

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 494 OF 2015

1. ISSA SUFIANI MALUA 2. PETER PASCALI 3. GODFREY MTAUMA GOMA	} APPELLANTS
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VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Aboud, J.)

**dated the 23rd day of November, 2012
in
HC. Criminal Appeal No. 51 of 2012**

JUDGMENT OF THE COURT

6th & 16th December, 2016
MZIRAY, J.A.:

Following a trial for the offence of Armed Robbery c/s 287 A of the Penal Code, the appellants were convicted by the District Court of Morogoro and each sentenced to serve 30 years in prison, the statutory minimum sentence. They unsuccessfully appealed to the High Court and have now lodged this second appeal in this Court.

The appellants filed separate Memoranda of Appeal consisting several grounds. For the reasons that will shortly become apparent, we do not need to go into those grounds, nor do we need to list them here. We also need not narrate the evidence that was adduced at the trial.

The appellants appeared in person unrepresented and Mr. Othman Katuli, learned Senior State Attorney represented the respondent Republic. The appellants however, fully adopted what was contained in their Memoranda of appeals but opted to initially hear the submission of the learned Senior State Attorney.

On his part, the learned Senior State Attorney supported the appellants' appeal. He pointed out that the charge sheet to which the appellants were arraigned was fatally defective as it did not explain to whom the threat was directed. He referred this Court to the decision in the case of **Baltazar Gustaf and Antony Alphonse v. R.**, Criminal Appeal No. 266 of 2014 (unreported) as authority in which this Court held that failure to show to whom the threat was directed is fatal and vitiated the entire proceedings. Apart from the charge sheet being defective, the learned Senior State Attorney informed this Court that at

the trial there was yet another procedural irregularity at page 41 of the record on change of Magistrates. He submitted that it was not proper for the second Magistrate to take over and continue with the trial without assigning any reason for the change of hands. He said that this was contrary to section 214(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 and that the irregularity was incurable.

The learned Senior State Attorney however submitted that even if the charge and the procedures were in order, still, the evidence on record is scanty to sustain the appellants' conviction. He pointed out that the evidence of PW1 and PW2 who were key witnesses in the incident did not in fact identify the culprits.

On their part, the appellants agreed with the views expressed by the learned Senior State Attorney and had nothing useful to add.

On our part, looking at the particulars of the offence, we entirely agree with the learned Senior State Attorney that the name of the person against whom the gun or the fire arm was directed in order to steal and retain the stolen property is not mentioned. This means the particulars of offence in this case have failed to give reasonable information as to

the nature of the offence charged against the appellants as required by section 132 of the CPA, which provides as follows:

*"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 charged.**"*

[Emphasis supplied.]

It is now settled that a person accused of an offence must know the nature of the charge facing him as per the principle of fair trial. The prosecution and the trial court are duty bound in making sure that the charge against the appellant is correct before the commencement of the hearing. To emphasize the duty of the prosecution to file a charge correctly, this Court in the case of **Mohamed Kamingo v. R.**, [1980] TLR 279 observed as follows:

"It is the duty of the prosecution to file the charge correctly, those presiding over criminal trials should, at the commencement of the hearing

make it a habit of perusing the charge as a matter of routine to satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended accordingly.

In the instant case, the charge sheet does not mention the person against whom the fire arms was directed in order to steal and retain the stolen property. This is a serious omission as the appellants did not know the nature of the case facing them. (See **Mussa Mwaikunda v. R [2006] TLR 387** and **Isidori Patrice v. R.**, Criminal Appeal No. 224 of 2007) (unreported).

Another irregularity pointed out by the learned Senior State Attorney is that there was a change of Magistrate at page 41 of the record without assigning any reason. Admittedly, it was not proper for the second Magistrate A.M. Waziri, RM to take over and continue with the trial without assigning any reason for change of hands. This is contrary to the provision of section 214(1) of the CPA. This is fatal. See: **Abdi Masoud & 3 others v. R.**, Criminal Appeal No. 116 of 2015 and

Priscus Kimaro v. R., Criminal Appeal No. 301 of 2013 (both unreported) where in the latter case this Court stated:

"...where it is necessary to re-assign a partly heard matter to another Magistrate, the reason for the failure of the first Magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."

In the light of the above considerations and the fact that the evidence of PW1 and PW2 as correctly submitted by the learned Senior State Attorney that the evidence of visual identification was not watertight. The two did not state the intensity of the electricity light. (See: **Waziri Amani v. R.**, [1980] TLR 250). We invoke the revisionary power conferred on us under section 4(2) of the AJA and quash the proceedings and judgment of the trial Court which leaves the proceedings and the judgment of the High Court with no legs to stand on. We are therefore

constrained to nullify the same and the sentence imposed on the appellants is set aside. Having done so, we order for the appellants' immediate release from prison unless they are otherwise lawfully held for some other cause.

DATED at DAR ES SALAAM this 8th of December, 2016.

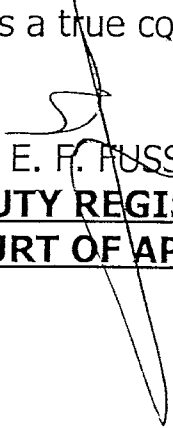
B.M.LUANDA
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

R.E.S.MZIRAY
JUSTICE OF APPEAL



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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL