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. 168 OF 2016

1. MATESO NGURUWE ..... 1. APPELLANT

2. FUKIA LIGANGA ..... 2. APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rugazia, J)

Dated the 17th June, 2011
In
HC. Criminal No. 63 of 2009

JUDGMENT OF THE COURT

17th & 25th July, 2019

MUSSA, J.A.:

In the District court of Kilombero, at Ifakara, the appellants were jointly arraigned for armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Laws (the Code) as amended by Act No. 10 of 1989. For purposes of clarity, we propose to extract the relevant portion of the charge sheet in full:-

> ***"OFFENCE SECTION AND LAW:*** *Armed robbery c/s 285 and 286 of the Penal Code, Cap. 16 of the Laws, as amended by the schedule to written laws amendment Act No. 10 of 1989.*
>
> ***PARTICULARS OF THE OFFENCE:*** *That the above named persons are jointly and together charged on the 18th day of March 2000, at or about 16:00 hrs at Mahutanga Village, Ifakara, within Kilombero District in Morogoro Region, did steal cash money TShs. 70,000/= the property of MASANJA s/o KIPARA and immediately before such stealing, did used actual violence by using firearm in order, to obtain the said stolen property."*

The appellants refuted the accusation on the charge sheet, whereupon the prosecution lined up three witnesses to establish its claim. On their part, both appellants resisted the case for the prosecution through unsworn testimonies to which they did not wish call any witnesses in support.

From its three witnesses, the case for the prosecution was to the effect that the alleged victim of the robbery, namely, Masanja Kipara (PW3) and his younger brother, who answers to the name of Juma kipara (PW1), operated for gain as cattle herders at Nakasisi Village, Kilombero

District. It was in evidence that, at the material time, their father owned a flock of three hundred cattle.

On the fateful day, PW1 and PW3 took two cows from the family kraal and drove them to a certain Bwawa la Mamba cattle market for the purpose of having them sold. From the sale of the cows, they realized a sum of TShs. 140,000/= out of which they bought some cattle medicine and, after dividing the residue amongst themselves, the elder brother (PW3) eventually remained with a take home sum of TShs. 70,000/=.

Having accomplished their business at the cattle market, PW1 and PW3 headed towards home, as it were, on a bicycle which was ridden by the former. They, however, had to briefly stop midway at Mahutanya Village in order to fix minor repairs on the bicycle. They resumed the journey around 5:30 p.m but, soon after, they could see several persons who were lying on the grass ahead of them. A moment later, those persons, who were seven in number, stood up and way – laid PW1 and PW3.

Speaking of the roadside intruders, PW1 who claimed to have previously known the appellants, told the trial court that, at the scene, the

first appellant was clad in a green coat and pair of tennis shorts (bukta), whereas the second appellant wore a combat trouser resembling a Tanzania Peoples Defence Forces (T.P.D.F) uniform and a dangris jacket. He recognized a third person, namely, Saibogi, who was clad in a complete T.P.D.F. uniform. PW1, further testified that one of the intruders was armed with a gun, whereas the others had machetes and spears. On his part, his brother (PW3), conceded that he saw the appellants for the first time during the roadside confrontation. Nevertheless, apparently, in the wake of a dock identification, he told the trial court that the first appellant was wielding a machete just as he was also in possession of bricks. The second appellant, he further claimed, was wielding a shot gun.

To resume the roadside encounter, on the spur of the moment, PW1 apprehensively abandoned the bicyle and ran clear of the scene. Unfortunately, PW3 could not follow suit as he had one of his legs physically disabled and he was, therefore, constrained to face the group of seven singlehandedly. It was the first appellant who initiated the attack on PW3 by hitting him twice with the flap of the machete and telling him to give them money. Next, another assailant kicked him and, as PW3 fell to the ground, the man dispossessed him of the sum of TShs. 70,000/= from

his trouser's pocket which was all the money he had. Soon after, the assailants made a bolt for it, wheupon PW3 shouted loudly to attract assistance.

In the meantime, PW1 apparently heard his sibling's yelling and decided to return to the scene so as to help his brother. He arrived at a time when the bandits were no longer at the scene, but PW3 disclosed to him the detail about being dispossessed of the money. From there, PW1 and PW3 reported the occurrence at Ifakara Police Station where, according to PW1, they told the police that they identified the appellants along with a certain Saibogi to be amongst the group of the seven robbers. The police, in turn, told PW1 and PW3 to organize themselves to arrest the culprits and take them to the police station.

Back home, PW1 and PW3 disclosed the occurrence as well as the police instructions to their paternal uncle, namely, Elias Meshaki (PW2). Thus, on the following day, PW1, PW2 as well as two other persons, namely, Kichiba and Lucas mounted a search for the culprits. The mission led them to Luwemo Village, where they located and apprehended the second appellant. They took him to the police station where they were informed that the first appellant had already been arrested. On the 28th

March, 2000 the appellants were formally arraigned in the District court of Kilombero and, that concludes the version which was unveiled by the prosecution witnesses.

In his unsworn statement, the first appellant completely disassociated himself from the alleged robbery occurrence which, he said, was unknown to him. The first appellant accounted to an urelated incident in which he assaulted a certain Maka and was, in consequence, arrested, tried and jailed for three years effective from the 31st March, 2000. As he was denying the accusation at hand, the appellant did not quite assert his whereabouts on the fateful day although he recalled that on the 15th March, 2000 he travelled to Mbeya and returned on a date he could not recollect, but within the ides of March, 2000.

On his part, the second appellant, similarly, completely disassociated himself from the robbery occurrence. His account was to the effect that, on the fateful day, he left Luwemo, his Village of residence, around 4:00 p.m. to make a follow up of a customer who was indebted to him at Viwanja Sitini area, Ifakara. It is, perhaps opportune to interject the second appellant's telling that he operated for gain as a brewer (Mgemaji) of a local brew popularly known as *tembo*. His further telling was that he

met his customer, got paid and, eventually, returned home around 8:00 p.m. or so. On the morrow of his uneventful mission, he was arrested and implicated for the Mahutanya robbery which he denied involvement. With so much in denial, on the 18th September, 2000 both appellants rested their respective defence cases and the judgment delivery was slotted for the 2nd October, 2000 but, for some obscure cause, on the scheduled date, the judgment delivery was pushed to 11th October, 2000.

On the latter date, it was only the second appellant who entered appearance and, as it were, a certain No. 4451 Cpt. Fadhili, a Prison officer, informed the trial court that the second appellant had escaped from custody and was still beyond reach. In the circumstances, the judgment was pronounced in the absence of the first appellant.

If we may now cull from the judgment, on the whole of the evidence, the learned trial Magistrate was impressed by PW1 and PW3 whose testimonies were, according to him, truthful and reliable. The respective defence cases of the appellants were considered but rejected. In the upshot, both appellants were found guilty, convicted and each was sentenced to thirty (30) years imprisonment.

A good deal later, on the 19th August 2002, apparently, from some obscure source, the trial court made this order with respect to the first appellant:-

> ***Court:*** *The accused has been arrested. His sentence to commence today.*

Both appellants were aggrieved by the convictions and the sentences meted by the trial court and preferred a joint appeal to the High Court. Having heard them as well as the respondent Republic, the High Court (Rugazia, J.) found no cause to fault the decision of trial court. In fine, the appeal was found to be without merits and it was, accordingly, dismissed in its entirely.

The appellants are still discontented and, presently, they seek to impugn the decision of the first appellate court in a joint memorandum of appeal which comprises six (6) points of grievance, namely:-

> *"1. That, your lordship the learned first appellate Judge grossly erred in law and in fact by sustaining the conviction and sentence meted out to the appellants based on defective charge as the person*

to whom the threat and violence was directed to was not mentioned in the particulars of the offence.

2. *That, your lordship the learned first appellate judge erred in law and in fact to uphold the trial court decision in a case where the police officer to whom the offence was first reported never testified to the effect that the appellants were the prime culprits.*

3. *That, your lordship the learned first appellate Judge grossly misdirected himself in law and in fact to uphold the trial court decision in a case where none of the police officer (s) from where the culprits were handed over testified to establish the course of the appellant's re-apprehension.*

4. *That, your lordship the learned first appellate Judge erred in law and in fact in upholding the appellants' conviction by relying on incredible and unreliable visual identification evidence of PW1 and PW3 at the scene of crime as the same did not establish the time duration which the appellants were put under their observation, the distance from the identifying witnesses to the alleged suspects and the vantage point visa-vis the scene of crime due to the fact that the robbery incident took place amidst many trees and grasses.*

5. *That, your lordship the learned first appellate Judge erred in law in failing to find that the appellants' conviction was wrongly based on unjustified and uncorroborated prosecution evidence.*

6. *That, your lordship the learned first appellate Judge erred in law and fact by sustaining the appellants' conviction in a case where the prosecution failed to prove their case beyond any speck of doubt as charged."*

When the appeal was placed before us for hearing, the appellants were fending for themselves, unrepresented, whereas the respondent Republic had the services of two learned State Attorneys, namely, Ms. Janeth Magoho and Ms. Gloria Mwenda. From the very outset, both appellants fully adopted their joint memorandum of appeal as well as the list of authorities to which they desired to rely on. They deferred the elaboration of the memorandum of appeal to a later stage in a rejoinder to the submissions of the Republic.

On her part, Ms. Magoho who took the floor to argue the appeal resisted it on account that the memorandum of appeal is bereft of merits. Starting with the first ground of the appeal, the learned State Attorney conceded though that, indeed, the person to whom the threat or violence

was directed at was not mentioned in the particulars. She was, however, quick to rejoin that the shortcoming is curable under the provisions of section 388(1) of the Criminal Procedure Act, chapter 20 of the Laws (CPA) which goes thus:-

> *"Subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or made such other order as it may consider just and equitable."*

We asked the learned State Attorney to avail to us an authority to fortify her curative contention of such a shortcoming akin to the one at hand, but she availed none and left the matter to our consideration and resolve.

Ms. Magoho then advanced to the second and third grounds of appeal which, she said, were intertwined. On the complaint about the non-featuring of police officers to buttress the robbery and identification claims by PW1 and PW3, Ms. Magoho had a short answer: Under section 143 of the Evidence Act no particular number of witnesses was, in any case required for the proof of those facts. Thus, to her, the police officers would not have added anything, of material substance, to the testimonies of PW1 and PW3.

Finally, on grounds 4, 5 and 6, the learned State Attorney contended that the two courts below made positive and concurrent findings on the credibility of PW1 and PW3 which was their prerogative and, in sum, Ms. Magoho urged us to dismiss the appeal in its entirely.

In reply, both appellants reiterated their grievances which are comprised in the joint memorandum of appeal. Through them, both protested innocence and invited us to allow the appeal and to set them at liberty.

We have, on our part, dispassionately considered the competing arguments from both sides but, as will shortly become apparent, this

appeal is disposable upon a very narrow compass which is premised in the first ground of appeal. In this regard, we have purposely extracted the charge sheet to palpably demonstrate that, although the owner of the stolen sums of money is named in the particulars of the offence, the identity of the person against whom the threat or violence was directed is not disclosed. First and foremost, this is contrary to the sample prescribed for preferring the offence of robbery as provided under Form No. 8 in the second schedule to the CPA which goes thus:-

"ROBBERY

.....

PARTICULARS OF OFFENCE

A. B. on the ..... day of ..... of ..... in the region of ..... stolen a watch and at or immediately before or immediately after the time of such stealing did use personal violence to C. D."

It is noteworthy that section 135 (a) (iv) of the CPA directs that related charges must conform to such forms as nearly as may be, making the necessary changes.

From numerous decisions of the Court, it is now trite that the particulars of the offence in the charge sheet have to disclose the essential elements or ingredients of the offence charged. With particular reference to the offence of robbery, the Court, for instance, in the unreported Criminal Appeal No. 31 of 2003 – **Zubeli Opeshutu vs The Republic**, made the following observation:-

> *"A pre-requisite for the crime of robbery is that there should be violence to the person or the complainant."*

More elaborately, in another unreported Criminal Appeal No. 78 of 2011 – **Kashima Mnadi vs The Republic**, the Court made a corresponding observation:-

> *"Strictly speaking, for a charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person on whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed.* ***So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on***

whom the actual violence or threat was directed."[Emphasis supplied].

In yet another unreported Criminal Appeal NO. 299 of 2009 – **Charles Nyamasero vs The Republic**, the particulars of the robbery were akin to the ones at hand, in that they simply alleged:-

> *"...immediately before such stealing, did use gun point in order to obtain the stolen properties."*

In its judgment, the Court made the following observation:-

> *"...the particulars of the offence failed to disclose or indicate as to whom the actual violence or threat was directed to. We are of the view that such an omission of an essential ingredient of the offence of armed robbery has led to a failure of justice on the part of the appellant."*

Having so held, the Court nullified the entire proceedings of the trial court as well as those of the High Court upon the invocation of section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (AJA).

We are minded to take a similar stance and, in fine, we likewise find that the shortcoming on the particulars of the charge sheet led to a failure

of justice and, accordingly, the proceedings of both courts below leading to the appeal at hand are nullified under the provisions of section 4 (2) of AJA.

Having found that the shortcoming on the particulars of the charge sheet led to a miscarriage of justice, the vexing issue is whether or not a retrial, under the rider to the provisions of section 388 (1) of the CPA, is fitting in the circumstances. On this subject, this court at least, took a firm stance in the unreported Criminal Appeal No. 490 of 2015 – **Mayala Njigailele vs The Republic**, where it was observed:-

> *"Normally an order of retrial is granted, in criminal cases, when the basis of the case, namely the charge sheet is in this case, the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise."*

Of recent, the foregoing statement of principle was followed with corresponding remarks in the unreported Criminal Appeals Nos. 119 of 2016 – **Swalehe Ally vs The Republic**; 302 of 2016 – **Meshaki Malongo @ Kitachangwa vs The Republic;** and 68 of 2017 – **Samwel Lazaro vs The Republic**.

We take the same position and hold that since we have found the charge, which was the foundation of the trial, to be incurably defective, then there is no charge in existence on which the appellants can be retried. As we have hinted upon, the defectiveness of the charge will suffice to dispose the appeal and, for that matter, we need not belabour on the merits of the other grounds of appeal. Thus, in the final event, we order the immediate release of the appellants from prison custody unless they are held there for some other lawful cause. Order accordingly.

DATED at **DAR ES SALAAM** this 23rd 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