

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 328 OF 2015

**ALLY IDD.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT**

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

(Maghimbi, J.)

**Dated 8th day of December, 2014
in
Criminal Session No. 88 of 2014**

JUDGMENT OF THE COURT

10th & 15th February, 2016.

MBAROUK, J.A.:

The appellant, Ally s/o Idd appeared before the Resident Magistrate's Court of Arusha at Arusha on 02-05-2013 to answer two counts of Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] as amended by section 10A of the Written Laws (Miscellaneous amendments) Act No. 3 of 2011. The trial magistrate convicted the appellant as charged and sentenced him to thirty (30) years imprisonment for each count and ordered the

sentence to run concurrently. Dissatisfied, the appellant filed his appeal to the High Court (Maghimbi, J.) where his appeal was dismissed in its entirety. Undaunted, the appellant has preferred this second appeal.

In this appeal, the appellant filed a memorandum of appeal containing three grounds of appeal but conveniently can boil down to only one ground of complaint that the prosecution failed to prove its case against the appellant beyond reasonable doubt.

At the hearing, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Mr. Juma Ramadhani, learned Principal State Attorney.

In the course of hearing the appeal, the Court inquired as to whether the trial magistrate complied with the mandatory requirements under section 228 of Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) which requires a trial magistrate to record the accused plea as nearly as possible in the words he used. To

appreciate what happened on that day, the record of proceedings reads as follows:-

"Date: 01/10/2013

CORAM: D. C. Kamuzona – DRM

Prosecution: Ms. Kasala

Accused: Present

Interpreter: Florence

Ms. Kasala: *The matter is for hearing but before we proceed with hearing, I pay to substitute charge.*

Accused: *We are ready to proceed.*

COURT: *Prayer granted. Charge read over and explained to accused person who is asked to plea thereto.*

Accused: 1st Count

2nd Count."

As shown above the appellant/accused's plea was not recorded. Having noted the defect, the Court took trouble to look

at the original file, but we found the same defect appeared as well. In the decision of this Court in the case of **Khalid Athumani v. Republic** [2006] T.L.R. 79 at page 83, the procedure has been stated after an accused person is brought before a court for the first time after being charged and quoted the case of **Adan v. Republic** [1973] EA 445 at page 446 where the erstwhile East African Court of Appeal stated as follows:-

"Where a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of

guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

In the instant case, the record of appeal shows that the trial magistrate has failed to record the appellant's plea after the two counts were read over to him.

Apart from that, the Court also found that the particulars of the offence of the two counts of Armed Robbery failed to indicate as to whom force was used. To appreciate what exactly appeared in the particulars of the two counts, we reproduce the charge sheet for ease of reference:-

*"IN THE DISTRICT COURT OF ARUSHA/ARUMERU DISTRICT
AT ARUSHA*

CRIMINAL CASE NO. 139 OF 2013

REPUBLIC

Versus

ALLY S/O IDD @ HAMISI GUERAA @ HAMISI IDDI

CHARGE

1ST COUNT

STATEMENT OF OFFENCE

*ARMED ROBBERY: Contrary to Section 287 A of the
Penal Code, [CAP 16 R.E. 2002], as amended by
Section 10A of the Written Laws (Miscellaneous
amendments) Act No. 3 of 2011.*

PARTICULARS OF OFFENCE

ALLY S/O IDD @ HAMIS GUERAA @ HAMISI IDDI on the 28th day of March, 2013 at Majengo ya Chini area within the City and Region of Arusha, did steal one Mobile Phone make ITTEL valued at Tanzanian Shillings sixty thousand (T.Shs. 60,000/=), the property of one JOHN S/O PASCHAL and immediately before and after such stealing did use Machete in order to obtain and retain the said property.

2ND COUNT

STATEMENT OF OFFENCE

ARMED ROBBERY: Contrary to Section 287 A of the Penal Code, [CAP 16 R.E. 2002], as amended by Section 10A of the Written Laws (Miscellaneous amendments) Act No. 3 of 2011.

PARTICULARS OF OFFENCE

ALLY S/O IDD @ HAMIS GUERAA @ HAMISI IDDI on the 28th day of March, 2013 at Majengo ya Chini area

within the City and Region of Arusha, did steal one Mobile Phone make BLACKBERRY valued at Tanzanian sixty hundred thousand (T.Shs. 600,000/=), the property of one FRANCISKA OCTAVIAN and immediately before and after such stealing did use Machete in order to obtain and retain the said property.

Signed at Arusha this 1st day of OCTOBER 2013

A. Kassala
STATE ATTORNEY

According to section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2002 it provides that:-

"132. 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 charge."

In terms of the above cited provision, sufficiency and clarity of the particulars of the charge against the person charged is a pre-requisite. The aim is to adequately inform the accused person the actual offence leveled against him and to place him/her in a better position to prepare his/her defence.

In the instant case, as shown in the particulars of the offence in the two counts of armed robbery the charge sheet has failed to show on whom the violence was directed. In the case of **Tayai Miseyeki v. Republic**, Criminal Appeal No. 60 of 2013 (unreported), this Court made the following observations:-

"...Looking at the particulars of the charge sheet which was preferred against the appellant as indicated at the beginning of this judgment, compared to the particulars of the offence of robbery as shown in the

second schedule, it does not show against whom the shotgun was used for purposes of retaining the sheep that was stolen. That was a serious omission. In every charge there must be a victim of the offence. In this case the sheep that was alleged to have been stolen was alleged to belong to Mountain side farm. That mountain side farm has owners. Since the charge sheet alleged that a shotgun was used to retain the stolen sheep, it was vital for the charge sheet to show against whom that shotgun was used. Because of the omission the charge is defective and cannot be cured by section 388 (1) of the Criminal Procedure Act."

It is evident that looking at section 287A of the CPA, one of the essential ingredients is threat or use of violence against the person on whom the robbery was committed. The stance, has been emphasized in the case of **Munziru Amri Mujibu and another v. The Republic**, Criminal Appeal No. 151 of 2012 (unreported) which quoted the case of **Kashima Mnadi v. Republic**, Criminal Appeal No. 285 of 2011 (unreported), where this Court stated as follows:-

"Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed."

In response to the defects raised by the Court, the learned Principal State Attorney submitted that as correctly pointed out by the Court, the trial magistrate has failed to record the appellant's plea when the two counts were read over to him. He said, that irregularity renders the whole proceeding a nullity. He further submitted that ordinarily when the proceedings are found to be nullity, the Court is obliged to order a re-trial. However, he said as shown herein above, the charge sheet contained a major defect of not showing in the particulars of the offence of armed robbery on whom the machete was directed to. In the circumstances, he urged us to find the defect in the charge sheet as fatal and cannot be cured. He therefore urged us to invoke the powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act (the AJA) and revise the proceedings and not ordering a re-trial as the defect in the Charge Sheet is fatal and cannot be cured. In addition to that, he prayed for us to quash the conviction and set aside the sentence imposed on the appellant and finally order for his release.

On his side, the appellant had nothing to add, he just prayed for him to be released.

As pointed herein above, in the course of hearing the appeal we noted that the appellant's plea was not recorded by the trial magistrate. That is contrary to the requirements of section 228 of the CPA and the directions made by the decisions of this Court in the case of **Khalid Athumani** (*supra*) and **Adan** (*supra*). Such a defect renders the whole proceedings before a trial court a nullity. When the proceeding of a case are found a nullity, ordinarily the higher court orders a re-trial. However, we fully agreed with the learned Principal State Attorney that as far as there is another defect found in the Charge Sheet which is fatal and cannot be cured, the remedy is to invoke the revisional powers conferred upon us under section 4(2) of AJA and quash the conviction and set aside the sentence imposed on the appellant.

In the upshot and for the foregoing reasons we quash all the proceedings, the conviction, set aside the sentence in both the Resident Magistrate's Court and the High Court and order the

release of the appellant from prison forthwith unless otherwise he is lawfully held in connection with another lawfully cause.

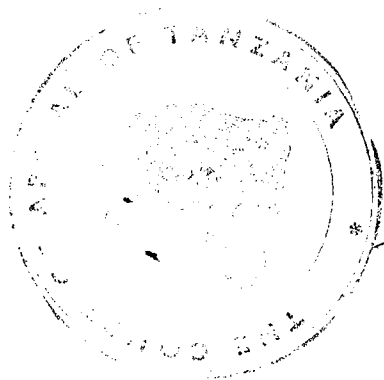
DATED at ARUSHA this 11th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL