

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)

CRIMINAL APPEAL CASE NO. 471 OF 2017

MARWA KACHANG'AAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Twaib, J)

dated 25th day of February, 2013

in

Criminal Appeal No. 25 of 2012

JUDGMENT OF THE COURT

23rd March & 15th April, 2020

MWANDAMBO, J.A.:

Marwa Kachang'a, the appellant herein, has appealed against the decision of the High Court sitting at Dar es Salaam which dismissed his appeal against conviction and sentence made by the District Court of Ilala in Criminal Case No. 243 of 2009.

The arraignment and the eventual conviction and sentence against the appellant arose from a charge sheet preferred under section 287 of the Penal Code [Cap 16 R.E 2002] (the Penal Code). Before the trial court, the appellant and another person going by the

name of Jimmy s/o Asher Mwita were charged with armed robbery contrary to section 287 of the Penal Code. The facts constituting in the charge sheet alleged that on 24th February 2009 at 20.30 hours, the appellant and Jimmy s/o Asheri Mwita at Kivule Kerezange area within Ilala District in Dar es Salaam Region, did steal cash TZS 1,350,000.00 the property of one Museven s/o Magige and immediately before and after such stealing, they used a gun and axe in order to obtain the sum stolen. The appellant and his colleague denied the accusations resulting into a trial whereby the prosecution paraded four (4) witnesses to prove its case. For their part, the appellant and his colleague had no other witnesses apart from themselves.

Out of the prosecution witnesses, it is only Mtongole Museven (PW1) and Kirato Mseti (PW2) who claimed to have been present at the scene of crime on the material night and positively identified the appellant. The substance of their evidence was that a group of people knocked the door of the house where PW1 and her husband, Museven Magige (PW3) resided and forced PW1 to show them where money had been kept to which PW1 surrendered after being threatened with a gun. According to PW1, the culprits ransacked the house and in the

end they managed to get away with TZS 1,350,000.00 which they retrieved from three different bags. PW1 claimed to have identified the appellant by the aid of a light illuminated by a lantern more because his face was not unfamiliar to her. Essentially, PW2's evidence was to corroborate what PW1 had testified. Like PW1, this witness claimed to have identified the appellant because he was familiar to him.

Not surprising, the appellant distanced himself from the accusation in his defence which he did upon oath following the trial court's unsolicited order to close the prosecution's case. Vindicating himself, the appellant told the trial court that his arrest was unconnected with the alleged offence, for he was arrested on 27th February 2009, while taking soup at a local restaurant popularly known as Mama Ntilie. It was his evidence that PW3 who was in the company of PW2 and two other people accused him of having an affair with his second wife. In the process, a fracas ensued at which the appellant is said to have been injured and later the police came whereupon, PW2 and her relatives revealed to them that he (the appellant) was a thief. Moments later, he was interrogated at the

police station before he was eventually charged with the offence of armed robbery.

The trial court found cogent evidence to convict the appellant but none against his colleague who was acquitted. The appellant's attempt to vindicate him on appeal before the first appellate court failed despite the fact that the respondent Republic did not support conviction. Placing reliance on the celebrated decision in **Waziri Amani v. Republic** [1980] TLR 250, the first appellate court dismissed the appeal upon being satisfied that the conditions set in that decision were all established.

Still dissatisfied, the appellant has come before the Court on six (6) grounds in the memorandum of appeal and five (5) supplementary grounds. Ground one in the supplementary ground runs:-

"that the High Court Judge erred both in point of law and in fact to sustain the appellant's conviction based on defective charge as section 287 of the Penal Code, did not constitute the offence of ARMED ROBBERY"

Considering that a positive determination of this ground has a bearing on the validity of the proceedings before the trial court and

the ultimate conviction and sentence, we invited Ms. Ester Martin assisted by Ms. Monica Ndakidemi both learned State Attorneys to address the Court on this ground before we could consider other grounds should such need arise.

Ms. Martin readily conceded that the charge was defective for two reasons. One, section 287 cited as the section creating the offence does not exist under the Penal Code. Two, the charge suffers from non-disclosure of necessary ingredient in relation to the person to whom the threat was directed in the commission of the charged offence.

Addressing the Court on the first limb, the learned State Attorney argued that section 287 in the manner it appears in the charge sheet does not exist under the Penal Code creating the offence of armed robbery. In her further submission, Ms. Martin argued that if the prosecution meant section 287(1), that section creates an offence of attempted robbery which is not the offence the appellant was charged with. The learned State Attorney took the view that the proper section should have been section 287A which creates the offence of armed robbery and since a proper section was not cited,

the charge sheet was defective for violating the mandatory provisions of section 132 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA). That section requires that a proper section creating an offence must be cited in the charge sheet.

In relation to the second limb, the learned State Attorney's submission was that the particulars in the charge sheet are conspicuously silent with regard to the person to whom the appellant directed threat in order to obtain the sum of money subject of the charge. Such non-disclosure, Ms. Martin argued, was fundamental to the trial of the appellant which was prejudicial to him.

The learned State Attorney argued that both defects were incurably fatal because they went to the root of the case before the trial court which cannot be made good by section 388 of the CPA. To bolster her submission, Ms. Martin referred us to our previous decision in **Oldonyo Mnegero v. Republic**, Criminal Appeal No. 115 of 2015 (unreported). That decision restated the legal position in relation to the mandatory requirements under section 132 and 135(a) (ii) of the CPA, namely; citation of a correct section creating an offence and

duty to disclose sufficient particulars necessary to enable the accused understand the nature of the case he has to meet.

On the cited defects, the learned State Attorney urged us to sustain the ground of appeal which is sufficient to dispose of the appeal in favour of the appellant. The appellant who appeared in person, unrepresented, had nothing useful to add. He only prayed for an order sustaining his appeal and setting him free.

Having heard the submissions from the learned State Attorney, there is no doubt that the charge sheet is wanting in material terms. For easy reference we take the liberty to reproduce the material part of the charge as under:-

"Statement of the offence: Armed robbery c/s 287 of the Penal Code Cap. 16 (R.E. 2002).

Particulars of the offence: That Marwa s/o Kachang'a and Jimmy s/o Asher Mwita are jointly and together charged on the 24th February 2009 at about 20.30 hours, the appellant and Jimmy s/o Asheri Mwita at Kivule Kerezange area within Ilala District in Dar es Salaam Region, did steal cash 1,350,000/= Tshs the property of one Museven s/o Magige and immediately before and after such stealing, did use gun

and Axer(sic!) in order to obtain the sum of money mentioned”.

As rightly submitted by Ms. Martin, the charge sheet did not meet the dictates of section 132 of the CPA which makes it mandatory that a statement of the specific offence together with particulars as may be necessary for giving reasonable information as to the nature of the offence charged to be disclosed. On the other hand, section 135(a) (ii) of the CPA makes it mandatory for the charge sheet to cite a specific section creating the offence. It is plain in the charge under consideration that the appellant was charged with the offence of armed robbery under section 287 of the Penal Code. However, as submitted by the learned State Attorney, section 287 does not exist under the Penal Code. Assuming it was meant to be section 287 (1) that section does not create the offence of armed robbery which the appellant was charged with. On the contrary, it creates the offence of attempted robbery distinct from armed robbery. Furthermore, if it meant to be section 287A which is the correct section, still, the charge lacks necessary particulars reasonable for the accused/appellant to understand the nature of the case he was to meet. One of the essential ingredients in charges of armed robbery is the name of the

person to whom the threat was directed in the course of committing the offence.

Failure to disclose such essential ingredient has been held to be fatal by this Court in various cases including; **Oldonyo Mnegero v Republic** (supra) referred to us by the learned State Attorney. In that case, a charge was made under section 285 and 286 of the Penal Code instead of section 287A. The Court held that the charge was incurably defective. Similarly, like in the instant appeal, the charge was found to be wanting for failure to disclose particulars regarding the person against whom threat was directed. In arriving at that conclusion, the Court referred to its previous decisions in **Kashima Mnadi v Republic**, Criminal Appeal No. 78 of 2011 (unreported), **Tayasai Miseyeki v. Republic**, Criminal Appeal No. 250 of 2011 and **Robert Mneney v. Republic**, Criminal Appeal No. 34 of 2015 (all unreported). Stripped of other aspects, the Court's holding in **Kashima Mnadi v. Republic** (supra) is that a charge should not only disclose the violence or threat but also, the name of the person to whom the actual violence or threat was directed.

The charge sheet under consideration lacks such necessary ingredients and so, as conceded by the learned State Attorney, the defect is not curable under section 388 of the CPA neither can it be made good by invoking the overriding objective under section 3A of the Appellate Jurisdiction Act, [Cap. 141 RE.2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018. This is so because the defect goes to the root of the case against the appellant which had the effect of rendering the trial unfair. Having regard to what we said in **Oldonyo Mnegero v. Republic** (supra), the very reason of attaining substantive justice which the overriding objective was introduced in the AJA cannot be invoked to countenance unfair trial as it were.

In the event, having held that the charge sheet is incurably defective, there could not have been any valid proceedings resulting into the conviction and sentence meted out to the appellant. Accordingly, the proceedings of the trial court are hereby nullified and the conviction quashed. Having quashed the conviction, the sentence lack legs to stand on. It is hereby set aside. As night falls day, the proceedings before the first appellate court must follow suit. They are

equally quashed and the judgment and orders that followed are hereby set aside.

In fine, the appeal stands allowed in ground one in the supplementary grounds of appeal with the net effect that the appellant shall be released forthwith from custody unless he is held lawfully for any other reason.

Order accordingly.

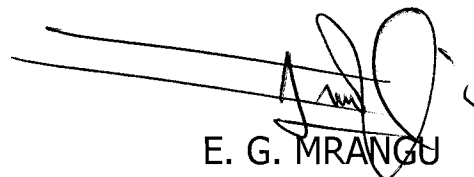
DATED at DAR ES SALAAM this 8th day of April, 2020

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 15th day of April, 2020 in the presence of the appellant in person and Miss. Theresia Mtao, learned State Attorney for the respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL