IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., KITUSI, J.A., And KEREFU, J.A)

CRIMINAL APPEAL NO. 170 OF 2016

JAFARI ALLY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rugazia, J.)

Dated the 11th day of September,2009
in
Criminal Appeal No. 83 of 2008

JUDGMENT OF THE COURT

17th & 25th July, 2019

KITUSI, J.A.:

The Appellant Jafari Ally has appealed to this Court against the decision of the High Court of Tanzania, Dar es Salaam District Registry, sustaining the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu in a case of Armed Robbery. The charge that triggered off these proceedings reads thus: -

***STATEMENT OF THE OFFENCE**: Armed robbery c/s 285 and 287A of the Penal Code, Cap 16 of the laws read together with Act No 4/2004.*

***PARTICULARS OF THE OFFENCE**: That Jafari Ally charged on 11th day of April, 2005 at 05.45 hrs at Tirdo area within Kinondoni District in Dar es Salaam Region did steal one wrist watch make Casio valued at Shs 5,000/= cash Shs 100,000/=, two radio cassettes valued at Shs 285,000/, all valued at Tshs 390,000/=, the properties of one Deogratius Rutagandama, immediately before such stealing he used actual violence by cutting him with panga on his head and **caused him to suffer grievous harm.**(emphasis ours)*

The background of the matter is that in the early hours of 11th April, 2005 (at around 5.45 am) Deogratius Rutagandama (PW1) was walking along Tirdo street within Msasani area in Dar es Salaam, when four armed men emerged and demanded money while attacking him with a machete. They succeeded to take from him cash TShs 160,000/= a mobile phone, a wrist watch and radio cassettes all belonging to PW1. Three of the assailants made away with the stolen items when they saw an approaching motor vehicle, but the fourth man was apprehended by PW1 who could not

let him go despite the fact that he had been severely wounded by his assailants.

According to PW1 his handling of the trapped assailant created a scene which attracted good samaritans who came to his assistance as they also mercilessly assaulted the suspect. The news of the suspect being in the hands of an angry mob at the verge of killing him soon reached the police at their Oysterbay Station as a result of which a No. D 9881 PC Aissea Kenneth (PW2) was instructed to go get the said suspect. He rushed to the scene and found the culprit barely alive and PW1 still holding the machete which he had grabbed from him.

PW1 testified that the appellant is the one he apprehended, and according to PW2 he is the one he rescued from the angry mob of the people who had turned up to give a hand to PW1. A PF3 was tendered by PW1 as Exhibit P2 to prove the injuries he sustained from the bandit's attack while the machete was tendered as Exhibit P1 as the weapon they used in the execution of the alleged robbery.

In defence, the appellant admitted to have been at the scene of the alleged crime and in the hands of the angry mob at that early hour of the

day, but told a different story as to how it all happened. He stated that he was proceeding on foot to his workplace at Masaki area, him being a trained painter. He used a short cut route which took him to Tirdo area, only to meet four strangers one of them bleeding from his head with a shirt tied on the said head. The four strangers inquired from the appellant if he had met some men on the run, but he said he had not. Upon the appellant's response, the man with the bleeding head said he identified him (appellant) as among the persons who had attacked and robbed from him. What followed were assaults on the appellant, PW1 using a panga and others using sticks and stones.

The trial court accepted the prosecution's version and found the appellant guilty thereby sentenced him to the statutory minimum custodial sentence of 30 years, which he unsuccessfully challenged at the High Court, as earlier intimated.

The Memorandum of Appeal raises four (4) grounds which, being short, we find easy to reproduce: -

1. *That, both trial magistrate and the learned judge erred in law and fact by upholding conviction and sentence to the appellant while the charge sheet*

(particular of offence) is in variance with the evidence (PW1) on records.

2. *That, the learned appellate judge erred in law and fact to uphold conviction to the appellant based on incredible and uncorroborated evidence of PW1 (the victim).*
3. *That, the learned High court Judge erred in law and fact when he upheld conviction and sentence to the appellant without considering that the charge sheet was bad for duplicity hence, he reached at wrong decision.*
4. *That, both trial magistrate and learned High Court Judge erred in law and fact to hold that the appellant was properly sentenced while he was not legally convicted during the trial.*

At the hearing of the appeal, the appellant entered appearance and personally prosecuted it, while the respondent Republic was represented by Ms. Anna Chimpaye and Ms. Neema Mbwana, learned State Attorneys. The appellant opted to let the State Attorney begin so that he could submit by way of a rejoinder.

Ms. Chimpaye, who argued the appeal, commenced by drawing our attention to the fact that almost all of the grounds of appeal were being

raised before us for the first time, but she went on to submit that since the said new grounds raise points of law, they still merit our consideration. Submitting on the first ground which relates to the charge being at variance with the evidence, the learned State Attorney conceded that the particulars of that charge do not show that among the stolen items there was a Nokia mobile phone, a fact that appears in the evidence of PW1. She however submitted that the appellant was not prejudiced by the said omission. When we asked the learned State Attorney to comment on the particulars of the charge not showing that the alleged violence was aimed at obtaining the stolen items or retaining them, she conceded that the charge was defective to that extent, but submitted that the defect is curable under Section 388 of the Criminal Procedure Act, Cap 20 R.E 2002. As regards the second ground which seeks to fault the finding of guilty based on the uncorroborated evidence of PW1, the learned State Attorney submitted that, it is not always that there must be corroboration to every testimony. Citing Section 143 of the Evidence Act, Cap 6, she submitted that even a single witness may suffice to prove an offence and went on to demonstrate the efficacy of PW1's testimony on how he was attacked and how he managed to get hold of the appellant, one of his assailants.

Turning to the third ground which complains that there is duplicity in the charge, the learned State Attorney said there is none, as Section 287A of the Penal Code, which defines Armed Robbery, was cited. Again, she submitted that the alleged defects, if they exist, are inconsequential because the appellant did not get prejudiced. She cited the decision of the Court in **Jamal Ally @ Salum V. Republic**, Criminal Appeal No. 52 of 2017.

Lastly, Ms. Chimpaye addressed the fourth ground, conceding it. The fourth ground complains that the trial court did not enter a conviction on the appellant before sentencing him. The learned State Attorney submitted that by not entering conviction, the trial court violated Section 235 of the Criminal Procedure Act, Cap. 20, R.E. 2002, and prayed that we be pleased to remit the case to the trial court with an order that it enters conviction. In addition, she invited us to nullify the proceedings and judgment of the High Court. When we asked the learned State attorney to justify her suggestion in view of the period that the appellant has served the sentence, she submitted that he has served 13 years, slightly below half the term, which she considered a short period.

On the other hand, when called upon to elaborate on the grounds of appeal and respond to the submissions by the State Attorney, the appellant adopted the said grounds and prayed that on the basis of the same we should set him free. He submitted in relation to the prayer for remitting the record to the trial court for conviction, that he has been in prison for too long to be punished for the court's mistake.

In considering the foregoing arguments, we propose to start with the last ground of appeal which in deserving cases may be sufficient to dispose of the matter. Failure to enter conviction is, as rightly submitted by Ms. Chimpaye, a violation of Section 235 (1) of the CPA, which provides;

> *"The court having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code".*

In many occasions we have held failure to convict to be a fatal omission as a result of which we have been remitting such matters to the trial court to enter conviction. We shall cite two cases to drive the point home, which are; **Marwa Mwita V. Republic,** Criminal Appeal No. 317 of

2014 and; **Malima Mazigo V. Republic**, Criminal Appeal No 315 of 2015 and; (all unreported).

Yet in some other cases we have taken a different route, such as in the following cases; **Musa Mohamed V. Republic**, Criminal Appeal No. 216 of 2005, **Omari Hussein Kipara V. Republic,** Criminal Appeal No. 80 of 2012 and **Jaffary Ndabita @ Nkotangwa V. Republic,** Criminal Appeal No. 27 of 2016; (both unreported). In the first case the Court held;

> *"One of the Maxims of Equity is that, 'Equity treats as done that which ought to have been done." Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant".*

In **Musa Mohamed** the Court considered the merits of the appeal and having satisfied itself that the evidence implicating the appellant was watertight, proceeded to deem that he had been convicted. We think it is also appropriate to make similar analysis where there are reasons to conclude that even if the conviction is entered, the appeal would eventually

succeed. That is exactly what was done in **Omari Hussein** where we considered the insufficiency of the evidence of visual identification, and declined the invitation to remit the case to the trial court. It is finally our considered view that where an appeal arises from proceedings in which a conviction was not entered, the decision whether or not to remit the case to the trial court will depend on the peculiar facts of each case. What then are the controlling facts in this case? This takes us to the consideration of the charge sheet, a complaint appearing in the third ground of appeal.

The learned State Attorney concedes that the charge is defective and we are undoubtedly in agreement. While we do not find merit in the third ground of appeal contending that there is duplicity of the charge, we find merit in the other aspect of defect and we do not go along with Ms. Chimpaye that this particular defect is curable. We consider the defect to be so patent in not associating the alleged violence to the alleged theft, and as such leaving unmentioned an important factor to the offence of Armed Robbery. Instead, the charge mentions grievous harm as the consequence of the violence, and this muds the waters so that it is unclear as to which offence was the appellant called upon to answer to. We thus pause to ask, should we remit the case for the appellant to be convicted on

a defective charge? Certainly, we do not tow that line and with respect we decline Ms. Chimpaye's invitation.

In addition, we have also taken a quick glance at the learned trial Principal Resident Magistrate's manner of dealing with the defence case. The learned Magistrate considered the defence after she had reached a conclusion that the prosecution had proved Armed Robbery. Even then, the reason she was unimpressed by the defence was that the appellant did not to her, look like a painter, the work he said he was doing for a living. We have considered this rather strange and extraneous because if there were proof of his guilt, the appellant would not be less of a thief merely by successfully proving that he is employed as a painter. All said, we have held in many occasions that it is wrong to consider the evidence for the prosecution separately and make conclusions before considering the defence. See for instance the cases of **Stayoo Kundai V. Republic**, Criminal Appeal No 267 of 2007 and **Christian Malianga V. Republic,** Criminal Appeal No. 474 of 2007 (both unreported).

In the circumstances, we see no point in considering the other grounds of appeal. For the foregoing reasons, we are firmly of the view that a conviction on the appellant would not stand, and exercising our

revisional powers under Section 4(2) of the Appellate Jurisdiction Act, Cap 141,[R.E.2002], we nullify the proceedings quash the judgments of both the trial court and the High court, and set aside the sentence imposed against the appellant. We order the appellant's immediate release if he is not otherwise being lawfully held.

We so order.

DATED at **DAR ES SALAAM** this 24th day of July, 2019

K. M. MUSSA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. KEREFU
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL