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. 220 OF 2018

RAMADHANI HUSSEIN RASHID @ BABU RAMA..... 1ST APPELLANT

ATHUMANI YUSUFU MBALIWA @ FUNDI ASANI.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Ngwembe, J)

Dated the 6th day of July, 2018

in

HC. Criminal Appeal No.48 of 2016

.....

JUDGMENT OF THE COURT

21st August & 3rd November, 2020.

WAMBALI, J.A.:

In the Court of Resident Magistrate of Dar es Salaam at Kisutu, the appellants Ramadhani Hussein Rashid @ Babu Rama and Athumani Yusufu Mbaliwa @ Fundi Asani (the first and second appellants respectively) were arraigned and convicted for armed robbery contrary to section 287A of the Penal Code [Cap.16 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No.3 of 2011. Noteworthy, in the same charge sheet, the appellants were jointly charged with three other persons (the third, fourth and fifth accused) who were later

discharged in terms of section 91 (1) of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). Consequently, each was sentenced to a term of thirty years imprisonment. Their first appeal to the High Court was dismissed.

The appellants are aggrieved and presently seek to impugn the decision of the High Court. Their complaints can be gleaned from a substantive and supplementary memoranda of appeal on the following compressed grounds:-

1. *That, the first appellate Judge erred to confirm the decision of the trial court while the charge was defective.*
2. *That, the first appellate court failed to observe that the appellants' trial was wrongly tried by five different magistrates without giving reasons contrary to the provisions of section 214 (1) of the CPA.*
3. *That, the first appellate Judge erred in relying on the retracted cautioned statement (exhibit P6) against the first appellant while it was un-procedurally admitted.*
4. *That, the first appellate Judge erred to hold that PW1 identified the second appellant at the scene of crime.*
5. *That, the first appellate Judge grossly erred in relying on the evidence of the existence of the fire arm and ammunitions (exhibits P1 and P4 respectively) while the prosecution failed to establish their connection to the offence allegedly committed by the appellants.*

6. *That, the first appellate Judge erred for failing to realize and resolve the disparity of the amount of money stolen contained in the charge sheet and the evidence of PW1.*
7. *That, the case against the appellant was not proved beyond reasonable doubt.*

At the hearing of the appeal before us, the appellants' attendance in Court was facilitated through video conference facility that was linked to Ukonga Central Prison. On the adversary, the respondent Republic was duly represented by Ms. Joyce Andrew Nyumayo and Ms. Rachel Novatus Balilemwa, both learned State Attorneys.

At the very outset, Ms. Nyumayo rose to inform the Court that the respondent Republic supported the appellants' appeal based on the first and second grounds of appeal. With regard to ground one, she conceded that according to the record of appeal the charge sheet which was placed before the trial court contained five persons, the appellants being the first and second accused respectively. However, she stated that in the middle of the trial, the third, fourth and fifth accused were discharged after the Director of Public Prosecutions (the DPP) entered *nolle prosequei* in terms of section 91(1) of the CPA. That notwithstanding, she added, the trial of the appellants proceeded without amending or substituting the charge up to the conclusion of the case.

Regarding the second ground of appeal concerning the change of magistrates without assigning reasons, she conceded that the trial court's record of proceedings in the record of appeal leaves no doubt that five trial magistrates presided over the case up to its conclusion without complying with the requirement of the provisions of section 214 (1) of the CPA.

In the circumstances, the learned State Attorney submitted that the procedural irregularities pointed above with respect to the first and second grounds of appeal are fatal and renders the entire trial a nullity. She thus urged us to nullify the proceedings of both courts below, quash the convictions and set aside the sentences of imprisonment imposed on the appellants. However, she declined to pray for a retrial of the appellants in view of the weak evidence in the record of appeal. In the event, the learned State Attorney implored us to acquit the appellants in the interest of justice.

On their part, the appellants supported the submission of the learned State Attorney and pressed us to allow the appeal and set them at liberty. They strongly contented that apart from the irregularities pointed out by the learned State Attorney, there is no evidence in the record of appeal to link them with the commission of the alleged offence of armed robbery.

On our part, we deem it appropriate to commence our deliberation by considering and determining the issue of a defective charge. In the first place, we have no hesitation to state that the DPP is entitled to withdraw the charge against any accused person under section 91 (1) of the CPA without being queried by the trial court. However, we are settled that in the circumstances of this case, after the charge which comprised five accused was withdrawn against the third, fourth and fifth accused, the DPP was duty bound to amend or substitute the charge to reflect that the said charge proceeded with the two remaining accused (the appellants).

On the other hand, even if the DPP could not have prayed to amend or substitute the charge sheet, in terms of section 234 (1) of the CPA, the trial court is permitted to make an order of amendment or substitution of a charge where it appears to it that the said charge is defective either in substance or form (**see Elias Deodidas v. Republic,** Criminal Appeal No. 259 of 2012 (unreported). In this regard, if that order could have been made, the particulars in the amended or substituted charge should have shown that only those remaining accused, in this case, the appellants are alleged to have been jointly involved in the commission of the offence of armed robbery. Unfortunately, this was not done in the present case. As a result, the trial court proceeded with the same charge

sheet which comprised five accused, including those who were discharged by the court up to the conclusion of the trial. In the result, the position in the particulars of the offence remained that five accused were alleged to have jointly committed the alleged offence of armed robbery.

In the circumstances of this case, we are settled that as some of the accused were discharged by the trial court after all five accused had pleaded to the charge, it was imperative that an amended or substituted charge could have been placed before the court for the appellants to plea. However, according to the record of appeal this was not the case.

It must be emphasized that where the original charge is amended or substituted, the accused must be arraigned, that is, to be called upon to plead to the other charge as required under section 234 (2) (a) of the CPA. Failure to do so renders the trial a nullity as the omission is not curable under section 388 of the CPA (see **Rojeli s/o Kalegezi & 2 Others v. Republic**, Criminal Appeal No. 141, CF 142, CF 143 of 2009, **Joseph Mosaganya v. Republic,** Criminal Appeal No.7 of 2009 (both unreported) and **Thluway Akonaay v Republic (1982) T.L.R. 92** and **Naoche Ole Mbile v Republic (1993) T.L.R 253)**. In all the said decisions the Court made it clear that the arraignment of an accused is not complete until he has pleaded.

In the present case, the record is clear as we have alluded to above that the charge which was read over and explained to the appellants in terms of section 228(1) of the CPA before the trial commenced contained five accused, all of whom pleaded not guilty to the alleged offence of armed robbery. The trial therefore, commenced with all five accused. However, as it were, after three prosecution witnesses had testified, the third, fourth and fifth accused were discharged after the DPP entered *nolle prosequei* under section 91 (1) of the CPA as reflected at page 59 of the record of appeal. Noteworthy, according to the record of appeal, notwithstanding the discharge of the three accused, the learned Principal State Attorney who prosecuted the case urged the trial court to proceed with the trial of the remaining two accused (the present appellants). The trial court acceded to the request and as a result, the trial of the appellants proceeded to conclusion without amending or substituting the original charge sheet.

Indeed, it is interesting to note that in the tittle of the trial court's judgment, all five accused are listed as parties, save for the explanation of the trial magistrate in his introductory remarks that the three stated accused were discharged in the middle of the trial. However, in its judgment the trial court proceeded with the evaluation of the evidence of all the prosecution witnesses including those who had implicated some of

the discharged accused in the commission of the offence of armed robbery. Be that as it may, in the end, it is only the appellants who were convicted based on the same evidence as indicated above.

Going by the trial court's record of proceedings in the record of appeal, we have no hesitation to state that though the appellants defended themselves against the offence of armed robbery before they were convicted, they did so to a defective charge. We are settled that the charge was incurably defective in substance because until they defended themselves, the particulars thereof remained intact showing that they jointly committed the offence together with three other accused who by then had been discharged for lack of evidence.

Taking into consideration the seriousness of the offence and the resulting convictions and sentences, we are settled that failure of the prosecution and the trial court to cause the charge to be amended or substituted after the three accused were discharged, is a serious irregularity which occasioned failure of justice on the part of the appellants. The defect therefore, rendered the entire trial a nullity. We must emphasize that there can be no valid trial where an accused has not been properly pleaded to the charge which he is finally convicted of (see **Albanus Aloyce & Marco Ibrahim v. Republic**, Criminal Appeal No.283 of 2015 (unreported).

In the circumstances of this case, we are satisfied that the defect in the charge cannot be cured under section 388 (1) of the CPA. Indeed, we are mindful of the settled position that a defective charge which is incurable cannot commence a lawful trial (see **Hassan Jumanne @ Msigwa v. The Republic**, Criminal Appeal No.290 of 2014 (unreported).

Having taken that position, we do not think it is important to consider the second ground of appeal on the change of magistrates which was also conceded to by the learned State Attorney. In the result, on the strength of the first ground of appeal which we have found merit, we allow the appeal. At this juncture, we do not also intend to consider the remaining grounds of appeal indicated above.

Consequently, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 to revise and nullify the trial and first appellate courts proceedings, quash the convictions and set aside the sentences of imprisonment imposed on the appellants.

In the event, as the omission to amend or substitute the charge in the circumstances of this case is incurable, we find that it is not appropriate to order a retrial. Moreover, we do not also find proper to acquit the appellants on the basis that the evidence paraded by the prosecution at the trial is insufficient as submitted by the learned State Attorney.

On the contrary, we order the appellants to be set at liberty unless otherwise lawfully held for other lawful cause because an incurably defective charge could not commence the trial of armed robbery.

DATED at **DAR ES SALAAM** this 27th day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on 3rd day of November, 2020 in the presence of the Appellants in person – linked through video conference from Ukonga Central prison and Ms. Dhamiri Masinde, 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