IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 427 OF 2016

JUMA MAGANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Sumbawanga)

(Khaday, J.)

dated the 12th day of August, 2011
in
Criminal Case No. 7 of 2010

JUDGMENT OF THE COURT

26th November & 3rd December, 2018

MMILLA, J. A.:

The appellant, Juma Maganga, was among the five (5) accused persons who were charged before the District Court of Mpanda in Rukwa Region (now Katavi Region) with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 of the Revised Edition, 2002, as amended by Act No 4 of 2004. The other persons charged along with him were Machembe s/o Kwilasa, Ngasa s/o Mashindike, Jonas s/o Jisole and

Masala s/o Zakaria (who were the first, second, third and fourth accused persons respectively). The appellant and Jonas Jisole (third accused), were found guilty, convicted and sentenced to thirty (30) years' imprisonment. Aggrieved, they appealed to the High Court of Tanzania at Sumbawanga. While the appeal of Jonas Jisole succeeded, the appellant's was dismissed. Undaunted, he has preferred this second appeal to the Court.

The facts of the case as discerned by the trial court were briefly that, on 4.12.2009 around 1:00 hours, bandits stormed at the matrimonial home of PW1 Chiru Ludegeja and PW2 Kwangu d/o Mathias. They entered in those persons' house after breaking the main door. The invaders were armed with machetes, clubs and sticks, and one of them carried a torch. It was also related that at the time the bandits entered in the said house, there was light therein which was sourced from a hurricane lamp, with the aid of which PW1 and PW2 claimed to have identified two persons; the third accused before the trial court (Jonas Jisole) and the fifth accused (the appellant). Those people, it was alleged, demanded to be given money. Following his hesitation to comply with the bandits' demands, PW1 was severely beaten. In order to save their lives, PW1 gave them Tzs 800,000/=. However, coupled with beatings, the robbers insisted to be

given more money. This time, the couple gave them Tzs 200,000/=, making a total of Tzs 1,000,000/=. On realizing that the couple had no more money to give them, the bandits broke into the shop which was within that house and stole therefrom several items, including clothes, sugar, beads and a bicycle, after which they fled.

After PW1 and his wife were sure that the bandits had left, they raised alarm to attract the attention of their fellow villagers. They also contacted the police at Maji Moto Police Station and informed them of that robbery incident. There was a positive response from their fellow villagers, and a good number of them gathered at the victims' home. The police commenced investigation immediately.

A couple of days later, PW1 and PW2 were informed that the bicycle which was stolen from their home was recovered and was at Maji Moto Police Station. They went to Maji Moto Police Station and allegedly identified the said bicycle as theirs. There was also recovered a jacket which PW1 recognized to be his, as well as the beads which likewise PW2 purportedly identified to be their property.

According to the testimony of PW3 No. F. 5572 DC Dotto, one day he and his Officer Commanding Station (OCS) received a tip from good citizens who were at the market place that there was a person who was attempting to sell a bicycle suspected to be stolen property. They hurriedly went to that area. On arrival at the said place, they saw a group of people, among whom was the appellant whom they found holding a bicycle. On seeing them, the latter dropped it and began running away, but they chased and apprehended him. On being asked where he got that bicycle, he said he bought it from Machembe s/o Kwilasa (first accused). The police arrested the said Machembe s/o Kwilasa at his home. The appellant had named as well the fourth and third accused persons. From the home of Machembe s/o Kwilasa, they proceeded to the house of the fourth accused whom they found in the company of the third accused. They arrested both of them; bringing the number of the culprits to five. All of them were sent to Maji Moto Police Station, and eventually charged before the District Court of Mpanda as it were.

All the accused persons, including the appellant, protested their innocence before the trial Court. To be specific, the appellant denied the allegations of having been found in possession of the alleged bicycle; and

that after all he was not identified by PW1 and PW2 at the scene of crime. As aforesaid however, the trial court convicted him, a decision which was upheld against him by the High Court.

The appellant filed a memorandum of appeal which raised nine (9) grounds which may conveniently be abridged into seven (7) of them as follows:-

1. That he was not correctly identified by the two eye witnesses; PW1 Chiru Ludegeja and PW2 Kwangu Mathias;
2. That the evidence of PW1 and PW2, who were husband and wife, was wrongly believed because it was not corroborated;
3. That the evidence constituted in exhibit P1 was improperly relied upon on the ground that those properties were not properly identified by PW1 and PW2;
4. That the evidence of PW3 No. 5572 DC Dotto to the effect that he arrested him (the appellant) at Efraim Bar at the market place was wrongly relied upon because it was not corroborated,
5. That the decision of the first appellate court is bad in law for having applied double standards because it allowed the appeal in

favour of Jonas Jisole and dismissed his appeal while both of them were convicted on the basis of the same evidence;

6. That the prosecution side did not prove the case against him beyond reasonable doubt; and
7. That both courts below did not properly consider his evidence in defence.

Before us, the appellant appeared in person and fended for himself. He prayed the Court to adopt his grounds of appeal and elected for the Republic to respond after which he could rejoin if need be.

On the other hand, the respondent/Republic enjoyed the services of Ms Catherine Gwaltu, learned Senior State Attorney, who hurried to inform us that she was supporting the appeal but for different reasons from those raised by the appellant.

In her brief but well focused submission, Ms Gwaltu stated firstly that the appellant's conviction in this case was based on a defective charge on account that the particulars of the offence did not mention the person against whom the said *panga* was used to obtain and retain the allegedly stolen property. She maintained that this contravenes the provisions of

section 132 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). That section, she said, requires the offences to be specified in the charge, and that it must indicate the necessary particulars as may be necessary for giving reasonable information as to the nature of the offence charged. She also referred us to the cases of **Juma Ismail and Another v. Republic**, Criminal Appeal No. 501 of 2015 and **Eliko Sikujua and Another v. Republic**, Criminal Appeal No. 367 of 2015, CAT (both unreported). On that basis, she urged the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), quash the proceedings and judgments of both courts below, set aside the sentence, and release the appellant from prison.

Ms Gwaltu pointed out yet another defect that after being informed by PW1 and PW2 that they were pagans, the trial court proceeded to receive their respective evidence without affirming them as contemplated by section 198 (1) of the CPA, read together with section 4 (a) and (b) of the Notaries Public and Commissioners for Oaths Act, Cap. 12 of the Revised Edition, 2002 (the NPCO). She contended that on the basis of section 198 (1) of the CPA, the evidence taken without first swearing in or

affirming the witness is invalid and requires to be expunged. She also cited the case of **Lazaro Daudi @ Emmanuel v. Republic**, Criminal Case No. 376 of 2015, CAT (unreported). The emphasis in that case was that evidence received in contravention of section 198 (1) of the CPA is invalid and cannot properly be relied upon. She argued that once the evidence of PW1 and PW2 is expunged, there is no cogent evidence to sustain the appellant's conviction. Once again, she asked the Court to clothe itself with the powers obtaining under section 4 (2) of the AJA, quash the proceedings and judgments of both courts below, set aside the sentence, and release the appellant from prison. In the final analysis, she urged the Court to allow the appeal.

On his part, the appellant submitted that he was entirely in agreement with all what the learned Senior State Attorney said. He requested the Court to uphold that submission and release him from prison.

Upon a careful traverse of the Record of Appeal, we share the concern of Ms Gwaltu that the particulars of the offence reflected in the charge sheet did not mention the name of the person against whom force

was used in perpetuation of the charged offence; also that PW1 and PW2 were not affirmed before their respective evidence was received by the trial court. In our considered view however, the first defect is sufficient to dispose of this appeal in its entirety for reasons we endeavour to assign in the course.

The beginning point is the charge sheet under focus. We wish to reproduce it hereunder for easy of reference:-

> ***"OFFENCE SECTION AND LAW:*** *Armed robbery c/s 287 (A) of the Penal Code Cap 16 vol. I of the laws as Amended by Act No. 4/2004 as Rectified by Government Notice No. 269 of 2004.*
>
> ***PARTICULAR OF THE OFFENCE:*** *That Machembe s/o Kwilasa, Ngasa s/o Mashindike, Jonas s/o Jisole, Masala s/o Zakaria and Juma s/o Maganga are jointly and together charged on 04th day of December, 2009 at or about 01.00 hrs at Mabiti village within Mpanda District in Rukwa Region did steal cash money Tshs. 1,000,000/=, one bicycle make Avon valued at Tshs. 100,000/=, oil lotion three boxes @ Tshs. 37,700/= valued Tshs. 113,100/=, 21 pair of Kitenge @ Tshs. 4500/= valued at Tshs. 94,500/=, 90 ushanga @ Tshs. 1000/= valued at Tshs. 90,000/ and 10 kgs of sugar @ Tshs. 16,000/= all total valued at Tshs. 1,413,600/= the property of One Chiru s/o Lugedeja and* ***immediately before and after such stealing did used a Panga to obtain and retain the stolen property.***

STATION ..... *Mpanda*

SIGNATURE

DATED *26/02/2010* ***PUBLIC PROSECUTION."*** *[The emphasis is ours].*

It is clear from the above quotation (see the bolded part in the particulars), that the particulars of the offence omitted to mention the person against whom the said panga was used to threaten, obtain and retain the allegedly stolen property, an aspect which is an essential ingredient of the offence under section 287A of the Penal Code. Then, that section, before being amended by Act No. 3 of 2011, provided that:-

> *"S. 278A (sic: s. 287A): Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or 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." [The emphasis is ours].

Ipso dure, the omission to mention the name of the person against whom force was used contravened the provisions of section 132 of the CPA which provides that:-

"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."

A situation like this facing us here was encountered by the Court in the cases of **Juma Ismail and Another v. Republic, Eliko Sikujua and Another v. Republic** (supra) and **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported), among others. In **Kashima Mnadi's** case, the Court underscored that:-

"Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate actual violence or threat to a person 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 (mention) the person on whom the actual violence or threat was directed."

As we said in **Juma Ismail's** case, the justification for the requirement to disclose the essential elements of the offence in the particulars is to enable the accused person to understand the case he is faced with. This was clearly underlined in the case of **Isidory Patrice v. Republic**, Criminal Appeal No. 224 of 2007, CAT (unreported). In that case the Court stated that:-

"It is a mandatory 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 the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea****. 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 law."*

We wish to emphasize that the omission under focus in the present appeal translates into the fact that the charge sheet lacked an essential ingredient of the offence of armed robbery, and is an incurably fatal defect which cannot be salvaged under section 388 of the CPA.

In view of what we have said in this judgment, we invoke the powers obtaining under section 4 (2) of the AJA on the basis of which we quash the proceedings and judgments in both courts below, the conviction thereof, and set aside the sentence which was meted out against the

appellant, and direct his immediate release from prison unless he is being continually held for some other lawful cause.

Order accordingly.

DATED at **MBEYA** this 29th day of November, 2018.

B. M. MMILLA
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