IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 528 OF 2016

FILBERT ALPHONCE MACHALO ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 29th day of July, 2016

in

Criminal Appeal No. 40 of 2016

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JUDGMENT OF THE COURT

3rd & 10th April, 2019

MWANGESI, J.A.:

In the Resident Magistrate's court of Arusha at Arusha, the appellant herein one Filbert Alphonce Machalo @ Mnoma, alongside Yusuph Mohamed @ Babushi, Linus Rashid @ Black, Hassan Ally Rume, Hassan Shaban Kuki, Said Juma @ Subaru, Omari Sulemani Shabani, Samweli Michael Mwiko @ Gonga, Daudi Abdallah Omari and Tadei Yuda Msuya,

stood arraigned for the offence of armed robbery contrary to the provisions of section 287A of the Penal Code Cap 16 R.E. 2002 (**the Code**), as amended by (Act No. 10A) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011.

It was the case for the prosecution that, on the 19th day of May, 2014 at Olasiti area within the City and Region of Arusha, the appellant and his co - accused did jointly and together steal 19 grams of gold chain, gold bangle worth TZS Two Million Six Hundred and Sixty Thousand (2,660,000/=), 1 phone 5 valued at TZS Two Million Two Hundred Thousand (2,200,000/=), 1 phone make Galaxy Note 3 valued at TZS One Million Five Hundred Thousand (1,500,000/=), 1 Android pad worth TZS Seven Hundred Thousand (700,000/=), 1 Samsung Tablet worth TZS Nine Hundred Thousand (900,000/=), 1 phone make Fook worth TZS Thirty Three Thousand (33,000/=), 1 phone make Blackberry valued at TZS Six Hundred and Fifty Thousand (650,000/=), 1 phone make Nokia valued at TZS Eighty Five Thousand (85,000/=), 1 Laptop make HP Probook valued at TZS Two Million and Six Hundred Thousand (2,600,000/=), 1 camera make Sony valued at TZS One Million and Four Hundred (1,400,000/=), 1

TV Flat screen 27 make Samsung valued at TZS Eight Hundred Thousand (800,000/=), 1 DVD player valued at TZS One Hundred and Forty Thousand (140,000/=), and cash money TZS Four Million and Two Hundred Thousand (4,200,000/=), all properties valued TZS Seventeen Million Eight Hundred and Seventy Thousand (17,870,000/=), the properties of one Professor Sendul Nguyaine and immediately before and after such stealing, did use pistol and bush knife to obtain and retain the said properties.

The facts leading to the arraignment of the appellant and his co-accused as gathered from the evidence led by the prosecution witnesses could briefly be stated that, on the 19th day of May, 2014 during night time, bandits armed with a pistol and bush knife, stormed into the house of Professor Sendul s/o Nguyaine wherein, under gunpoint robbed and parted away with a number of valuables including cash money totaling about TZS seventeen Million and Eight Hundred and Seventy Thousand. The incident was reported at the Police Station where through their investigation, the appellant and his companions were arrested and charged with the offence of armed robbery.

All accused protested their innocence when the charge was read over to them. And, in order to establish the guilt of all accused, the prosecution paraded seven witnesses that is, Mwanaidi Mohamed (PW1), Zuwena Mohamed (PW2), Robert Julius (PW3), Ole Nguyaine (PW4), Charles Philemon Sanai (PW5), E. 2548 Detective Constable Michael (PW6) and Assistant Inspector Evarist Mwamengo (PW7). At the close of the prosecution case, it was ruled out by the trial Resident Magistrate that, all accused had no case to answer save the fourth accused who happened to be the appellant herein, who was called upon to enter his defence. The rest of the accused were therefore discharged and set at liberty in terms of the provisions of section 230 of the Criminal Procedure Act, Cap 20 R.E 2002 **(the CPA**)

In defending himself the appellant relied on his own sworn testimony and never called any other witness to supplement his defence. At the end of the day after the learned trial Resident Magistrate had evaluated the evidence which was placed before her, she came out with a finding that the prosecution had managed to establish its case to the hilt. The appellant was therefore convicted of the charged offence, and sentenced to the

statutory term of imprisonment for thirty years. His efforts to challenge the decision of the trial court in the High Court of Tanzania at Arusha, proved futile and hence this second appeal.

The appellant's challenge against the concurrent findings of the two lower courts is premised on five grounds of appeal namely:

1. *That, the first appellate Court erred in law and in fact in finding that, the appellant was properly identified both at the scene of the crime and at the identification parade.*
2. *That, the purported identification parade was not conducted in accordance with the rules that have been laid down under the Police General Orders (PGO).*
3. *That, the first appellate Court ought to have upheld ground No. 3 of appeal after holding that the charge sheet was defective.*
4. *That, the first appellate Court erred in law by failing to notice the inconsistency between PW4'S testimony during the trial and the statement he made to the police.*

5. *That, the first appellate Court misdirected itself and consequently erred in law when it based its conviction on the basis of weak tenuous and unreliable evidence of PW4 and PW7.*

On the date when the appeal was called on for hearing before us, the appellant entered appearance in person as he had no benefit of being legally represented. The respondent/Republic on the other hand, had the services of Ms Lilian Aloyse Mmassi, learned State Attorney. In his address to us in amplification of the grounds of appeal, the appellant generally challenged the evidence of visual identification which was alleged to have been made to him on the night of the incident arguing that, it was shaky and unreliable. He as well challenged the identification alleged to have been made to him at the identification parade of which, according to him, its conduct was made without compliance with what has been stipulated in the Police General Orders (PGO).

The appellant further faulted the trial court and the first appellate court for grounding their conviction against him on a defective charge. He argued that the charge which was preferred against him was defective because it was not indicated therein, to whom the weapons alleged to have

been applied in effecting the commission of the offence of armed robbery, were directed. Additionally, the appellant went on to submit, the first appellate Judge, imposed her own names to the alleged victim of the incident in that, while the charge sheet bears a different name from the one who testified in court, when told about the anomaly by the appellant, she ruled out that the two names were in respect of one and the same person. Basing on those shortfalls, it was the submission of the appellant that the case against him was not established to the required standard and implored us to allow the appeal and set him at liberty.

The response by the learned State Attorney, was prefaced by stating her stance that, the respondent/Republic was not resisting the appeal. While wholly acceding to what was submitted by the appellant, she further amplified the defect on the charge sheet by arguing that according to the charge sheet as reflected at page 8 of the record of appeal, it is indicated that the robbed properties belonged to one Professor Sendul s/o Nguyaine. Even though it was alleged that the robbery was done with the use of a pistol and a bush knife, it was not indicated anywhere in the charge sheet as to whether the said pistol and bush knife were directed to the victim.

Additionally, the learned State Attorney went on to submit, even in the evidence which was tendered in court by the prosecution witnesses, there was none to show that the pistol and bush knife which were allegedly used in the commission of the offence, were directed to Professor Sendul Nguyaine, the victim of the incident. Placing reliance on the holding in **Ally Idd Vs Republic,** Criminal Appeal No. 328 of 2015 (unreported), Ms. Mmasi argued that, the omission occasioned in the charge sheet was fatal.

Still on the charge sheet, it was the submission of the learned State Attorney that, according to what was disclosed in the charge sheet, the victim of the incident was one Professor Sendul s/o Nguyaine. However, the one who posed as the victim of the incident during trial, was one Ole Nguyaine. Since the two names refer to two different people, the implication was that, there was no evidence tendered by the victim of the incident to establish its occurrence. Reference being made to the decision in **Mashiku Justine Vs Republic,** Criminal Appeal No. 96 of 2004 (unreported), the learned State Attorney told the Court that, the anomaly was fatal and could not be cured under the provisions of section 388 of **the CPA.** She concluded her submission by urging us to allow the appeal.

At issue for the Court to resolve in view of the submissions from either side above, is whether or not, the appellant was justifiably convicted by the two lower courts. After having closely considered the proceedings of the trial court and the evidence tendered at the same, it is our view that even though the appellant lodged five grounds of appeal to challenge the decision of the two lower courts, only one ground suffices to dispose of this appeal that is, the third ground which is in respect of the defect on the charge sheet.

As correctly argued by both sides above, the defect of the charge in the instant appeal was occasioned by the fact that it was not indicated in the particulars of the offence, to whom the pistol and bush knife which are alleged to have been used in the commission of the offence of armed robbery at the house of Professor Sendul Nguyaine were directed. According to the wording of the provisions of section 287A of **the Code** which creates the offence of armed robbery, one of the essential ingredients of the offence is use of force or threat against a person on whom the offence is committed. The holding in the case of **Kashima Mnandi Vs Reublic**, Criminal Appeal No. 285 of 2011 (unreported), which

was followed in **Munziru Amri and Another Vs Republic,** Criminal Appeal No. 151 of 2012 (unreported), clarified as to how the commission of the offence of armed robbery can be said to have taken place when it stated thus:

> *"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 partlculars of the offence of robbery must not only contain the violence or threat but also the person on whom actual violence or threat was directed."*

A look at the particulars of the charge sheet that was placed at the door of the appellant in this appeal, discloses that they did not meet the requirement as clarified above. To appreciate the situation, we hereby reproduce the particulars of the offence in part that:

Particulars of offence

"Yusuph Mohamed @ Babushi, Linus Rashid @ Black, Hassan Ally Rume, Albert Alphonce @ Mchalo @ Noma, Hassan Shaban

Kuki, Said Juma @ Subaru, Omari Suleman Shabani, Samwel Michael Mwiko @ Gonga, Daudi Abdallah Omari and Tadei Yuda Msuya, on the 19th day of May, 2014 at Olasiti area within the City and Region of Arusha, jointly and together did steal 19 grams of chain gold, gold bangle worth TZS 2,660,000/= I phone 5 valued at TZS 2,200,000/=, ----------, all total valued at TZS 17,870,000/=, ***the property of one Professor Sendul s/o Nguyaine and immediately before and after the time of such stealing, did use pistol and bush knife in order to obtain and retain the said properties.***" [Emphasis supplied]

It is evident in the light of what was put in the bolded part of the particulars of the offence above that, they omitted to indicate to whom the pistol and bush knife which were used in committing the offence of robbery in the instant appeal, were directed. Such fact also does not feature anywhere in the testimonies of all prosecution witnesses who testified brfore the trial court. The holding of this Court in **Tayai Miseyeki Vs Republic**, Criminal Appeal No. 60 of 2013 (unreported) expressed the fate where the defect on the charge sheet, is as the one which is being discussed in the instant appeal when it was stated that:

"--- Since the charge sheet alleged that a shotgun was used to retain the stolen sheep, it was vital for the charge sheet to show against whom that shotgun was used. Because of the omission, the charge is defective and cannot be cured by section 388 (1) of the Criminal Procedure Act."

The circumstances of the charge sheet in the instant appeal being quite similar to what were in the case of which its holding has been quoted above, we associate ourselves to what was held above. That apart, the omission in the appeal at hand has further been compounded by the fact that, the victim of the incident never appeared in court to give evidence. The failure by the victim of the incident to appear in court and testify, rendered the situation to be that there was no direct evidence at all, which was led by the prosecution to establish the commission of the alleged offence of armed robbery.

It is reflected in the proceedings at page 95 of the record of appeal that, this complaint was raised at the first appellate Court, where it constituted one of the grounds of appeal. In dismissing this ground of appeal, the learned first appellate Judge stated that:

"Having perused the records it is true that the person named in the charged sheet is Professor Senduye Nguyaine and the PW4 is Ole Nguyaine. But with the little Maasai culture I have knowledge of, Ole is used to connote a respect that, it is an elderly person and the "son of". Therefore, Ole Nguyaine may be the same person. The omission in my view, did not prejudice the prosecution case against the appellant to make it a sufficient reason to warrant the Court to raise a reasonable doubt, adverse to the prosecution evidence. This ground lacks merit and is hereby dismissed."

With due respect to the learned first appellate Judge, we think it was a misdirection to dismiss the ground of appeal by the appellant, by invoking her own imported opinion instead of basing on the evidence which was before her. There was nothing in the record to show that Professor Sendul Nguyaine, was one and the same person as Ole Nguyaine. It is our understanding as clearly reflected in the record that the two names, portray two different people and ought to have been treated so.

On the basis of what we have endeavored to highlight above, there is no doubt that the appeal by the appellant is sound. We therefore answer

the issue which we posed at the beginning of this judgment in the negative that, there was no justification for the appellant to be convicted of the offence which he stood charged with. Consequently, we allow his appeal by quashing the concurrent findings of the two lower courts and set aside the sentence of imprisonment for thirty years. In lieu thereof, we order that he be released from prison forthwith, unless he is otherwise being lawfully held for some other justifiable cause.

Order accordingly.

DATED at **ARUSHA** this 9th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that is a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL