IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 190 OF 2018

EDWARD LUAMBANO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Phillip, J.)

dated the 18th day of June, 2018
in
(HC) Criminal Appeal No. 230 of 2017

JUDGMENT OF THE COURT

18th August & 22nd October, 2020

MKUYE, J.A.:

The appellant Edward Luambano was charged and convicted of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 by the District Court of Ilala at Samora Avenue and was sentenced to 30 years imprisonment.

The appellant being aggrieved unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam Registry in which the appeal was

dismissed. Still protesting his innocence, he has now appealed to this Court.

The brief facts leading to this appeal can be briefly stated as follows:

Tamimu Upete, (PW1) who was the first prosecution witness in this case, worked as a turn boy in a transport company. On the material date he just arrived from Iringa and on reaching at Dar es Salaam at Kigogo Sambusa Market area he participated in uploading the goods from the lorry and later he called Kaifa Hatibu (PW2), his friend to pick and accompany him home. When they reached the place where he rented a room, before even they could enter inside the said room they were ambushed by about eight youths who started assaulting them while demanding to be given money.

PW2 managed to run away while leaving PW1 behind. The invaders then broke the door to PW1's room. Upon entering inside the room, they ordered him to switch on the light and started ransacking the whole room. They were alleged to have made away with cash money to the tune of Tshs. 150,000/=, **clothing** valued at Tshs. 300,000/= and a pair of shoes worth Tshs. 20,000/=. PW1, claimed to have known the

appellant prior to the incident as they lived in the same street and he even knew his father and that he managed to identify him from the tube light that was lit outside and also from the light inside the room. The matter was then reported to the ten-cell leader and to police. The appellant was arrested after almost two months later when he allegedly resurfaced from hiding and was subsequently arraigned before the court as allude to earlier on. The prosecution presented four witnesses whereas for the defence, the appellant testified alone.

The appellant has raised two memoranda of appeal. In the substantive memorandum of appeal lodged on 20th August, 2019 he raised eleven (11) grounds of appeal and in the supplementary memorandum of appeal lodged on 13th January, 2020 he raised five (5) grounds of appeal which for a reason which shall subsequently become obvious, we shall not reproduce them.

From the outset, the Court wished to satisfy itself on the propriety of the charge sheet in view of the fact that the record of appeal contains two charge sheets, the one filed on 4th April, 2014 (the April charge) and the other one filed on 29th October, 2014 (the October charge) which in essence have different particulars especially on the total value of the properties alleged to have been stolen. This is so because the Court

wanted to get clarification on two aspects. **One,** which charge between the two was read over to the appellant on 30th October, 2014 when the proceedings in this case commenced before Mkasiwa Senior Resident Magistrate (SRM) as there is no indication that there was a substitution of a charge. **Two,** which charge was considered in the judgments of the trial court (District Court) and the High Court in its first appellate jurisdiction.

The respondent Republic which was represented by Ms. Jenipher Massue learned Senior State Attorney being assisted by Ms. Ashura Mnzava learned State Attorney Attorney took us at pages 1 and 6 of the record of appeal and made some sort of a guess work that since the trial began on 30th October, 2014 then the charge which was read over was the one filed on 29th October, 2014. However, she pointed out that, in its judgment, found at page 46 of the record of appeal, the trial court referred to the charge sheet filed in April, 2014 which means that the charge sheet that was read over to the appellant at the District Court was at variance with the one that was referred to in the judgment. Ms. Massue further contended that even the High Court (the 1st appellate court) [at its first appellate jurisdiction] referred to the October charge

that was read over at the trial court but not used in the trial court's determination.

In this regard, she argued that the effect of the variance in the particulars of offence in the April charge and the October charge was fatal. She said, it prejudiced the appellant as he could not be in a position to understand the charge and prepare his defence and, hence, he was not accorded a fair trial. She was of a firm view that, the variance did go to the root of the matter which cannot be cured under section 388 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA).

The learned Senior State Attorney did not end there. She submitted that should the Court find that the anomaly is fatal, this is not a fit case for ordering a retrial. She said, after having examined the prosecution evidence found it to be weak to sustain the conviction. On that premise, she urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and nullify the proceedings and judgments of both lower courts, quash the conviction, set aside the sentence and release the appellant forthwith from custody.

On his part, the appellant who appeared in person, unrepresented while linked through video conference from Ukonga Central Prison welcomed the learned Senior State Attorney's stance and urged the Court to consider the anomaly it has raised and release him from custody.

We have anxiously examined the two charge sheets and the submissions from either side on this issue. In the first place we wish to preface our determination by pointing out that in terms of section 228 (1) of the CPA, it is the duty of the trial court to read out the charge to the accused person so that he can answer to it whether he admits or denies it. The said section stipulates 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".*

The above provision is couched in imperative manner, that is, it is a requirement that has to be complied with. This is important to enable the accused to understand the nature of the offence he is facing and be in a position to prepare his defence. Failure to do so renders the entire

trial a nullity. (See **Naoche Ole Mbile v. Republic, (1993) TLR 253.**)

In this case, it is notable that the record of appeal contains two charge sheets. The first charge appears at pages 1-2 while the other one is at pages 3-5 of the record of appeal. The charge sheet appearing at pages 1-2 reads:

> ***"...STATEMENT OF OFFENCE.***
>
> *Armed robbery contrary to section 287A of the Penal Code, [Cap 16 RE 2002] as amended by Act No. 3 of 2011".*
>
> ***PARTICULARS OF OFFENCE***
>
> *"EDWARD LUAMBANO on the 1st day of January, 2014 at Mchikichi area within Ilala District in Dar es Salaam Region, did steal cash Tshs. 450,000/= trousers and shirts valued at Tshs.300,000/= and a pair of shoes valued at 20,000/=, all total valued at Tshs. 770,000/=the property of TANZIM UPETE @ ABDALLA and immediately before and during such stealing did threaten TANZIM UPETE @ SADICK with machete and "bisibisi" in order to obtaln and retain the said property".*

Dated at Dar es Salaam this 29th day of October, 2014

.....

STATE ATTORNEY"

On the other hand, the charge sheet which is dated 29th October, 2014 reads:

"CHARGE STATEMENT OF OFFENCE

ARMED ROBBERY contrary to section 287 A of the Penal Code [Cap 16 RE 2002] as amended by Act No. 3 of 2001".

"PARTICULARS OF OFFENCE

EDWARD LUAMBANO, on 1st day January, 2014 at Mchikichini Jangwani area within Ilala District in Dar es Salaam Region did steal cash money Tshs. 450,000/=, shoes and clothes valued at Tshs. 120,000/= total valued at Tshs. 570,000/= the property of TANZIM UPETE and immediately before such stealing did threaten him with a machete in order to obtain and retain the said property".

Dated Dar es Salaam this 4th day of April, 2014.

.....

STATE ATTORNEY"

When the matter was called on for the first time on 30th October, 2014 as shown at page 6 of the record of appeal, the charge was read over and explained to the accused person in the language he understood and he pleaded not guilty (si kweli). Though there are two charges it is not indicated as to which charge between the two was read over to the appellant since it is not shown if the April charge was substituted by the latter.

The learned Senior State Attorney submitted that it was the October charge which was read over to the appellant and, we think, she is probably right. This is so because of what can be gleaned from the facts of the case which were read over during preliminary hearing on 27th November, 2014, referring to the value of the stolen properties stated in the October charge. However, even if it is assumed that it was the October charge that was read over to the appellant, still the nagging question is what was the status or what happened to the April charge because there is no indication that it was substituted.

What is certain is that the April charge co-existed with the October charge. We are of this view because of what is revealed at page 46 of the record of appeal whereby the trial court composed its judgment on the basis of the April charge. This is clear in the introductory words of

the District Court's judgment where the total value of the properties stolen was Tshs. 540,000/= instead of Tshs. 770,000/= indicated in the October charge which was read over to the appellant. Upon evaluation of the evidence available, the trial court came to the conclusion that the appellant committed the offence (though it is unclear as per which charge) and convicted him as shown at page 53 of the record of appeal. This implies that, if we assume that it was the October charge which was read over, then the appellant was convicted and sentenced with an offence under a charge which he was not called upon to plea?

Strangely enough, it appears the High Court Judge noticed the anomaly and proceeded to change the particulars of the offence as depicted at page 68 of the record of appeal whereby the appellate judge said that the appellant did steal cash money Tshs. 450,000/=, trousers and shirts valued at Tshs. 300,000/= and a pair of shoes valued at Tshs 20,000/= (with a total value of Tshs. 770,000/=) the properties of Tanzim Upete @ Abdallah. Interestingly enough however, at page 74 of the record of appeal, the first appellate court upheld the trial court's decision by dismissing the appellant's appeal.

This also has really exercised our mind because we wonder how could the 1st appellate judge agree with the trial court's decision while it

based on the charge which was not read over to the appellant. We think, basing its decision on the October charge which might have been read over but not decided was an irregularity which was fatal and incurable under section 388(1) of the CPA. It resulted into the miscarriage of justice. It rendered the whole trial against the appellant a nullity.

Under normal circumstances, if the former charge was found to be overtaken by events/ or did not reflect the nature of complaint, the prosecution ought to formally file the proper charge and cause the trial court to substitute it for the former one. What would have followed thereafter was to read over the substituted charge to the accused and require him to enter a plea as per section 228 of CPA. (See - **Naoche Ole Mbile v. Republic,** (Supra). This was, unfortunately, not done.

There is yet another anomaly relating to the variation between the charge purported to have been read over and the evidence in respect of the total value of the stolen properties. Though the said charge showed the total value of the stolen properties to be Tshs. 770,000/=, PW1 testified that the properties stolen were cash to the tune of Tshs. 150,000/=, trousers and shirts worth Tshs. 300,000/= and a pair of shoes valued at Tshs. 20,000/= which made a total of Tshs. 470,000/=

which is also different from the total value in the April charge. Indeed, the variance between the charge and the evidence vitiated the standard of proof of the case.

In the case of **Masota Jumanne v. Republic,** Criminal Appeal No. 137 of 2016 (unreported), the Court was confronted with akin situation and it had this to say:

> *"In a nut shell the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge".*

See also **Japhet Anael v. Republic**, Criminal Appeal No. 78 of 2017 (unreported).

Equally in this case, it is notable that the particulars of offence in the charge sheet were at variance with the evidence from PW1 as regards the amount/the value of the property stolen. In other words, the evidence led by the prosecution did not support the allegation contained in the charge sheet. And, the effect of the variation between

the charge and evidence in proof of such case is that the offence was not proved.

Lastly, Ms. Masue argued that since the appellant might not have understood the charge against him, the Court should invoke section 4 (2) of the the AJA and nullify the proceedings of both lower courts, quash the conviction and set aside the sentence meted out against the appellant. She was against ordering a retrial as the prosecution evidence was weak to support conviction.

On our part, we agree with her. We have also considered whether there is ample evidence to sustain the conviction and we found none. Indeed, we agree with the learned Senior State Attorney's submission that the prosecution evidence is weak such that it cannot sustain the conviction against the appellant. In this regard, we think, ordering a retrial may not be the best option as it would provide a good opportunity for the prosecution to fill in gaps which is against the purpose of the retrial.

Ultimately, in terms of section 4 (2) of the AJA, we hereby accordingly nullify the proceedings and judgments of the courts below, quash the conviction and set aside the sentence meted out against the

appellant. We then order the release of the appellant forthwith unless held for some other lawful reasons.

Order accordingly.

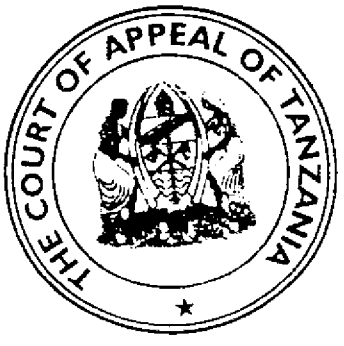
DATED at **DAR ES SALAAM** this 21st day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of October, 2020 in the presence of the appellant in person via video link and Mr. Benson Mwaitenda, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL