IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK,J.A., MMILLA,J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 7 OF 2013

KANUTI S/O KIKOTI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mkuye, J.)

dated 24th day of October, 2012
in
DC. Criminal Appeal No. 8 of 2008

JUDGMENT OF THE COURT

13th & 20th August, 2015

MWARIJA, J. A.:

The appellant and four other persons were jointly charged in the District Court of Iringa with the offence of Armed Robbery contrary to sections 287 A and 285 of the Penal Code, Cap. 16 of the Revised Edition 2002. According to the charge sheet filed in the District Court, the particulars of the offence reads as follows:

" That Kanuti s/o Kikoti, Hussein s/o Thabit, Kassim s/o Mwenge,Mikidadi s/o Kusiga @ Africa and Omary s/o Raphael @ Machela are jointly and together

charged on 15th day of July, 2008 at about 21:30 hrs at Kitawanya Village within the Rural District and Region of Iringa did steal Tshs. 100,000/= The property of one Jailos s/o Zengela Immediately after such stealing did use actual violence by threatening with a gun in order to retain the said property."

After a full trial, the appellant was found guilty as charged. He was consequently sentenced to 30 years imprisonment term. As for the other four persons who were jointly charged with the appellant, the learned trial Resident Magistrate found that the evidence against them was insufficient to find them guilty of the offence. They were therefore acquitted.

The facts giving rise to this appeal can be briefly stated as follows: On the 15th July, 2008 at about 22:00 hrs, Jailos Zengela (PW2) was at his shop with his wife. He was in the process of closing the shop and his wife was already out of the shop premises. Before PW2 had closed the shop however, three persons arrived there under the pretext of buying cigarettes.

Since however, they had a different motive, while one of them entered into the shop premises, the other persons remained outside. They then suddenly forcefully restrained PW2's wife from movement or doing anything. At the same time, the one who was in the shop premises ordered PW2 to remain silent.

Realizing that those persons were in fact robbers, he quickly took a *panga* (bush knife) which he kept in the shop and used it to cut that person on his face. Finding himself overcame by PW2, the injured person ordered those who were outside to shoot PW2 with a gun. They fired three bullets, one in the air and two towards the shop. One of the bullets injured PW2 on his left leg. He then raised an alarm which was positively respondent to by villagers. Shortly after the alarm, people arrived at the scene. He told them that he cut are of the bandits on the face with a *panga.* The police also arrived as they were also informed. In the same night, the appellant who had a fresh cut wound on his face was arrested and taken to the scene. After investigation had been completed, the appellant and the other four persons who were later acquitted, were charged as stated above.

During the trial, PW2 gave evidence that he properly identified the appellant, firstly, because he had known him before the material date of the offence, secondly, that the conditions for identification in the shop were favourable because there was enough light from a hurricane lamp and thirdly, that when he was arrested, the appellant had a fresh bleeding cut wound on his face thus proving that he was the very person who was cut with a *panga* by PW2.

There was also the evidence of PW4, Hasibu Mangayela Mwofuga which is to the effect that, after hearing the gun fire in the material night of the incident, he went to the scene and participated in the manhunt for the robbers and that he managed to arrest the appellant who was bleeding from his face as a result of a cut wound.

The defence by the appellant was that he was arrested by peoples' militia (Sungusungu) on the material date (15/7/2008) at 20:00 hrs on suspicion of being a vagabond. That in the course of his arrest, the *Sungusungu* did hit him with a stick on his face. According to his evidence, the fresh wound found on his face was

caused by *Sungusungu* who did beat him at the time of his arrest. He however tendered a P.F. 3 which shows that the wound on his face was caused by a sharp object.

The learned Resident Magistrate believed the evidence of the prosecution witnesses and found that the prosecution had proved its case beyond reasonable doubt. He found it undisputable that the offence was committed and that according to the evidence, the appellant was properly identified as one of the persons who committed it. He was thus convicted and sentenced as stated above.

The appellant was aggrieved by the decision of the District Court and thus appealed to the High Court where his appeal was partly allowed. The learned appellate Judge found that since according to the evidence of Jailos Nzegele (PW2), the person against whom the offence was committed, there was nothing which was stolen from him in the course of commission of the offence, the charge of Armed Robbery was wrongly preferred. The learned Judge found that the act of stealing which is one of the important elements of that offence, was not established.

She therefore quashed the conviction and set aside the sentence of 30 years imprisonment and instead convicted the appellant of the offence of Attempted Armed Robbery contrary to section 287 B of the Penal Code. She consequently sentenced him to 15 years imprisonment term. Aggrieved further, the appellant has appealed to this Court.

At the hearing of the appeal, the appellant appeared in person and unrepresented while the respondent Republic had the services of Ms. Kasana Maziku, learned State Attorney. The appellant raised three grounds of appeal which can however be consolidated into two; firstly that the learned appellate Judge erred in upholding the finding of the trial magistrate that the evidence on the appellant's identification was watertight and secondly, that the learned appellate Judge erred in finding that the prosecution evidence sufficiently proved the case against him.

The appellant, who as stated above was not represented, did not make any submission in support of his grounds of appeal.

He opted to respond after the learned State Attorney had made her reply submission against the appeal. On the first ground, Ms. Maziku argued that according to the evidence, the appellant was properly identified. She submitted that according to the evidence of PW2, the appellant was known to him before and that since there was light from a hurricane lamp in the shop, it enabled PW2 to properly identify the appellant. She cited the case of **Rajabu Khalfani Katumbo v.R,** (1994) TLR 129 to substantiate her argument that light from a hurricane lamp can enable identification of a person.

She submitted further that the conditions stated in the case of **Waziri Amani v. R,** (1980) TLR 250 were met. According to the learned counsel, the evidence of identification was watertight. Relying also on the evidence of PW2 and the appellant's PF.3 which shows that the injury on his face was caused by a sharp object while in his defence he said that the injury was caused by a stick which is a blunt object, Ms. Maziku argued that this

inconsistence fortifies the evidence that the appellant was the parson who was cut with a *panga* by PW2 at the scene of crime.

On the second ground, Ms Maziku argued that the evidence tendered by the prosecution was sufficient to prove the case against the appellant as found by the High Court. According to the learned State Attorney, it was not necessary to call PW2's wife because failure to do so did not affect the weight of the evidence which was necessary in proving the case. Ms. Maziku went on to argue that, in any case, under S.143 of the Tanzania Evidence Act, Cap. 6 of the Revised Edition 2002, no specific number of witnesses is required to prove a case.

As to the appellant's complaint that the Doctor who prepared PW2's P.F 3 was not called to testify, the learned State Attorney argued that since that medical document was not admitted in evidence, there was no need of calling the author thereof. In any case, Ms. Maziku argued, the document was not acted upon in making the impugned decision. With those arguments, Ms. Maziku prayed that the appeal be dismissed.

After the learned State Attorney had closed her submission, we required her to address us on a pertinent legal point concerning the charge. According to the charge sheet which we have reproduced above, the person to whom the threat was directed was not disclosed. It was merely stated in the particulars of the offence that "*.....immediately after such stealing [the accused persons] did use actual violence by threatening with a gun in order to retain the said properties.*" The issue thus is whether such an omission to specify the person who was threatened rendered the charge sheet fatally defective.

In response, Ms. Maziku argued that although there is such a defect in the charge sheet, the fact that the High Court convicted the appellant of the offence of Attempted Armed Robbery after it had found that the evidence did not support the offence of Armed Robbery, the defect did not extend to the offence which the appellant was subsequently convicted of. According to the learned State Attorney, the defect in the charge

sheet did not affect the appellant's conviction founded on a different offence of Attempted Armed Robbery.

On his part, the appellant did not have anything useful to submit. He merely repeated the complaints which he raised in his memorandum of appeal, that PW2's wife was not called to testify He insisted that her evidence should have corroborated the evidence of PW2 that he was together with her on the material night of the offence. The appellant also raised a new issue concerning intensity of the light from the hurricane lamp which PW2 said that he used to identify the appellant.

Having considered the argument made by the learned State Attorney on the point of law raised herein, we do not with respect, agree with her that after the appellant had been convicted of the offence of Attempted Armed Robbery, the defect in the charge sheet ceased to exist. Section 287B of the Penal Code under which the appellant was convicted provides as follows:-

> " *Any person who with intent to steal anything from another person, is armed with any dangerous or*

offensive weapon or instrument or is in company of once or more persons, and in the course thereof ***threatens, or attempts to threaten to use actual violence*** *to any person commits an offence termed attempted armed robbery and on conviction is liable to imprisonment for a minimum period of fifteen years with or without corporal punishment."* *(Emphasis supplied).*

From the wording of s. 287 B of the Penal Code reproduced above, it is obviously clear that an act of threat to a person is an important element in committing the offence under that section. The charge sheet ought therefore to disclose the person to whom the threat was made or was intended to be made. This is therefore not only an important element in the offence of Armed Robbery as Ms. Maziku thought, but also in the offence of Attempted Armed Robbery.

It is trite principle of a fair trial that a person accused of an offence must know the nature of the charge facing him. This

requirement is spelt out under S. 132 of the Criminal Procedure Act, Cap. 20 of the Revised Edition 2002. The provision states as follows:

> *" Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged,* ***together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*** *(* Emphasis supplied).

The effect of an omission to disclose, in a charge of Armed Robbery, a person to whom a threat was made, has been considered by this Court in a number of cases. Some of the cases are **Kashina Mnadi v. R,** Cr. Appeal No. 78 of 2011 and **Magesa Chacha Nyakibili and Another v. R**, Cr. Appeal No. 307 of 2013 (both unreported). In both cases, the Court relied on its previous decision in the case of **Isidori Patrice v. R,** Cr. Appeal

No. 224 of 2007 (unreported). In that case, the Court stated as follows on the effect of such omission:

> *" 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. 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 with the necessary* ***mens rea.*** *Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the*

essential facts of the offence and any intent specifically required by law."

Where therefore, a charge of Armed Robbery or, as we have found above, Attempted Armed Robbery, does not disclose the important element in question, the charge sheet is rendered fatally defective, the result of which the proceedings and judgment based on it become a nullity. In the result and for the foregoing reasons, we find it appropriate to invoke our revisional jurisdiction under s.4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 and hereby quash the proceedings and judgment of the trial court. That leaves the proceedings and judgment of the High Court without a base. The same are for this reasons, also hereby nullified and the sentence is set aside.

What follows for our consideration is the issue whether or not we should order a retrial or release the appellant from prison. In **Magesa Chacha Nyakibali and Another v. R,** Cr. Appeal No. 307 of 2013, the case in which the charge of Armed Robbery was found to be fatally defective, we said that we could ended up

in discharging the appellants or ordering a retrial. We declined to order a retrial because the evidence relied upon by the prosecution in that case was insufficient. Of course, we heed to the principle stated in the case of **Fatahali Manji v. R,** (1966) EA 343. In that case, the erstwhile Court of Appeal for Eastern Africa stated as follows:-

> *"in general a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the trial. Even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice requires."*

Having considered the principle as stated in the **Fatahali Manji case** (supra), we find that under the particular circumstances of the present case, it will be in the interest of justice to order a retrial. In arriving at our decision, we have considered the nature of the evidence on which the appellant's conviction was founded. We have also considered the fact that the appellant has been in prison for only 6 years from the date of his first conviction by the trial court. Although his term of imprisonment was reduced by the High Court following his substituted conviction, he has not served a substantial part of 15 years imprisonment term imposed by the High Court.

We find therefore that the interest of justice constrains us to order that the record be remitted to the trial court for retrial of the appellant after an appropriate action by the Director of the Public Prosecutions in ensuring that the charge sheet filed in the District Court is in accordance with the law. We wish to add that in case the new trial leads to the appellant's conviction, the time he has

spent in prison serving the sentences imposed on him by the two courts below be taken into account when sentence is passed.

It is so ordered.

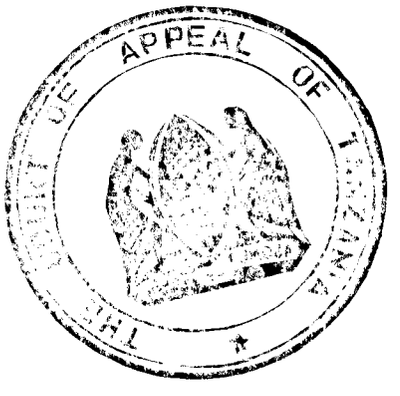
DATED at **IRINGA** this 19th day of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL