

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 439 OF 2015

MAULID S/O ALLY HASSAN APPELLANT
VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mwita, J.)

dated the 2nd day of June, 2008

in

Criminal Appeal No. 143 of 2003

JUDGMENT OF THE COURT

7th & 15th February, 2018

MJASIRI, J.A.:

In the District of Court of Tabora at Tabora, Maulidi s/o Ally @ Hassan was charged with the offence of Armed Robbery contrary to section 285 and 286 of the Penal Code, Cap 16 RE 2002, the Penal Code. It was the prosecution case that on August 17, 2004 the accused person committed the offence by stealing the properties of one Mwasiti d/o Juma by using violence and attacking her with an iron bar to facilitate the robbery.

The appellant was convicted as charged and was sentenced to the mandatory minimum sentence of thirty years imprisonment. Aggrieved by the decision of the trial court the appellant appealed to the High Court. His appeal to the High Court was unsuccessful hence his second appeal to this court.

The appellant was represented by Mr. Kamaliza Kayaga, learned advocate while the respondent Republic had the services of Ms. Juliana Moka, learned State Attorney.

When the appeal was called on for hearing the Court wanted to satisfy itself as to whether or not the appellant was properly charged in accordance with the law.

Mr. Kayaga submitted that the charge is defective as the appellant was charged with wrong provisions of the law. At the time the appellant was being charged, that is August 24, 2004, the relevant charge was section 287A of the Penal Code and not sections 285 and 286 of the Penal Code. Mr. Kayaga submitted further that as a result of this injustice the appellant has been in custody since August 26, 2005 which is a period of fourteen (14)

years. He asked the Court to nullify the proceedings, quash the conviction against the appellant and set aside the sentence of thirty (30) years imprisonment.

Ms. Moka on her part supported the appeal. She submitted that the charge was defective. She stated that following the amendment to the Penal Code vide Act No. 4 of 2004 which came into effect on April 14, 2004 a new section was added immediately after section 287, section 287A, which provides as follows:.

"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for

a minimum term of thirty years with or without corporal punishment.”

According to the learned State Attorney, the appellant did not receive a fair trial, as he was charged with the wrong provisions of the law, and hence not clearly establishing the offence he was charged with. She concluded that the proceedings were a nullity, and like the learned defence counsel asked the court to nullify the proceedings and to set aside the sentence, given the fact that the appellant has already spent 14 years in prison.

It is evident from the record that the appellant has been charged and convicted on a defective charge. In **Hassan Jumanne @ Msingwa**, Criminal Appeal No. 290 of 2014, it was stated that, it is trite law that at the beginning of any trial, the accused must be arraigned. This means the court has to put the charge or information to him and require him to plead. Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity (See – **Naoche Mbile v. Republic**, [1993] TLR 253. No trial can commence if there is no

charge or information to which the accused can plead (See – **DPP v. Ally Nur Dire and Another**, (1988) TLR 252). It follows therefore, as night follows day that a defective charge cannot commence or support a lawful trial, unless it is amended before the completion of the trial according to the law.

In the case of **Abdalla Ally v. Republic**, Criminal Appeal No. 253 of 2013, CAT (unreported), the Court stated that:-

"Being found guilty on a defective charge, based on a wrong and /or non-existent provisions of the law, is evident that the appellant did not receive a fair trial. 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 severe charge of rape."

This is precisely what happened in this case. At the time the appellant was charged, sections 285 and 286 of the Penal

Code no longer dealt with the offence of armed robbery following the amendment of the Penal Code under Act No. 4 of 2004 which came into effect on April 14, 2004. This means that the appellant did not have a fair trial and the trial was a nullity. See **Gabriel Mwakanemela v. Republic**, Criminal Appeal No. 377 of 2013. (unreported).

Normally, where the proceedings of a trial court are nullified, a retrial would ordinarily be ordered. However a retrial would be ordered only if it would be in the interest of justice to do so. See for instance **Fatehali Manji v. Republic**, [1966] EA 41. However as pointed out by both counsel this was not a fit case to order a retrial. Taking into account the fact that the appellant has already been in prison for a period of fourteen (14) years.

In view of the circumstances of this cases and in exercising our revisional powers under section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002], we hereby quash the proceedings and judgments of the trial court and the High Court

on first appeal. We set aside the sentence of thirty (30) years meted out to the appellant. The appellant is to be released from Prison immediately, unless he is otherwise being lawfully held.

Order accordingly.

DATED at **TABORA** this 12th day of February, 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.


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL