IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 438 OF 2016

1. FLORENCE ATHANAS @ BABA ALI.....1ST APPELLANT
2. EMMANUEL MWANANDEJE.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mwambegele, J.)

dated the 8th day of September, 2014
in
Consolidated DC. Criminal Appeal Nos. 64, 65 & 66 of 2013

.....

JUDGMENT OF THE COURT

23rd & 29th August, 2019

SEHEL, J.A.:

The appellants together with one Jastine s/o Mwanauta were jointly and together charged before the District Court of Sumbawanga at Sumbawanga. The trio stood charged with two counts of armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002 as amended by the Written Laws (Miscellaneous amendments) Act No. 3 of 2011 while the first appellant faced a third count of unlawful possession of a firearm and ammunition without a licence contrary to section 4 (1) and (2) and 34 (1)

and (2) of the Arms and Ammunitions Act, Cap. 223 RE 2002 (herein after referred to Cap 223).

For the counts of armed robbery, they were each convicted and sentenced to serve a term of thirty years imprisonment for each count. The first appellant was also convicted of unlawful possession of a firearm and ammunition without a licence and sentenced to serve a term of 15 years imprisonment. The sentences were to run concurrently. Aggrieved by their conviction and sentence, they each filed their separate appeals that were consolidated to one appeal at the High Court (the first appellate court). On account of their confessional statements, the first appellate court sustained their conviction and sentence and allowed the appeal by Jastine s/o Mwanauta. He was therefore set free. Still aggrieved, the appellants filed their separate memoranda of appeal to this Court.

The first appellant raised seven grounds while the second appellant raised nine grounds, which can conveniently be summarized as follows:

1. That the first appellate court erred in law and fact by dismissing the appeal without considering there was no certificate issued by the Director of Public Prosecution (the DPP) for prosecuting a third count on economic offence.

2. That the first appellate court erred in law and fact to believe that armed robbery took place at Kaengesa guest house while there was no complainant in the case, as the owner of the guest house was not called as a witness to prove the same.

3. That the first appellate court erred in law and fact by upholding the conviction and sentence based on uncorroborated evidence of PW3.

4. That the first appellate court erred in law and fact when it dismissed the appeal relying on improper identification of the evidence of PW7 without considering the possibilities of a witness to make a mistaken identity since the event occurred at night.

5. That the first appellate court erred in law and fact when it believed the evidence of PW7 that the appellants booked a room at Kaengesa guest house without producing either a reception book or independent guests to corroborate the same.

6. That the first appellate court erred in law and fact by relying on the cautioned statements, exhibit P1 and P4, which were obtained in violation of the law.

7. That the first appellate court erred in law and fact in dismissing the appeal while there was no evidence from a ballistic expert to prove that Exhibits P5 were ammunitions.

8. That there was no seizure certificate note to prove that the appellant was found in possession of cartilage.

9. That the first appellate court erred in law and fact in relying on the dock identification while there was no identification parade.

10. The charge against the appellants was not proved beyond reasonable doubt.

The evidence that led to the appellants' apprehension and conviction was such that: on 22 June, 2012 Magreth Songoro PW7, a receptionist at Kaengesa guest house was at work. At around 10.00 hrs, the appellants arrived at the guest house and booked a room, they were allocated room number 9. After securing a room, the appellants went out but left their bag at the reception for safe custody. They returned to the guest house in the evening to collect their bag but before they left, PW7 warned them that the guest house normally closes at 22.00 hrs. PW7 recounted that at about 01.00 hrs she heard sounds of bullets. She saw the appellants broke the door to a room occupied by a guest, robbed that guest, and demanded money from

her. She surrendered TZS 750,000.00. In that havoc, PW7 alleged to have seen the 2nd appellant holding a gun whose size was about 2 ft but could not tell the type of the gun. It was her account that the appellants entered into another room, they shot one person and commanded a store to be opened and took 20 litres of petrol and beers. PW7 alleged to have identified the appellants by the aid of a torch. However, she did not state who held the torch.

It is not clear who reported the matter to the police but the appellants were arrested by D. 5286 D/Sgt Satiel PW3 on 23rd June, 2012 at a petrol station. PW3 recounted that upon learning of the robbery incident at Kaengesa, he went to Matai bus station and made an inquiry from the riders of motor cycles commonly known as "Bodaboda", parked at Matai bus stand, if they had seen any new faces in town. One of the motor cycle riders, Joachim Silungwe, PW4 alleged to have informed PW3 the whereabouts of the appellants which led to their apprehension. PW3 said after arresting the appellants, he searched the first appellant and found him with four rounds of ammunitions that were collectively admitted as exhibits P5. After the arrest, PW3 said the first appellant tried to escape but successfully arrested him with the assistance from the Samaritans. PW4 said he witnessed the recovery of the ammunitions from the first appellant and Christian Atanas, PW5 was one

of the Samaritans who assisted in the apprehension of the first appellant. The appellants were taken to Matai police post. On 24th June, 2012 A/Insp. Msimbe PW6 lined up an identification parade. The extract of the identification parade register was admitted as exhibit P6. G.6896 D/Constable Abdalla, PW2 said on 23rd June, 2012 he was at Sumbawanga police station and received information that a robbery took place at Kaengesa village. He went to the scene of the crime together with his fellow police officers, Denis, Mashuke, and Rocky where they managed to recover nineteen rounds of SMG ammunition, exhibit P2 and he a drew a sketch map, exhibit P3. Later on 25th June, 2013 PW2 recorded the cautioned statement of the second appellant while on 26th June, 2012 at 15.00 pm D. 4942 D/Cpl. Sebastian, PW1 recorded the cautioned statement of the first appellant. Both cautioned statements were admitted as Exhibits P4 and P1 respectively.

At the trial court both appellants denied to have committed the offences but admitted to have been arrested at the petrol station.

The trial court having weighed the evidence from both sides entered a verdict of guilty against the appellants, convicted and accordingly sentenced them as indicated herein. Their appeal to the first appellate court was unsuccessfull thus the present appeal.

At the hearing of the appeal, the appellants appeared in person, unrepresented. The respondent Republic had the services of Mr. Fadhili Mwalongo, learned Senior State Attorney assisted by Messrs Simon Peres and John Kabangula, learned State Attorneys.

Both appellants adopted their grounds of appeal and preferred for the learned State Attorney to respond to their grounds and if need arise they will rejoin.

In reply, Mr. Mwalongo prefaced by urging us not to consider grounds number 5, 6, 9, and 10 raised by the first appellant and grounds number 2, 3, 6, and 7 raised by the second appellant (currently they are grounds number 2, 5, and 7) because they are new grounds. They were not raised and considered at the first appellate court whereas this Court will only look into matters which came up in the lower courts and were decided there from. He argued, to bring them at this stage is an afterthought. In support of his submission, he referred us to the cases of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 and **George Maili Kembuge v. Republic**, Criminal Appeal No. 327 of 2013.

Responding to the first ground of appeal that there was no certificate issued by the DPP to prosecute an economic case before the District Court,

Mr. Mwalongo brought to our attention the amendment to the Economic and Organized Crime Control Act, Cap. 200 RE 2002 (Cap. 200), that is, Miscellaneous Amendment Act No. 2 of 2010 (Act No. 2 of 2010) that deleted Paragraph 19 from the list of Economic offences thus making the offence no longer an economic offence. By virtue of that amendment, he contended that the District Court had jurisdiction to try the offence of unlawful possession. He pointed out that as the appellants were charged on 31st August, 2012 after the amendment therefore there was no need of seeking the Certificate from the DPP.

With regard to the complaint on the cautioned statements that they were recorded after the lapse of four hours and no explanation was given for the delay, Mr. Mwalongo conceded and further added that there are other three apparent irregularities warranting not to act on the statements though the first appellate court based its decision on the cautioned statements. First, they were recorded out of prescribed period of four hours from the appellants' arrest. The appellants were arrested on 23rd June, 2012 but the cautioned statement of the second appellant was recorded on 25th June 2012 while that of the first appellant was recorded on 26th June, 2012. Secondly, they were recorded under a wrong provision of the law, that is under section 58 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) that deals

with a statement written by the appellants but in the present appeal the statements were recorded by the police officer who is empowered under section 57 of the CPA to record the same and not section 58 (1) of the CPA. Thirdly, the record of appeal at pages 42 and 45 shows that the cautioned statements were not read out in court after being cleared for their admission which is contrary to the law. In support, he cited the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 139 of 2017 (unreported). With these irregularities, he urged us to expunge them from the record.

Lastly, Mr. Mwalongo submitted that, even if the cautioned statements are expunged there is cogent evidence for not supporting the appeal. He said the appellants were properly identified by PW7 since the witness had ample time to observe the appellants as they first arrived at the guest house in the morning hours at about 09.00 am to 10.00am, booked a room, left, returned to take their bag and at night they invaded at the guest house, demanded money from PW7 and ordered her to open the store where they took 20 litres of petrol and beers. When probed by the Court to comment as to whether the conditions were favourable for proper identification of the appellants, on reflection and having carefully reviewed the record, Mr. Mwalongo conceded that there were no favourable conditions. He pointed out that it was the first time PW7 to have seen the appellants thus in an ideal situation an

identification parade ought to have been conducted but in the matter at hand although it was conducted it was not properly done therefore the extract of the parade register, exhibit P6 cannot be acted upon. Further, he added that there was no explanation as who held the torch at the scene of crime and its intensity was not explained. In totality, he said the evidence of identification as given by PW7 cannot be said to be absolutely watertight.

Responding on the propriety or otherwise on the charge for the two counts of armed robbery, he conceded that the charge is defective for failure to disclose the person upon whom the threat was directed and that omission could not be salvaged by section 388 of the CPA.

Mr. Mwalongo also conceded that the count of unlawful possession of a firearm and ammunition without a licence was not proved as there was no seizure certificate to prove that the alleged four ammunitions which were seized from the first appellant. With these irregularities coupled with insufficient evidence, the learned Senior State Attorney supported the appeal and prayed for the conviction and sentence be set aside and the appellants be set free unless held for another lawful purpose.

Appellants had nothing to rejoin other than praying to be set free.

We have dully considered the submissions of the learned State Attorneys, reviewed the record and gone through the appellants' grounds of appeal. We wish to start with the issue whether this Court could hear and determine a matter not raised and decided by the first appellate court. On this issue we wish to reiterate what we said in the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported) that:

> *"It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

That position of the law was further restated in the case of **Godfrey Wilson v. Republic** (supra) referred to us by the learned Senior State Attorney wherein the cases of **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (unreported) and **Hassan Bundala@ Swaga v. Republic** (supra) were cited as follows:

> *"With an exception of the 6th ground of appeal which raises a point of law, as was stated in **Galus Kitaya** and **Hassan Bundala's** cases (supra), we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them. In other words, we find*

ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, we refrain ourselves from considering them."

In this appeal, we have made a comparison between the grounds of appeal filed in the High Court (pages 107 to 111 of the record of appeal) and this Court and found, as rightly pointed out by Mr. Mwalongo, that grounds number 5, 6, 9, and 10 raised by the first appellant and grounds number 2, 3, 6, and 7 raised by the second appellant (currently they are grounds 2, 5, and 7) are new grounds. They were not raised and determined by the first appellate court. We are therefore enjoined in the present appeal to follow suit of what we have held before by refraining ourselves from considering them.

We now turn to the complaint on whether it was compulsory to obtain a certificate from the DPP to prosecute an offence of unlawful possession of firearms and ammunition at the District Court. As rightly submitted by the learned Senior State Attorney, section 11 of Act No. 2 of 2010 delisted Paragraph 19 from the First Schedule of Cap. 200. Prior to that amendment, all offences for unauthorized possession of arms and ammunition contrary to the provision of Cap 223 were scheduled economic offences triable by the

High Court (See section 57 (1) of Cap. 200) sitting as an Economic Crimes Court. Subordinate courts, at that time, had no jurisdiction to try such offences unless and until the D.P.P. or State Attorney duly authorised by him, had "by certificate under his hand," ordered under s. 12(3) that they be tried by such courts.

Nevertheless, the changes made by Act No. 2 of 2010 not only removed offences for unauthorized possession of arms and ammunition from being economic offences but also vested the powers to the subordinate courts to try these offences hence it was uncalled for to seek the certificate from the DPP or State Attorney.

In the case of **Mwanzo Wilson @ Bunga v. Republic**, Criminal Appeal No. 267 of 2016 (unreported) that:

> *"As rightly argued, Written Laws (Miscellaneous Amendments) Act No. 2/2010 amended Paragraph 19 of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] by deleting Paragraph 19 of the said Act. The effect of deleting this section is twofold.* ***One****, it removed cases involving arms and ammunitions in the list of economic and organized crimes and in doing so, it ousted the jurisdiction of the High Court as court of first instance to try such*

offences. With such move the power of trying such offences was vested in the subordinate courts. ***Two,*** *the requirements of the fiat of the DPP in prosecuting cases involving firearms and ammunitions was no longer there."*

The appellants in the present appeal were charged before the District Court of Sumbawanga on 31st day of August, 2012. Almost two years after the amendment came into operation on 26th March, 2010 by Government Gazette Number 13 Vol. 91 of 26th March, 2010. Therefore, their complaint has no merit.

Now we move to consider the issue we posed on the propriety or otherwise on the two counts of armed robbery which the learned Senior State Attorney readily conceded and we agree with him that the charge on the two counts of armed robbery was defective for failure to disclose in the particulars of offence the person who was threatened. In the case of **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported) we were faced with akin situation where the charge of armed robbery did not disclose the person against whom the robbery was committed. In that case we emphasized the need of indicating in the particulars of the offence the person on whom the threat was made since it was not only an essential

ingredient of the offence of armed robbery but also for the accused person to understand the nature of the charge leveled to him. We stated:

> *"Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. 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. This requirement is provided under Section 132 of the Criminal Procedure Act, Cap. 20 RE. 2002 so that to enable the accused person to know the nature of the offence he is going to face."*

The particulars of offence in respect of the two counts of armed robbery in the present appeal have no such disclosure. The alleged threat of the use of a short gun/SMG or SAR and machete in order to obtain and retain properties belonging to Nasser s/o Abdallah and Magreth d/o Songoro was

not shown to have been directed to any person. Such an omission rendered the charge sheet defective in respect of the first and second counts of armed robbery. In other words, they do not establish the offence of armed robbery. A charge that does not disclose any offence in the particulars of the offence is manifestly wrong and could not be cured under Section 388 of the CPA. (See **Mussa Mwaikunda v. Republic** [2006] TLR 387). Consequently, in the eyes of the law there was no charge of armed robbery preferred against the appellants.

Here we wish to pose and remind magistrates once again on their magistracy powers provided under section 129 of the CPA as we said in the case of **Oswald Abubakari Mangula v. Republic** [2000] TLR 271 that:

> *"We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied, inter alia, that it discloses an offence known in law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It should always be remembered that the provisions of section 129 of the Criminal Procedure Code are mandatory."*

Having held that there was no charge of armed robbery we are now left with the count of unlawful possession of arms and ammunitions. It was the testimony of PW3 that the first appellant was found with four rounds of ammunition. In his defence, the first appellant denied to have been found with any rounds of ammunition. The Senior State Attorney rightly observed that there ought to be a search and seizure certificate to corroborate the evidence of PW3 that indeed the ammunitions were found and seized from the first appellant. The evidence of the purported witness, PW4 who claimed to have witnessed the recovery of rounds of ammunition from the first appellant has no evidential value in absence of search and seizure certificate.

Next is the complaint on cautioned statements, exhibits P1 and P4 that they were recorded out of the statutory prescribed period of four hours, there was noncompliance of section 58 of the CPA; and they were not read out after being cleared for their admission. We have meticulously reviewed the cautioned statements and we concur with the learned Senior State Attorney that they were fraught with procedural irregularities. First, they were recorded after the lapse of the basic four hours period from the time the appellants were arrested and there was no clarification from any of the prosecution witnesses as to why there was such a delay. While PW3 said he arrested the appellants on 23rd June, 2012 but the first appellant's cautioned

statement, exhibit P1, was recorded on 26th June, 2012 after the expiration of three days whereas that of the second appellant, exhibit P4, was recorded on 25th June, 2012 after a lapse of two days. Obviously, those statements were taken contrary to sections 50 and 51 of the CPA. They were recorded out of the basic period available for interviewing a person who is in police custody, that is, four hours. This means the statements made by both the appellants were inadmissible in evidence. (See: Criminal Appeal No. 308 of 2007, **Roland Thomas @ Mwangamba v. The Republic** (unreported).

The second irregularity is noncompliance with section 58 (1) of the CPA that reads:

> *"When a person under restraint informs a police officer that he wishes to write out a statement, the police officer:*
>
> *(a) shall cause him to be furnished with any writing materials he requires for writing out the statement; and*
>
> *(b) shall ask him, if he has been cautioned as required by paragraph (c) of subsection (1) of section 53, to set out the commencement of the statement the terms of the caution given to him, so far as he recalls them."*

In **Seko Samwel v. Republic** [2005] TLR 371 we interpreted the import of section 58 of the CPA as follows:

> *"A cautioned statement under section 58 is supposed to be written without the writer being led by being asked questions. That is the import of section 58. On the other hand, a record of an interview under section 57 is required to be recorded in question and answer model. This comes about when a police officer is interviewing a person to ascertain whether he/she has committed an offence and if that person makes a confession."*

In the present appeal, the cautioned statements, Exhibits P1 and P4, although they indicated to have been recorded under section 58 of the CPA but they are in answer and question form contrary to the procedure stated under section 58 of the CPA.

Lastly, the cautioned statements were not read out in court after they were cleared for admission. Admittedly, as correctly pointed out by the Senior State Attorney, pages 42 and 45 of the record of appeal show that the cautioned statements were admitted as exhibits but their contents were not read out to the appellants. In fact even the extract of the identification parade register, exhibit P6 was not read out in court after its admission. This

Court in the case of **Issa Hassan Uki v. Republic** (supra) having referred to the cases of **Thomas Pius v. Republic**, Criminal Appeal No. 245 of 2012 and **Jummanne Mohamed & 2 Others v. Republic**, Criminal Appeal No. 534 of 2015 (both unreported) stated:

> *"It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In Thomas Pius the documents under discussion were: Post Mortem Report, cautioned statement, extra-judicial statement and sketch map. We relied on our previous unreported decision of Sunni Amman Awenda v. Republic, Criminal Appeal No. 393 of 2013 to hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about."*

The documents under discussion in the appeal before us are the two cautioned statements Exhibits P1, P4 and the extract of the Identification parade register exhibit P6 whose contents were not read out to the appellants after they were admitted in evidence. The failure occasioned a miscarriage of justice to the appellants since they were deprived to understand the substance of the admitted documents. Under the circumstances, the statements and identification parade register were

wrongly admitted and acted upon in convicting them and we accordingly expunge them.

For the above reasons, we concur with the learned Senior State Attorney that the appeal is meritorious. We thus allow the appeal. We quash the convictions, set aside the sentences and order the immediate release of the appellants, Florence s/o Athanas @ Baba Ali and Emmanuel s/o Mwanandeje from custody unless otherwise lawfully detained.

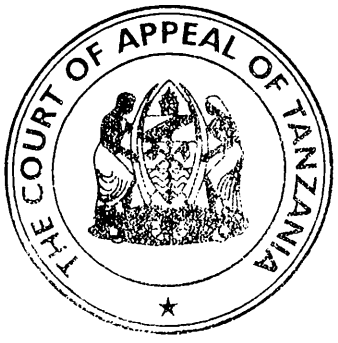
DATED at **MBEYA** this 29th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2019 in the presence of Mr. Ofmedy Mtenga learned State Attorney for the respondent Republic and the appellants in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL