

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 47 OF 2012

IBRAHIM ALLY KISWABI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Msuya, J.)

Dated the 18th day of August, 2011

In

Criminal Appeal No. 8 of 2003

JUDGMENT OF THE COURT

1st & 22nd June, 2016

MUSSA, J.A.:

In the Resident Magistrate's Court of Dar es Salaam, at Kisutu, the appellant along with four others were arraigned upon a charge sheet that was comprised of two counts. In the indictment, the appellant stood as the first accused; whereas his co-accused persons were, namely, Hussein Ibrahim Sharif, John Gasper Kimario, Albogast Gasper Kimario and Chuli Amani who were, respectively, the second to the fifth accused persons.

On the first count, the appellant and his co-accused persons were jointly arraigned for armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Revised Laws. The allegation was that on the 8th March, 1998, at Sinza area, within Dar es Salaam Region, the appellant and company jointly stole a Toyota Land Cruiser Motor vehicle registration No. TZL 7838, a rifle gun with twenty bullets, a sonny radio camera, a Minolta camera and an assortment of documents, all of which were properties of a certain Wernel Protreff. It was further alleged that immediately before such stealing, the perpetrators wielded a pistol at the said Werner Protreff in order to obtain the stolen properties.

The second count was preferred in the alternative, as against the fourth and fifth accused persons only. The accusation laid at their door was for receiving suspect property, contrary to section 311(1) of the Penal Code, Chapter 16 of the Revised Laws. The prosecution allegation was that on the 8th March 1998, at Soweto area, within Moshi District in Kilimanjaro Region, the two accused persons received the referred Toyota Land Cruiser, knowing or having reason to believe that the same was stolen or unlawfully acquired.

To support its case, the prosecution featured eight witnesses and one documentary exhibit which was comprised in a cautioned statement and,

thereafter, it rested its case. When called to make their defence, the appellant along with the second and fourth accused persons individually gave affirmed testimonies, whereas the third and fifth accused persons also individually gave sworn evidence. At the conclusion of the trial, the presiding Resident Magistrate found the second and third accused persons not guilty and acquitted them. Conversely, the appellant was convicted as charged, whereas the fourth and fifth accused were acquitted for the first count, but they were also convicted for the alternative count. Upon conviction, the appellant was sentenced to a term of thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Msuya, J.). He is presently aggrieved upon a memorandum of appeal which contains six points of grievance, namely:-

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- 1. That, your Lordship both trial Magistrate and learned appellate Judge grossly erred in law and fact by taking into account the un-procedure visual identification evidence PW2 (DOCK) and that of PW3, PW4, PW5 and PW6 as they were accorded an opportunity to see the appellant at the police station before he was arraigned in court*

as no parade officer was summoned nor parade form PF. 186 tendered for verification of the court to fortify the purported identification parade in compliance with rules and regulations of the P.G.O No. 231.

- 2. That, the learned appellate judge erred in law and facts by considering Exhibits P.1, P.2 and P.3 against the appellant tendered by PW1 and admitted un-fairly and un-procedural as he was not accorded an opportunity by the court to object or to say otherwise as per mandatory requirement of trial court.*
- 3. That, the learned appellate judge grossly erred in law and fact by miss-assessing the evidence of 3^d accused before relying or considering it as one of the basis for conviction.*
- 4. That, the learned appellate judge erred in law and fact by sustaining conviction and sentence meted in the appellant in a case where he did not take a plea up on substitution of the later charge.*

5. *That, the learned appellate judge grossly erred in law and fact by convicting the appellant in a case which was poorly investigated and prosecuted.*
6. *That, the learned appellate judge grossly erred in law and fact by not assessing the prosecution evidence objectively or exhaustively before embracing it as basis for conviction. "*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Mohamed Salum, learned Senior State Attorney, who was being assisted by Ms. Selina Kapanga, learned State Attorney. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the respondent. For his part, Mr. Salum supported the appeal, more particularly, the fourth ground of appeal in which the appellant contends that the conviction was vitiated by the fact that the trial court did not take and record the appellant's plea on the substituted charge. As we shall shortly demonstrate, the contention is compellingly valid and since the same suffices to dispose of this matter, we need not belabor on the factual setting giving rise to the appellant's conviction.

It is common ground that the charge sheet which culminated in the conviction of the appellant was introduced as a substituted charge a good deal later after the commencement of the trial. More precisely, the charge was introduced by the prosecution on the 4th November 1998, whereupon the learned presiding Magistrate acknowledged it thus:-

"Court: *The substituted charge is filed. It has been noted that the 1st and 2nd accused have been withdrawn from the charge sheet.*

Sgd: L.J. Mbuya, RM

4/11/1998 "

Nonetheless, the trial court did not read over the substituted charge to the remaining accused persons and neither did it take their plea. On a subsequent day (the 2nd February, 1999), when the case was ready for hearing, the trial court did, actually, read over the substituted charge to the accused persons by way of a reminder but, ironically, the court did not proceed further to take the pleas of the accused persons who included the appellant.

Thus, it was against the foregoing background that the trial was held, concluded and, as hinted upon, culminated in the conviction of the appellant.

Before us, Mr. Salum criticized the trial court for not taking and recording the appellant's plea on the substituted charge. In the result, the learned Senior State Attorney urged that the entire trial was vitiated. To this submission, Mr. Salum sought to rely on the case of **Thuway Akonaay Vs The Republic** [1987] TLR 92 (CA). The learned Senior State Attorney did not, however, press for a retrial, the more so as the appellant has been in prison custody for more than fifteen (15) years. When asked to make a rejoinder, the appellant fully supported the submissions of the learned Senior State Attorney.

For our part, we fully subscribe to the view taken by Mr. Salum to the effect that the omission to take the appellant's plea on the substituted charge was fatal to the entire trial proceedings. In this regard, we need do no more than reiterate what was said by the Court in **Thuway Akonaay** (supra):-

"It is mandatory for a plea to a new charge to be taken from an accused person, failure to do that renders a trial a nullity."

Thus, on account of the omission to take the appellant's plea on the substituted charge, the entire trial which resulted in his conviction was rendered a nullity. We, accordingly, set aside the entire proceedings of the

two courts below but, given the fact that the appellant has served a substantial portion of his prison term, we refrain from ordering a retrial.

In the end result, the appellant should be released from prison custody forthwith, unless if he is held there for some other lawful cause. It is so ordered.

DATED at DAR ES SALAAM this 15th day of June, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL