IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MMILLA, J.A. AND NDIKA, J.A.)

CRIMINAL APPEAL NO. 178 OF 2016

1. JOSEPH SHABANI MOHAMED
2. MICHAEL ELIAS KALINGA } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

dated the 17th day of August, 2015
in
High Court Criminal Appeal No. 39 of 2012

.....

JUDGMENT OF THE COURT

2nd & 9th March, 2018

MMILLA, J.A.:

The appellants, Joseph Shabani Mohamed and Michael Elias Kalinga (the first and second appellants respectively), were charged before the District Court of Ilala at Ilala in the Region of Dar es Salaam 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. 3 of 2011. After full

trial, both of them were found guilty, convicted, and sentenced to a 30 years' imprisonment term. They unsuccessfully appealed to the High Court at Dar es Salaam, hence this second appeal to the Court.

The facts of the case were briefly that, on 4.12.2007 at about 19.30 hours, the security guards on duty at Kiltex Industry at Gongolamboto area, PW2 Idd Abdalla, and another one known by the single name of Atanas, were visited by two persons who inquired about the whereabouts of one Gaspar Mtumbuka, who was PW2's fellow guard. On being informed that the said Gaspar Mtumbuka was not on duty, the inquirers, who happened to be bandits, attacked PW2 and robbed him a shot gun together with 5 rounds of ammunition, and a cell phone. PW2 staged a resistance, but he was overpowered because the two bandits were instantaneously joined by two other bandits, one of whom was armed with a machete. They succeeded to retain the loot and vanished from the scene of crime.

After the bandits had let him free at the time of escaping, PW2 raised alarm which was answered by the security guards from a nearby Namara

Textile Industry. They hurriedly reported the incident to police, and that because PW2 had sustained injuries, he was issued with a PF3 and proceeded to hospital for treatment. Meanwhile, the police commenced investigation and succeeded to arrest the appellants. They accordingly charged them in the court of law.

When the appeal came up for hearing, both appellants appeared in person and fended for themselves. On the other hand, the respondent/Republic enjoyed the services of Ms Mkunde Mshanga, learned Senior State Attorney, assisted by Ms Lillian Rwetabura, learned State Attorney.

At the commencement of hearing, Ms Mshanga hastened to inform the Court that she detected an error in the proceedings of the case before the trial court. She successfully sought for leave to submit on it.

Ms Mshanga submitted that in the course of trial on 4.8.2008, the prosecution sought for leave to substitute a fresh charge, and that the trial court granted that prayer. Though the fresh charge was read over to the accused/appellants, the trial magistrate did not record their respective

pleas. According to the record at page 18, she added, the trial magistrate recorded that "**Substituted charge read over and explained to both accused who <u>maintain</u> their plea of not guilty.**" Ms Mshanga contended that failure to record the appellants' pleas offended the provisions of section 228 (2) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). She added that the error was fatal, and made the proceedings and judgment of that court a nullity; so also the proceedings and judgment of the High Court, because they were based on a nullity. She urged the Court to invoke the powers it has under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), quash the proceedings and judgment of both lower courts, set aside the sentence, and order a retrial.

On their part, while agreeing with the observation advanced by the learned Senior State Attorney, the appellants submitted in common that since they were not to blame for the alleged error, and because they have been behind bars for almost 11 years, they were requesting the Court to release them.

To begin with, there is no controversy that after granting the prosecution's prayer for substitution of the charge on 4.8.2008, the trial court partially complied with the provisions of section 228 (1) of the CPA which instructs it to state to the accused person the substance of the charge, and require him to explain whether he admits or denies the truth of the charge in that it read over and explained the fresh charge to the accused/appellants. However, that court did not proceed to record the accused/appellants' respective pleas. As already pointed out, it endorsed that "**Substituted charge read over and explained to both accused who <u>maintain</u> their plea of not guilty.**" We think that that was not proper.

The ordinary and natural meaning of the word "**substitute**" is to replace one thing by another, or rather change. Relating this to substitution of the charge as it were in the present case, it means that the previous charge was replaced by a new one, therefore that the appellants plead to that substituted charge. *Ipso facto*, their new pleas ought to have been recorded. The Court had the occasion of directing the necessity of recoding

the accused's plea in the cases of **Akberali Walimohamed Damji v. Reginum** 2 T.L.R. 137 and **Frank s/o Mgala and two Others v. Republic,** Criminal Appeal No. 364 of 2015, CAT (unreported). According to these cases, omission to do so renders the trial a nullity because it leaves no doubt that the appellant's plea was not taken. Consequently, we agree with Ms Mshanga that the omission was a fatal irregularity, rendering the trial a nullity. Accordingly, we invoke the powers we have under section 4 (2) of the AJA, quash the proceedings and judgment of the trial court, as well as those of the High Court for having been based on a nullity, and set aside the sentence.

As earlier on pointed out, Ms Mshanga urged the Court to order retrial, while the appellants have in common requested the Court to release them on the ground that they have been behind bars for almost 11 years now.

The issue whether or not to order a trial *de novo* should be looked at, among others, along the principles which have been set out in the several cases in which such a question cropped up, including that of **Fatehali**

Manji v. Republic [1966] E.A. 343. In that case the erstwhile East African Court of Appeal held at page 344 that:-

> *"Section 319(1) (a) (i) of the Criminal Procedure Code of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial but, as was pointed out in* ***Ahmedi Ali Dharamsi Sumar v. Republic*** *(1) ([1964] E.A. 481 at p. 482), quoting excerpts from the judgment in* ***Salim Muhsin v. Salim Bin Mohamed*** *and Others (2) ". . . . discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion . . . in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be*

ordered; each case must depend on its particular facts and circumstances and ***an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.***" [Emphasis is added]

Ms Mshanga's urge for a retrial was based on the nature of the offence which faced the appellants. She submitted that it being an offence of armed robbery, and taking into consideration that the appellants have been behind bars for only one third of the due punishment, it will be in the interests of justice if the Court orders retrial.

We have considered the attractive argument of the appellants that they have been behind bars for almost 11 years now. However, we agree with Ms Mshanga that given the nature of the offence facing them, that is, armed robbery, as well as the impending punishment, we think that the interests of justice demand us to order a retrial. Consequently, we remit the record to the trial court with a direction for the case to be expeditiously

tried. We also direct that in case of a conviction, the sentence must be ordered to run from the date of the previous purported conviction.

Order accordingly.

DATED at **DAR ES SALAAM** this 6th day of March, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEA

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL