of the passengers did not testify. In this respect the appellants were convicted for stealing other items for which no evidence at all was led to prove that they stole the said properties. To that end justice was not done to the appellants. There was therefore no fair hearing on the part of the appellants.

Invoking powers of revision under section 4 (2) of the Appellate Jurisdiction Act, CAP 141 R.E. 2002, we quash the proceedings and judgments of the two courts below. Consequently, the conviction of the appellants on the offence of conspiracy and the omnibus charge of robbery is quashed and the sentences imposed set aside. Given the circumstances under which the offence was committed, it is in the interest of justice to order a retrial. We accordingly order a retrial of the appellants under Rules 117 (4) of the Court of Appeal Rules, 2009. Since the appellants have already spent four years in prison since they were convicted, we order the District Court of Handeni to ensure that it conducts the trial as expeditiously as possible. It so is ordered.


DATED at **TANGA** this 29th day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL