IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 290 OF 2014

HASSAN JUMANNE @ MSINGWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

dated the 2nd day of June, 2014
in
(DC) Criminal Appeal No. 156 of 2010

JUDGMENT OF THE COURT

27th November & 1st December 2015

MASSATI, J.A.:

Following a trial for the offence of armed robbery contrary to section 287A of the Penal Code, the appellant was convicted by the District Court of Igunga, and sentenced to 30 years imprisonment, the statutory minimum. He unsuccessfully appealed to the High Court, and has now lodged this, his second appeal in this Court.

Before the trial court, it was alleged that on the 2nd day of October, 2004, at about 21.45 hours at Mbutu road within the township and district of Igunga, in Tabora Region, the appellant stole a motor vehicle make Toyota Mark II Registration No. TZS 5310, valued at Tshs. 5,000,000/= the property of RASHIDI s/o MASUNGA and at the time of such stealing threatened to murder the driver of the said vehicle with a firearm. To that charge, the appellant pleaded not guilty.

In order to prove the case, the prosecution produced four witnesses. PW1 RASHID s/o MASUNGA said that he was the owner of the motor vehicle which he entrusted to his younger brother SADICK s/o MOHAMED to use it as a taxi. (the taxi) It was given commercial No. 17. On 2/10/2004 at 9.45 p.m. he was phoned by D/C MASESA to go to the police station. He went there and found his young brother crying, and he informed him that the taxi had been stolen by the son of JUMANNE MSINGWA. PW1, D/C MASESA, LISA and HUSSENI then left in another vehicle to track down the stolen taxi. Close to Igurubi village, they found the taxi on the roadside. Apparently its engine had ceased. On inspection, they found that the vehicle had been cannibalized. He tendered the taxi as Exh. P2.

It was further in evidence from PW2 EMMANUEL SANGA that, on the fateful day, the appellant went to him and requested him to call SADICK who was driving the taxi, so that he could take him to Igunga Secondary School. When SADICK came, he (PW2) together with the appellant and his colleague left together in the taxi. On arriving at the school, the appellant asked SADICK to stop the car, where upon the appellant and his accomplice got hold of SADICK, and manhandled him to extract money from him. PW2 took to his heels, and went to report to the police. Soon after SADICK also joined him at the police station.

PW3 E5923 D/CPL MASESA received the first reports of the robbery from PW2, and SADICK MOHAMED (PW4). Then, Inspector Shillah, Sgt. Hussein, and D/C Lissa together with PW1 tracked down the taxi. They traced it at Rudeo, Mwamakano village, and confirmed PW1's testimony that it was vandalized. He also testified that the appellant was arrested on 10/3/2008.

SADICK MOHAMED (PW4) the taxi driver, testified as to how the appellant, whom he knew from before, enticed him, through PW2, to follow him to their shop, and how, the appellant and his cohort, lured him to take

them to Mbutu road. He also explained how, on arrival, the appellant and his colleague, threatened to kill him with a gun. Whereupon PW2 and PW4, abandoned the taxi for their safety, after which the appellant and his colleague, drove it away. In turn, they decided to go to report to the police. PW4 admitted that the taxi belonged to RASHID MOHAMED, although he was the one who was driving it.

On the other hand, the appellant gave a sworn testimony, and raised the defence of alibi. He told the trial court that on 2/10/2004 at about 7.00 p.m., he was at Matanda village, in Shinyanga, studying at a VETA College there. He admitted however, that he knew PW4 as he was his schoolmate, and that he was arrested on 13/3/2008, but denied any involvement in the offence.

After evaluating the prosecution and defence evidence, the trial court was satisfied that the prosecution case was proved beyond reasonable doubt, hence the conviction. On first appeal the High Court, dismissed the appellant's appeal in its entirety. Aggrieved, the appellant now seeks to impugn those findings.

The appellant raised four grounds of appeal, which could be summarized as follows. **One**, that the trial was conducted by two different magistrates, without informing the appellant of his right to resummon the witnesses. **Two**, that since the appellant was known to the victim, it is incredible that it should have taken the police four years to arrest him. **Three**, that it was wrong for the trial court to have found that the appellant made a cautioned statement to PW3, when the statement itself was not produced in evidence. And **lastly**, there is a contradiction in the evidence on record as to the true name of the owner of the motor vehicle. It was for those reasons which the appellant adopted at the beginning of the hearing of this appeal that he urged us to allow the appeal.

At the hearing of the appeal, the appellant appeared in person, but the respondent /Republic was represented by Miss Upendo Malulu, learned State Attorney.

Ms Malulu did not seek to support the conviction and sentence. In addition to the second to the fourth grounds of appeal, with which she agreed, the learned counsel also raised two other infirmities in relation to the procedure adopted in the trial of the appellant. **First**, the motor vehicle,

which was tendered as Exhibit P2, was received without first according the appellant an opportunity to comment on it. This amounted to an unfair trial, citing **MATATIZO BOSCO v R**, Criminal Appeal No. 287 of 2014 (unreported) as authority. **Second**, although after the amendment, in 1988, of section 214(1) of the Criminal Procedure Act (Cap. 20 R.E. 2002), it was now not mandatory for the successor magistrate to inform an accused of the right to resummon witnesses (as there is no such right now), nevertheless, it is mandatory for the successor magistrate to record the reasons why the predecessor magistrate could not complete the trial. Failure to do so, vitiates the proceedings. For this, she cited **MASHAKA MAGESHA v R**, Criminal Appeal No. 13 of 2014 (unreported). In this case, the trial was commenced by MALAMSHA, PDM who recorded the evidence of PW1, PW2 and PW3, but for no recorded reasons, G. M. PIUS, PDM, took over and recorded the evidence of PW4, the appellant's defence, and went on to compose the judgment. So the trial was a nullity, she urged, and so urged us to allow the appeal.

At the prompting of the Court, the learned State Attorney also conceded that by omitting to mention the name of the person who was robbed at gun point, the charge sheet was also incurably defective, and its

effect was also to nullify the entire proceedings. For that, she relied on **MATATIZO BOSCO's** case as authority. However, in view of the discrepancies in the evidence, she felt that it would not be in the interests of justice to order a retrial. Instead she prayed that the appellant be set free.

Given a chance to respond, the appellant said that he was agreeing with the respondent, and had nothing useful to add.

It is trite that one of the fundamental principles of our criminal justice is that, at the beginning of any criminal trial, the accused must be arraigned. This means that the court has to put the charge or information to him and require him to plead. Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity. (See **NAOCHE MBILE v R** (1993) TLR 253). Therefore no trial can commence if there is no charge or information to which the accused can plead. (See **DPP v ALLY NUR DIRE AND ANOTHER** (1988) TLR. 252). From these authorities it follows that just like a notice of appeal institutes a criminal appeal in the High Court and in this Court, it is the **charge** or **information** under the CPA which commences a criminal trial in a subordinate court and the High Court. It

follows therefore that a defective charge cannot commence or support a lawful trial, unless it is amended before the completion of the trial according to the law. This is the reason why in **OSWALD MANGULA v R**, Criminal Appeal No. 153 of 1994 (unreported) this Court cautioned that:

> *"no charge should be put to an accused before the magistrate is satisfied inter-alia, that it discloses an offence known to law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It shall always be remembered that the provisions of s. 129 of CPA 85 are mandatory. The charge laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the District Court on the basis thereof were a nullity since you cannot put something on nothing."*

That is how seriously, this Court has taken of the need to have a proper charge before the commencement of a trial in a criminal case.

In a number of its recent decisions, this Court has consistently held that, one of the defects in a charge which could be fatal, was the omission to include an essential ingredient of the charged offence. Although, in the past, the trend was to treat some defects in the charges as curable under

section 388 of the CPA the emerging trend now, is to treat other omissions such as essential ingredients, especially, in serious charges, attracting long prison sentences as incurable because, obscure charges are taken as being inconsistent with the minimum standards of a fair trial. (See **MUSSA MWAIKUNDA v R** (2009) TLR. 387; **MATATIZO BOSCO v R** (*supra*).

The appellant in this case was charged with a serious offence of armed robbery. In **MATATIZO BOSCO's** case, it was pointed out that, it was a serious omission, not to mention the person against whom the violence was directed. Similarly, in this case, as shown at the beginning of our judgment, the person against whom the violence was directed was only described as "the driver of the motor vehicle". The issue is whether this was a sufficient disclosure?

We think not. First, item 8 of the second schedule to the CPA, requires that the specific person be mentioned. For ease of reference, we reproduce it below:

> *"8. ROBBERY*
> *Robbery with violence, contrary to section 285 of the Penal Code.*
> *PARTICULARS OF THE OFFENCE*

A.B., on the ... day of ... in the region of ... stole a watch and at or immediately before or immediately after the time of such stealing did use personal violence to C.D."

So this was the intention of the legislator.

Secondly, in toe with the principles of fair trial, it is only logical that the accused ought to know, who he was going to face as a witness. This would enable him prepare for his defence.

So, in a number of its recent decisions, this Court has insisted that the omission to mention the person against whom the violence was applied or aimed at, was fatal and incurable. (See **ATHUMANI JUMA AND FOR OTHERS v R**, Criminal Appeal No. 37 of 2009, **KASHIMA MNADI v R**, Criminal Appeal No. 78 of 2011 **MUNZIRU AMIRI MUJIBU v R**, Criminal Appeal No. 151 of 2012, **TAYAI MISEYEKI v R**, Criminal Appeal No. 60 of 2013 and **MATATIZO BOSCO v R** (supra) (all unreported).

So, in the light of the above authorities, and the situation in the present case, we also proceed to declare that by omitting to mention, specify, or identify the person against whom the threat of the firearm was aimed, the

charge was incurably defective. This means that the whole trial proceedings and those of the High Court on first appeal are vitiated.

Although Ms. Malulu has alluded at other infirmities afflicting the proceedings of the trial court, we think the above is sufficient to dispose of this appeal, without the necessity of revisiting the irregularities pointed out by her. The only remaining issue, is, what would be the fate of the appellant after nullifying the proceedings.

Ordinarily, where the proceedings of a trial court are nullified, a retrial would be ordered. But a retrial would only be ordered if it would be in the interests of justice to do so. (See **FATEHALI MANJI v R** (1966) EA 341. We agree with the learned State Attorney that this was not a fit case to order a retrial. This is because, in this case if we order a retrial, the prosecution would not only get a chance to fill in the yawning gaps in their evidence, (such as the cautioned statement which was not received in evidence) but also cause a mental torture on the appellant who has already been in prison since 2008.

In the light of the circumstances of this case and exercising our revisional powers under section 4(2) of the Appellate Jurisdiction Act, we

quash all the proceedings of the trial court and the High Court on first appeal. We quash the conviction and set aside the sentence. We order that the appellant be released from prison immediately, unless he is held there for some other lawful cause.

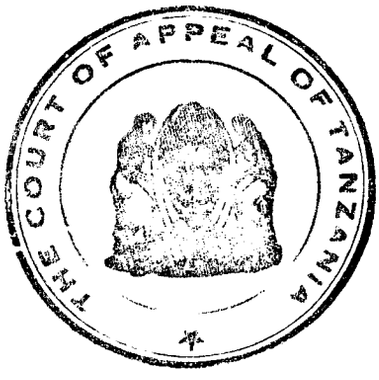
DATED at **TABORA** this 28th day of November, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL