

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CRIMINAL APPEAL NO. 306 OF 2015

MASHAKA SUKU APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Kaduri, J.)

dated 4th day of May, 2009

in

DC. Criminal Appeal No. 162 of 2008

JUDGMENT OF THE COURT

3rd & 6th September, 2018

LILA, J.A.

In the District Court of Kahama within shinyanga Region, Mashaka Suku, the appellant, together with Njige magobo and Makame Ndininde were arraigned for the offence of armed robbery. It was alleged by the prosecution that the trio, on the 18th July, 2006 at about 01:00 hrs at Bukombe Village within Bukombe District in Shinyanga Region, did steal cash Tshs. 150,000/= the property of one Joseph Kazinza and immediately before, at or after such stealing they used actual violence by hacking him on his head with a sharp *panga* in order to retain the said money. They pleaded not guilty to the charge. The Prosecution

called three witnesses to prove the charge. At the end, the trial court found the appellant and Njige Magobo guilty of the offence as charged, convicted and sentenced them to serve 30 years imprisonment.

The appellant was dissatisfied with both the conviction and sentence handed down by the trial court. He appealed to the High in (DC) Criminal Appeal No. 162 of 2008. The High Court (Kaduri, J.) dismissed the appeal for want of merit. Further dissatisfied, the appellant tries his luck in this Court on second appeal. He has raised five grounds of appeal in his memorandum of appeal amongst them is ground No. 1 which is couched thus:-

"That, the offence of armed Robbery was founded on a wrong provision of the law, because the cited provision creates (sic) the offence of simple robbery which is minor to that of Armed Robbery. My lord judges the offence of Armed robbery is created by section 287 "A" (sic) and 286, my conviction was illegally see the case of MWAIMUDISMAS AND TWO OTHER V. REP CRIMINAL APPEAL NO. 343 OF 2009 CAT DAR, (UNR) AND ALFAYO MICHAEL SHEMWILU AND ANOTHR V. REP CRIMINAL REVISION NO. 2 OF 2013 HIGH COURT MOSHI-MUGASHA – (UNR) (sic)."

The thrust of the quoted complaint is based on the offence sections cited in the statement of offence in the charge that was levelled against the appellant at the time of his arraignment. That part reads:-

"OFFENCE SECTION AND LAW: *Armed robbery
c/s 285 & 286 of the penal code cap 16 vol. 1 of
the law."*

In actual fact, the appellant has raised a legal issue which we found crucial in the determination of the appeal. We therefore permitted the parties to argue on it in the first place.

At the hearing of the appeal the appellant appeared in person and unrepresented. The respondent Republic had the services of Mr. Ildephonce Mukandara who was assisted by Mr. John Mkony, both learned State Attorneys.

Mr. Mukandara addressed the Court following the appellant deferring his arguments till, if need arose, after the learned Senior State Attorney had argued when he would make a rejoinder.

Arguing on the point, Mr. Mukandara readily conceded that indeed the charge was defective for citing sections 285 and 286 in the statement of offence as the provisions creating the offence of armed robbery. Elaborating, he said at the time the offence was committed, the

Penal Code was already amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2004 which became operational on 1/7/2004 consequent upon which a new section 287A was introduced in the Penal Code creating the offence of armed robbery. He further said from then the offence of armed robbery was not chargeable under sections 285 and 286 of the Penal Code but under the new section 287A. In view of the above, he said, the charge was fatally defective and could not be cured under section 388(a) of the criminal Procedure Act Cap. 20 R. E. 2002 (the CPA). On the way forward, he argued that the appellant was prejudiced hence did not receive a fair trial and he urged the court to invoke the powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) to revise and quash the proceedings and judgment of the trial court for being a nullity as well as nullify the proceedings and judgment of the High Court which emanated from nullity proceedings, quash the conviction and set aside the sentence handed down by the trial court and order the appellant be set free. In support of his arguments he referred us to our decision in the case of **Onesmo Joseph and Another Vs. Republic**, Criminal Appeal No. 21 & 22 of 2012 (unreported).

On the rival side, the appellant had nothing to say on the legal point as he is a layperson on matters of law. He simply supported what was said by the learned State Attorney.

We, indeed, fully subscribe to the stance taken by the learned State Attorney. The charge is fatally defective on account of the reasons well stated by the learned State Attorney which we need not repeat. The provisions of section 135 (a) (ii) of the CPA provides, in mandatory terms, the format of charging. That section states:-

*"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, **if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence.**" [Emphasis supplied]*

The import of the foregoing provisions is that the charge must, in the statement of offence, make reference to the section of the enactment creating the offence. We would add that for a charge to be valid it must

make reference to the proper provision of the law which creates the offence.

In the matter at hand, the appellant was charged with the offence of armed robbery under section 285 and 286 of the Penal Code for the offence he was accused of committing on 18/7/2006. On that date, as rightly stated by the learned State Attorney, section 287A of the Penal Code, a specific provision creating the offence of armed robbery was already in effect. It is apparent that the appellant was charged, tried and thereafter convicted under a wrong section of the law. This Court has, in many occasions, insisted that since it is the charge which initiates a criminal trial then the same should be proper so as to enable the accused person understand the nature of the offence he is facing hence be able to marshal an informed defence. Otherwise, the accused person is prejudiced and the Court has consistently nullified the trial on account of the accused failure to receive a fair trial – see **Onesmo Joseph and Another Vs. Republic** (supra) which was rightly cited by the learned State Attorney and **Abdalla Ally Vs. Republic**, Criminal Appeal No. 253 of 2013 (unreported). For instance, in the case of **Abdalla Ally Vs. Republic** (supra), the Court observed as follows:-

"...being found guilty on a defective charge based on wrong and /or non-existent provisions of the

law, it cannot be said that the appellant was fairly tried in the courts below..”

The Court went ahead and decided that:

“In view of the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in court... The wrong and or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware that he was facing a serious charge of rape.”

In the present matter the appellant was charged, tried and convicted under wrong provisions of the law. He was, therefore, not made aware of the proper nature of charges facing him so as to prepare an informed or rational defence. The trial was unfair. In this regard, and on the authorities, the trial was a nullity.

In the circumstances, we are inclined to invoke the powers of revision under Section 4(2) of the AJA and quash the proceedings and judgment of the trial court, quash the conviction and set aside the sentence. We also quash the proceedings and judgment of the High Court because they stemmed from nullity proceedings and judgment of

the trial court. We hereby order the appellant be released from prison forthwith unless held therein for another lawful cause.

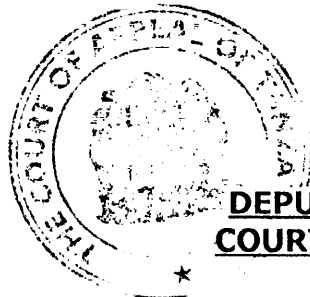
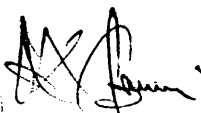
DATED at **TABORA** this 5th day of September, 2018.

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.

A circular seal of the Court of Appeal is visible on the left. It features a central emblem and the text "THE COURT OF APPEAL" around the perimeter. A small star is located at the bottom of the seal.
A handwritten signature in black ink is positioned above the name.
A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL (T)