IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J.., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 364 OF 2017

TIZO WILLIAM.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Khaday, J.)

Dated 17th day of September, 2009

In

DC. Criminal Appeal No. 38 of 2009

JUDGMENT OF THE COURT

6th & 8th November, 2019

MKUYE, J.A.

The appellant, TIZO WILLIAM along with one, TIMOTH AMPHREY (co-accused person) who is not subjected to this appeal were charged before the District Court of Sumbawanga at Sumbawanga with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002. It was alleged that on 10/5/2008 at about 23:45 hrs at Jangwani

area within Sumbawanga Municipality in Rukwa Region, they did jointly and together by using a hand knife, steal a mobile phone HUWAWEI in making, the property of one Adella Sulemani.

After full trial, both were found guilty, convicted and sentenced to a term of 20 years' imprisonment. In the High Court the co-accused's appeal was successful on account among others that the charge was not read over to him and was released from custody. The appeal by the appellant herein was dismissed in its entirety. Still undaunted, the appellant has brought a second appeal to this Court on nine (9) grounds of appeal which for a reason to be apparent shortly, we shall not reproduce.

At the hearing of the appeal, the appellant appeared in person and fended for himself; whereas the respondent Republic enjoyed the services of Ms. Scholastica Lugongo, learned Senior State Attorney assisted by Ms. Irene Godwin Mwabeza, learned State Attorney.

At the commencement of hearing of the appeal, the appellant sought to adopt his grounds of appeal without more. He prayed for the learned

State Attorney to respond first and reserved his right to rejoin later, if need would arise.

From the outset, Ms. Mwabeza sought leave of the Court to address it on the shortfall they have detected in the proceedings of the trial court. She pointed out that, though the proceedings at page 4 of the record of appeal show that the appellant entered a plea of not guilty by stating that "si kweli" literally translated "not true", it is not shown in the record if the charge was read over to him. The learned State Attorney argued further that, though on 25/5/2008, the prosecution prayed to substitute the charge in order to add another accused person, the record does not show that the said substituted charge was read over to the appellant. She added that, when the matter came up for preliminary hearing on 2/6/2008 as was scheduled, the court proceeded with preliminary hearing without reading over the charge to the appellant and his co-accused. She was of the view that, failure to read over the charge to the appellant contravened the provisions of section 234 (1) and (2) (a) of the Criminal Procedure Act Cap 20, RE 2002 (the CPA) which requires that where there is any alteration or substitution to the charge it has to be read over to the accused person. To

bolster her argument she referred us to the decisions of this Court in **Thuway Akonaay v. Republic** [1987] TLR 92; **Ibrahim Ally Kiswabi v. Republic,** Criminal Appeal No. 47 of 2012; and **Aidan Mhuwa @ Joseph and another v. Republic,** Criminal Appeal No. 139 of 2014 (both unreported).

In the end she contended that, failure to comply with section 234 of CPA rendered the proceedings and decisions thereof nullity. She however, prayed that, since the appellant has been incarcerated for about eleven (11) years' on the omission that was occasioned by the court, the Court should invoke its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and nullify the proceedings, quash the judgment and set aside the sentence of 20 years' imprisonment meted out to the appellant and allow the appeal.

On being prompted by the Court on the legality of the sentence, she was quick to concede that it was illegal as the offence to which the appellant was charged was punishable by a minimum sentence of 30 year's imprisonment. In that premise, she opined that, should the Court decline to allow the appeal, the sentence be enhanced.

In rejoinder, the appellant, essentially, joined hands with the learned State Attorney on the defect raised. He did not however, agree with her proposition for enhancement of sentence should the Court decline to allow the appeal.

We have gone through the submissions of both sides and the entire record of appeal. We think, the issue to be determined by this Court is whether or not the appellant was afforded a chance to enter his plea.

From the outset, we wish to state that the procedure in criminal matters including trials is governed by the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). If the charge is lodged and admitted in the court, it is the duty of the court to summon the accused so that he can answer the charge in terms of section 228 (1) of the CPA which provides as follows:

> *"228(1) 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".*

Under the above provision, it is a mandatory requirement for the court to take the plea of the accused before the trial commences. This is vital to enable the accused to understand the nature of the charge laid at his door and be able to prepare his defence. To show it's important, if such a requirement is not complied with, it renders the entire trial a nullity. This was emphasized in the case of **Naoche Ole Mbile v. Republic** [1993] TLR 253 where it was held that:

> *"(i) One of the fundamental principles of our criminal justice is that at the beginning of the criminal trial the accused must be arraigned, ie the court has to put the charge or charges for him and required him to plead;*
>
> *(ii) Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity".*

Likewise, section 234 (1) of the CPA permits a charge to be amended or substituted. And, where the charge is so amended or substituted, it shall be the duty of the court to take a new plea in relation to the amended or substituted charge in terms of subsection (2) (a) of the section. In the case of **Thuway Akonaay** (supra) which was rightly cited by Ms.

Lugongo, the Court found the trial to be a nullity because the plea to the altered charge was not taken from the appellant. The Court held that:

> *"It is mandatory for the plea to a new or altered charge to be taken from the accused person, failure to do that renders a trial a nullity"*

Similar stance was taken in a number of decided cases. Just to mention a few, they include, **John Leiya Masawe v. Republic**, Criminal Appeal No. 80 of 2016 (unreported); **Ibrahim Ally Kiswabi** (supra); **Aidani Mhuwa @ Joseph** (supra). For instance, in the latter case of **Aidani Mhuwa** (supra) the Court stressed that:-

> *"... we are settled in our minds that failure by the trial court to perform its mandatory duty imposed on it by the provisions of section 234(2) (a) of the CPA is not a mere procedural lapse, but a fundamental irregularity going to the root of the case. The irregularity cannot be cured under section 388(1) of the CPA (See **Shabani Isack @ Magambo Mafuru and Another v. Republic** Criminal Appeal No. 192, 218 of 2012 (unreported)"*

In this case, it is notable that when the appellant was arraigned before the trial court for the first time the charge was not read over to him.

Although the record shows that the appellant said *"sio kweli"* literally translated, *"not true"* and the court entered a plea of not guilty to the charge, it is not certain as to what exactly the appellant was pleading. To be more precise, the charge was not read over to him. On the basis of the above cited authorities, this alone renders the trial a nullity.

That however, was not the only shortcoming. As was rightly submitted by Ms. Mwabeza, on 21/5/2008 the prosecution, in the absence of the appellant and his co-accused, had sought to substitute the charge in order to add another accused person. It is obvious that on that date, the substituted charge could not have been read over in the absence of the accused persons. The matter was adjourned to 2/6/2008 for preliminary hearing.

When the same came up for preliminary hearing on 2/6/2008 this is what transpired:

> *"2/6/2008*
>
> *Coram: Khamsini RM*
>
> *PP:Insp. Abdallah*
>
> *CC: E. Mwakyembe*

Accused: Both present

Pros. The matter is coming for preliminary hearing and the facts are ready. We are also ready.

PRELIMINARY HEARING TAKES OFF

Facts No. 2 undisputed....

Facts No. 3 undisputed..."

From the above quotation, it is vivid that the preliminary hearing proceeded without the charge being read over to the accused who were present in court and required them to plead. After the conclusion of preliminary hearing, the matter was fixed for hearing on 17/6/2008 but hearing did not commence as the witnesses did not turn up and was again adjourned to 1/7/2008. On that date; (1/7/2008) hearing commenced without reading over the charge against the appellant and his co-accused and required them to plead. The record shows that the matter proceeded that way to its conclusion. This means that the appellant was not afforded the opportunity to enter his plea. Incidentally, the High Court nullified the proceedings against the co-accused because the charge against him was

not read over to him and enter plea. Unfortunately, it did not detect the same anomaly in relation to the appellant.

Looking at what we have demonstrated above, we are satisfied that the appellant was not afforded the right to plead to the charge laid at his door.

On the basis of this irregularity, Ms. Lugongo urged us to invoke section 4(2) of the AJA and nullify the proceedings and judgment of the trial court and High Court and set aside the conviction and sentence. She also commented on the illegality of sentence meted out to the appellant and asked for its enhancement should the Court decline to allow the appeal.

On the issue of sentence, we agree with Ms. Mwabeza that the sentence of 20 years' imprisonment for an offence of armed robbery was illegal. Unfortunately this went unnoticed in the High Court. We think, the courts below ought to have imposed the mandatory sentence of thirty (30) years' imprisonment as required by law.

That notwithstanding, after having considered the nature of the irregularity we agree with the learned Senior State Attorney that the

omission to read over the charge to the accused person was a fatal irregularity which renders the proceedings a nullity. Hence, in exercise of the powers vested on us under section 4(2) of the AJA, we hereby nullify and quash the proceedings and judgment of the courts below, set aside the sentence thereof. Given that the appellant has served almost 11 years' since his incarceration, we order the immediate release of the appellant unless otherwise held for other lawful reason(s).

DATED at **MBEYA** this 8th day of November, 2019.

I.H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 8th day of November, 2019 in the presence of the Appellant in person, unrepresented and Mr. Ofmedy Mtenga learned State Attorney for the respondent is hereby certified as a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL