IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: JUMA, C.J., MWARIJA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 559 OF 2016

EZEKIEL KWIHUJA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Ruhangisa, J.)

dated the 28th day of October, 2016
in
Criminal Appeal No. 131 of 2015

RULING OF THE COURT

12th & 14th August, 2020

KEREFU, J.A.:

In the District Court of Shinyanga at Shinyanga, the appellant, EZEKIEL KWIHUJA, was arraigned on a charge comprised of two counts on the offence of armed robbery. For purposes of clarity, we find apposite to extract the relevant portion of the said charge sheet in full: -

"1ST COUNT

STATEMENT OF OFFENCE

ARMED ROBBERY: Contrary to Section 287A of the Penal Code, [Cap. 16 R.E. 2002] as amended by Act No. 4 of 2004.

PARTICULARS OF OFFENCE: EZEKIEL S/O KWIHUJA on 19th July, 2012 at Mwamanyuda village within Shinyanga District in Shinyanga Region, stole a money cash Tshs 512,000/= and mobile phone make Nokia valued at Tshs 60,000/= the property of one LEBI S/O MABEJA and at the time of such stealing did wound the said LEBI S/O MABEJA in order to obtain or retain or prevent or overcome resistance to its being stolen or retained.

2nd COUNT

STATEMENT OF OFFENCE

ARMED ROBBERY: Contrary to Section 287A of the Penal Code, [Cap. 16 R.E. 2002] as amended by Act No. 4 of 2004.

PARTICULARS OF OFFENCE: EZEKIEL S/O KWIHUJA on 19th July, 2012 at Mwamanyuda village within Shinyanga District in Shinyanga Region, stole mobile phone make Nokia valued at Tshs 40,000/= the property of one SHIJA D/O MWANDU and at the time of such stealing did wound the said SHIDA D/O MWANDU in order to obtain or retain or prevent or overcome resistance to its being stolen or retained."

The appellant denied the charge, whereupon the prosecution paraded three (3) witnesses namely Lebi Majeba, the victim who testified as PW1, Shija Mwandu, the wife of PW1 who testified as PW2 and the police

officer No. F.2199 D/CPL Samwel Majinge, (PW3) who investigated the incident and arrested the appellant. The prosecution side also tendered two documentary exhibits.

In a nutshell, the prosecution case as narrated by the prosecution witnesses indicated that, on 19th July, 2012 at around 01:00hrs when PW1 and his wife PW2 were sleeping in their house, suddenly the main door was broken and two people entered. PW1 testified that torch light was flushed at him and heard one person shouting from outside ordering him to surrender the money he obtained from the cow business. PW1 said, the two robbers entered into their bedroom and he managed to recognize the appellant through torch light because he knew him before the incident and had interacted with him as a photographer who visited their house on that business. PW1 testified further that, the appellant tightened his face with a cloth, attacked and wounded him. PW1 said, he fell down on the floor and the robbers stole TZS 512,000.00 and two mobile phones worth TZS 60,000.00 and TZS 40,000.00, respectively.

In support of PW1's testimony, PW2 also testified that she managed to identify the appellant by using torch light and the appellant's voice which was familiar to her as she knew him prior to the commission of the

offence. PW2 also added that, the appellant was their family photographer and she used to see him at the flour milling machine where he worked. PW2 testified further that the robbers intended to rape her but failed because she was in her menstruation period. That, after the incident the robbers ran away and the incident was reported to the police. Subsequently, a search was mounted by PW3 whereby the appellant was arrested and charged with the offence of armed robbery as indicated above.

On his side, the appellant testified alone, as he did not summon any witnesses. After a full trial, the trial court accepted the version of the prosecution's case and the appellant was found guilty, convicted on the first count and sentenced to thirty (30) years imprisonment and ordered to pay a compensation of TZS 1,000,000.00.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed, hence the present appeal. In the Memorandum of Appeal, the appellant raised four (4) grounds of appeal which, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, the appellant's appearance was facilitated through a video link from Shinyanga Prison whereas the respondent had the services of Mr. Nassoro Katuga, the learned Senior State Attorney assisted by Mr. Jukael Jairo and Ms. Edith Tuka, both learned State Attorneys.

When the appellant was given an opportunity to amplify on his grounds of appeal, he preferred to let the learned Senior State Attorney respond first but he reserved his right to rejoin, if need to do so would arise. In the event, we invited Mr. Katuga to commence his submission.

On taking the floor, Mr. Katuga, from the outset, declared his stance of supporting the appeal on a point of law pertaining to the charge sheet the appellant was charged with. He thus sought leave, which we granted, for him to address us on that legal issue.

Mr. Katuga argued that, the conviction and sentence meted against the appellant before the trial court was based on an incurably defective charge and the same went unnoticed by the first appellate court.

Amplifying on the said defect, Mr. Katuga argued that, as per the charge sheet the offence the appellant was charged with was alleged to

have been committed on 19th July, 2012 when section 287A of the Penal Code had already been deleted and substituted with a new section vide the Written Laws (Miscellaneous Amendments) Act. No. 3 of 2011. He elaborated further that, since the armed robbery raised in the charge sheet is alleged to have been committed on 19th July, 2012 then, it was improper for the charge sheet to be anchored on a non-existent provision of the law.

On account of such shortcoming, Mr. Katuga argued that the said defect is fatal and cannot be cured under section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). It was therefore his view that, since the appellant was charged on a non-existent law, then the proceedings and judgment of both courts below were a nullity. Based on his submission, Mr. Katuga beseeched us to invoke the powers of revision bestowed upon the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA) to nullify the aforesaid proceedings and the judgment of both courts, quash the conviction and set aside the sentence meted out against the appellant.

As for the way forward, Mr. Katuga prayed the Court to leave the matter at the liberty of the Director of the Public Prosecutions (the DPP) to decide to initiate a fresh trial or otherwise.

In rejoinder, the appellant welcomed the submissions by Mr. Katuga though he had a different view on the way forward. He submitted that, since the pointed-out anomaly was not occasioned by him, he should not be penalized on the mistakes done by the court. On that account, the appellant prayed that the appeal be allowed and he be set at liberty, as he had been in prison custody for more than six (6) years.

From the submissions made by the parties, the crucial issue for our consideration is whether or not the charge sheet preferred against the appellant was defective and whether the said defects are curable under section 388 of the CPA or not and finally, to what extent the said defects have prejudiced the trial, conviction and the sentence meted against the appellant.

It need not be overemphasized that the charge is a foundation of a criminal trial. Thus, those who are responsible in formulating charges must ensure that charges are drawn in compliance with the law. Likewise,

any court, before acting upon a charge, must first consider if the same is crafted in accordance with the requirement of the law. It is also a principle of the law that, an accused person must know the nature of the case he is facing and the sentence thereat. Therefore, it is a mandatory requirement of the law that a charge sheet should contain a statement of the specific offence or offences with which the accused is to face at the trial, so that he can well prepare his defence. The process of framing a charge sheet is governed by sections 132 and 135 (a) (ii) of the CPA. The said provisions prescribe the mode and the format to be used in framing the charge or on the manner in which the offences are to be charged. In particular section 132 provides that: -

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

Similarly, section 135 (a) (ii) of the CPA requires the statement of the offence to cite a correct reference of section of the law which sets out

or creates a particular offence alleged to have been committed. The said provision states as follows: -

> *"the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all essential elements of the offence and,* ***if the offence charged is one created by enactment shall contain reference to the section of the enactment creating the offence.****" [Emphasis added].*

From the wording of the cited provisions of the law, it is clear that every charge should contain a statement of the specific offence and must also indicate the correct provisions of the law creating the offence.

In the instant appeal, as it can be discerned from the provisions of the law cited in the charge sheet we have previously reproduced, the appellant was charged with the offence of armed robbery alleged to have been committed on 19th July, 2012 contrary to section 287A of the Penal Code as amended by Act No. 4 of 2004. Mr. Katuga argued that the said section was deleted and replaced by the new provision vide section 10 of the Written Laws (Miscellaneous Amendments) Act. No. 3 of 2011.

Upon our research, we found merit in Mr. Katuga's submission because the Written Laws (Miscellaneous Amendments) Act. No. 3 of 2011 which deleted and replaced section 287A of the Penal Code came into force on 10th June, 2011. Therefore, at the time the appellant was arraigned to answer the charge before the trial court, the section indicated in the charge sheet was non-existent, thus the appellant was charged with a non-existent offence.

Thus, the charge sheet laid against the appellant was prepared contrary to sections 132 and 135 (a) (ii) of the CPA. It is our considered view that, the failure by the prosecution to cite the correct provisions of the law which created the offence, had occasioned injustice to the appellant as he could not appreciate the nature of the offence he was facing, so as to properly marshal his defence. In the case of **Kastory Lugongo v. The Republic,** Criminal Appeal No. 251 of 2014 (unreported) the Court when faced with an akin situation stated that: -

> *"We are keenly aware that not every defect in the charge sheet would vitiate the trial. As to the effect the defect could lead, would depend on the particular circumstances of each case,* ***the overriding consideration being whether the defect worked***

to prejudice the accused person. Our particular concern here is the reality that the appellant was arraigned under a non – existent provision of the law." [Emphasis added].

Similarly, in the case at hand, we find that the ailment of making a reference to a non-existent provision of the law on the charge was fatal and vitiated the whole trial. We are therefore in agreement with the submission of Mr. Katuga that the charge laid against the appellant was defective for being predicated on a non–existent law and the said defect cannot be cured under the provision of section 388 (1) of the CPA. Therefore, the trial was a nullity and so was the appeal before the High Court, because it stemmed from a fatally defective charge.

In the premises, we are inclined to invoke the revisional powers under section 4 (2) of the AJA and nullify the entire proceedings and judgement of the trial court and the High Court, quash the conviction and set aside the sentence imposed on the appellant.

On the way forward, we are mindful of the prayer made by Mr. Katuga that we should consider to leave the matter at the discretion of the DPP to decide to initiate a fresh trial or otherwise. With respect, we

find the prayer by Mr. Katuga untenable in the circumstance of this appeal. We as well find the option for an order for a retrial not feasible, because normally an order for a retrial is granted when the charge, which is the basis of the trial is in existence. In **Mayala Njigailele v. Republic,** Criminal Appeal No. 490 of 2015 (unreported), which is more relevant in the case at hand, the Court held that: -

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

See also the cases of **Fatehali Manji v. The Republic**, (1966) EA 343, **Swalehe Ally v. The Republic,** Criminal Appeal No. 119 of 2016, **Meshack Malongo @ Kitachangwa v. The Republic,** Criminal Appeal No. 302 of 2016 and **Samwel Lazaro v. The Republic**, Criminal Appeal No. 68 of 2017.

We take the same position and hold that, since we have found that the charge which was the foundation of the trial was incurably defective,

there is no charge in existence with which the appellant can be retried. Consequently, we order for the immediate release of the appellant from prison unless he is held for some other lawful cause.

Ordered accordingly.

DATED at **SHINYANGA** this 13th day of August, 2020.

I. H. JUMA
CHIEF JUSTICE

A.G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of August, 2020 in presence of the Appellant via Video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL