

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MTWARA**

**(CORAM: MBAROUK, J.A., MJASIRI, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 205 OF 2015**

**JUMBO ABDALLAH .....APPELLANT**

**VERSUS**

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

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

**(Mzuna, J.)**

**Dated the 12<sup>th</sup> day of September, 2014**

**In**

**Criminal Appeal No. 3 of 2014**

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**JUDGMENT OF THE COURT**

6<sup>th</sup> & 9<sup>th</sup> October, 2015

**MMILLA, J. A.:**

The appellant was charged in the District Court of Masasi in Masasi District in the Region of Mtwara with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code Cap. 16 of the Revised Edition, 2002. He was found guilty, convicted and sentenced to 20 years imprisonment. His appeal to the High Court at Mtwara was unsuccessful. Besides upholding conviction, the first appellate court enhanced the sentence from 20 years to 30 years imprisonment. Still aggrieved, he instituted the present appeal which is against both, conviction and sentence.

The facts of the case were briefly that, on 19.1.2012 at around 22:00 hours, the appellant allegedly hired PW1 Abdalla Ally to take him to Mbonde village where he intended to pick his girl friend. Unfortunately he missed her. Upon that, the appellant instructed PW1 to drive back to Rest Street in Masasi town. He obliged. On arrival at "TOKURA" area, the appellant asked PW1 to stop the motor cycle so that he could attend a call of nature. Again, PW1 conformed. Suddenly, the appellant held PW1 by the neck and a struggle ensued. At the same time, two other persons emerged from the bush and began assisting the appellant to roughen up PW1. They pushed him down, grabbed the motor cycle and hurriedly vanished with it. Left with no better option, the complainant marched to town and reported the incident to police who commenced investigation. The appellant was subsequently arrested at Nyangao and charged of that offence.

The appellant's defence consisted of a general denial that he did not commit the alleged offence. As already pointed out, his first appeal to the High Court was unsuccessful, hence the present appeal.

Before us, the appellant appeared in person and was not represented, while Mr. Ladislaus Komanya, Senior State Attorney and Ms Nunu Mangu, learned State Attorney represented the respondent Republic.

The appellant's memorandum of appeal has raised five grounds, which we find, after carefully considering them to boil down to two major grounds; **one** that, he was not properly identified by the prosecution witnesses particularly PW1, PW3 and PW4; and **two** that, he was wrongly convicted because he was not found with the allegedly stolen motorcycle.

At the commencement of the hearing, he elected for the Republic to submit first and chose to say something thereafter if need would arise.

At the outset, Ms Nunu Mangu informed the Court that they were supporting conviction and sentence. She submitted that there was strong prosecution evidence to establish that the appellant was the one who, together with two other persons attacked and robbed PW1 the motorcycle. However, when asked by the Court to comment on the competence or otherwise of the charge, particularly in so far as it did not indicate the person against whom the force was directed to, she conceded that it was indeed defective because it did not indicate the person against whom the violence was directed to as contemplated by section 285 of the Penal Code. She added that it was a fatal irregularity such that it could not be cured by the provisions of section 388 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). On the basis of that, she urged the Court to invoke its revisional powers conferred

by section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (AJA) with a view of quashing the proceedings and judgments of the two lower courts and set aside the sentence thereof. She proposed however, for the Court to order retrial on the basis of her previous submission that there was strong evidence to establish appellant's guilty if the case starts ***de novo***.

On his part the appellant, who is a lay person had nothing substantial to submit in this regard. However, he prayed for the Court to decline the Republic's request to order a retrial on a ground that the evidence of the prosecution was weak and unreliable. He elaborated that he was not properly identified by PW1, PW2 and PW4, similarly that none of them gave any description regarding the clothes he wore on the alleged date. Worse more, he submitted, he was not found with the allegedly stolen motorcycle.

On our part, we fully agree with Ms Mangu that the charge is defective because it did not indicate the person against whom the violence was directed as required by section 285 of the Penal Code. We also agree with her that it is a fundamental irregularity which cannot be cured under section 388 of the CPA. Thus, under powers conferred on us by section 4 (2) AJA, we quash the proceedings and judgments of both courts below, set aside the sentence and

order appellant's release from prison unless otherwise he is being continually held for some other lawful cause.

As already pointed out, Ms Mangu urged us to order retrial. On the other hand however, the appellant asked the Court to decline that request. The immediate issue is whether or not it is appropriate to order retrial in the circumstances of the present case.

To begin with, there are a range of cases in which the Court has given guidelines to be followed when it is confronted with such a situation. The cases include those of **Fatehali Manji v. R.** [1966] E. A. 343, **Lazaro s/o Stephano v. Republic** Criminal Appeal No. 9 of 2013 CAT, **Sultan Mohamed v. Republic**, Criminal Appeal No. 176 of 2003 (both unreported), among others. In **Lazaro s/o Stephano v. Republic** (supra), in which the Court quoted with approval the decision in **Fatehali Manji v. R.** (supra), the Court held that:-

"In general a retrial may be ordered only where 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 purposes of enabling the prosecution to fill in gaps in the prosecution in its evidence at the**

**trial...each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires.”** [Emphasis is provided].

In the circumstances of the present case, we are of the settled mind that a retrial would not serve any useful purpose. At any rate, it is likely to give the prosecution chance to fill in gaps in their case. We are saying so because after carefully analyzing the evidence on record, we agree with the appellant that the prosecution evidence did not prove the case against him beyond reasonable doubt. There are two reasons for this as we will proceed to illustrate hereunder.

In the first place, we agree with him that he was not properly identified. The record is clear that the offence was committed at night. However, neither PW1, or PW3 nor PW4 explained how they managed to identify him, especially so when it is considered that nobody said that there was any light at the scene of crime. Also, none of the three prosecution witnesses described how he was clad on the day they allegedly saw him at Rest Street where he hired PW1 to send him to Mbonde village.

Secondly, the appellant was not arrested with the allegedly stolen motorcycle. We think that had he been found with the said motorcycle that

could have boosted the prosecution's case otherwise wanting evidence of visual identification.

It is on that basis that we hold the view that to order a retrial in the circumstances of this case, may occasion injustice for it cannot be ruled out that the prosecution may seize the chance to fill in gaps in their case. For these reasons, we decline the invitation by Ms Mangu to order retrial.

Order accordingly.

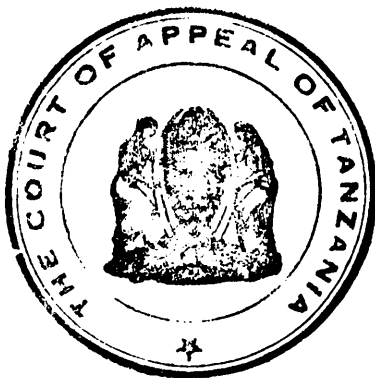
**DATED** at **MTWARA** this 8<sup>th</sup> day of October, 2015.


M.S. MBAROUK  
**JUSTICE OF APPEAL**

S. MJASIRI  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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



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