

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 290 OF 2015

1. AMIRI JUMA SHABANI
2. STEPHEN JOSEPH MMASI
3. AVITI MICHAEL MARASHA @ OLOMI } APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwingwa, J.)

Dated the 12th day of June, 2015
in
DC. Criminal Appeal No. 23 of 2012

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JUDGMENT OF THE COURT

19th & 21st July, 2016

MASSATI, J. A.:

The appellants were charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code. They were sentenced to 30 years imprisonment each. Their appeals were dismissed entirely by the High Court sitting at Moshi. This is therefore their second appeal.

It was alleged before the District Court of Moshi that the appellants and three others, jointly and together, on the 3rd day of August, 2009, at

02:00 hours, at Kibosho Mkorongo village, within Moshi Rural District, in Kilimanjaro Region, did steal cash (Tshs) 560,000/=, one mobile phone, (Nokia) worth (Tshs) 120,000/= one mobile phone Motorola worth (Tshs) 70,000/=, all total valued at Tshs 750,000/= the property of one EVARIST s/o PAUL MASSAWE and immediately before and after that did use a gun in order to obtain and retain the said property.

At the hearing of this appeal the appellants appeared in person. They adopted their joint memorandum of appeal comprised of six grounds as well as their joint written submission, but opted to first hear from the respondent before they exercised their right to expound on their grounds of appeal.

The respondent/Republic was represented by Mr. Felix Kwetukia, learned State Attorney. He did not mince words in supporting the appeal. Briefly, he submitted that the appellants were convicted on the basis of identification evidence by PW1, PW2 and PW3, which was materially, contradicted by that of PW5 on whether or not there was sufficient light which enabled the witnesses to see and identify the alleged robbers. Therefore, such material contradictions raised serious doubts in the prosecution case, they are to be resolved in favour of the appellants. As such, the appeal should be allowed and they should be

set free. Mr. Kwetukia also referred us to our own decision in **HAROD SEKACHE @ SALEHE KOMBO vs R.**, Criminal Appeal NO. 13 of 2007 (unreported) on the question of identification in unfavourable conditions.

We then asked him to address us on the propriety of the charge sheet which was also raised by the appellants in their second ground of appeal. Upon a careful reading of the charge sheet, the learned counsel conceded that the charge sheet was defective for failure to disclose the person against whom the violence was used. On that ground, he submitted that the trial was a nullity and deserves to be nullified, but that in view of what he had earlier on submitted, he was not inclined to pray for a retrial.

On their parts, the appellants agreed with the submissions of the learned State Attorney, and had nothing to add.

This appeal will be disposed of on a narrow compass.

There is no dispute that the particulars of the offence set forth in the charge sheet do not disclose against whom the gun was used. For ease of reference, the charge sheet is reproduced in full below:-

CHARGE

STATEMENT OF OFFENCE: *Armed Robbery Contrary to Section 287 A of the Penal Code Cap 16 R.E. 2002. As amended by Act No. 4 of 2004 and Rectified by Government Notice No. 269 of 2004.*

PARTICULAR OF OFFENCE: **AMIRI S/O JUMA SHABNAI, STEPHEN S/O JOAWPH MMASI, MWAWU S/O APLINARY CHAMI, FLORENCE S/O PETER MALYA, SERVULI S/O AUGUST MSAKI @ PEPSI, AVITI S/O MAIKO MARASHA @ OLOMI** *are jointly and together charged on the 3rd day of August, 2009 at about 02:00 hours at Kibosho – Mkorongo village, within the Rural of Moshi in Kilimanjaro Region, did steal cash money Tshs. 560,000/=, one Mobile phone make Nokia worthy Tshs. 120,000/=, and one mobile phone make Motorola worth Tshs. 70,000/= all total valued at Tshs. 750,000/= the property of one EVAREST S/O MASSAWE, and immediately before and after the act did use a gun in order to obtain and retain the said properties.*

Signed at Moshi this 05th day of February, 2010.

Sgd.
STATE ATTORNEY

Section 132 of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA) requires every charge or information to contain such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. Section 135 (a) (iv) of the CPA enjoins the prosecutors to use the forms set out in the second schedule to the CPA and to conform to them as nearly as may be. The prescribed form for the charge of robbery is set out in Form No. 8 of the Fourth Schedule to the CPA, which is reproduced below for ease of reference.

8. ROBBERY

PARTICULARS OF OFFENCE

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

From the above, it is clear that, it is essential to allege in a charge of robbery, the use of personal violence to a named person. In a number of decisions, this Court has pronounced that where a charge of armed robbery omits to mention such ingredient, the charge is incurably defective. (See **KASHIMA MNADI vs R.**, Criminal Appeal No. 78 of 2011 (unreported)).

The appellants' appeal is therefore meritorious. On account of the aforementioned irregularity, we exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, and revise the proceedings and judgments of the courts below. We nullify, and quash the proceedings and convictions and set aside the sentence imposed upon the appellants. In view of the discrepant evidence on record it would not be in the interests of justice to order a retrial. We shall not make such an order. Instead, we order the immediate release of the appellants from prison unless they are held herein for some other 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. FUSI
DEPUTY REGISTRAR
COURT OF APPEAL