IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 341 OF 2015

ROBERT MNENEY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha

(W.N.B. Kapaya, PRM-Extended Jurisdiction.)

Dated 31st day of May, 1999
in
Criminal Appeal No. 41 of 1998

JUDGMENT OF THE COURT

19th & 24th October, 2016

MJASIRI, J.A.:

This appeal arises from the decision of the District Court of Arusha. The appellant Robert Mneney and three others, Kassim Daudi, Willy Zakayo and Babueli Merola @ Rolex were charged with armed robbery contrary to sections 285 and 286 of the Penal Code. The appellant was convicted as charged and was sentenced to thirty (30) years imprisonment. Kassim Daudi, Willy Zakayo and Babueli Merola were acquitted by the trial court. Aggrieved by the conviction and sentence, the appellant appealed to the

High Court. His appeal was heard by Hon. Kapaya, PRM Ext. Jurisdiction, and the same was dismissed, hence his second appeal to this Court.

It was alleged by the prosecution that on July 8, 1997 at about 14.30 hours, the appellant together with three others invaded the Precision Bureau de Change located at India Street within the Municipality of Arusha and did steal cash comprising of USD 9620, Kenya Shs.69,000/= DM 400 and UK Sterling Pounds 8650, the property of Precision Bureau de Change and immediately before or after such stealing did use a pistol and two motor vehicles with Registration No. TZG Nissan Blue Bird and ARF 138 Peugeot 404 in order to obtain the said property. The appellant and his accomplices were alleged to have stormed into the Bureau de Change building which also had other offices. A gun was allegedly pointed at the cashier of the said Bureau and, the door was pushed open and money was emptied from the safe. According to the cashier one Mathew Massawe (PW1) he was too frightened by the holdup that he could not identify the person who robbed him. The invasion caused a frenzy and the other employees ran amok and some hid in the manager's office. People were asked to lie down. PW4, Ephata Materu who was the owner of the Bureau de Change, testified that he was informed by one of the fruit vendors stationed outside the building that four people escaped using a motor

vehicle with Registration No. TZG 9900. The motor vehicle belonged to an Asian businessman, who had employed the appellant as a driver to ferry his children to and from school.

The prosecution called five (5) witnesses in support of their case. Unfortunately Captain Moses Materu, the son of PW4, died in a plane crash and did not therefore testify. His evidence was admitted in Court under section 34B (2) of the Evidence Act, [Cap. 6 R.E. 2002].

The appellant was linked to the robbery because the motor vehicle he was driving TZG 9900 was connected to the robbery. It was alleged that TZG 9900 was used as a getaway car. The appellant opted not to present any defence. The appellant has been in custody for nearly seventeen (17) years.

The appellant initially lodged a four - point memorandum of appeal. He subsequently filed four additional grounds of appeal. The grounds of appeal are reproduced as follows:-

1. *That, the first appellate court erred in law and fact for not holding that the charge was defective.*
2. *That, the trial court wrongly and unlawfully admitted the dying declaration of the late Captain Moses Materu.*

3. *The first appellate court erred in law and in fact when it failed to scrutinize the evidence of PW4 and PW5 and Exhibit P3 and hence arrived at a wrong decision.*
4. *The prosecution failed to prove the case beyond reasonable doubt.*

The following additional grounds of appeal were subsequently presented in Court by the appellant:-

1. *The conviction and sentence imposed upon me was unconstitutional under Article 13 (6) (c) of the 1977 Constitution of the United Republic of Tanzania.*
2. *The sentence imposed upon me was contrary to sections 285 and 286 as I was supposed to be sentenced to fifteen (15) years for the offence of armed robbery.*
3. *The sentence of thirty (30) years I am serving presently was not in effect when the alleged offence of armed robbery was committed on July 8, 1997.*
4. *That the punishment of thirty (30) years was a result of the amendment under G.N. No. 269 of 2004 introducing section 287 A.*

At the hearing of the appeal the appellant appeared in person and did not have the benefit of legal representation. The respondent Republic was represented by Mr. Khalil Nuda learned Senior State Attorney, assisted by Ms Amina Kiango.

The learned Senior State Attorney did not support the conviction. He reached this decision for various reasons. **Firstly,** the first appellate court, lacked jurisdiction. He submitted that under section 45 of the Magistrates' Courts Act, [Cap. 11 R.E. 2002] (the Act), the High Court may direct that an appeal instituted in the High Court be transferred and heard by a Resident Magistrate with extended jurisdiction under section 45 (1) of the Act. However there must be a transfer order. In the absence of the transfer order, as in the instant case the proceedings conducted by the Principal Resident Magistrate were null and void.

Secondly, the charge was defective. The particulars of the charge did not meet the requirements under section 285 of the Penal Code. It did not disclose the essential elements. The person to whom the actual force or threat was directed was not mentioned in the charge sheet.

Thirdly, the evidence on record was very weak and was not sufficient to establish the charge. No witness identified the appellant.

The only evidence linking the appellant with the offence is that of PW4, the owner of the Bureau de Change. According to his testimony, he was informed by a street vendor who was outside the Bureau that the

robbers escaped using a motor vehicle with Registration No. TZG 9900. However the street vendor was not called to testify. Mr. Nuda submitted further that there is no concrete evidence to support the charge. In view of the defective charge and the lack of sufficient evidence it would not be appropriate to request for a rehearing of the appeal by a magistrate with proper jurisdiction. He asked the Court to quash the judgments and proceedings of both the first appellate court and the trial court.

The appellant on his part, being unrepresented did not have anything useful to add. He simply agreed with the learned Senior State Attorney.

In relation to whether or not the appeal was properly transferred to Hon. W.N.B. Kapaya, Principal Resident Magistrate with extended jurisdiction, it is evident from the record that no formal order of transfer was made thereby offending the provisions of section 45 (2) of the Act. It then follows as the night follows day that the proceedings and judgment before Hon. Kapaya were a nullity. The way forward would have been to quash the proceedings and judgment of the first appellate court under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], (the Appellate Jurisdiction Act). This means that the appellant's appeal to the High Court is still pending, and the next step would be to remit the record

to the High Court with directions to proceed with the appeal according to law. However in view of the other anomalies as submitted by the learned Senior State Attorney, we would not follow this course of action. See **Edward Miti v. Republic**, Criminal Appeal No. 80 of 2014 and **Nyawaje John and Two Others v. Republic**, Criminal Appeal No. 14 of 2007 both unreported).

On the defective charge, the law is settled. This Court has held in a number of cases that the particulars of the offence must state and include all the essential ingredients to the offence, failure of which would render the charge to be defective. See - for instance, **Juma Azizi v. Republic**, Criminal Appeal No. 58 of 2010 and **Ally Ramadhan @ Dogo v. Republic,** Criminal Appeal No. 45 of 2007 (both unreported) and **Musa Mwaikunda v. Republic** (2006) TLR 387.

Section 285 of the Penal Code under which the appellant was charged provides:-

> *"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or*

to prevent or overcome resistance to its being stolen or retained is guilty of robbery."

In **Zefania Siame v. Republic**, Criminal Appeal No. 250 of 2011 (unreported), the Court in making reference to section 285 had this to say in relation to a defective charge:-

> *"There is no gainsaying that from the wording of the above provision,* ***it is essential that the person against whom the threat or use of violence is directed be mentioned in the charge sheet.***
>
> *[Emphasis provided].*

Section 135 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] provides the modality in which the charges are to be framed. Section 135 (a) (iv) of the CPA provides as follows:-

> *"the forms set out in the Second Schedule to this Act, or forms conforming to them as nearly as may be, shall be used in cases to which they are applicable; and in other cases forms to the like effect, or conforming to them as nearly as maybe, shall be used, the statement of the offence and the particulars of offence being varied according to the circumstances in each case."*

Item 8 of the Second Schedule provides a format for a robbery charge. It is reproduced as follows:-

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

See **Zefania Siame** (supra).

In view of the requirements under section 135 of the CPA, failure to mention the person against whom the use of threat or violence was directed rendered the charge defective. The proceedings and judgment of the trial court and the first appellate court were therefore a nullity.

In addition to the above mentioned anomalies the learned Senior State Attorney submitted that the conviction of the appellant was against the weight of the evidence. The evidence linking the appellant with the crime was far fetched and did not place the appellant at the scene of crime. The vendor who gave the information on the Registration number of the motor vehicle alleged to have been used by the robbers was not called as a witness.

It is trite law that the burden of proof in a criminal case is always on the accused person and it never shifts (section 3 (2) (a) of the Evidence Act [Cap. 6, R.E. 2002].

For the reasons stated hereinabove, given the defective charge and the lack of sufficient evidence, acting under the powers vested in this Court under section 4 (2) of the Appellate Jurisdiction Act, we hereby quash the proceedings and judgment of the trial court and the first appellate court and set aside the sentence of 30 years meted out to the appellant. The appellant should be released from custody forthwith unless otherwise lawfully held.

Order accordingly.

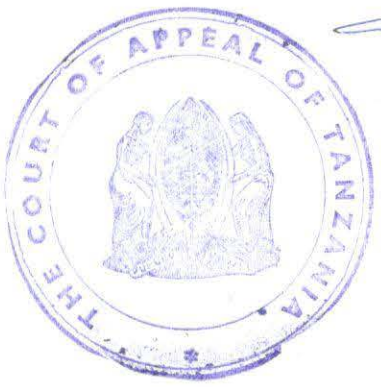
DATED at **ARUSHA** this 21st day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL