IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A)

CRIMINAL APPEAL NO. 469 OF 2015

1. PETER NDIEMA ..... 1st APPELLANT

2. NIKAS NDIEMA ..... 2nd APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Mwanza)

(Matupa, J.)

dated the 1st day of October, 2015
in
Criminal Appeal No. 143 of 2012

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JUDGMENT OF THE COURT

27th June & 5th July, 2018

MWANGESI, J.A.:

The two appellants herein, were arraigned at the District court of Musoma at Musoma for the offence of armed robbery contrary to the provision of section 287 A of the Penal Code, Cap 16 R.E 2002 as amended by Act No. 4 of 2004. It was the case for the prosecution that, on the 6th day of January, 2010, at about 23: 00 hours, at Kwigutu village within the rural District of Musoma in Mara Region, the accused (appellants) jointly and together, stole cash TZs 250,000/=, the property

of one Zabron Kigongo and immediately before such stealing, they used a panga to cut him on his left leg in order to obtain the said property.

When the charge was read over to the accused, they both protested their innocence and thereby, moving the prosecution to parade about three witnesses to establish the guilt of both of them. Additionally, the prosecution tendered three exhibits to supplement the oral evidence. On their part in defence, the appellants relied on their own sworn testimonies, which was not supplemented by any other additional evidence. At the end of the day, after the trial magistrate had evaluated the evidence placed before him, was satisfied beyond doubt that, the case against both appellants had been established to hilt. Both the two were therefore convicted as charged, and each sentenced to the statutory term of imprisonment for thirty years. Furthermore, each of them was ordered to be canned twenty-four strokes. Their appeal to the High Court of Tanzania in Mwanza Registry, was unsuccessful and hence this appeal.

The brief facts of the case as could be discerned from the testimony of the complainant (PW1) was to the effect that, on the night of the 6th day of January, 2009, his house was broken in by some armed

bandits, who after storming inside, bitterly harassed him together with his wife and robbed TZs 250,000/=. And in the course of the scuffle, he was seriously cut with a panga by one of the bandits on his left leg, causing him to become unconscious. The matter was reported to the Police by his neighbours and other formalities of the Police followed leading to the arrest of the appellants and being charged.

It was the version of the prosecution during trial through the testimonies of PW1 and PW2 that, the appellants herein were properly identified on the fateful night being among the bandits who invaded the house of PW1. On their part, the appellants strongly resisted. As already stated above, the version from the prosecution witnesses was believed by both the trial court and the first appellate court and hence, this second appeal.

In their separate memoranda of appeal, each of them has listed about eleven grounds to challenge the concurrent findings of the two lower courts. Nevertheless, after a close look at the two memoranda of appeal which are synonymous, we are of the view that they can conveniently be condensed to mainly five complaints of the appellants namely, **firstly,** that they were not correctly identified on the fateful

night; **Secondly,** that there was inconsistency of the evidence of the prosecution witnesses; **Thirdly,** that the chain of custody of the exhibits which were tendered and relied upon by the prosecution was broken; **Fourthly,** that their defence evidence was not considered by both courts; **And fifthly,** that there was variance between the charge sheet and the evidence received from the prosecution witnesses.

On the date when the appeal was called on for hearing, the appellants entered appearance in person unrepresented and therefore, fended for themselves whereas, the respondent/Republic was represented by Mr. Lameck Merumba, who was assisted by Ms Gati William, both learned State Attorneys.

Upon the appellants being informed by the Court of their right as regards the procedure to address the Court, they both requested the Court to adopt their lodged grounds of appeal, and opted to let the learned State Attorney respond to their grounds of appeal first, while reserving their right to rejoin, if need could arise.

On his part, Mr. Merumba supported the appeal outright, and requested the Court to permit him to address us on one ground only, which he believed would dispose of the entire appeal. The ground of

appeal which he chose, was the fifth complaint of the appellants above, which relates to the variance between the charge and the evidence that was received from the prosecution witnesses. It was the submission of the learned State Attorney that, a charge is the document which initiates criminal proceedings against an accused person. It is the document which states the type of offence which has been committed. And all the evidence which is received from the prosecution witnesses is aimed at establishing the commission of such an offence by the accused.

According to the charge against the appellants in this appeal, the learned State Attorney went on to submit, it is indicated that, the offence of armed robbery was committed on the 6th day of January, 2010. Nonetheless, the evidence of all the three prosecution witnesses who testified before the trial court, was to the effect that, the offence was committed on the 6th day of January, 2009. In the view of Mr. Merumba, the fact that the evidence received by the trial court was in respect of an offence which was committed a year before the one alleged to have been committed by the appellants, the implication is that, there was no evidence which was tendered to establish the commission of the offence which faced the appellants.

Mr. Merumba submitted further to the effect that, much as the records in the case file could divulge, the incident of armed robbery was reported to the Police, where a PF3 was issued to PW1 to go and get treated the injuries which he suffered on the material night. The involvement of policemen in the matter is further noted in the testimonies of PW1 and PW2. Under the circumstances, the learned State Attorney could not see the reason as to why the police officer who investigated the case, was not called to testify before the trial court. The omission of such an important witness for the prosecution, left much to be desired as he was the only person who could have explained the situation we are faced with. He invited us to draw an adverse inference on the part of the prosecution.

And, when the learned State Attorney was prodded by the Court as regards the reliance put to the provision of section 234 (3) of the Criminal Procedure Act, Cap 20 R.E 2002 by the first appellate Judge that, could be applied to cure the anomaly occasioned by the variance between the charge sheet and evidence, his reaction was that, there was misinterpretation of the section. In his opinion, the time envisaged under the provision, does not involve dates or months. He therefore, concluded

his submission by urging us to find merit in this appeal and that, we be pleased to allow it by quashing the findings of the two lower courts and set aside the sentences imposed to the appellants, the resultant of which is to set them at liberty.

Understandingly, both appellants had nothing substantial in rejoinder on the obvious reason that, the entire submission made by the learned State Attorney, was in their favour. They only implored the Court to set them at liberty as they have illegally remained behind bars for quite a long time.

In the light of what has been submitted by the learned State Attorney above, the issue for determination by the Court is whether or not, both appellants in this appeal were legally prosecuted and sentenced. To begin with, we are fully at one with the learned State Attorney that, a charge is the document which initiates criminal proceedings against an accused person. It is from the particulars of the charge wherein the prosecution is called upon by the court to tender evidence in establishment of the offence alleged to have been committed by the accused person. In the same vein, it is from the particulars of the charge, in which the accused person is required to defend himself.

The charge which was placed at the doors of the appellants in this appeal bears the following wording:

"Offence section and law: Armed robbery contrary to section 287A of the Penal Code Cap 16 of the Laws R.E 2002 as amended by Act No. 4 of 2004.

Particulars of offence: That Peter s/o Ndiema and Nikas s/o Ndiema are jointly and together on the 6th day of January, 2010 at about 23: 00 Hours, at Kwigutu village within the rural District of Musoma in Mara Region, did steal money TZs 250,000/= the property of one Zabron s/o Kigongo and immediately before such time of stealing did use a panga to cut him on his left leg in order to obtain the said property."

Nonetheless, from the testimonies of all the three witnesses who were summoned by the prosecution to testify against the appellants, told the trial court that, the incident of robbery occurred on the 6th day of January, 2009. Such averment on the part of PW1, is at page 18 of the record, while for PW2 is at page 19 and that of PW3, is seen at page 22 of the record of appeal. Undoubtedly therefore, as complained by the appellants and supported by the learned State Attorney, there was

variance between the particulars of the charge and the evidence from the prosecution witnesses in establishment of the commission of the offence.

The question that crops up from the foregoing position is as to whether the variance of time between the particulars of the charge and the evidence was fatal. When the anomaly was brought to the attention of the first appellate Judge, he was of the view that, the same was not fatal because it was curable, placing reliance on the provision of section 234 (3) of the Criminal Procedure Act, Cap R.E 2002, which stipulates that, the variance between the charge and the evidence adduced in support of it with respect to **time** at which the alleged offence was committed, is not material. We will give our position later, and for the moment, we wish to discuss first as to why there has to be congruence between the particulars of the charge and the evidence.

It is important for the particulars of the charge to be compatible with the evidence adduced by the prosecution witnesses to establish commission of the offence for the purpose of ensuring fair trial in that, it will enable the accused person to prepare well his defence. In fostering

such spirit, the Court in the case of **Leonard Raphael and Another Vs. Republic**, Criminal Appeal No. 4 of 1992 (unreported), stated that:

> *"Prosecutors and those who preside over criminal trials are reminded that when, as in this case, in the course of trial, the evidence is at variance with the charge and discloses an offence which is not laid in the charge, they should invoke the provisions of section 234 of the Criminal Procedure Act 1985, and have the charge amended in order to bring it in line with the evidence."*

As it happened to be the case in the instant appeal, the charge was never amended in terms of section 234 of the **CPA**, so as to be in harmony with the evidence received from the prosecution witnesses. Under the circumstances, as it was submitted by the learned State Attorney, since the evidence tendered was in respect of an offence committed in the year 2009, and the charge against the appellant was alleged to have been committed in the year 2010, there was no evidence tendered to establish the commission of the offence which the appellants were facing and thereby, causing the appellants not to be able to prepare their defence well.

We now turn to consider the provision of section 234 (3) of **the CPA,** which according to the learned first appellate Judge, could be applied to vindicate the anomaly occasioned in the proceedings. The provision bears the following wording:

> *"Variance between the charge and the evidence adduced in support of it with respect to* ***time*** *at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that in fact instituted within the time if any, limited by law for the institution thereof"*

In our considered view, we do not think that the interpretation which was given to the provision by the learned Judge that, the variance of time envisaged under the section was meant to include even variance on dates or months was not proper. On the contrary, we are of the view that where there is variance of time extending to either days, months or years, the provision does not accommodate. In so stating, we are backed up by the observation which was made by the Court in the case of **Mathias Shishi @ Mulumba Vs. Republic**, Criminal Appeal No. 375 of 2015 (unreported), where there was variance of dates between the

charge and the evidence that was tendered by the prosecution witnesses in establishment of the offence, when it stated that:

> *"The trial court should have noticed the discrepancy and moved to amend the charge under section 234 of the Criminal Procedure Act. As we observed in* ***Makelele Kulindwa Vs. Republic,*** *Criminal Appeal No. 175 of 2013 (unreported), this was a serious omission because as demonstrated by the record, it embarrassed the appellant in his defence as he decided to address the Court as of his whereabouts on the 6th June, 2013, which was not the date he was alleged to have committed the offence."*

Since the variance of dates between the charge and the particulars of the offence discussed in the above cited cases was similar to the one under discussion, there is no gainsaying in holding that, the embarrassment which encountered the appellants in those cases was the same as the one encountered by the appellants in this appeal.

The foregoing position notwithstanding, there were also other discrepancies noted in the proceeding in this appeal. Among them was the one pointed out by the learned State Attorney, of failure by the prosecution to call the investigator of the case to give evidence in court.

When cross-examined by the first accused at page 17 of the record, PW1 is recorded to have stated in part that:

> "--- *you broken (sic) my door using the big stone called Fatuma. The investigator who investigated the case came to my home saw the stone and the broken door ---"*

Also at page 20 of the record, PW2 is recorded to have stated that:

> *"I found and collected your identities inside my home, they belonged to you all, and I gave them to the Police who kept them -*

The two excerpts above establish that a Police Officer was fully involved in the incident concerning the appellants, but to the surprise of many, such Police Officer was nowhere to give his testimony in court. Had the trial court or the first Judge considered the above pointed out anomalies, evidently they would have reached at a different verdict against the appellants from the one being impugned.

With the foregoing observation, we find no need to discuss the other grounds of appeal which were raised by the appellants as to do so would be mere academic exercise. It only suffices to hold that, there was

no justification in finding the appellants culpable to the charged offence. We are therefore, constrained to allow the appeal by quashing the findings of the two lower Courts and setting aside the sentences and the ancillary order of corporal punishment which were meted to the appellants. In lieu thereof, we direct that both appellants be set at liberty forthwith unless they are otherwise legally held for some other justifiable cause.

Order accordingly.

DATED at **MWANZA** this 3rd day of July, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL