IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A. KOROSSO, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 175 OF 2018

ISSA MWANJIKU @ WHITE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

at Dar es Salaam)

(Ngwembe, J.)

dated the 26th day of June, 2018
in
Criminal Appeal No. 57 of 2017

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JUDGMENT OF THE COURT

17th August & 6th October, 2020

LEVIRA, J.A.

In the District Court of Morogoro at Morogoro the appellant, Issa Mwanjiku @ White was charged, tried and convicted of robbery contrary to sections 285 (1) and 286 of the Penal Code, Cap 16 R.E. 2002 as amended by Act No. 3 of 2011 (the Penal Code) and was sentenced to serve thirty (30) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court vide Criminal Appeal No. 57 of 2017 and hence, the current second appeal.

Briefly, the background of the case was that, the prosecution alleged that on 1st June 2016 while at Lumanda Mashambani area, the appellant robbed cash, Tshs 50,000/= and mobile phone make Nokia worth Tshs. 600,000/= the properties of Gabriel Herman @ Msuya (PW1). According to PW1, on 30th May 2016 around 6.00 pm while he was at his farm, the appellant and another person who is not a party to this appeal approached him and requested to be employed to harvest paddy. PW1 accepted the request subject to conditions that, they sign a contract, have a surety and submit their passport size photographs. PW1 took them to his home to prepare a contract. He then gave them Tshs. 20,000/= and a room to sleep. The following day (1st June, 2016) PW1 and those two people (the appellant and his fellow) went to the farm. However, after 15 minutes they approached PW1 who was at the camp and requested to be shown a kitchen so that they could prepare food and proceed with the work. While PW1 was showing them the kitchen, the appellant's friend grabbed him on the neck.

Then, the appellant held PW1's legs, pulled him and started beating him till his two ribs were broken and he became unconscious. Thereafter, they tied PW1's neck by using a wire and threw him in the toilet. Having done so, the appellant and his fellow took from PW1 the

ignition switches of a tractor and a Pajero, cell phone, Tshs. 50,000/= and also burnt his radio. PW1 stayed in the toilet for three hours before a neighbor who was passing came to his rescue.

PW1 narrated to the said neighbour what happened and gave him his wife's telephone number to call. The neighbor then rang PW1's wife and shortly thereafter, PW1's child (Joseph Msuya, PW3) arrived at the scene of crime, took PW1 to Dakawa Police Station and later to the hospital for treatment. According to PW1, the appellant and his co-robber were using a hired bicycle. At the time they were returning the bicycle to the owner, the appellant was arrested but his fellow managed to escape.

The evidence of PW1 was to a certain extent corroborated by that of his sons; Amos Msuya (PW2) and PW3. The testimony of PW2 was to the effect that, he was at the farm when his father was entering into an agreement with the appellant and his co-robber. As such, he said, he witnessed the signing of the agreement between his father and those robbers and he as well signed it as a witness. Thereafter, he left the farm and went home. PW2 received the information concerning his father being invaded by the bandits after one day. On his part, PW3 testified that on 1/6/2016 he went to the scene of crime after having

received information that his father was invaded. Upon arriving at the scene, PW1 narrated to him how he was invaded and that his cell phone and Tshs. 50,000/= were stolen by the invaders. PW3 participated in taking PW1 to Dakawa Police Station to collect PF3 and later to Mzinga Hospital for treatment.

However, Dr. Benedict Bigawa (PW5) from Morogoro Referral Hospital testified that, he was the one who attended PW1 and he signed PF3 which was issued by an investigator in this case, with No. G7759 D/C Mohamed (PW4) from Dakawa Police Station and the same was admitted as exhibit PIII during trial.

In his evidence, PW4 narrated what he was informed by PW1 concerning how the incident took place. He also stated how he conducted investigations which enabled him to meet Iddy Hamis (PW6), the owner of the bicycle allegedly used by the robbers on the material day. According to PW4, it was confirmed by PW6 that he had hired the said bicycle to the appellant and his fellow. However, to the contrary, PW6 stated in his evidence that on 17/4/2016 it is when he hired the appellant and his fellow the bicycle and not on 1st June, 2016 as it was alleged. PW6 tendered bicycles registration book which was admitted as exhibit P3.

It is noteworthy that PW4 drew a sketch map of the scene of crime which he tendered during trial and the same was admitted as exhibit PI. He also tendered the agreement between PW1 and the two robbers which was admitted as exhibit PII.

In his defence, the appellant who testified as DW1 stated that he was arrested by the police on 4th June, 2016 while on his way back home from the football ground. He was taken to the police station, kept under custody for 22 days, forced to sign a cautioned statement but he refused. Later, he was taken to the court and upon being charged, he pleaded not guilty to the charge.

Upon full trial, the appellant was convicted and sentenced as earlier on indicated. Dissatisfied, he unsuccessfully appealed to the High Court as the learned Judge was firm that, the trial court analyzed the prosecution evidence logically and rightly arrived to a conclusion that the appellant was involved in committing the charged offence. He thus dismissed the appeal and sustained the appellant's conviction as well as the sentence.

Still discontented, the appellant has preferred the current appeal. Through his memorandum of appeal, the appellant raised eleven

grounds which can be paraphrased into the following grounds of complaints: **One**, that the charge sheet was defective. **Two**, that there was a variance between the charge sheet and prosecution evidence. **Three,** that he was not furnished with the complainant's statement. **Four**, that the evidence was recorded in violation of section 210 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). **Five**, that the neighbour who allegedly had helped PW1 at the scene of crime was not called to testify during trial. **Six**, that all the exhibits tendered during trial were not read over after being admitted. **Seven,** that the District Court of Morogoro had no jurisdiction to entertain the case because the offence was committed at Mvomero District. **Eight**, that the appellant was illegally arrested without arrest warrant and detained under police custody over the prescribed time. **Nine**, that the appellant was denied his right to make a rejoinder by the first appellate court. **Ten**, that the trial court did not evaluate the evidence properly. And **eleven**, that the appellant's sentence was excessive.

At the hearing of the appeal, the appellant appeared in person, unpresented via video conference link to Ukonga Central Prison, whereas the respondent Republic had the services of Ms. Mwanaamina

Kombakono, learned Senior State Attorney assisted by Mr. Adolf Lema, learned State Attorney.

We note that on 14th August, 2020 the appellant filed in Court his written submissions in support of the appeal wherein, he abandoned grounds number **three** and **eight** paraphrased above. The appellant relied solely on his written submissions with no further explanation at the hearing. For the reasons that will shortly come into light, we do not intend to reproduce in full the respondent's counsel response to all the grounds of appeal. Instead, we shall determine the remaining grounds of appeal straight away.

We prefer to start, at first, with the second ground alleging variance between the charge sheet and the prosecution evidence. Elaborating on the said variance, the appellant submitted in his written submissions that the particulars of offence showed that the alleged robbery occurred on 1st June, 2016, but this allegation was different from the evidence of PW4 and PW6. He submitted further that, PW4 who was an investigator in this case claimed that he received information from PW1 that, he (PW1) was invaded by two robbers who went to his farm with a bicycle written "Idd Hamis" (PW6). As part of his investigation, PW4 went to PW6, the owner of the said bicycle to inquire

on the allegations and subsequently, the appellant was arrested. However, the appellant stated that PW6 was very specific that he hired a bicycle to the appellant on 17th April, 2016 and after one week which is approximately on 24th April, 2016.

According to the appellant, there is material variance between the charge sheet, the evidence of PW4 and PW6 as regards to when the alleged offence was committed. In addition, he highlighted that PW6 was called at the police and ordered to inform the police in case the appellant returns his bicycle even before the alleged date of incident (1st June, 2016). In the circumstances, the appellant argued that the charge against him was not proved beyond reasonable doubt.

In reply Ms. Kombakono concurred with the appellant on existence of the highlighted variances between the charge sheet and the prosecution evidence. In addition, she referred the Court to pages 11 and 12 of the record of appeal where PW1 stated that, he was invaded by two people and explained the participation of each in commission of the offence. She submitted further that, the evidence of PW4 also unveiled that PW1 was invaded by two people but the appellant was charged alone and the other person was not included or rather, mentioned in the charge sheet.

The learned counsel added that, another difference was that PW1 testified that his phone and Tshs. 50,000/= were stolen by those invaders without mentioning the value of the said phone, but the charge sheet indicated the value of the said phone to be Tshs. 600,000/=. Apart from that, she said, as indicated above, PW1 alleged that the ignition switches of his car and tractor were stolen by those two robbers, but that complaint was not indicated in the charge sheet. She argued, this is also a material variance between the prosecution evidence and the charge.

According to Ms. Kombakono, whenever such variance occurs, the prosecution is required under section 234(1) of the CPA to amend the charge sheet but it was not the case herein. In the circumstances, she submitted, failure to make any amendment to the charge sheet occasioned a failure of justice on the part of the appellant and it is as good as that the prosecution failed to prove the charge beyond reasonable doubt. On that account, she supported the appeal by cementing that the appellant did not know the nature and extent of the charge he was facing. Finally, she urged us to allow the appeal on that ground.

We have carefully considered the submissions by both parties in regard to the second ground of appeal. We note that, both parties are at one that there was material variance between the charge sheet and the prosecution evidence. We shall now determine whether the alleged variance exists and if it does, whether it is curable under the law.

In determining these issues we prefer, at first, to reproduce particulars of offence as per the charge sheet hereunder:

> *"**PARTICULARS OF OFFENCE***
>
> ***ISSA MWANJIKU @WHITE,*** *on the 1st June, 2016 at Lumanda Mashambani area Luhindo Village Dakawa Ward within the Mvomero District in Morogoro Region, robbed one,* ***GABRIEL HELMAN @MSUYA*** *his cash* ***Tshs. 50,000/=*** *and a mobile phone make,* ***NOKIA*** *worth* ***Tshs. 600,000/=*** *the properties of the said* ***GABRIEL HELMAN @MSUYA*** *and immediately before such stealing did use actual violence against him in order to obtain the said stolen properties.*
>
> ***Dated*** *at Morogoro this 28th day of June, 2016.*
>
> *Signed*
> ***STATE ATTORNEY***
>
> ***Presented*** *for filing this 29th Day of June, 2016.*
>
> *Signed*
> ***COURT CLERK"***

The above particulars indicate clearly that the alleged offence was committed on 1st June, 2016. It is a settled position that a charge sheet is a foundation of a criminal trial. The purpose of charge sheet among others is to inform the accused person the nature and magnitude of the charge facing him with a view of enabling him/her to prepare his/her defence. The law requires the one who alleges to prove. In criminal charges, the prosecution side is duty bound to prove the charge against an accused person beyond reasonable doubt. The burden of proof never shifts. (See for instance, **Ahmed Omari v. Republic**, Criminal Appeal No. 154 of 2005 (unreported)).

To prove the charge against the appellant that he committed the offence on the alleged date, the prosecution called six witnesses including the victim who testified as PW1. As introduced above, the evidence of PW1 is clear that, on 1st June, 2016 is when the victim (PW1) was invaded by two people and the participation of each was well narrated. However, the appellant is challenging the decision of the lower courts that there was material variance between the evidence of PW1 and that of PW4 and PW6 regarding the date on which the alleged offence was committed.

According to the evidence on record of appeal, PW4 stated that on 1st June, 2016 is when the victim (PW1) went to the police to report the incident that had happened to him. At page 19 of the record, PW4 stated that on the same date he decided to go to Idd Hamis (PW6) the owner of the bicycle allegedly used by the appellant and his fellow on the material day. He met PW6 who admitted to have hired the appellant and his fellow a bicycle and that after three days they went again to hire another bicycle. However, we note that PW4 did not state the date on which the appellant and his fellow went to PW6 to hire the said bicycles. The evidence as to when the appellant and his fellow hired the bicycle from PW6 was stated by PW6 himself at page 27 of the record of appeal where he testified as follows:

> *"Yes I am familiar with accused, he used to hire the bicycle from me. Different people was to hire my bicycle (sic). I remember on* ***17/4/2016 accused person came to my office to hire the bicycle.*** *On the bicycle there are my names and telephone numbers. After one week I was called at the police station that if the accused will return back the bicycle I should inform them. Yes the victim identified those bicycles because of my*

name Idd Hamis.... They took the said bicycle on ***17/4/2016 around 6 am."*** [Emphasis added].

Basing on the record of appeal, we agree with both parties that the date of incident indicated in the charge sheet varies from the date mentioned by PW6, the owner of the bicycle allegedly hired by the appellant on the material day. We take note that, the appellant's conviction to a large extent was based on the identification made by PW1 in relation to the bicycle which was written the name of PW6. At page 47 of the record of appeal, the trial court had this to say:

> *"Secondly, the accused person hired the bicycle from PW6 and the same bicycle was identified by PW1 at the scene because it had the name of Idd Khamis the owner."*

From the above reasoning of the trial court, it is common knowledge that the trial court's decision was to a large extent influenced by the identification made by PW1 in connection with the bicycle which was written the name of PW6. As it has been demonstrated above, there was no dispute that the appellant used to hire bicycle from PW6. However, the evidence of PW6 indicated that the appellant hired the said bicycle on a different date from the date indicated in the charge sheet and the one mentioned by PW1. That apart, but also we take

further note that, PW6 stated in his evidence that he used to hire his bicycles to various people. The immediate question that follows is, if the appellant hired the bicycle from PW6 for the last time in April, 2016 was he the one involved in the incident which occurred in June, 2016? The answer to this question is uncertain and in our view, it was not safe for the trial court to arrive at such conclusion to convict the appellant, more so because PW6 apart from mentioning a different date he added that his bicycles are hired by various people. In the circumstances, all possibilities of mistaken identity ought to have been eliminated to establish that indeed the appellant was at the scene of crime on the material date.

The settled position is that, it was incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the person accused will be expected to know and prepare his reply. (See **Halid Hussein Lwambano v. The Republic,** Criminal Appeal No. 473 of 2016 (unreported)). Therefore, it is our observation that, the variance of the incident dates between the one indicated in the charge sheet and of hiring the bicycle as testified by PW6 is not minor. It goes to the root of the case because it cast doubt regarding the identification and the role

of the appellant in the commission of the alleged offence. At any stretch of imagination, if the appellant hired the bicycle from PW6 on 17th April, 2016 and the incident took place on 1st June, 2016, we think, it was unsafe to connect him with the fateful incident. This is due to the fact that, the prosecution evidence is silent as to whether and when he returned the said bicycle to the owner (PW6). Otherwise, we are firm that a variance of more than a month from when the alleged bicycle was hired and the date of incident indicated in the charge sheet, leaves a lot to be desired on the prosecution side and as such rendering the charge not proved to the hilt.

In **Abel Masikiti v. Republic,** Criminal Appeal No. 24 of 2015 the Court observed as follows:

> *"If there is **any variance or uncertainty in the dates**, then the charge must be amended in terms of section 234 of the CPA. If this is not done, **the preferred charge will remain unproved** and the accused shall be entitled to an acquittal."*

Being guided by the excerpt from the above decision and as we have amply demonstrated, certainly, the variance of dates could suffice to

dispose of the appeal, but we consider it important to highlight other variances before we conclude.

Another variance is noted from PW1's testimony and the charge sheet on what was stolen from him. We observe that PW1 was very specific on the items stolen from him, but some of the items were not included in the charge sheet. Instead, as correctly, in our view, submitted by Ms. Kombakono, the charge sheet included a value of the alleged stolen cell phone (Tshs. 600,000/=) which was not mentioned by PW1, the victim. The source of the value of the said cell phone was not disclosed neither by PW1 nor other prosecution witnesses, but it was indicated in the charge sheet. We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard.

We agree with Ms. Kombakono that in terms of section 234(1) of the CPA the prosecution ought to have moved the trial court to order amendment of the charge sheet and give the appellant an opportunity to plead to the altered charge; this section provides that:

"Where at any stage of a trial, ***it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of a charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet circumstances of the case*** *unless, having regard to the merit of the case, the required amendments made under the provisions of this subsection shall be made upon such terms and as the court shall deem just.*

(2) subject to subsection (1) where a charge is altered under that subsection -

(a) the court shall thereupon call the accused person to plead to the altered charge." [Emphasis added].

The above provision envisages the situation where there is variance between the evidence and the charge sheet as in the case under consideration. As intimated earlier, failure to amend the charge sheet is also fatal and prejudicial to the appellant and in our considered opinion, it is not curable under section 388 (1) of the CPA.

Having answered the first issue in affirmative and the second in negative, we wish to remark, it is very unfortunate that the first appellate court did not deal with the variances between the charge sheet and the prosecution evidence although the appellant raised it in the first and fifth grounds of appeal in the petition of appeal. The learned Judge made a general observation at page 65 of the record of appeal where he stated as follows:

> *"The judgment of the trial court analyzed the evidence of the prosecution logically and rightly arrived to the conclusion that the appellant was involved in the criminal act. This court arrives to the same conclusion. I am satisfied that the trial magistrate alluded to all features of the case against the appellant and the* ***conviction and sentence of appellant was according to the law."*** [Emphasis added].

It can be gathered from the excerpt above that the first appellate Judge agreed wholesale with the decision of the trial court. With respect, we think, had he considered the variances we have endeavored to demonstrate above, he would not have arrived at the conclusion he made. Suffices to say, that the second ground of appeal alone is meritorious and sufficient to dispose of this appeal. In our settled view,

there is no useful purpose that will be served in considering the other grounds of appeal raised by the appellant.

In the event, we allow the appeal and, proceed to quash the conviction and set aside the sentence imposed on the appellant. Accordingly, we order that, the appellant be set at liberty forthwith unless held for lawful purposes.

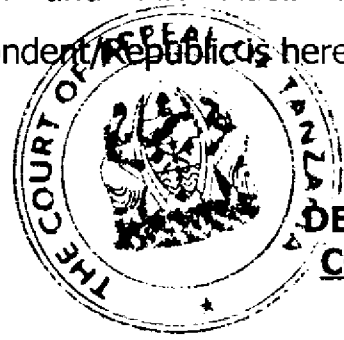
DATED at **DAR ES SALAAM** this 30th day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
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, learned State Attorney for the, respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL