IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 219 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

ALLY JUMA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 11th day of June, 2014
in
Criminal Appeal No. 6 of 2014

.....

JUDGMENT OF THE COURT

4th & 9th December, 2015.

RUTAKANGWA, J.A.:

The appellant and nine others were arraigned before the District Court of Nyamagana District ("the trial court") on a charge of Armed Robbery. The particulars of the charge partly informed the appellant and his co-accused that:-

> *"..... they did steal cash money Tshs.19,000/= the property of JAMES s/o MANGA and **immediately before or immediately** after such stealing did threatened (sic) one JAMES s/o MANGA cut (sic) him with scissor in **Order to obtain** the said money."*
>
> *[Emphasis is ours].*

We find ourselves enjoined to observe in passing at the outset that as far as the accused persons were concerned, the charge was embarrassingly defective. If any threat or violence was ever used in order to obtain the said Tshs.19,000/=, then it could not have been immediately after the said obtaining. All the same, we shall return to this issue later if there will be any pressing need to do so.

After that defective charge had been read out to the 10 accused persons, they all pleaded not guilty with the exception of the 1st accused (Charles s/o Ghati), who pleaded guilty, was convicted and sentenced to thirty (30) years imprisonment. A full trial followed for the rest.

At the conclusion of the prosecution case, the trial court held that the 3rd, 4th, 8th and 9th accused persons had no case to answer as none "of the witnesses mentioned their real involvement with the case." They were accordingly acquitted.

The prosecution case, we have gathered, rested on the admittedly incoherent evidence of the said James s/o Manga, who testified as PW1.

PW1 Manga had told the trial court that on 2nd May, 2010, at around 13:30 hrs., he was at Kigoto area having a bath. At that hour, two men

turned up and one of them took his clothes, searched the pockets and made away with his Tshs.19,000/= without any fuss. As he gave chase to that thief, the second man, *"hid himself in the stone."*

PW1 Manga further testified that as he *"was passing nearby" he "was arrested",* thrown on the ground and beaten. Some unidentified people arrived there and as he was narrating to them what had befell him, he heard a woman saying *"aliyeibiwa yuko mlimani na aliyeiba amekamatwa",* meaning "the victim of the theft is on the hill and the thief had been arrested." He, then immediately rushed to where that woman was. The said woman requested him to go to the 10-cell leader, which he did.

At the 10-cell leader he found the thief under arrest and on being interrogated he admitted the theft. They took the thief back to the scene of the crime and after returning the stolen money he was released. After his release, however, according to the account of PW1 Manga, the thief picked up stones and began throwing the stones at them. As that was not enough, the thief *"called his group of twelve men and they"* too, pelted them with stones. This forced the ten cell leader to call the police, who on arrival arrested the entire group. The ten-cell leader was one Homy Juma, who testified as PW2.

The policemen who responded to the call by PW1 Manga were led by PW3 No. D 3674 D/CPL. Agdius. His evidence was short and to the effect that on the material day he was detailed to go to *"mountain pimbi Kitogo"* to render help as *"there were group of men causing trouble."* On arrival there, the complainant told them that they *"had been invaded by a group of men who had escaped to the mountain."* They combed the area and managed to arrest a group of ten men, who were subsequently charged.

The remaining five accused persons gave sworn/affirmed evidence. The appellant, who was the 2nd accused, testified that he was a porter and was arrested on the material day as a vagabond while on his way home from work at Kirumba Mwaloni. He denied being involved in any robbery.

The judgment of the trial court is patently lacking in analysis. The learned trial Resident Magistrate, after reproducing the evidence of each witness, concluded thus;-

> *"After that the court was moved to find out whether the accused persons were involved in armed robbery.*
>
> *From the evidence adduced this Court though believing that the event occurred at Kigoto Kirumba but this court is not sure or less convinced on the manner which the*

other accused were involved but the second accused one Alli Juma.

The other accused were just arrested at the scene of event but the reasons of arrest were not clearly put out. I say so since at the place there were many others doing their activities.

On the second accused this court is moved to believe that he was involved in the event. PW1 told the court that the accused (second) was the one who fell him down and beat him. The time was day time and at that time this court finds that there was no room for mistaken identity. Moreever this court believed PW1 as the witness of truth and he was telling the truth. His demeanour was unshakable. In that regard this Court do convict the second accused and acquit the rest of the others."

The appellant's attempt to prove his innocence in an appeal to the High Court proved abortive. The appellant had seven (7) grounds of complaint. The 7th ground read thus:-

"The learned Trial Magistrate had erred in law and fact to ignore and/or took no cognizance upon the appellant's strong defence offered before the court in contrast to few weakness of the prosecution case in favour of the appellant as expressed in the case of ***LOCKHART SMITH*** *V. R . [1965] E.A. 211 - 217".*

Indeed, the trial court never considered the defence case at all.

In her short judgment, the learned first appellate judge did not address herself to this 7th ground of appeal at all. She only concentrated on the issue of identification and determined the appeal against the appellant on that basis only. In our respectful opinion that was where the learned first appellate judge fell into an error of law. This is because identification was a non-issue. The appellant never disputed being arrested at the scene of the crime. He had accounted for his presence there and had given the reason for his arrest.

Both courts below, in our settled minds, had a duty to consider the defence of the appellant even if they ended up rejecting it but with reasons. It is trite law of respectable antiquity that failure to consider the defence is fatal and may lead to a conviction being vitiated: See, for instance, **LOCKHART SMITH** (supra), **ELIAS STEVEN V. R.** [1982] T.L.R. 313, **HUSSEIN IDD & ANOTHER V. R.** [1980] T.L.R. 283, **SIZA PATRICE V. R.** (CAT), Criminal Appeal No. 19 of 2010, **LUHEMEJA BUSWELO V. R,** (CAT), Criminal Appeal No. 164 of 2012, and **JEREMIAH JOHN V. R.** (CAT) Criminal Appeal No. 416 of 2013 (both unreported), etc.

In the case of **JEREMIAH JOHN** (supra), the Court succinctly held thus:-

"The common ground of complaint to the effect that the appellants were not given a fair hearing, in that their defence evidence was not considered at all, and where it was, not adequately, affords us a good starting point of our discussion. We are of this view because our Constitution, in Article 13 (6) (a) compels all courts to give accused persons a fair or full hearing when determining their rights. It is now settled law that this duty is not discharged when the court does not consider either at all or adequately, the defence case.

.....

We may as well point out clearly, for the avoidance of doubt, that at the time of ***LOCKHART's*** *decision, the duty to give an accused person "a fair hearing" was yet to become a constitutional imperative."*

In most of the cases referred to above the convictions were quashed. In **LUHEMEJA,** the Court quashed the conviction for robbery and set the appellant free. In the case of **JEREMIAH JOHN**, the Court also quashed the conviction for murder, but given the gravity of the charge, a re-trial was ordered.

In the present appeal, there is no gainsaying that neither the trial court nor the first appellate court considered the appellant's defence at all. This was a fatal irregularity which was readily conceded by Mr. Hemedi Halidi

Halfani, learned State Attorney for the respondent Republic. The appellant was denied his constitutional right to a fair trial. His conviction was, therefore, perverse on account of total failure to consider his defence and cannot be cured at this stage under either the provisions of section 388 of the Criminal Procedure Act or Rule 115 of the Tanzania Court of Appeal Rules, 2009. This being a second appeal, this Court cannot step into the shoes of the trial court. We do not know what would have been the decisions of the courts below if they had considered his defence. We are tempted to believe that they might have reached a different verdict. We are supported by the evidence on record.

Although PW1 Manga had the audacity to tell the court that he had had his money stolen by a rowdy group of men and that was why he sought police intervention, he was belied by PW3 D/Cpl. Agdius. The latter witness unequivocally told the trial court that they were sent to the scene of the crime to render assistance as there was a *"group of men causing trouble".* It goes without saying, therefore, that PW1 Manga's first information report did not include a complaint of theft. The evidence of PW3 D/Cpl. Agdius was further to the effect that when they arrived at the scene they were told by the *"complainant"*, presumably PW1 Manga or PW2 Homy, that *"they had*

been invaded by a group of men who escaped to mountain (sic)." Again there was no report of the theft, leave alone armed robbery. It is increasingly obvious to us, therefore, that the crime of armed robbery, which is becoming fashionable these days, might have been an afterthought in order to teach a lesson those trouble makers. Furthermore, we have found no cogent evidence linking the appellant with the accused Charles Ghati, as the evidence of PW1 Manga on this is very incoherent, a fact conceded by Mr. Hemedi Halifani.

In view of the above discussion and holdings, we allow this appeal in its entirety, quash the conviction and set it aside as well as the prison sentence and order the immediate release from prison of the appellant unless he is otherwise lawfully held.

Under normal circumstances we would have penned off after allowing the appeal. However, we shall go further in order to establish if Charles Ghati was properly convicted of armed robbery. The brief facts given by the public prosecutor include the claim to the effect:-

> *"That on 02/05/2010 at 13.30 hrs the accused steal (sic) Tshs.19,000/= from James Manga and immediately before or after the accused used scissor to obtain or retain the money."*

It is clear from the above extract that up to the arraignment stage the prosecution was yet uncertain of the time the violence was used and for what ends. But this uncertainty was cleared by the evidence of PW1 Manga.

According to PW1 Manga, at the time of stealing the money no violence or threat of it was used by the Charles Ghati. Ghati took to his heels after stealing the money. When being arrested by PW2 Henry, he offered no resistance but freely confessed to have stolen Tshs.19,000/=, which he surrendered and was released. The act of throwing stones, according to PW1 Manga, came subsequently when he was no longer retaining the money. So going by the evidence of PW1 Manga and PW2 Homy, Charles Ghati did not use violence against any of them immediately before or during the course of stealing the money in order to obtain it nor did he use violence immediately thereafter in order to retain the stolen money. He could not have used violence to retain what was not in his possession. It is clear, therefore, that his conviction for armed robbery was illegally obtained by the prosecutor's deliberate distortion of the facts, taking advantage of the accused's ignorance, hence our earlier observation that charges for armed robbery are becoming fashionable these days even when there is no

justification. The only offence committed by Charles Ghati, in our considered opinion, was simple theft c/s 265 of the Penal Code.

Under these circumstances, the interests of justice constrain us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141, to quash and set aside the conviction for armed robbery and sentence of thirty years imprisonment. We substitute therefor a conviction for theft under section 265 of the Penal Code. We sentence Charles Ghati to a term of imprisonment of three (3) years, which will result in his immediate release from prison unless he is otherwise lawfully held.

It is so ordered.

DATED at MWANZA this 8th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL