IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 430 OF 2015

MABULA DOTO @ RUNEKE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

Dated the 2nd day of March, 2009
in
DC. Criminal Appeal No. 72 of 2007

.....

JUDGMENT OF THE COURT

5th September & 19th November, 2018

MUSSA, J.A.:

The appellant seeks to impugn the decision of the High Court (Mujulizi, J.) which upheld the conviction and sentence handed down against him by the District Court of Bariadi way back on the 27th April, 1999.

It is pertinent to observe, from the very outset, that the charge sheet is not included in the record of appeal. As it were, at a certain stage, the original record of the trial proceedings got lost and all efforts

to trace the Charge Sheet, which disappeared with the record, were to no avail.

Nonetheless, from the judgment of the trial court, it is discernible that the appellant along with seven others were arraigned for armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Laws. If the listing of the accused persons as comprised in the judgment is anything to go by, during the trial, the appellant stood as the fourth accused, whereas the first, second, third, sixth, seventh and eighth accused persons were, respectively, Chambe Kweja, Shiwa Kisinda, Chanzo Mabila, Mussa Saasita, Henry Charles, Mlela Mahelegeba and Lazalo Masanja.

Again, from the judgment of the trial court, it comes to light that the particulars of the offence alleged that on the 28th September, 1998, at Nyawa Village, within the District of Bariadi, the appellant and his co-accused persons jointly stole a sum of Shs. 1,000,000/= in cash as well as an assortment of shop items all of which were properties of a certain Luge Mahina. It was further alleged that, immediately before and after such stealing, the appellant and the co-accused persons did use a firearm in order to obtain and retain the stolen properties.

When the charge sheet was read over and explained, all the accused persons pleaded not guilty, save for the eighth accused person who pleaded guilty and admitted the facts which were outlined by the prosecution. Thus, upon his own plea, the eighth accused person was found guilty, convicted and sentenced to a term of thirty years imprisonment plus a corporal punishment of twelve strokes of the cane.

The trial with respect to the appellant and the others who refuted the charge proceeded to a finish and, in the result, they were all found guilty and convicted for the charged offence. Upon conviction, each was handed down a thirty years prison term plus a corporal punishment of twelve strokes of the cane. The appellant was dissatisfied but his first appeal to the High Court was dismissed in its entirety (Mujulizi, J.), hence this second appeal. Ahead of our consideration of the contentious issues in the appeal, it is necessary to explore, albeit briefly, the factual background giving rise to the apprehension, arraignment and the subsequent conviction of the appellant.

From a total of eight witnesses, the case for the prosecution unfolded a tragic happening at the residence – cum shop of Luge Mahina (PW1) which is situate at Nyawa Village, Bariadi District. Around midnight or so, the hitherto silent night at the Village was broken by the

sound of a gunshot which was followed by the forced entry into PW1's shop by way of an axe. Within a while, seven bandits engulfed the inside of the shop whilst another kept vigil outside the building. The unwelcomed visitors had three torches which they were wielding thereabouts as they collected items from the shop. The shop owner (PW1) also had a torch and was watching the besetting of his properties through an opening in an adjacent room. He tried to wail about but, soon after, he shrinked amidst a threat from the intruders that he was risking his life. Speaking of the intruders, PW1 claimed that, through his flash light, he recognized all the accused persons who were previously known to him, save for the first accused. The peculation of the shop items took a good while and, after the intruders were done, they made a bolt for it but only after releasing a second gun shot.

Thereafter, PW1 went outdoors where he continually sounded alarms to attract the assistance of his village mates. In response, Paulo Nindilo (PW2), a village militiaman, immediately attended the scene. According to him, he also heard the first gunshot, whereupon he approached the shop but was prevented from any further move by the first accused who threatened him with a gun. The witness also claimed

to have recognized the first accused with the aid of a torch which he was holding.

In the immediate aftermath of PW1's alarms, several villagers attended the scene of the crime. Incidentally, those who attended were collectively referred to by the prosecution witnesses as "*the mwano People*". We shall henceforth just as well refer to them as such.

The evidence was to the effect that PW1 and PW2 immediately named the culprits to the *mwano people* whereupon, around 8.00 am or so, on the morrow of the incident, the *mwano people* besieged the residencial premises of the second accused person for a start. As it turned out, the second accused person was at his residence in the company of the fifth accused person. Upon interrogation, the second and fifth accused persons prevaricated a bit but, eventually, they admitted complicity in the midnight robbery. The two accused persons went so far as to show the *mwano people* a dugout in the neighbourhoods of the premises specifically made to hide the stolen items. It was said that, from that ditch, a host of shop items were retrieved to which PW1 made claims in court that they were his belongings. It was further claimed that, whilst the *mwano people* were still at his residence, the second accused person just as well implicated

the first, third, fourth (the appellant), sixth, seventh and eighth accused person for complicity in the robbery. Those implicated were interrogated and, according to the prosecution witnesses, each admitted complicity and showed the *mwano people* where his share of the robbery loot was hidden. More particularly, as regards the appellant, a militiaman who was amongst the *mwano people,* namely, Sita Sahani (PW4) did not mince words in the manner the *mwano people* extorted the alleged confession from him:-

> *"The 4th accused was whipped and he agreed that he was with his collegues at the place of the scene (sic). We took him to his home. The 4th accused took us to a bush where we found a sack which contained stolen shop items and we took it and brought them at the MWANO."*

We hope to find time, later in our judgment, to make a remark or two on the foregoing extracted piece of evidence. For the moment, it will suffice if we wind up the prosecution version with the evidence to the effect that, in his testimonial account, PW1 bluntly identified all the various items which were allegedly retrieved from the accused persons to be his stolen shop belongings.

In reply, the appellant completely dissociated himself from the prosecution's condemnation. His account was to the effect that, on the fateful day, he spent the night at his house of residence and did not move up until he was apprehended by militiamen on the following morning. His captors severely whipped him and subsequently planted on him several items on the pretex that he stole them in the course of the robbery episode.

We have already intimated that, on the whole of the evidence, the two courts below were duly impressed by the version told by the prosecution witnesses and that, in the result, the appellant along with seven others, was, respectively, convicted by the trial court and lost his first appeal in the High Court.

When the appeal was placed before us for hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of two learned State Attorneys, namely, Messrs Ildephonce Mukandara and Tumaini Pius. As it were, the appellant fully adopted the memorandum of appeal which is comprised of five points of grievances. He, however, deferred its elaboration to a later stage, if need be, after the submissions of the Republic. On his part, Mr. Mukandara commenced his address by raising a preliminary

contention that the appeal is, in the first place, incompetent on account of being incomplete, contrary to the mandatory requirements of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Elaborating, the learned State Attorney submitted that Rule 71 (2) and (4) of the Rules imperatively require the record of an appeal to contain, among other documents, copies of *the information, indictment or charge*. In the absence of the charge sheet in the record of appeal, it was Mr. Mukandara's submission that the record of appeal is incomplete and, for that matter, the appeal itself has been rendered incompetent. In the result, the learned State Attorney urged us to strike out the appeal. In reply, the appellant was completely at a loss, the more so as, quite understandably, the issue raised by the learned State Attorney was rather too technical for him to grasp. He, however, opposed the plea to have the appeal struck out for that, he said, will further delay his quest for justice.

Having heard either parties with respect to the preliminary point taken by Mr. Mukandara, we asked them to just as well address us on the merits of the appeal, that is, irrespective of the contention that the same is incompetent.

In this regard, Mr. Mukandara unhesitatingly submitted that the appeal is meritorious. To begin with, he said, from the judgment of the trial court, it is discernible that the allegedly stolen shop items were, after all, not itemized, let alone the fact that PW1 bluntly identified the items retrieved from the accused persons as his belongings.

Furthermore, it was the submission of the learned State Attorney that the alleged recognition of the appellant by torch light was far from being satisfactory and, thus, in the upshot and, without prejudice to his earlier contention on the competency of the appeal, Mr. Mukandara advised us to allow the appeal with an order for the immediate release of the appellant from prison custody. On his part, having heard the learned State Attorney submitting in support of his appeal, the appellant joined hands with the submission without more.

For a start, it behoves us to determine the preliminary issue raised by the learned State Attorney pertaining to the competency of the appeal. It is true that Rule 71 (4) of the Rules, which relates to appeals from the High Court in its appellate jurisdiction, read in conjunction with Rule 71 (2) (b) of Rules requires that the record of appeal should contain a copy of *the information, indictment or charge*, amongst other documents.

In this regard, we are, indeed, conscious of numerous decisions to the effect that a record of a civil appeal which is not accompanied by copies of any of the documents enumerated under Rule 96(1) or (2) of the Rules is, on that score, rendered incomplete with the consequential result of invalidating the appeal itself. But, as hinted upon, those decisions relate to civil appeals and are, in part, fortified by Rule 90 (1) of the rules a portion of which reads:-

> *"Subject to the provisions of Rule 128,* ***an appeal shall be instituted*** *by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-*
>
> *(a) a memorandum of appeal in quintuplicate;*
>
> *(b)* ***a record of appeal in quintuplicate;***
>
> *(c) security for the costs of the costs of the appeal,...."* [Emphasis supplied.]

It therefore, follows from the extract that a civil appeal cannot be validly instituted by an incomplete record, hence our numerous decisions on the subject. But, as regards criminal appeals, we take the position that they are on a different footing the more so as, unlike a civil appeal under Rule 68 (1) of the Rules, a Notice of Appeal institutes a Criminal Appeal. As to whether or not the record of a criminal appeal could be invalidated for not having a copy of the charge sheet, we propose to

borrow a leaf the decision of the Court of Appeal of Kenya in **Samwel Karani Vs The Republic** [2009] e KLR.

In that case, the Court had to grapple with a similar shortcoming in that the charge sheet had gone missing and was not included in the record of appeal. In the course of its deliberations, the Court was appreciative of the fact that Rule 61 (4) and 61 (2) of the Court of Appeal Rules [which are, respectively, a replica of our Rule 71(4) and 71(2) (b)] require that the record of appeal should contain a copy of the charge sheet amongst other documents. Nevertheless, the Court observed:-

> *"... we are of the view that there was substantial compliance with rule 61 (4) as the judgment of the subordinate court containing the substance of the charge is incorporated in the record of appeal and that the absence of the charge has not caused any prejudice to the appellant."*

We find the foregoing observation compellingly persuasive and, accordingly, we similarly hold that the absence of the charge sheet did not vitiate the record of appeal. In the result, we overrule the

preliminary point raised by Mr. Mukandara to the effect that the appeal is incompetent.

We now turn to the merits of the appeal and, to begin with, it is plain from the record of proceeding that the appellant was implicated by three strands of separate evidence. The first strand of the evidence is comprised in the claim by PW1 to the effect that he recognized him with the aid of a torch light. But the witness also conceded that the intruders also had three torches with which they wielded to locate the shop items. He did not, however, elaborate as to how exactly he recognized the seven persons who engulfed his shop with the aid of a torch. In any event, this court has, on occasion, held that a visual identification through the aid of a torch is most unreliable (see, for instance, the unreported Criminal Appeal No. 101 of 2003 – **James Chilonji Vs The Republic**). Thus, to us, the evidence of visual recognition by PW1 fell too short of being watertight. That would suffice to resolve the first strand of the evidence in favour of the appellant.

The second strand of the evidence relates to the allegation that the appellant confessed involvement in the robbery before the *mwano people*. The alleged confession was not reduced into writing and, as we have hinted upon, the appellant was thoroughly whipped by his captors

before he confessed involvement in the robbery (see the testimony of PW4). Certainly, the alleged confession cannot be said to have been voluntary and, for what it is worth, this strand of the evidence need only be discounted.

The last strand of the evidence involves the items which were allegedly found in possession of the appellant and the subsequent invocation, by the two courts below, of the doctrine of recent possession. More particularly, the first appellate court heavily relied on the doctrine to sustain the appellant's conviction. Unfortunately, the learned first appellate Judge did not explore the essential prerequisites of the application of the doctrine. These were expressed with succinctness in the unreported Criminal Appeal No. 94 of 2007- **Joseph Mkumbwa** and **Another Vs The Republic**:-

> *"For the doctrine to apply as a basis of a conviction, it must be proved **first** that the property was found with the suspect, **second**, that the property is positively proved to be the property of the complainant, **third**, that the property was recently stolen from the complaint, and **lastly**, that the stolen thing constitutes the subject of the charge against the accused."*

As is plainly discernible from the foregoing extract, the prosecution is, *inter alia*, obliged to positively establish that the retrieved property or properties is (are) the very one(s) which was (were) stolen from the complainant. In our view, this may only be achieved through a proper and adequate identification of the property or properties by its owner. Unfortunately, as we have hinted upon, in the matter at hand, PW1 simply told the trial court that the items which were allegedly retrieved from the appellant were his belongings. He did not go so far as to assign distinctive marks, if there were any, on the retrieved items. Such an identification falls short as, we should suppose, there are hundreds or, perhaps, thousands of shop items with identities corresponding to the retrieved ones.

What is more, as correctly remarked by the learned State Attorney, the allegedly stolen shop items were not itemized on the charge sheet which was recited by the trial court in its judgment. As it turned out, the charge sheet simply and generally alleged that the accused persons stole "*various shop articles valued at shs 500,000=/....*" To say the least, the last prerequisite pegged on the application of the doctrine of recent possession was not met much as the allegedly

retrieved items did not constitute the subject of the charge against the appellant.

All said, in the light of insufficient evidence of visual recognition as well as the identification of the allegedly stolen items, we are of the settled view that it is unsafe to sustain the conviction against the appellant. In the final result, this appeal succeeds and, accordingly, the conviction and sentence are, respectively, quashed and set aside. The appellant should be released from prison custody forthwith unless he is otherwise lawfully detained. It is so ordered.

DATED at **DAR ES SALAAM** this 30th day of October, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL