IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 326 OF 2017

1. DEOGRATIUS PHILIPO
2. JOHN JOSEPH ..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Utamwa, J.)

dated the 15th day of September, 2014
in
(DC) Criminal Appeal No. 70 of 2012

JUDGMENT OF THE COURT

14th & 29th May, 2019

KWARIKO, J.A.:

The appellants Deogratius Philipo and John Joseph together with Deusdedit Ally, then second accused person who was acquitted and therefore, is not part to this appeal were arraigned before the District Court of Temeke with the offence of armed robbery with violence (sic) contrary to section 285 and 286 of the Penal Code [CAP 16 R.E. 2002] (the Penal Code). The particulars of the offence were that; on the 19th day of April, 2003 at about 06:00 hours at Kurasini Gate No. 5 along Mandela Road @ Port Access Area within Temeke Municipality in Dar es Salaam Region, the trio stole one motor vehicle make Toyota Mark II

white in colour with registration No. TZQ 2960 valued at Tshs 4,000,000/= the property of one Mohamed Kumbakumba and immediately before stealing they tied with a rope on his neck one Mohamed Abdallah, the driver of the said motor vehicle and threatened him with a toy pistol in order to obtain the said property.

The three denied the charge where they were fully tried. At the end, the appellants were convicted of the offence of attempted robbery contrary to section 287 of the Penal Code and sentenced to thirty (30) years imprisonment. The second accused was acquitted. Aggrieved, the appellants appealed to the High Court where their conviction was substituted with the offence of armed robbery contrary to section 287A of the Penal Code and sentenced to thirty (30) years imprisonment without corporal punishment. The appellants have come before this Court on a second appeal.

At this juncture we find it appropriate to summarise the evidence adduced at the trial. It is as follows. Hamisi Said Kumbakumba (PW4) owned a car make Toyota Mark II with registration No. TZQ 2960. The car was used in taxi business with its driver Mohamed Abdallah (PW2). On 19/4/2003, PW2 parked the car at Ubungo area where at about 5:00 p.m he was approached by two customers who were later identified to be the appellants. The two expressed their intention to hire the car to go to a place called Binti Kayenga area in Kigogo. After they concluded the

agreement, the journey started. The second accused was picked later along the way. However, at a certain area, PW2 was ordered to stop so that the second accused could alight. It was at that juncture when PW2 was tied up with a rope and one of the three thugs took over the driving seat. At Bandari area fuel ran off hence the thugs stopped to refuel. At that point PW2 raised an alarm where the appellants were arrested by the people around there.

Meanwhile, after they received information of the robbery, policemen went to the scene. These included No. E. 1276 DC Jumanne (PW1). On the way, they met a person walking suspiciously and fast but they ignored him. However, when they got to the scene, they were given the description of the third thug which fitted that suspicious person. They followed and arrested him at a bus stop nearby; he was the second accused person. The said motor vehicle, black toy pistol, registration card of the said motor vehicle, statement of one Valentino Hassan and cautioned statement of the second appellant were admitted as exhibits P1, P2, P3, P4 and P5 respectively.

In his defence, the first appellant said when he was at a bus stop with other people, police came and arrested him. He said he was there waiting for his relative to deliver to him bereavement news. While the second appellant said he was selling tea and milk at the bus stop when he was arrested for this offence.

With the foregoing evidence, the appellants were convicted and sentenced as shown earlier.

In their joint memorandum of appeal, the appellants have raised seven grounds of appeal which we have summarized as follows:

1. *That, the first appellate court erred in law to substitute the offence from attempted robbery to armed robbery;*
2. *That, the charge was incurably defective;*
3. *That, the prosecution evidence was at variance with the charge;*
4. *That, identification of the appellants did not meet the required conditions;*
5. *That, the evidence of PW2 could not be corroborated by the evidence of PW1 and PW3 which also required corroboration;*
6. *That, the first appellate court erred to hold that rope and waist belt are dangerous weapons to prove armed robbery; and*
7. *That, failure to call the civilians who allegedly arrested the appellants adversely impacted on the prosecution case.*

The appellants also filed written submissions to expound their grounds of appeal.

At the hearing of the appeal, the appellants appeared in person unrepresented, whereas the respondent Republic was represented by Ms. Faraja George assisted by Ms. Jacqueline Werema both learned State Attorneys.

When the appellants were called to argue the appeal, they adopted the grounds of appeal and the corresponding written submissions they filed earlier. They had nothing to add.

On her part, Ms. George supported the conviction and sentence against the appellants. For reasons that will be apparent shortly, the submissions by the parties will not be reproduced here. However, they will be discussed in the course of this judgment should need arise.

We find it convenient to start with the second ground of appeal which raises a point of law and if decided in the affirmative it will dispose of the appeal. The appellants submitted in that ground that they were charged with the offence of armed robbery with violence which is non -existent. They argued that sections 285 and 286 of the Penal Code cited in the charge sheet only creates the offence of robbery with violence and provides punishment. They contended that the omission

rendered the charge defective. Thus, there was no charge upon which they could have properly pleaded to.

On her part, Ms. George only argued that the offence which was preferred against the appellants was robbery with violence hence the charge was not defective.

It need not be overemphasized that the charge is a foundation of a criminal trial. Hence, any court admitting the charge from the prosecution must ensure that it is drawn in compliance with the law. Recognizing the importance of the charge, the following provisions of the law give direction on how it should be drawn and its contents. Section 132 of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA) provides thus: -

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

Also, section 135 (a) (i) of the CPA provides: -

> *"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."

As it can be gathered from the wording of the cited provisions of the law, every charge should contain a statement of the specific offence, describing it in a clear language together with the particulars of the offence so as to give an accused necessary and reasonable information and a clear picture of what he is being accused of so that he can properly prepare his defence.

As we indicated at the beginning of this judgment, the charge that was laid before the appellants' door on 23/4/2003 reads: -

"Armed robbery with violence contrary c/s 285 & 286 of the Penal Code Cap 16 Vol. 1 of the Laws."

Having gone through the cited provisions of the law, we are in agreement with the appellants that the prosecution preferred a non-existent offence against them. The statement of the offence created two distinct offences infused in the single statement. However, at the material time there was no provision in the Penal Code creating the offence known as armed robbery. The offence of armed robbery was created by the amendment to the Penal Code vide the Written Laws

(Miscellaneous Amendments) Act No. 4 of 2004 by adding section 287A immediately after section 287. Section 285 of the Penal Code which creates the offence of robbery with violence reads: -

> *"Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."*

Whereas section 286 of the Penal Code which provided punishment before the 2004 amendment read: -

> *"Any person who commits robbery is liable to imprisonment for twenty years and if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with any other person or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses personal violence to any person, he is liable to imprisonment for life, with or without corporal punishment."*

Therefore, it has been established that, the offence that was laid before the appellants was ambiguous and therefore it cannot be held

that they understood it for them to provide proper plea and ultimate defence.

In law, where the statement or particulars of the offence are short of the requirements of the cited law the same render the charge fatally defective. This position of law was taken by this Court in the case of **Mussa Mwaikunda v. R** [2006] T.L.R 387, **Sylivester Albogast v. R,** Criminal Appeal No. 309 of 2015, **Maulid Ally Hassan v. R,** Criminal Appeal No. 439 of 2015, **Paulo Kumburu v. R** and **Antidius Augustine v. R,** Criminal Appeal No. 89 of 2017 (all unreported).

Now, since after arrest the court must put the charge before the accused to plead, it follows that, the appellants who pleaded to a defective charge, did not have a lawful trial. This renders the whole trial proceedings a nullity. Similarly, the appeal proceedings before the High Court lack legs upon which to stand as they originated from the null proceedings. We therefore nullify the proceedings of the two courts below, quash the conviction and set aside the sentence imposed on the appellants.

Having nullified and quashed the proceedings of the courts below, under normal course of things we would have ordered a retrial of the appellants. However, we would not take such a move because the charge which is the foundation of a criminal trial has been declared

fatally defective. There is no charge upon which a retrial would be conducted. We find support on this stance in our earlier decision in **Paulo Kumburu** (supra) where it was said thus;

> *"Since in this case the charge sheet is incurably defective, implying that it is non-existent, the question of a retrial does not arise."*

In fine, we find the second ground of appeal meritorious. For this finding, the rest of the grounds die naturally. Consequently, we allow the appeal and order the immediate release of the appellants Deogratius Philipo and John Joseph from prison unless their continued incarceration is related to some other lawful cause.

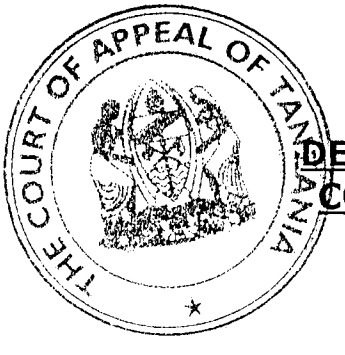
DATED at **DAR ES SALAAM** this 27th day of May, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

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



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL