

**IN THE COURT OF APPEAL OF TANZANIA**

**AT BUKOBA**

**(CORAM: MWARIJA, J.A, MUGASHA, J.A., And MKUYE, J.A.)**

**CRIMINAL APPEAL NO. 169 OF 2018**

**1. KAMUGISHA FAUSTIN @ NELSON**

**2. DENIS JULIUS ..... APPELLANTS**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Matogolo, J.)**

**dated the 28<sup>th</sup> day of July, 2016**

**in**

**Criminal Appeal No. 34 & 35 OF 2015**

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**RULING OF THE COURT**

6<sup>th</sup> & 14<sup>th</sup> May, 2019

**MKUYE, J.A.:**

In the District Court of Karagwe at Karagwe the appellants Kamugisha Faustin @ Nelson and Denis Julius were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code) vide Original Criminal Case No. 64 of 2014. It was alleged in the particulars of offence that on the 20<sup>th</sup> of

March 2014 at about 03:00hrs at Kayanga Mwisho wa lami in Karagwe District and Kagera Region the appellants being armed with a panga did steal two mobile phones make Nokia valued at Tshs.140,000/=, cash money Tshs.453,000/= all with a total value of Tshs.593,000/=, the property of Karumuna Vedasto and at / or immediately after the time of stealing, the appellants did use the panga to assault one Karumuna Vedasto in order to obtain or retain the said properties.

The evidence leading to this appeal can be briefly stated as follows:

In the night of 20/3/2014, the victim Vedasto Karumuna (PW1) was asleep with his wife Proscovia Karumuna (PW2). At about 03:00hrs, he heard the door to his room broken. And alas! the robbers emerged in his room while armed with a panga. They cut him and his wife (PW2) while demanding to be given money. The alarm was raised and neighbours responded. On finding the victims injured, the neighbours took them to the police where PF3s were issued. Thereafter, they were taken to the hospital for treatment.

Later on, through information from the police informer, Ass/ Inspector Maiko Masome (PW6) arrested the 1<sup>st</sup> appellant on 21/3/2014

and was arraigned before the court on 24/3/2014. On 27/3/2014 the charge was substituted and Peterson Henery and Paschal Peter (the former 2<sup>nd</sup> and 3<sup>rd</sup> accused persons) were added. On 27/3/2014 Denis Julius (the former 4<sup>th</sup> accused and the 2<sup>nd</sup> appellant herein) was arrested and joined in the case through the charge which was substituted on 1/4/2014. On 17/4/2014, the charge was withdrawn against the former 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant. However, upon a full trial, the trial court found the two appellants guilty. They were convicted and sentenced to 30 years imprisonment. They unsuccessfully appealed to the High Court hence, this second appeal on eight grounds of appeal and for a reason to be apparent shortly we shall not reproduce them.

When the appeal was called on for hearing, the appellants appeared in person and unrepresented; whereas the respondent Republic was represented by Ms. Chema Maswi learned State Attorney.

Before proceeding with the hearing of the appeal on its merit, we wished to satisfy ourselves on the propriety of the appeal by the appellants; the reason being whether the 2<sup>nd</sup> appellant was properly tried in view of the fact that the charge of armed robbery he was facing, was

on 17 /4/ 2014, withdrawn. Also, we wanted to satisfy ourselves after the charge was withdrawn whether or not there was a charge which was read over to the 1<sup>st</sup> and 2<sup>nd</sup> appellants so that they could enter their pleas.

Ms. Maswi, readily conceded that following the withdrawal of the charge against the former 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant herein, there was no charge which could have proceeded against him. Apart from that, she said, there is nowhere in the record of appeal where it is shown that after the withdrawal of the charge there was a substituted charge which was read over to the appellants herein. She further pointed out that even their pleas were not properly taken on 12/5/2014. In that regard she argued that, as the trial court proceeded with trial against the 2<sup>nd</sup> appellant who was discharged instead of the one who was supposed to remain charged, it was a fatal irregularity which renders the whole trial against him a nullity. She further added that, as the court proceeded on uncertain charge against the appellants the proceedings thereof were equally void. This, she said, also adversely impacted on the proceedings before the High Court. In the end, she implored the Court to invoke section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the

AJA) and nullify the proceedings and the decisions of the two courts below, quash the conviction and set aside the sentence imposed against the appellants and leave the matter to the Director of Public Prosecutions (DPP) to determine their fate.

On his part the 1<sup>st</sup> appellant, apart from conceding to the issue raised by the Court, he was of the view that ordering a retrial under the circumstances will lead to miscarriage of justice against him.

As for the 2<sup>nd</sup> appellant, he argued that though he had raised this issue at the High Court it was not dealt with. On the way forward, he left the matter in the hands of the Court to determine and set him free.

On our part, after having examined the court record and the submissions of both sides, we are satisfied that there was a glaring shortcoming on the manner the appellants were tried. The shortcoming is twofold. **One**, continuing with proceedings against the 2<sup>nd</sup> appellant while the charge against him was withdrawn. **Two**, continuing with trial against both the 1<sup>st</sup> and the 2<sup>nd</sup> appellants while there was no substituted charge which they were called on to plead after the previous charge had

changed on the account of the withdrawal of the charges against the former 2<sup>nd</sup> accused and 2<sup>nd</sup> appellant.

It is apparent from the record that initially the 1<sup>st</sup> appellant was on 24/3/2014 charged with an offence of armed robbery contrary to section 287A of the Penal Code. On 27/3/2014 the charge was substituted whereupon Peterson Henery (2<sup>nd</sup> accused) and Paschal Peter (3<sup>rd</sup> accused) were added. Yet again, as shown at pages 5 and 6 of the record of appeal, on 1/4/2014 the charge was substituted to include the 4<sup>th</sup> accused (2<sup>nd</sup> appellant) and thus changing the content of the charge sheet in order to accommodate the 1<sup>st</sup> to 3<sup>rd</sup> accused persons including Denis Julius @ Zitakubi as the 4<sup>th</sup> accused. On that date the charge was read over to the 4<sup>th</sup> accused who entered a plea of not guilty. The trial court intimated that the other accused persons would enter their pleas on 3/4/2013 something which never happened.

As earlier indicated, on 17/4/2014, the charge against the former 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant herein was withdrawn under section 98(a) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) and were discharged as shown at page 7 of the record of appeal as hereunder:

"17/4/2014

*Coram: P.J. Matete – DRM*

*Public Pros: D/Cpl Cylilo*

*B/C: G. Ndaula*

*Accused: All Present*

*Public Prosecutor: Your honour **I pray to withdraw the charge against 2<sup>nd</sup> and 4<sup>th</sup> accused persons u/s 98 (a) of CPA, 1985. I pray for preliminary hearing date.***

*Order: The **second accused, Peterson s/o Henery and the fourth accused, Denis s/o Julius @ Zitakubi are hereby discharged u/s 98 (a) of CPA, 1985. Preliminary hearing on 28.4.2014. Accused further remanded in custody.***

*Sgd: V.T. Bigambo*

*RM*

*17.4.2014"*

*[Emphasis added]*

Incidentally, section 98(a) of the CPA which was invoked by the public prosecutor deals with the withdrawal of any charge in respect of

any trial before a subordinate court. And where such withdrawal is granted, the trial court is required to discharge the accused concerned.

The said provision provides as hereunder: -

*"98. In any trial before a subordinate court any public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of one or more of the offences with which such person is charged; and upon such withdrawal.-*

*(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but such discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;*

*(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."*

In this case, though the former 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant were discharged as alluded to earlier on, the 2<sup>nd</sup> appellant continued with



trial until the conclusion of the case whereupon he was along with the 1<sup>st</sup> appellant convicted and sentenced to 30 years imprisonment.

The effect of the discharge of the accused under section 98(a) of the CPA is that it would not operate as a bar to subsequent charge on account of the same facts. It, therefore, means that where the accused is discharged under the said provision, such person shall remain free unless subsequent proceedings against him are recommenced by the prosecution on account of the same facts and this will entail refilling of a new case in court which may have to be registered under a new number.

In the matter under consideration, we have been unable to glean where the prosecution was recommenced against the 2<sup>nd</sup> appellant. Indeed, it is not certain as to which charge the 2<sup>nd</sup> appellant stood arraigned until his conviction. Unfortunately, this went unnoticed by the 2<sup>nd</sup> appellant, the public prosecutor and the trial magistrate. Even their appeals before the High Court were unsuccessful though the 2<sup>nd</sup> appellant had raised this issue before the High Court but the same was not attended.

In our view, trying and convicting the 2<sup>nd</sup> appellant on a charge which had been withdrawn or unknown charge, was an irregularity which is incurable under section 388(1) of the CPA as it resulted into a miscarriage of justice rendering the whole trial against the 2<sup>nd</sup> appellant a nullity.

As to whether there was a substituted charge which was read over to the 1<sup>st</sup> and 2<sup>nd</sup> appellants for them to enter their pleas after the charge against the 2<sup>nd</sup> appellant had been withdrawn on 17/4/2014 we found none. To be particular, there was no substituted charge prepared in respect of the remaining accused persons, that is, the former 1<sup>st</sup> accused (1<sup>st</sup> appellant herein) and the former 3<sup>rd</sup> accused whose whereabouts are unknown though the charge against him was never withdrawn. Neither was there a substituted charge in respect of the 1<sup>st</sup> and 2<sup>nd</sup> appellants who, all through, stood charged with an offence. However, **“it would appear that on 12/5/2015 when the matter was called on for preliminary hearing, at page 8 of the record of appeal, the appellants entered their pleas”** as reflected hereunder: -

*"Date: 12.5.2014*

*Coram: V.T. Bigambo, DRM*

*Public Prose: D/Cpl Cylilo*

*B/C: T. Alibalio*

*Accused: Present*

*PP: Preliminary hearing*

*Court: **Both accused enter plea of NOT GUILTY on the offence.***

*EPNG*

### ***MEMORANDUM OF FACTS***

***Accused and address as per charge sheet on 20/3/2014 around 3:00am at Kayanga both accused being armed with pangas they did attack Audax Karumuna Vedasto and steal two mobile phones valued of Tshs. 140,000/= and cash money Tshs. 453,000/= both total Tshs. 593,000/= and they did cut the victim on different parties of his body.***

*The accused was arrested and brought to court to face this charge.*

*That's all*

*Section 192 (3) CPA.*

*Accused: We both dispute the facts which constitute an offence but we admit personal particulars.*

*1<sup>st</sup> Accused: Sgd :Kamugisha Faustine*

*2<sup>nd</sup> Accused: Sgd: Denis*

*PP: Sgd: Cpl. Cylilo..."*

[Emphasis added]

We have highlighted that **"it would appear that on 12/5/2015...the appellants entered their pleas"** for a reason. This is because, though the appellants are recorded to have entered a plea of not guilty to the offence, it is not certain as to whether the charge was read over to the accused or not as the record of appeal does not bear out that the same was read over to them. Likewise, the plea of each appellant is not reflected in the record. Besides that, assuming it was read over, it is also not known as to whether the charge read over to the appellants was the one in which the charges against the former 2<sup>nd</sup> accused and the 2<sup>nd</sup> appellant herein was withdrawn. Incidentally, even during the preliminary hearing the names of the appellants were not

mentioned. The record merely shows that "the names and address as per charge sheet".

Ordinarily, in the circumstances where the charge is withdrawn which implies that the content of the existing charge must have been changed, there ought to have been prepared and filed a fresh charge covering the remaining accused who were the former 1<sup>st</sup> accused (1<sup>st</sup> appellant) and the former 3<sup>rd</sup> accused person in that charge. Alternatively, if the prosecution had made their mind to recommence proceedings against the 2<sup>nd</sup> appellant as well, they ought to have filed a fresh charge involving both appellants. That appears to have not been done. Failure to do so might have culminated in the dilemma we are now facing.

Certainly, the charge is very crucial in the institution of criminal trials. Thus, section 234 of the CPA which permits among other aspects, the alteration, amendment or substitution of charges provides as follows:

*"(1). Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make order for alteration of the charge **either by way of amendment of the charge or by***

*substitution or addition of a new charge as the court thinks necessary to meet circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and all amendments under the provisions of this subsection shall be made upon such terms as the court shall deem just.*

(2). *Subject to subsection (1), where a charge is altered as aforesaid:*

(a) *the court shall thereupon call the accused person to plead to the altered charge; and*

(b).....n/a.”

[Emphasis added]

In the case of **Thuway Akonaay vs. The Republic**, (1987) TLR 99, when the Court was confronted with a situation whereby the charge was substituted and a new charge was not read over to the appellant it held that:

*"It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity."*

[See also **Kurubone Bagirigwa & 3 Others v Republic**, Criminal Appeal No 132 of 2015 (unreported)].

In the present case, assuming the pleas were entered on a charge which was not amended, this was fatal and it is tantamount to have been no plea being taken contrary to section 228 (1) of the CPA which stipulates as follows:

*"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."*

In the light of the stated mandatory requirement, the arraignment of an accused will not be complete until he has entered a plea and if a plea is not taken, the trial would be a nullity. (See - **Akbarali Damji vs. Republic**, Criminal Appeal No. 220 of 56 reported in 2 TLR 137)

In view of the stated shortcomings as earlier stated, the proceedings were vitiated as the appellants were convicted on the basis of a null trial. Therefore, we invoke section 4(2) of the AJA and nullify the proceedings and judgments of the two courts below, quash the conviction

and set aside their sentences. We have considered the issue of leaving the matter to the DPP to determine the appellants' fate as was prayed by Ms. Maswi but, we think, in the circumstances of the case, it will not be in the interest of justice to do so. We order for their immediate release unless held for other lawful reasons.

**DATED** at **BUKOBA** this 13<sup>th</sup> day of May, 2019.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**



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

  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**