**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., KOROSSO, J.A. And SEHEL, J.A.)**

**CRIMINAL APPEAL NO. 10 OF 2018**

**JUMANNE MONDELO..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)**

**(Munisi, J.)**

**dated the 19th day of November, 2012**
**in**
**HC Criminal Appeal No. 162 of 2011**

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## JUDGMENT OF THE COURT

13th July, & 6th October, 2020

**SEHEL, J.A.:**

In the District Court of Bagamoyo at Bagamoyo (the trial court) the appellant, Jumanne Mondelo, was charged with the offence of armed robbery contrary to section 278A of the Penal Code, Cap 16, R.E. 2002 (the Penal Code). It was alleged that on 7th day of June, 2008 at about night time at Zinga area within Bagamoyo District in Coast Region he did steal cash money TZS 85,000.00, the property of one Juma Masanga and

before such stealing did injure Juma Masanga by using a machete in order to obtain the said property.

The appellant denied the charge. Consequently, the case proceeded to a full trial whereby the prosecution paraded a total of three witnesses and tendered one exhibit, PF3 (Exhibit P1) whereas the appellant fended for himself and did not call any witness. At the end of the trial, the appellant was found guilty as charged. He was thus convicted and sentenced to 30 years' imprisonment. His appeal to the High Court (the first appellate court) was unsuccessful hence the present appeal.

It is important, before venturing into the appeal, to give a brief background. On the 7th July, 2008 there was a dancing festival at the house of one Fadhili Mhadhi, a father in law of the victim of the offence, Juma Masanga (PW1). According to his evidence, he belatedly arrived at the festival. The food was already served and there was none remaining for him to eat. His wife advised him to go and buy some fish from the local market so that she could prepare a meal for him. He took that advice. Whilst on his way, he met the appellant, his friend. He asked for his escort to the local market to buy fish for his wife to prepare food. Upon hearing PW1's plight, the appellant offered him food at his home.

They, therefore, went to the appellant's house. PW1 remained outside and the appellant went in to take a chair for PW1. While he was outside, four people armed with wood sticks came out from the appellant's room and demanded for money. PW1 replied that he had none. They then started beating him. He fought back. In the course of fighting, he managed to fall down one of his attackers and that is when the appellant appeared armed with a machete. He cut PW1 on his head. During the fracas, PW1's left hand was also fractured. They took from him TZS 85,000.00 and left him helplessly.

After a while, the appellant returned and PW1 was still down. The appellant kicked him thrice and left again. He reappeared with his friends and they started asking PW1 as to who had inflicted injuries to him. He replied that he did not know but begged to be taken to his father's home. They took him but left him at the house neighbouring his father's home.

In the early morning of 8th June, 2008, the wife of John Mgeni (PW2) discovered PW1 lying helplessly outside on the ground complaining that he was beaten. After being informed by his wife, PW2 went outside and queried PW1 as to who was responsible. PW1 replied that it was his friend Juma. When asked further as to why, he simply replied that he did not know. The matter was then reported to the police.

E. 3987 D/Cpl Yohana (PW3), a police officer who investigated the crime, told the trial court that on the 7th day of July, 2008 he was assigned an armed robbery case. He began his investigation by interrogating PW1 who told him that the appellant had invited PW1 to have food at his home but while PW1 was there the appellant together with his three friends started beating him and demanded for money. That they used bush knife and wood sticks. Then they robbed from him TZS 85,000.00. Further, PW1 told PW3 that he was not able to identify his attacker since he was down.

On how the appellant was arrested, PW3 said, the appellant was arrested after he went to the police to report the incident of being beaten and the properties of his boss being destroyed.

The case for the prosecution was further built upon one documentary evidence namely postmortem examination report (Exhibit P1).

In his sworn defence case, the appellant claimed that on that fateful day he was at home and thereby arrived one person going by the name of Maduhu who told him that PW1 was calling him. That person left but after a few minutes he returned with a group of people armed with clubs and sticks and started beating him and destroyed his belongings. He went

to report the matter to the police but he was arrested and charged. He completely denied attending the dancing festival and said he did not know PW1 before the alleged incident.

The trial court found that the offence of armed robbery was proved beyond reasonable doubt. It found it as a fact that PW1 was injured and the evidence of being injured was corroborated with PF3 which was tendered as Exhibit P1. The trial court further believed the story given by PW1 that after he was injured the appellant and his friends stole from him TZS 85,000.00. Against this backdrop, it found that the appellant was guilty as charged. Consequently, he was convicted and sentenced to 30 years' imprisonment.

Dissatisfied, he appealed to the High Court. The first appellate court upheld the finding of the trial court. It, like the trial court, was convinced with the account given by PW1 and found his account was corroborated by the evidence of PW2 and the PF3 and that the evidence on the friendship between the appellant and PW1 stood unchallenged. It thus did not find any justifiable reason to fault the findings of the trial court on the credibility of PW1. Accordingly, his appeal was dismissed for lacking merit.

Still aggrieved, he came to this Court marshaled with a six point memorandum of appeal followed by additional five supplementary grounds of appeal. He has also filed written submissions to expound his grounds of appeal. However, for a reason soon to be unfolded, we shall not reproduce the grounds of appeal.

At the hearing of the appeal, the appellant appeared in person unrepresented, via video link conference from Ukonga Prison whereas the respondent/Republic was represented by Ms. Mwanaamina Kombakono, learned Senior State Attorney assisted by Ms. Daisy Makakala, learned State Attorney.

When given a chance to expound his grounds of appeal, the appellant being a layperson had nothing much to say apart from adopting his two sets of memoranda of appeal and urged us to set him free from prison custody.

In opposing the appeal, the learned Senior State Attorney first took issue with the grounds of appeal. She pointed out that the first, second and fourth grounds in the memorandum of appeal were new as they were not raised and determined by the High Court. She further pointed out that all grounds in the supplementary memorandum of appeal with the

exception of the fifth ground which is the repetition to the sixth ground of the memorandum of appeal were also new. Therefore, she urged us not to consider them. In support of her submission, she cited to us the decision of this Court in the case of **Omary Saimon v. The Republic**, Criminal Appeal No. 358 of 2016 (unreported) where we reiterated our position that on issues of fact, our jurisdiction is derived from section 6 (7) (a) of the Appellate Jurisdiction Acts, Cap. 141 R.E 2009 (now it is R.E 2019) as such we will only look into matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.

With that prayer, she contended that she will focus her submission on the third ground where the appellant complained that the charge sheet ought to have contained in the particular of offence the words "together with others not before the Court" in order to correlate with the evidence. She will also submit on the fifth ground of appeal that conviction and sentence of the appellant was based on the un-procedurally tendered Exhibit P1 by the PP. Lastly, she will make a submission on whether the conviction and sentence of the appellant were based on a case that was proved to the hilt.

Arguing in respect of the third ground that there was defective charge sheet, she readily conceded that, according to the tendered evidence, the appellant was not alone in the commission of the crime but that apart the appellant participated in injuring PW1 and that initially the appellant was charged with another person who was later on discharged. She referred us to page 9 of the record of appeal that on 25th February, 2009 the prosecution prayed to amend the charge by removing the 2nd accused person which prayer was granted and the case proceeded against the appellant. She added that after the amendment, the charge was read over and explained to the appellant who pleaded not guilty thereto.

Ms. Kombakono further argued that the charge has minor infraction curable under section 388 of the Criminal Procedure Act, Cap. 20 R.E 2019. She referred us to the statement of offence which shows that the appellant was charged with the offence of robbery contrary to section 287A of the Penal Code. On that account, she argued that since section 287A of the Penal Code provides for an offence of armed robbery and the particulars of the offence tally with the provisions of section 287A of the Penal Code then no prejudice was occasioned to the appellant.

Addressing us on the flouting of procedure in tendering Exhibit P1 which was the fifth ground of appeal, Ms. Kombakono argued that according to the record of appeal, it shows that PF3 was tendered by an incompetent person, the Public Prosecutor ("the PP") who was not a witness and worst still after its admission it was not read out to the appellant for him to know and understand its contents. She accordingly urged us to expunge Exhibit P1 from the record of appeal.

Finally, arguing generally on the sixth ground of appeal that whether the case was proved by the prosecution beyond reasonable doubt, Ms. Kombakono submitted that the key witness was PW1 who was believed by the trial court and the first appellate court that he was injured and that evidence on injury was corroborated by the evidence of PW2. She further argued that PW1 told the trial court on how the appellant was involved in the crime as such a minor contradiction on PW1 and PW3 should be disregarded because the evidence of PW3 was hearsay. With that submission, she implored us to dismiss the appeal.

The appellant, on his part, had very little to say in rejoinder. He contended that the report made by PW1 to the two witnesses, that is, PW2 and PW3 was on assault and not armed robbery. He thus urged us to allow the appeal with an order of his release from the prison custody.

Having considered the grounds of appeal and the submission of the parties, we find it apt to start with the legal issue raised by the learned Senior State Attorney that some of the grounds of appeal in the memorandum and supplementary memorandum of appeal are new grounds. We entirely concur with her. We, on our part, have compared the first, second and fourth grounds of appeal in the memorandum and the five grounds in the supplementary memorandum of appeal with the ones advanced before the High Court, appearing at pages 29 to 31 of the record of appeal and we are satisfied that they were not raised and considered by the High Court. They are new grounds and not on point of law.

This Court has, in numerous occasions held that it has no jurisdiction to deal with an issue raised for the first time that was not raised nor decided by lowers courts unless that issue raises a point of law; the jurisdiction of the Court is confined to matters which came up in the lower court and were decided. (See - **Jafari Mohamed v. The Republic**, Criminal Appeal No. 112 of 2006; **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015; **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015; and **Omary Saimon v.**

**Republic** (supra) (all unreported)). We thus refrain ourselves from considering them.

Having disregarded the new grounds of appeal, we are now left with three issues. The first issue is whether the charge sheet is defective. The second issue relates to the procedure of tendering Exhibit P1 and the last issue is whether the case of armed robbery was proved beyond reasonable doubt by the prosecution. We shall depose the issues one after another as it was done by the learned Senior State Attorney.

Starting with the appellant's complaint on the defective charge sheet, the appellant is complaining that the charge sheet lacked proper wordings as it ought to have contained the words "together with others not before the court". As correctly observed by the learned Senior State Attorney the appellant was initially charged with another person. Indeed the appellant was initially charged with another person and that fact is also supported by his own evidence. Unfortunately, we failed to find a copy of that initial charge sheet in the record of appeal. That apart, at page 9 of the record of appeal we noted that on 25th February, 2009, the Public Prosecutor prayed to substitute the charge by withdrawing charges against the 2nd accused. That prayer was granted. Then, the new charge was read over to the appellant and he pleaded not guilty thereto. Since

the new charge whose copy is appearing at page 1 of the record of appeal was read over and explained to the appellant and he entered his plea to the substituted charge, we find there was no embarrassment and or prejudice on the part of the appellant.

Furthermore, we are in total agreement with the learned Senior Staet Attorney that the particulars of offence omitted to spell out the word "armed". However, that anomaly did not render the charge to be fatally defective because the charging provision cited in the statement of offence tallied with the particulars of offence. The charging provision was section 287A of the Penal Code which creates an offence of armed robbery. Also, the particulars of offence contained clear information of the nature of the offence charged. It is our considered view that the details contained in the particulars of offence coupled with the proper charging provision of the law enabled the appellant to understand the nature and seriousness of the offence thus curable under section 388 of the CPA.

In the case of **Jamali Ally @ Salum v. The Republic**, Criminal Appeal No. 52 of 2017 we were faced with a scenario where the charge of rape omitted to cite the proper provision of the law on the offence of rape of a minor and there was a citation of the non-existent provision of the law in respect of the punishment. In that appeal the appellant was

alleged to have raped his niece of 12 years old. The charge was preferred under sections 130 and 131 (1) (e) of the Penal Code. The Court after noting the defect held:

> *"where the particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age, and where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged, thus any irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA)."*

Likewise, in this appeal we find that the particulars of offence were clear that the appellant was being charged with an offence of armed robbery and there was a proper citation of the charging provision section 287A of the Penal Code which creates an offence of armed robbery thus

the omission of the word "armed" in the statement of offence is curable under section 388 of the CPA.

As regards the complaint that the PF3 was tendered by the public prosecutor; and that it was not read over to the Court, we agree with both parties that there was a flouting of procedures in tendering and admitting the PF3 for two main reasons: First, the PF3 was tendered by the PP. The PP being not a witness he could not be examined or cross-examined on PF3.

In **Thomas Ernest Msungu @ Nyoka Mkenya v. The Republic**, Criminal Appeal No. 78 of 2012 (unreported) we observed that:

> *"A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In tendering the report the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198(1) of the Act."*

We still hold the position that it was wrong for the PP to assume the role of a prosecutor and witness.

We also agree to the second limb regarding failure to read out the PF3 in court. The record bears out that after PF3 was admitted it was not read out in court. It is now settled law that once a document has been cleared for admission and admitted in evidence, it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice. See:- **Sunni Amman Awenda v The Republic**, Criminal Appeal No 393 of 2013; **Jumanne Mohamed and 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015; **Manje Yohana and Another v. The Republic**, Criminal Appeal No. 147 of 2016; and **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 (All unreported).

The essence of reading the tendered document was succinctly stated in the case of **Joseph Maganga and Dotto Salum Butwa v. The Republic**, Criminal Appeal No. 536 of 2015 (unreported) thus:

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity. "*

Accordingly, Exhibit P1 ought to be and we do hereby proceed to expunge it from the record because there was a flouting of procedures in tendering and admitting it.

After expunging Exhibit P1 from the record, we now proceed to ascertain the rest of the evidence if the same is cogent enough to sustain a conviction of armed robbery contrary to section 287A. Admittedly on the issue of injury, there is evidence adduced by PW1, the victim and that of PW2. PW1 told the trial court that he was invited by the appellant, his longtime friend, to have food at the appellant's home. With that evidence we are certain that the two know each other very well such that there could not be mistaken identity. PW1 further testified that while he was waiting outside the appellant's home, four people emerged from the appellant's house and started beating him. He tried to fight back but then the appellant appeared and joined. The appellant left PW1 helplessly and he could not move. After a while, the appellant appeared and moved him to a place nearby his father's home.

PW2 on his part said he saw PW1 with wounds. Hence, they took him to the hospital to be treated. With that evidence coming from PW1 (the victim) and PW2 we have no flicker of doubt that the appellant together with his four friends had common intention to injure PW1. We

thus hold that the fact that PW1 was injured was sufficiently proved beyond reasonable doubt by the prosecution evidence.

However, we have doubts as to whether there was any stealing of money as alleged in the charge sheet and testified by PW1. It is trite law that for an offence of armed robbery to be established there must be, amongst other things, proof of theft (See the case of **Dickson Luvana v. Republic**, Criminal Appeal No. 1 of 2005 (unreported)).

In this appeal, we do appreciate that PW1 told the trial court that after being beaten, the appellant together with his four friends stole from him TZS 85,000.00 but when he was asked by PW2 on the reason of his beating by Juma, he responded that he did not know the reason. If indeed, it was true that he was robbed his money then why did he not mention that robbery at the earliest opportunity. His failure to mention the robbery incident to PW2 casts doubt on his evidence which doubt shall be resolved in favour to the appellant.

Therefore, in terms of Rule 38 of the Tanzania Court of Appeal Rules, 2009 as amended, we substitute the conviction of armed robbery contrary section 287A of the Penal Code with a lesser offence of assault and hereby sentence the appellant to seven (7) years imprisonment

running from 2nd November, 2009 the date of conviction by the trial court which means that by now he must have been completed his sentence.

In fine, we allow the appeal to the extent herein above shown and we make an order for his immediate release from prison unless he is otherwise lawfully held.

**DATED** at **DAR ES SALAAM** this 30th day of September, 2020.

A. G. MWARIJA
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

The Judgment delivered this 6th day of October, 2020 in the presence of the Appellant linked through video conference from Ukonga prison and Mr. Adolf Kisima, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. Kainda
J. Kainda
**DEPUTY REGISTRAR**
**COURT OF APPEAL**