

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.)**

**CRIMINAL APPEAL NO. 252 OF 2015**

**MANSOOR S/O KHAMISI ULUNGU**

**@ SIMBA DUME ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Bongole, J.)**

**dated the 2<sup>nd</sup> day of March, 2015**

**in**

**Criminal Appeal No. 90 of 2014**

**.....**

**JUDGMENT OF THE COURT**

21<sup>st</sup> August & 13<sup>th</sup> September, 2018

**NDIKA, J.A.:**

Mansoor Khamis Ulungu @ Simba Dume was, before the Resident Magistrate's Court of Dar es Salaam at Kisutu, charged with the offence of armed robbery, on three counts, contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition 2002 (Penal Code) as amended by Act No. 3 of 2011. After a full trial, he was convicted of the aforesaid offence on the first and second counts but acquitted on the third count. Each conviction earned him a thirty years' term of imprisonment, both of which

were ordered to run concurrently. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania sitting at Dar es Salaam, challenging the conviction and sentence. Still dissatisfied, he now appeals to this Court.

The factual background to this appeal is, briefly, as follows: PW3 Evodius Alex Mtatiro owned a shop at Tandale kwa Mtogole in Kinondoni Municipality in Dar es Salaam that mainly dealt in vending stationery and prepaid airtime. On 25<sup>th</sup> August 2011 at or about 21.00 hours, PW1 Witness Mathew, the shop's supervisor, was about to close up the shop for the night having reconciled the accounts and collected the cash from the day's sales. She was together with two salespersons, namely, PW8 Emmanuel Joseph Ngatiho and one Nurathy Juma. All of a sudden, they heard a gunshot fired outside the shop. In a terrifying and frantic scene that ensued, two robbers stormed into the shop while two others remained outside. One of them wielded a gun and others had bush knives. Inside the shop, one of the robbers hit PW1 with an object and then snatched from her a bag that contained TZS. 535,000.00 in cash. They then ransacked the shop and made away with an additional sum of TZS. 1,200,000.00, three cellphones and a laptop, all of which were the property of the shop owner (PW3).

PW1 adduced that he saw and identified the appellant as one of the two robbers that confronted her and that he picked him out at the identification parade that was subsequently conducted by the police on 2<sup>nd</sup> April, 2012 under the supervision of PW4 Inspector Geoffrey. On what aided the appellant's identification at the scene, she explained that the shop was brightly lit up by electric bulbs inside and outside. PW8's evidence largely echoed that of PW1, the most relevant part of it being his assertion that he too saw and identified the appellant at the scene. On his part, PW3 recounted that he had just arrived outside the shop for verification of the stock and the day's sales when the armed robbery unfolded. He averred to have seen and identified the appellant as one of the robbers and that he recognized him at the identification parade held by the police. Most tellingly, however, was the evidence of the shop's security guard (PW7 Zungu Shabani Hamisi) that he knew the appellant for a long time before the fateful night and that he saw and recognized him at the scene as he spotted his scar on the back of his head. All these four witnesses (PW1, PW3, PW7 and PW8) claimed that the appellant was clad in a white gown (*kanzu*) and a skullcap (*baraghashia*) at the scene.

A police officer (PW2 D.6816 D/Cpl. Primy) told the trial court on the manner of the appellant's arrest at Tandika in Dar es Salaam on 27<sup>th</sup> March 2012 following a lead from an informer. On his part, PW5 D/Sgt Abdallah Hamisi stated that he interrogated the appellant at the police and took his cautioned statement in which he confessed to the armed robbery. Nonetheless, the aforesaid statement was not admitted in evidence as the trial court appears, for an obscure cause, to have aborted an inquiry it had initiated into the voluntariness and authenticity of the statement after its admissibility had been objected to by the appellant.

The appellant's defence was very brief. Although he admitted that he was arrested on 27<sup>th</sup> March, 2012, he flatly refuted the prosecution's finger pointing that he was one of the bandits that raided PW3's shop.

On the whole of the evidence, the trial court found it uncontroverted that PW3's shop was raided as alleged and that the appellant was unmistakably identified as one of the armed bandits that robbed PW1 and PW3. As hinted earlier, the court convicted the appellant of the charged offence on the first and second counts. The appellant was, however, acquitted of that offence on the third count, which was alleged to have

been committed on the said Nurathy Juma. Again, we wish to restate that the appellant's first appeal before the High Court came to naught.

The appellant lodged nine grounds of complaint against the High Court's decision. For the reason that will become obvious later in this judgment, we find no pressing need to reproduce herein all the nine grounds of appeal except the first ground which contends as follows:

*"That the first appellate Judge erred in law and misdirected himself to uphold the conviction and sentence against the appellant despite that the charge against the appellant was fatally defective due to the fact that the person against whom the bush knife and gun were directed was not mentioned in the particulars of offence in the charge sheet."*

At the hearing of the appeal before us the appellant appeared in person, unrepresented. Having adopted his grounds of appeal, he deferred his elaboration on them to a later stage, if need be, after the submissions of the respondent Republic.

On her part, Ms Honorina Munishi, learned Senior State Attorney representing the respondent Republic, conceded, with creditable frankness,

that the charge sheet was incurably defective for failing to specify in the particulars of the charged offence on all three counts the person against whom the use or the threat to use the bush knife or gun was perpetrated. In her view, the charge sheet was drawn contrary to the mandatory requirement under section 132 of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA) for stipulating the particulars of the charged offence. Citing the decision of this Court in **Baltazar Gustaf and Another v. Republic**, Criminal Appeal No. 266 of 2014 (unreported), Ms Munishi submitted that the defect at issue was fatal and cannot be cured under section 388 (1) of the CPA. Accordingly, she prayed that the appeal be allowed, the appellant's conviction quashed and the sentence imposed on him set aside. In view of that, she urged that the appellant be restored to liberty at once.

Responding, the appellant supported Ms Munishi's submission and urged the Court to allow his appeal and release him from prison in view of the defect under focus.

At this point we find it apposite to interject, in fairness, that the appellant did not raise the present complaint before the High Court as a ground of appeal. As we held in **Baltazar Gustaf** (supra), we are enjoined to take up and consider the complaint on the reason that it is a point of

law that essentially centres on an accused's basic rights and guarantee of fairness in a criminal trial.

So as to determine the question whether the impugned charge sheet was proper or not, we find it vital to reproduce the relevant part of the said charge sheet for ease of reference:

**"IN THE RESIDENT MAGISTRATE'S COURT OF DAR ES  
SALAAM AT KISUTU**

**CRIMINAL CASE NO. 101 OF 2012**

**REPUBLIC**

**VERSUS**

**MANSOUR KHAMIS ULUNGU @ SIMBA DUME**

**1<sup>ST</sup> COUNT**

**STATEMENT OF OFFENCE**

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

**PARTICULARS OF OFFENCE**

**MANSOUR KHAMIS ULUNGI @ SIMBA DUME**, on the 25<sup>th</sup> day of August, 2011 at Tandale kwa Mtogole area within Kinondoni District in Dar es Salaam Region, stole one handbag, cash TShs. 530,000.00, two mobile phones make **NOKIA** valued TShs. 235,000.00 and one Voting Card the property of one **WITNESS MATHEW MASAKI** and immediately before such stealing did use weapons namely a bush knife and a gun in order to obtain the same.

**2<sup>ND</sup> COUNT**

**STATEMENT OF OFFENCE**

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

**PARTICULARS OF OFFENCE**

**MANSOUR KHAMIS ULUNGI @ SIMBA DUME**, on the 25<sup>th</sup> day of August, 2011 at Tandale kwa Mtogole area within Kinondoni District in Dar es Salaam Region, stole Cash TShs. 1,200,000.00, one laptop make DELL valued at TShs. 900,000.00, 4 mobile phones of different makes the property of one **EVODIUS ALEX** and immediately before such stealing did use weapons namely a bush knife and a gun in order to obtain the same.

**3<sup>RD</sup> COUNT**

**STATEMENT OF OFFENCE**

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

**PARTICULARS OF OFFENCE**

**MANSOUR KHAMIS ULUNGI @ SIMBA DUME**, on the 25<sup>th</sup> day of August, 2011 at Tandale kwa Mtogole area within Kinondoni District in Dar es Salaam Region, stole one mobile phone make **TECNO** valued at TShs. 75,000.00 the property of one **NURATHY JUMA** and immediately before such stealing did use weapons namely a bush knife and a gun in order to obtain the same.

Dated at Dar es Salaam this 13<sup>th</sup> day of April 2012

(Sgd)

**STATE ATTORNEY"**

It is settled that for a charge sheet to be valid under the law, it must be drawn in accordance with the provisions of sections 132 and 135 of the CPA. Briefly, section 132 requires that, apart from a statement of the specific offence charged, every charge or information must contain such particulars as may be necessary for giving reasonable information as to the



nature of the offence charged. In addition, section 135 provides for the mode in which offences are to be charged. What is particularly relevant to this appeal is paragraph (a) (iv) of section 135. It requires the charge sheet in general to conform, as nearly as possible, to the forms set out in the Second Schedule to the CPA. Part 8 of that Schedule provides a form for the charge of robbery; it compels indication of the person against whom violence or threat of violence was perpetrated. By dint of logic, that requirement extends to the offence of armed robbery.

As indicated earlier, the appellant was charged with the offence of armed robbery, on three counts, contrary to section 287A of the Penal Code, as amended by Act No. 3 of 2011. The above-cited section provides:

*"A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing **uses or threatens to use violence to any person in order to obtain or retain the stolen property,** commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment."* [Emphasis added]

We have made bold the text above to highlight one of the prerequisites of the crime of armed robbery (or any other kind of robbery), which is that there should be use of violence or threat of use of violence to the person of the complainant. In **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported), the Court held that:

*"Strictly speaking for a 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 the use of actual violence or threat to the person targeted to be robbed. **So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed.**"* [Emphasis added]

[See also the unreported decision of the Court in **Zubell Opeshutu v. Republic**, Criminal Appeal No. 31 of 2003; and **Baltazar Gustaf** (supra)].

Having reflected on the charge sheet at hand, we agree with the appellant and Ms Munishi that the said charge is defective in all three counts in that the particulars of offence do not specify the alleged victims

of the use or threat of use of actual violence by the assailants in order for them to obtain the properties allegedly stolen at PW3's shop. We thus find that an essential ingredient of the charged offence of armed robbery was omitted and that the charge in the whole was fatally defective. That is so because the said omission meant that the charge failed to give the appellant reasonable information as to the nature of the charged offence thereby negating fairness in the criminal trial. As rightly submitted by Ms Munishi, the said defect could not be cured under section 388 of the CPA. Accordingly, we find merit in the first ground of appeal.

We are cognizant that the case at hand involves a trial that was subverted by a defect for which the prosecution bears the blame. In **Ahmedi Ali Dharamsi Sumar v. Republic** [1964] EA 481, at p.483, the predecessor to this Court stated on an appeal from the High Court of Tanganyika that:

*"It is true that where a conviction **is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial.**"* [Emphasis added]

Ordinarily a retrial would be ordered, in criminal cases, when the charge sheet, which is the foundation of the case, is proper and in existence. Since in this case the charge sheet is incurably defective, implying that it is legally non-existent, the question of a retrial does not arise. See, also, the decision of the Court in **Mayala Njigailele v. Republic**, Criminal Appeal No. 490 of 2015 (unreported).

In the final analysis, we allow the appeal, quash the conviction and set aside the sentence against the appellant. We order that the appellant be released from custody and set free forthwith unless he is held or detained for any other lawful cause.


**DATED** at **DAR ES SALAM** this 11<sup>th</sup> day of September, 2018.

B. M. MMILLA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

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

  
S.J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

