IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: LUANDA, J. A., MZIRAY, J. A. and NDIKA, J. A.)

CRIMINAL APPEAL NO. 321 OF 2015

MUSTAPHER SONGAMBELE ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Fikirini, J.)

dated the 27th day of May, 2015
in
DC Criminal Appeal No. 7 of 2015

JUDGMENT OF THE COURT

9th & 15th May, 2018

MZIRAY, J.A:

The appellant was charged in the District Court of Songea at Songea with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code Cap. 16 Vol I of the Laws. He was convicted and sentenced to 5 years imprisonment. His appeal to the High Court at Songea was unsuccessful. Besides upholding the trial court decision, the first appellate court enhanced the sentence from 5 years to 15 years imprisonment. Still aggrieved, he instituted this present appeal.

The appellant appeared in person and unrepresented at the hearing of his appeal. The respondent Republic was represented by Ms. Amina Mawoko, assisted by Ms. Hellen Chuma, learned State Attorneys.

The appellant filed a memorandum of appeal consisting of a total of ten (10) grounds. For reasons that will shortly become apparent, we do not need to go into those grounds nor do we need to list them here. We also need not narrate the evidence that was adduced at the trial.

Before the learned State Attorneys had responded to the appellant's grounds of appeal, we called upon them to address us first on whether there was any conviction in the trial court's judgment which could be challenged both in the High Court and in this Court and Second, on the propriety of the charge.

Ms. Mawoko learned State Attorney, on the issue of conviction, without much ado admitted that there was none, and that this was contrary to section 235 read together with section 312 of the Criminal Procedure. Act Cap 20 R.E. 2002 (the CPA). As a consequence, the judgment was a nullity, she argued. She therefore invited this Court to exercise its revisional powers under section 4(2) of the Appellate

Jurisdiction Act Cap 141 R.E. 2002 (the AJA), to quash the proceedings and judgment of the High Court and the judgment of the trial court, and remit the record to the trial court for it to compose a judgment according to law.

As to the propriety of the charge, she readily conceded that the charge sheet was not properly drawn so as to have enabled the appellant to understand the nature of the charge preferred against him and make a defence as it did not specify to whom the threat of violence was directed.

On his part, the appellant had nothing useful to argue. He only pleaded with the Court to release him from jail.

We have carefully considered the arguments presented. We entirely agree with the learned State Attorney's submission that the trial magistrate did not enter conviction. It follows, therefore, that in the absence of a conviction, one of the prerequisites of a judgment in terms of section 312(2) of the Act was, therefore, missing. The subsection provides.

> *"(2) In the case of **conviction** the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is*

convicted *and the punishment to which he is sentenced."* [Emphasis added].

Based on that preceding sub section and several authorities of this Court, it goes without saying therefore that in the case of a conviction, the conviction must be entered. Failure to enter conviction renders a judgment incompetent. In **Amani Fungabikasi v. R.**, Criminal Appeal No. 270 of 2008 (unreported) the Court said:-

> *"It was imperative upon the trial District Court to comply with the provisions of section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt. In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312(2) of the Act was missing. So, since there was no conviction entered in terms of section 235(1) of the Act; there was no valid judgment upon which the High Court could uphold or dismiss."*

(See also **Shabani Iddi Jololo and Three Others v. R.**, Criminal Appeal No. 200 of 2006; **Hassan Mwambanga v. R.**, Criminal Appeal No. 410 of 2013 (both unreported). In **Mwambanga's case** (supra) the Court formulated the law thus:-

> *"it is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction."*

That being the position, there is no doubt that the judgment of the High Court had no leg to stand on. In the circumstance therefore, the appeal is incompetent for being based on invalid judgment of the High Court.

We could have determined the appeal on this point alone and remit the record to the district court with directions to enter a conviction. However, on a second thought, we think that would be a time wasting exercise because the charge sheet which is the foundation of the criminal

trial, in our view, as rightly conceded by the learned State Attorney, is fatally defective. The charge sheet which was laid against the appellant and upon which he was convicted reads:

"CHARGE SHEET

OFFENCE, SECTION AND LAW: *Robbery with violence c/s 285 and 286 of the Penal Code Cap 16 of the laws.*

PARTICULARS OF THE OFFENCE: *That MUSTAPHER SONGAMBELE charged, on 9th day of December, 2004 at or about 06.45 hrs at Making'inda Msamala area within the Township and District of Songea in Ruvuma region, did steal cellular phone make SIEMEN A 35, valued at Tshs. 70,000/= the property of one* ***MUSTAPHER s/o MILANZI*** *and immediately before or after the time of such stealing he used actual violence in order to obtain or retain the said stolen property."*

It is obvious that the Charge Sheet levelled against the appellant is incurably defective in that the name of the person against whom the violence was directed was not mentioned thus; the charge against the appellant was improperly formulated. See **Kashima Mnadi v. R,** Crim. Appeal No 78 of 2011 (unreported).

It is trite law that obscure charges are taken as being inconsistent with the minimum standards of a fair trial. (See **Mussa Mwaikunda v. R.** (2006)

TLR. 387 and **Matatizo Bosco v. R.**, Criminal Appeal No. 287 of 2014 (unreported). In the latter case, it was pointed out that, it was a serious omission, not to mention the person against whom the violence was directed. Similarly, in this case, the person against whom the violence was directed was not mentioned. Such omission goes contrary to the requirement in the specimen charge of robbery in Item 8 of the Second Schedule to the CPA which put it as a condition that the specific person on which the violence was directed has to be mentioned. For ease of reference, we reproduce the specimen charge in the Second Schedule to the CPA as hereunder:

> *"8. ROBBERY*
> *Robbery with violence, contrary to section 285 of the Penal Code.*
> *PARTICULARS OF THE OFFENCE*
> *A.B., on the ... day of ... in the region of ... stole a watch and at or immediately before or immediately after the time of such stealing* ***did use personal violence to C.D.****"* [Emphasis added].

So, this was the intention of the legislator that the person against whom the violence was targeted must be mentioned in a charge of robbery. Apart

from that, in the principles of fair trial, it is only logical that the accused ought to know, who he was going to face as a complainant witness in the trial. This would enable him prepare well for his defence.

In a number of its recent decisions, this Court has insisted that the omission to mention the person against whom the violence was applied or aimed at, was fatal and incurable. (See **Athumani Juma and Four Others v R**, Criminal Appeal No. 37 of 2009, **Munziru Amiri Mujibu v. R**, Criminal Appeal No. 151 of 2012 and **Tayai Miseyeki v. R**, Criminal Appeal No. 60 of 2013 (all unreported).

In the light of the above authorities, and the situation in the present case, we proceed to declare that by omitting to mention or specify the person against whom the violence was directed to, the charge was incurably defective. This means that the whole trial proceedings and those of the High Court on first appeal were fatally vitiated.

That said, and taking into account that the appellant has served 12 years out of 15 years, a substantial part of the sentence, to serve interest of justice, this won't be a fit case to order a retrial.

In the light of the above, we hereby exercise our revisional powers under section 4(2) of the AJA to quash all the proceedings of the trial court and the High Court on first appeal. We quash the entire proceedings and set aside the sentence. We order that the appellant be released from prison immediately, unless he is held there for some other lawful cause.

DATED at **IRINGA** this 11th day of May, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL