

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

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

CRIMINAL APPEAL NO. 220 OF 2014

**SAMWEL MARWA ROSWE @ MASABA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT (Appeal
from the decision of the High Court of Tanzania
at Mwanza)**

(Bukuku, J.)

**dated the 11th day of June, 2015 in
Criminal Appeal No. 4 of 2014**

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JUDGMENT OF THE COURT

18th & 21st October, 2016

MASSATI, J.A.:

The appellant and another person whose first appeal was allowed by the High Court (Mwangesi, J.) was convicted of two counts of conspiracy to commit an offence, and armed robbery, contrary to sections 384 and 287 A of the Penal Code. His appeal was dismissed in its entirety by Bukuku, J. on 11/6/2015. He has now come to this Court in a second appeal.

The brief facts that led to the present appeal are that one LILIAN w/o ABIHA EMMANUEL PW1, runs a grocery at her house at Nyangoto village. One Agaton s/o Agustino Katikilo was her employee. On 20/6/2011 two persons visited the grocery. First at 2.00 p.m. and then at 8.00 p.m. (20.00 hrs.). When they visited the second time, they were armed with guns and local made

weapons. By use of the said arms, they took away 2 cell phones (Nokia) worth 140,000/= belonging to Katikilo and several airtime vouchers, worth Tshs. 125,000/=, one handset worth Tshs, 100,000/= and a bottle of gin called Konyagi worth Tshs. 15,000/= the properties of PW1. In the course of the robbery a watchman one MWIKABWE S/O MWITA WAGARA was injured. After this, the bandits vanished.

The prosecution case was that the appellant was one of the bandits. So, after some investigations, the appellant and his colleague aforementioned were charged with three counts. The charges looked like this:

CHARGE SHEET

NAME AND TRIBE OR NATIONALITY OF THE

PERSON(S) CHARGED

1. SAMWEL S/O MARWA ROSWE @
MASABA TRIBE: KURYA
AGE:45 YRS
OCCP: PEASANT
RELG: CHRISTIAN
RESD: KETAWASH VILLAGE
2. MARIBA S/O CHACHA GESABO MARWA @ AMOS
MARIBA TRIBE: KURYA
AGE: 43 YRS
ACCP: PEASANT

RELG: CHRISTIAN

RESID: KANGARIAN

VILLAGE 1ST COUNT:

STATEMENT OF OFFENCE: Conspiracy to commit offence c/s 384 of the penal code CAP 1 Vol. 1 of the laws.

PARTICULARS OF OFFENCE:

That SAMWEL S/O MARWA ROSWE @ MASABA and MARIBA S/O CHACHA GESABO MARWA @ AMOS MARIBA are jointly and together charged at the unknown time, date and place within Tarime District in Mara region did conspire to commit offence to wit armed robbery.

2ND COUNT:

STATEMENT OF OFFENCE: Armed robbery c/s 287A of the penal code CAP 16 Vol. 16 of the laws.

PARTICULARS OF OFFENCE: that SAMWEL S/O MARWA ROSWE @ MASABA and MARIBA S/O CHACHA GESABO MARWA @ AMOS MARIBA are jointly and together charged on 20th day of June 2011 around 20:00 hrs. at Nyamongo area within Tarime District in Mara region did steal two mobile phones made NOKIA valued at Tshs. 140,000/= the property of one AGATON S/O AUGUSTINE KATI KILO and immediately

before or after stealing did use fire arm and bush knife to obtain or retain such property.

3RD COUNT:

STATEMENT OF OFFENCE: Armed Robbery c/s 287A of the penal Code CAP 16 Vol. 1 of the laws.

PARTICULARS OF OFFENCE: that SAMWEL S/O MARWA ROSWE @ MASABA and MARIBA S/O CHACHA GESABO MARWA @ AMOS MARIBA are jointly and together charged on 20th day of June 2011 at Nyamongo area within Tarime District in Mara Region did steal air time vouchers valued at Tshs. 100,000/= cash money Tshs. 125,000/= one mobile phone valued at Tshs. 100,000/= and six bottles of Konyagi valued at Tshs. 15,000 all making the total value of Tshs. 340,000/= the property of LILIAN W/O ABIHA EMMANUEL and immediately before or after stealing such properties did use fire arm and bush knife to obtain or retain such properties.
STATION

..... DATE

PUBLIC PROSECUTOR

After a total of 8 prosecutions witnesses and 10 documentary exhibits, the trial Court found that the appellant had a case to answer. He gave a sworn evidence and denied committing the offence. As we do not intend to go into the merits of the appeal, we do not think that it is necessary to restate the

substance of all the evidence on record. Suffice if to say that he was nevertheless convicted and sentenced to 5 years in the first count, and 30 years imprisonment in the third count. Hence the present appeal.

At the hearing of the appeal, the appellant appeared in person ready to argue his 6 grounds of appeal. The said grounds of appeal are as follows:-

MEMORANDUM OF APPEAL

1. That, the essential ingredient of robbery i.e. stealing was not proved by any of the claimed victims indicated in the charge sheet.
2. That, the charge sheet is silent as to who was threatened, thus the definition of robbery as stipulated by the penal code cap 16 was no met.
3. That, identification parade as was conducted has not conformed to the statutory requirements which are contained in police general order (PGO) No. 232.
4. That, the alleged caution statement of the appellant has wrongly admitted and relied upon as though retracted by the appellant no enquiry conducted to test its voluntariness or otherwise.
5. That, the alleged caution statement was recorded out of time (the basic period available to interview a suspect) in thus a violation to the CPA Cap 20 R.E. 2002.

6. That, identifying witnesses failed to describe the appellant during and after the incident.

Before he started to argued his appeal, he allowed the State Attorney to argue first, reserving his right of reply.

The respondent/Republic was represented by Mr. Hemed Hamad Halfani, assisted by Ms. Subira Mwandambo both learned State Attorneys. Mr. Halfani took the lead.

In a brief but focused submission, Mr. Halfani submitted that the respondent supported the appeal on the strength of the first two grounds of appeal. Starting with the second ground, he submitted that in a charge of armed robbery, it was essential to disclose the name of the person to whom the violence was perpetrated. In support he referred us to section 132(1) and item 8 of the Second Schedule to the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA) and the decision of BARTAZAR GUSTAF & ANOTHER V.R. Criminal Appeal No. 266 of 2014 (unreported).

On the first ground, Mr. Halfani submitted that it was essential to prove the theft (stealing) before proving robbery. He referred us to the decision of this Court in DICKSON LUVANA V.R Criminal Appeal No. 1 of 2005 (unreported). He went on to submit that in this case, there was no evidence of the theft.

On account of those irregularities, Mr. Halfani prayed that we exercise our revisional powers under section 4(2) of the Appellate Jurisdiction Act Cap 141

R.E 2002 (the AJA) to revise and quash the proceedings of the lower courts. He also prayed that there be no order for a retrial as the evidence on record was deficient. He thus asked us to set the appellant free.

The appellant joined hands with the respondent's submission and had nothing useful to add.

This appeal may be decided on a very narrow compass, premised from the second ground of appeal.

There is no dispute that as it reads, although the name of the owner of the properties allegedly stolen is mentioned in the count of robbery, the identity of the person against whom the violence was directed is not disclosed. This is contrary to the sample form prescribed for preferring such offence as provided under Form No. 8 to the Second Schedule to the CPA that sets out the manner of stating particulars for the offence of robbery.

ROBBERY

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PARTICULARS OF OFFENCE

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

This is the form which is prescribed for use under section 135 (a) (iv) of the CPA, wherein it is directed that any related charges must conform to them as nearly as possible.

It is now trite that omission of such an essential ingredient in the particulars of the offence of armed robbery, renders the charge fatally defective, leading to a failure of justice, which cannot be cured under section 388 of the CPA (See ISDORI PATRICE V.R. Criminal Appeal No. 224 of 2003, ZUBERI OPESHUTU V.R., Criminal Appeal No. 31 of 2003, KASHIMA MNADI V.R., Criminal Appeal No. 78 of 2011, all cited is BALTAZAR GUSTAF AND ANOTHER V.R., (supra)

For the above reason which we think, is sufficient to dispose of this appeal, we are decidedly of the view that the charge laid at the appellant's doors were so defective that the trial emanating therefrom was rendered unfair. We therefore, exercise our revisional powers under section 4(2) of the AJA and revise and quash all the proceedings of the two courts below. We quash the conviction and set aside the sentence.

Ordinarily after nullifying the trial proceedings, an order of retrial would follow. But in deciding whether or not to order a retrial some principles have to be taken into consideration. The general principle is that a retrial will be ordered when the original trial was illegal or defective. It would not be ordered when conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. The ultimate principle is that a retrial should only be made if it is in the interests of justice to do so each case depending on its circumstances. (see, FATEHALI MANJI V.R., (1966) EA 543).

In the present case the appellant was charged with conspiracy and armed robbery. Since his co accused at the trial was acquitted on first appeal, the charge of conspiracy which requires at least two persons to convict would not stand. As for the offence of robbery, stealing is also one of the essential ingredients. As Mr. Halfan has submitted, evidence of that element in the present proceedings is wanting as PW1's evidence falls far short of proving theft. In the circumstances, an order of retrial would only work more injustice to the appellant, as it would amount to a persecution, because it would allow the prosecution to fill in gaps in its evidence.

We accordingly order that he be released from custody forthwith and set free, unless he is held there for some other lawful cause.

DATED at MWANZA this 19th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL