IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: MBAROUK, J.A, MUGASHA, AND J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO.445 OF 2015

SHARIFU JUMA ALLY.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Ruhangisa, J.)

dated the 26th day of June , 2015
in
Criminal Appeal No. 14 of 2015

JUDGMENT OF THE COURT

5th & 12th October, 2017

MUGASHA, J.A.:

In the District Court of Kinondoni, the appellant **SHARIFU JUMA ALLY** and **ANUARY SALEHE AWADH** were arraigned as hereunder:

" STATEMENT OF OFFENCE

ARMED ROBBERY: Contrary to section 287A of the Penal Code [Cap 16 R.E 2002] as amended by Act No 3 of 2011.

PARTICULARS OF THE OFFENCE

SHARIFU JUMA ALLY and ANUARY SALEHE AWADHI, on the 16th day of November, 2013 at

the junction of Kawawa Road and Morogoro Road: Magomeni area within Kinondoni District in Dar-es-salaam region, did steal cash money Tshs. 8,500,000/= the property of RAPHAEL GODION MWAMPEMBWA and immediately before such stealing did use a gun in order to obtain the said properties."

Both denied the charge subsequent to which to establish its case, the prosecution paraded six witnesses namely: **RAFAEL GODION MWAMPEMBWA** (PW1), **OLIVER GODION MWAMPEMBWA** (PW2), **VIOLET NDEONANSIS MTERI** (PW3), **and F. 8778 DC LUKWAMBA (PW4), 7932 D /CPL SHABANI** (PW5) and **F266 D/CPL AMIRI** (PW6). They also tendered in evidence two physical exhibits five bullets and two magazines collectively admitted as exhibit P.E 1 and one documentary exhibit.P.E.2 the cautioned statement of the appellant. The defence had two witnesses who were the accused persons themselves.

The gist of the prosecution evidence at the trial was briefly as follows: Having desired to purchase a motor vehicle, PW1 on 9/11/2013 in Mbeya approached his friend one **ANYAMBWILE KILONGO** to connect him with a person involved in selling motor vehicles. It was

alleged that, **ANYAMBWILE KILONGO** informed **ANUARY SALEHE AWADH** a resident of Dar-es-salaam who promised to find the motor vehicle. On 14/11/2011, **ANUARY SALEHE AWADH** called PW1 informing him that the motor vehicle, make NOAH which was in good condition was available for sale. Thus, **ANUARY SALEHE AWADH** asked PW1 to deposit cash money in his account but PW1 declined and opted to travel to Dar-es-salaam on 15/11/2013. On the following day while in Dar-es-salaam, PW1 accompanied by his sister PW2 met **ANUARY SALEHE AWADH** who took them to Jangwani at a garage where the Motor vehicle make NOAH was parked.

After inspecting the motor vehicle, PW1 was satisfied with its condition and agreed to pay as purchase price the sum of Tshs. 8,500,000/= but he had no cash in hand. As such, PW1 accompanied by his sister and **ANUARY SALEHE AWADH** they went to NBC Bank at Ubungo branch where PW1 withdrew Tshs. 8,500,000/= and gave Tshs. 6,500,000/= to **ANUARY SALEHE AWADH.** However, **ANUARY SALEHE AWADH** could not hand over to PW1 the respective documentation of the motor vehicle having claimed to have forgotten them at his office at Jangwani. Then, they all headed to Jangwani and while on the way, they were attacked by bandits armed with a gun

who made away the envelope which contained Tshs. 6,500,000/=. PW1 raised alarm and managed to contain the bandits. During the fracas it is alleged that, the appellant who was among the bandits fell down and was arrested at the scene by the police and other people who had responded to the raised alarm. Subsequently, the appellant and **ANUARY SALEHE AWADH** were charged with the offence of armed robbery. They denied the charge. After a full trial, the presiding magistrate found the prosecution case not proved against **ANUARY SALEHE AWADH** and accordingly acquitted him. However, the appellant was convicted with armed robbery and sentenced to imprisonment for thirty years.

Dissatisfied, the appellant unsuccessfully appealed to the High Court, hence the present appeal. In both Memoranda of appeal the initial and the supplementary, the appellant raised a total of fourteen grounds of appeal which may be conveniently condensed into two major ones namely: **One**, that the first appellate court erred to sustain the conviction and the sentence meted on the appellant relying on a defective charge of armed robbery which did not disclose person or persons against whom the violence or threat was directed;

Two, the charge was not proved against the appellant beyond reasonable doubt.

At the hearing before us, the appellant appeared in person whereas the respondent Republic was represented by Ms. Anita Sinare and Mr. Gabriel Kamugisha, learned State Attorneys. The appellant preferred initially, to hear the submission of the learned State Attorney reserving a right to reply. In her submission Ms. Anita Sinare, supported the first ground of appeal conceding that, the charge is defective having not disclosed the essential ingredient on the person who was threatened in the alleged robbery incident where a sum of Tshs. 8,500,000/= was stolen from PW1. She argued that, since the charge lacked the crucial ingredient, the defect is incurable and the trial was vitiated. To support her proposition, she cited the unreported case of **SADIKI JOSEPH MSHALU AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 64 of 2011 and **CHALA SANJWALA VS REPUBLIC,** Criminal Appeal No. 97 of 2014.

On the way forward the learned State Attorney initially prayed that the appeal be allowed and the appellant be set free. However, on a serious reflection on the principles guiding a remedy of retrial, she pressed for it arguing that on record, there is sufficient prosecution

evidence against the appellant. In this regard, she urged us to allow the appeal, quash the conviction and set aside the sentence and order a retrial.

On the other hand, apart from praying that the appeal be allowed and set him free, the appellant objected the retrial arguing that on record there is no sufficient evidence to ground a conviction. The appellant relied as well on the cases of **SADIKI JOSEPH MSHALU AND ANOTHER VS REPUBLIC** (supra) and **CHALA SANJWALA VS REPUBLIC** (supra).

After a careful consideration of the record and arguments raised by the respective parties, we shall address the appeal by initially determining the propriety or otherwise of the charge upon which the appellant was tried.

As intimated earlier, the charge laid against the door of the appellant and another person who was acquitted was on the provisions of section 287A of the Penal Code which provides as follows:

> " *Any person who steals anything, and at or immediately after the time of stealing is armed*

with any dangerous or offensive weapon or robbery instrument, or is in company of one or more persons, ***and at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person,*** *commits an offence termed" armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

[Emphasis supplied].

An important element of the offence of robbery is indeed the use of force against the victim for the purposes of stealing or retaining the property after stealing the same. Moreover, since it is the charge which lays a foundation of a trial, in the present case, the omission to mention a person against whom force or the gun was directed to therefore rendered the charge sheet defective, because the accused persons were not able to understand the nature of charges they faced and what defence to put up. (See the unreported case of **MUSSA RAMADHANI VS REPUBLIC,** Criminal Appeal No. 368 of 2013).

Guided by the provisions of section 287 A of the Penal Code and having scrutinised the charge under discussion, we are of settled view that it was incurably defective lacking essential ingredient of armed robbery. We say so because, non-disclosure of the person upon whom the threat or violence was directed in order to retain the stolen money in the charge contravenes section 132 of the Criminal Procedure Act which stipulates the mandatory requirements giving a clear direction on the contents of the charge as follows:

> *" Every charge or information shall contain, and shall be sufficient if it contains , a statement of 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."*

The rationale of the sufficiency of the particulars of the offence in the charge and the importance of proper framing of the charge against the accused person and according to law was underscored by the Court in the unreported case of **ISIDORI PATRICE VS REPUBLIC,** Criminal Appeal No 224 of 2007 (unreported). Thus, we said:

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mensrea. Accordingly the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by the law".

In the case of **CHALA SANJWALA VS REPUBLIC** (supra) cited by the appellant and the learned State Attorney, the Court held the charge to be fatally defective for not disclosing the person on whom the use of

pistol was directed in the charge. In **CHALA SANJWALA's** case (supra), the Court relied on the unreported case of **KASHIMA MNADI VS REPUBLIC,** Criminal Appeal No. 78 of 2011 which addressed the impropriety of the charge of armed robbery and concluded as follows:

> *"Strictly speaking for any charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without use of actual violence or threat to a person targeted to be robbed. So the particulars of the offence must not only contain the violence or threat but also the person on whom the actual violence or threat was directed"*

In the present matter notwithstanding that, during trial the evidence paraded indicated that the actual violence was targeted to PW1 and PW2, the prosecution did not amend the charge to enable the appellant to clearly understand the nature of case facing him but he was found guilty and convicted. In the absence of any amendment to the charge, the trial and the conviction of the appellant was based

on a defective charge. Therefore, he was unduly prejudiced to answer the charge he was unaware of, which could have been achieved if the charge had disclosed all the essential ingredients. (See **MUSSA MWAIKUNDA VS REPUBLIC** [2006] TLR 387 and **ISIDORE PATRICE VS REPUBLIC** (supra).

Despite the appellant being found guilty on a defective charge, it cannot be said that he was fairly tried as the lack of specific particulars as to whom the violence was directed to in the robbery incident prejudiced the appellant in his defence. (See the unreported case of **SIMBA NYANGURA VS REPUBLIC,** Criminal Appeal No. 144 of 2008). Thus, the trial under scrutiny was vitiated which occasioned a miscarriage of justice on both the prosecution and the defence. It is unfortunate that the defective charge missed the eye of the High Court which embarked on a nullity in the hearing and the determination of the first appeal.

In view of the aforesaid, the purported trial is a nullity and we hereby quash the conviction and set aside the sentence. As no appeal can stem from a nullity, we hereby nullify the entire proceedings and judgment of the High Court. On the way forward, we shall be guided by principles stated in often cited the case of **FATEHALI MANJI VS R**

[1966] E.A.343 where the erstwhile Court of Appeal of East Africa said:

> *"In general, a retrial may be ordered only when the original trial was* ***illegal or defective****, it will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purposes of enabling the prosecution to fill its evidence at the first trial...* ***each case must depend on its own facts and an order for retrial should only be made where interests of justice require it."***
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> [Emphasis supplied].

In the light of the principles stated in **FATEHALI MANJI VS R** (supra), facts and circumstances in the present case are different from what obtained in the cases of **SADIKI JOSEPH MSHALU AND ANOTHER VS REPUBLIC,** (supra) and **CHALA SANJWALA VS REPUBLIC**, (supra) where the Court did not order retrials having annulled the proceedings and judgments based on defective charges. In our considered view, in the matter at hand, the interests of justice require the remedy of the retrial. As such, we hereby order an expedited retrial and if the

appellant is convicted, the term of sentence already served should be considered.

DATED at **DAR-ES-SALAAM** this 10th day of October, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL