IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL CASE NO. 87 OF 2016

1. OMARY ALLY
2. SAID ISMAIL .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Shangwa, J.)

dated the 2nd day of March, 2007
in
Criminal Appeal No. 142 of 2005

JUDGMENT OF THE COURT

5th & 27th March, 2018

MUGASHA, J.A.:

This is an appeal from the decision of the High Court in Criminal Appeal No. 87 of 2015 whereby the verdict of the District Court of Kinondoni was upheld and the sentence of the appellants enhanced to statutory minimum jail term of thirty years.

At the trial, the prosecution case was that, on 22/11/2002 at 12.50 hrs the appellants and **JUMA s/o RAJAB** impersonated themselves as Tanesco employees, entered into the premises of **ASHA**

d/o ALLY (PW1) and robbed one Deck make Panasonic worth Tshs. 156,000/= and cash money Tshs. 700,000/= the property of PW1. Immediately before such stealing, they threatened PW1 with a pistol in order to obtain the said properties.

The appellants denied the accusations. **JUMA s/o RAJABU** who was 3rd accused person testified to have been hired by the appellants. At the end of the trial, the appellants were convicted and sentenced to imprisonment to 18 years. **JUMA s/o RAJABU** who is still at large, was convicted and sentenced in absentia.

As earlier intimated, the first appeal to the High Court was unsuccessful and the appellants have preferred a second appeal to the Court. They have lodged a joint memorandum of appeal comprising a total of fifteen (15) grounds of complaint; the major one being that, the charge relied upon at the trial was never read over and explained to the appellants.

We have opted to deal with only that ground because it has a critical bearing on the fundamental principles of our criminal justice system. [See **NAOCHE OLE REBILE VS REPUBLIC** (1993) TLR].

At the hearing of the appeal, the appellants fended for themselves and were unrepresented. The respondent Republic was represented by Mr. Nassoro Katuga, learned Senior State Attorney.

The appellants initially preferred to hear the submission of the learned Senior State Attorney.

The learned Senior State Attorney submitted that, the trial and the conviction of the appellants was irregular. It was based on a substituted charge which was never read over and explained to the appellants following the addition of the 4th accused. He argued this to be in contravention of section 228(1) of the Criminal Procedure Act **[CAP 20 RE.2002]** which imperatively requires the charge to be read over and explained to the accused and he be required either to admit or deny the truth of the charge. He added that, since the charge was substituted, it ought to have been read over and explained to the appellants as required by section 234 (2) of the CPA.

On probing by the Court Mr. Katuga also pointed out that, following the death of the 4th accused, the charge sheet consisting the three accused persons was substituted but neither was it read over to

the appellants nor is it in the record of appeal. In this regard, he argued that, the appellants were tried and convicted on the basis of a charge they were not aware of and as such, they were not accorded a fair trial which vitiates their convictions.

In view of the said anomaly and as the way forward, the learned Senior State Attorney urged us to nullify the proceedings and the judgments of the Courts below. In the interest of justice, he declined to press for a retrial due to the peculiar circumstances surrounding the trial and the conviction of the appellants who have been in custody for more than fourteen (14) years.

On the other hand, this being a point of law the appellants had nothing useful to add apart from urging the Court to set them free.

After a careful consideration of the record of appeal and the submission of the learned Senior State Attorney, the issue for our consideration is the propriety or otherwise of the decisions of the two courts below and a subject of the present appeal.

The conduct of a criminal trial is regulated by the Criminal Procedure Act. After the charge sheet is admitted in the trial court and

the accused summoned in order to answer the charge, section 228(1) of the CPA gives the following directions:

> *"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

The cited provision imposes a mandatory requirement for the accused's plea to be taken before proceeding with the trial of the case to enable such accused to be aware of the charges he is facing and for the purposes of preparing a defence case. Omission to comply with the stated fundamental requirement of the law makes the proceedings illegal and renders the trial a nullity. In the case of **NAOCHE OLE REBILE V. REPUBLIC** (supra), the Court was confronted with a scenario whereby the appellant was convicted on the basis of the charge which was read over in his absence. The Court categorically held as follows:

> *(i) One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, i.e. the Court has to put the charge or charges to him and require him to plead;*
>
> *(ii) Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity."*

[See also **ATHUMANI MKWELA AND 2 OTHERS V. REPUBLIC**), Criminal Appeal No. 173 of 2010].

Moreover, under section 234 of the CPA, it is permissible to amend the charge. Whenever the charge is amended, in terms of section 234(2) (a) of the CPA, the trial court is duty bound to take new pleas on the amended charge. In the case of **THUWAY AKONNAY VS. REPUBLIC** (1987) TLR 92, the Court dealt with the issue on the propriety or otherwise of an omission to call upon the accused person to plead to a new charge of arson that had been substituted for that of threatening violence. Thus, the Court held:

> *"It is mandatory for a plea to a new or altered charge to be taken from the accused, failure to do that renders a trial a nullity."*

In the present matter, the record bears out the following: **One,** on 26/11/2002 the initial charge which is not in the record was read over to the appellants and the pleas of not guilty were taken. **Two,** on 27/11/2002 the charge was substituted after the addition of the 4th accused person. However, instead of reading it over and explaining to all accused persons it was only read over to the 4th accused who denied the charge. **Three,** following the death of the 4th accused, the

case against him abated and the prosecutor on 20/1/2003 is on record to have produced a new charge sheet comprising the three accused persons who include the present appellants. We could not trace the said charge sheet despite going through the original record.

Apart from not locating the charge substituted on 20/1/2003 after the death of the 4th accused person, the record does not show if the respective charge was read over and explained to the appellants when the case file was before Pangahela, RM and later Mkwawa, RM who conducted the fresh trial and wrote the judgment. Again, the position remained the same even after our perusal of the original record.

Given the circumstances, the arraignment of the appellants was not complete as no pleas were taken and the trial was a nullity (See **AKBARALI DAMJI VS. REPUBLIC** (2) TLR 137). In the premises, the appellants were not accorded a fair trial and we agree with the learned Senior State Attorney that, on account of the peculiar circumstances of this case and the fact that the appellants have been behind bars for more than fourteen (14) years, a retrial is not in the interest of justice.

We thus invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE. 2002**], nullify the judgments and proceedings of the courts below, quash and set aside the sentence and order the release of the appellants unless if held for another lawful purpose.

DATED at **DAR ES SALAAM** this 19th day of March, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL