IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 283 OF 2015

1. ALBANUS ALOYCE
2. MARCO IBRAHIMU ..... **APPELLANTS**

VERSUS

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

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

(Munuo, J.)

Dated the 26th day of March, 2002
In
DC Criminal Appeal No. 133 of 2001

.....

JUDGMENT OF THE COURT

18th & 21st July, 2016.

KILEO, J. A.:

The appellants Albanus Aloyce and Marco Ibrahim were aggrieved by the decision of the High Court of Tanzania sitting at Moshi (Munuo, J. as she then was), in DC Criminal Appeal No. 133 of 2000 which sustained a conviction of robbery with violence contrary to sections 285 and 286 of the Penal Code. The High Court had also enhanced to 30 years imprisonment the sentence of 15 years imprisonment which was imposed by the trial court. In the exercise of their statutory right they preferred this appeal before the Court.

Marco Ibrahim passed away before his appeal came up for hearing and in terms of Rule 78 (1) of the Court of Appeal Rules 2009, it abated.

It was alleged, at the trial court, that on 31/3/2001 at around 11.00 at night a group of armed bandits who included the appellant invaded and attacked one David Tarsis making away with his cow and three goats. Conviction was on the basis of identification evidence.

The appellant filed a memorandum of appeal consisting of seven grounds. Six of the grounds centered mainly on the insufficiency of evidence for sustaining a conviction while the second ground was based on violation of section 234 (2) (a) of the Criminal Procedure Act (CPA).

At the hearing of the appeal the appellant appeared in person with no legal representation while the respondent Republic was represented by Ms. Elianenyi Njiro, learned Senior State Attorney.

When we called upon the appellant to address us he opted to have the learned Senior State Attorney address us first. Ms. Njiro supported the appeal right away. Conceding to ground number two in the memorandum of appeal she submitted that the record indeed showed that there was non-compliance with section 234 (2) (a) of the CPA. She urged us to allow the appeal on that ground, quash conviction and set

aside the sentence. She also submitted that in view of the insufficiency of the evidence that was on record she would not ask for a retrial.

The matter need not detain us. It is a cardinal principle of the criminal justice system that whenever an accused person is brought before the court on a criminal charge the substance of that charge must be read over and explained to that person who shall be required to plead thereto. There can be no valid trial where an accused person has not pleaded to a charge that is brought against him or her. This principle is enshrined in section 228 (1) of our CPA which states:

> **"228. Accused to be called upon to plead**
>
> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."**

The principle is reinforced under section 234 (1) and (2) (a) of the CPA which is the subject of the matter before us. The provision states:

> **"234 Variance between charge and evidence and amendment of charge**
>
> **(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge**

as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;"

There is no gainsaying that where a charge is substituted the former or earlier charge ceases to exist, hence the compulsion to call upon an accused to plead to the altered charge.

In order to appreciate the issue at hand it befits that we reproduce the proceedings of 24. 5. 2001 in the trial court. Below is partly what transpired on that date.

24. 5. 2001

Coram: W. Nathan PDM

3rd Accused: Present

Insp. Masilamba for prosecution

PP: We have arrested 3rd accused and want to substitute another charge found on the same fact.

Substituted charge read over and explained to 3rd accused. States Not true. Entered as PNG....."

It is obvious that on 24/5/2001 the appellant who appeared as the second accused at the trial was not in court. When the case came up for hearing on 29/05/2001 the trial magistrate went straight on to take down the testimonies of the prosecution witnesses without reading over the substituted charge to the accused persons. It follows therefore that the appellant was tried on a charge that was neither read over to him nor pleaded to. Without mincing words we agree with both the appellant and the learned Senior State Attorney that the trial which led to his conviction was a nullity. It being a nullity we hereby quash and set aside all the proceedings of the High Court which hinged on null proceedings as well as the proceedings of the trial court beginning from 24. 5. 2001. Consequently, conviction flowing from the null proceedings is quashed and sentence is set aside.

Ms. Njiro advised us that though under normal circumstances in a case of this nature a re-trial would be ordered, but in the circumstances of this case it would not be in the interest of justice to do so as the evidence on record was so deficient.

We entirely agree with Ms Njiro. There is indeed no evidence on record that could justify a conviction for the criminal charge that the appellant was initially faced with even if a re-trial was to be ordered. Conviction of the appellant was based on identification by a single witness which was done through torchlight in a dark rainy night. This could hardly suffice to sustain a conviction.

Before we are done with this matter we wish to comment on another anomaly that we noted. The proceedings show that after each accused had testified his co-accuseds were not given an opportunity to put questions to him. An accused person who testifies becomes a witness and if there are other persons who are charged along with him they have a right, we believe, to put questions to him/her. This is essential because there may be times when an accused may give incriminatory evidence against his/her co-accused(s) in which case a denial of the right of cross-examination by the concerned accused could result in a miscarriage of justice. Judicial officers are enjoined to take heed of this.

The above said and done, we allow the appeal by Albanus Aloyce. As already pronounced above, conviction entered against him is quashed

and sentence set aside. We order his immediate release from prison unless he is therein held for lawful cause.

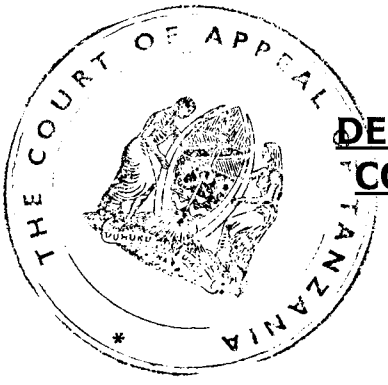
Dated at **Arusha** this 19th day of July 2016

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL