

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 64 OF 2012**

**NYIGA KINYALU.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mbeya)**

**(Wambura, J.)**

**dated the 16<sup>th</sup> day of September, 2011**

**in**

**DC. Criminal Appeal No. 17 of 2010**

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**JUDGMENT OF THE COURT**

**16<sup>th</sup> & 21<sup>st</sup> October, 2014**

**KILEO, J.A.:**

Pursuant to Criminal Case No. 128 of 2008 the appellant and one Mushangis/o Shimbiwere, on 21/05/2009, arraigned before the District Court of Mbarali at Rujewaof the charge of armed robbery contrary to section 287 A of the Penal Code Cap 16 as amended by Act No.4 of 2004. They were convicted of the offence charged. His appeal to the High Court was unsuccessful hence this second appeal.

The particulars of offence have it that on 12<sup>th</sup> June 2008 at about 3.00 hours at TAG'WANU the appellant and Mushangi Shimbi stole cash Tshs 450,000/- the property of Kasema s/o Ndaki and at or immediately before or after the time of stealing the money cut the said Kasema Ndaki on his head and Savai d/o Ng'wandu at the face near to her left eye by using a knife and panga in order to retain the said property.

The prosecution case centred mainly on identification of the appellant and his co-accused at the scene of crime. PW1 and PW2 who were husband and wife testified to the effect that they were able to identify the appellant and his companion at that time of the night as there was a kerosene lamp burning. The witnesses also said that they knew the appellant prior to the incident as he used to be their neighbour at Nyamalala.

The appellant filed a memorandum of appeal comprising of 9 grounds. These grounds may however be condensed into three main complaints:

- 1. Insufficient identification**
- 2. Contradictory testimonies and;**
- 3. Failure to consider defence.**

The appellant appeared in person at the hearing of the appeal and had no legal representation. Apart from asking us to adopt his memorandum of appeal he did not have much to tell us, understandably, he being a lay person.

The respondent Republic was represented by Mr. Stambuli Ahmed, learned State Attorney who did not resist the appeal. He submitted that identification was not watertight bearing in mind that the crime was committed at night and neither the positioning of the kerosene lamp nor the intensity of its light was given to rule out the possibility of mistaken identity. Mr. Ahmed conceded further that there were some disparities in the testimonies of the witnesses which ought to have been resolved in favour of the appellant. He pointed out for example that while PW1 said that the incident occurred at Nyamalala where they were residing, his wife PW2 testified to the effect that the incident occurred at Matoola. The charge sheet itself gave the scene of crime as being at TAG'WANU village.

After having heard the learned State Attorney on his submission the Court *suomoto* invited him to address us on the failure by the trial court to give the appellant the right to have witnesses who had earlier testified before the charge was substituted on 21/05/2009 to be re-

recalled as per dictates of section 234 (2) (b) of the Criminal Procedure Act (CPA). In response the learned State Attorney submitted that non-compliance with that provision was a fatal irregularity.

Section 234 of the CPA provides:

**"234. Variance between charge and evidence and amendment of charge**

**(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.**

**(2) Subject to subsection (1), where a charge is altered under that subsection—**

**(a) the court shall thereupon call upon the accused person to plead to the altered charge;**

**(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall**

**have the right to re-examine any such witness on matters arising out of such further cross-examination; .....**"

The record shows that before the prayer for substitution of the charge was made two witnesses who were actually the key witnesses, had already testified. The appellants were not informed of their right to demand for a recall of the witnesses who had already testified as per requirement of the above cited provision. We agree with Mr. Ahmed that failure to comply with section 234 (2) (b) of the CPA was an irregularity that rendered the proceedings before the trial court a nullity. In **Ramadhan Abdallah v. Republic** [2002] T.L.R.45 this Court held that where a charge has been substituted under section 234 the court has a duty to inform an accused of his right to demand witnesses who have already testified to be recalled. The Court in that case observed:

*".....We wish to state that the rationale for section 234 is easy to discern. A new charge is introduced after some witnesses have already testified. The new offence charged may,.....consist of new ingredients and or may attract different consequences..."*

In the instant case we have noted from the record that the prosecution had asked for a substitution of the charge in *order 'to reflect the correct amount stolen.* It is our view that a charge is drawn depending on information that is given by a complainant. The charge in

this case must have been drawn from the information that was given by the complainants and it would be proper to assume (unless proved otherwise) that initially they had given the amount of Tshs. 250,000/- as the amount stolen from them. The original record also shows that on 25/6/2008 the charge was amended to include a second accused and the same amount of Tshs.250,000/- was given as the amount stolen. We are of the settled view that under these circumstances it was necessary for the court to inform the appellant of his right to have PW1 and PW2 recalled, either to testify afresh or for further cross-examination. The appellant would then have an opportunity, among other things, to test the credibility of the witnesses.

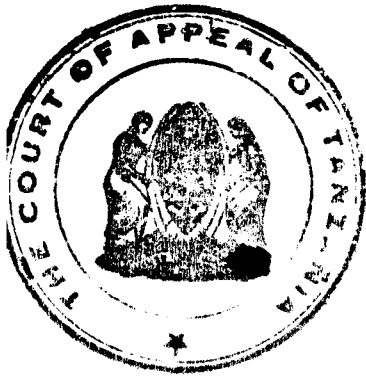
As we have already observed, failure to comply with section 234 (2) (b) of the CPA rendered the proceedings in the trial court a nullity. The proceedings before the trial court being a nullity it follows that even the appellate proceedings in the High Court were also a nullity.

Acting under section 4 (2) of the Appellate Jurisdiction Act we hereby quash and set aside all proceedings in the High Court and the trial court subsequent to the substitution of the charge including conviction and sentence.

Having nullified all the proceedings as above, the question that follows is what to do next.

It is our considered view that given the time the appellant has spent in custody and the weakness of the prosecution case as appears in the record and as pointed out by the learned State Attorney, it will not be in the interest of justice to order a re-trial. The appeal is in the event allowed. Conviction is quashed and sentence is set aside. The appellant is to be released from custody forthwith unless detained for some lawful cause.

**DATED** at **MBEYA** this 18<sup>th</sup> day of October, 2014.

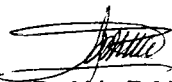


E. A. KILEO  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

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

  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**