IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 91 OF 2019

HASSAN SAID TWALIBU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 30th day of July, 2018
in
Criminal Appeal No. 64 of 2017

JUDGMENT OF THE COURT

18th & 20th November, 2020.

KEREFU, J.A.:

This appeal stems from the decision of the District Court of Masasi at Masasi in Mtwara Region where the appellant, Hassan Said Twalibu and Muhsin Hassan who was the second accused but not part to this appeal, were jointly charged with the offence of stealing contrary to sections 258 and 265 of the Penal Code, Cap. 16, the Revised Edition, 2002 (the Penal Code). It was alleged that on 29th day of March, 2016 at about 09:00 hours at Miungo Village within Masasi District in Mtwara Region the appellants stole one motorcycle make SANLG, red in colour with Registration Card No.

MC 163 AZJ, Engine No. 15957312 and CHASSIS NO. LBRSP JB53F9036770, valued at TZS 1,880,000.00, the property of one Shabani Yusuph Ngilo.

To prove its case, the prosecution paraded three witnesses and tendered two documentary exhibits namely, a motorcycle Registration (exhibit P1) and the appellant's cautioned statement (exhibit P2), respectively. The appellant and the second accused relied on their own evidence as they did not call any witness.

In brief, the prosecution evidence which led to the appellant's conviction as obtained from the record of the appeal is that, Shabani Yusuph Ngilo (PW1) the owner of the alleged stolen motorcycle testified that on 29th March, 2016 he received a phone call from his friend who informed him that his motorcycle operated by the second accused as a *bodaboda* a motorcycle for hire was stolen. PW1 asked the second accused on the said matter and he confirmed that it was stolen by a passenger at Chiungutwa Village. PW1 reported the matter to police. A moment later, he was informed that someone had been arrested in connection with a stolen motorcycle. PW1 rushed to the police station where he found the appellant

but without the alleged stolen motorcycle. PW1 tendered the motorcycle Registration Card which was admitted in evidence as exhibit P1.

Selina Said (PW3) testified that, on 28th March 2016, the appellant came to her home and requested her to keep his bag, which she agreed. PW3 stated further that on the next day the appellant returned accompanied by the second accused and he picked his bag and left. PW3 said, soon thereafter, she was invaded by a group of people including the second accused who accused her of conspiring with the appellant to steal a motorcycle. F. 8723 DC Mustafa (PW2) the investigation officer testified that, he was involved in the investigation of the incident and he visited the scene of crime. PW2 added that he interviewed the appellant and recorded his cautioned statement. The said statement was admitted in evidence as exhibit P2.

In his defence, the appellant who testified as DW1 stated that he was arrested on 16th June, 2016 while travelling from Mtwara to Dar es Salaam by bus. He said that when they arrived at Madangwa Village, the said bus got a breakdown and passengers were requested to alight. After getting out of the said bus, he was attacked by a group of *bodaboda* riders who grabbed all his properties and sent him to Mnazi Mmoja Police Station

and later he was transferred to Nachingwea Police Station where he was remanded for thirteen days without knowing his charges. DW1 added that while at the said Police Station, PW1 and PW2 came and were asked to identify him.

On his side, Muhsin Hassan (DW2) testified that in March, 2016 he was operating the PW1's motorcycle for hire. On a particular date he was hired by the appellant to take him to Mkundi Village. While they were on the way, the appellant managed to cheat on him and stole the motorcycle. DW2 said, he notified his fellow bodaboda riders for help and reported the matter to the police. DW2 added that he was called at the Police Station to identify the appellant.

After a full trial, the second accused was acquitted while the appellant was found guilty, convicted and sentenced to seven years imprisonment. Aggrieved, the appellant appealed to the High Court. The High Court (Mlacha J.) partly allowed the appeal as he reduced his imprisonment term from seven to five years. Still protesting his innocence, the appellant has knocked at the doors of this Court on a second appeal seeking to challenge the decision of the first appellate court. In his Memorandum of Appeal, the appellant raised four (4) grounds of

complaint. However for reasons that will shortly come to light we need not recite them herein.

At the hearing of the appeal before us, the appellant appeared in person, without legal representation, whereas the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney. The appellant adopted the grounds of appeal and opted to let the learned Senior State Attorney respond first but he reserved his right to rejoin, if need to do so would arise.

Upon taking the floor, Mr. Ndunguru, at the outset, informed the Court that he is supporting the appeal on a point of law pertaining to the procedural irregularity that, *whether the appellant was convicted for the charge to which he had pleaded as required by law.*

Submitting on that point, Mr. Ndunguru argued that having perused the record of appeal he realized that the original charge which the appellant was charged and pleaded to on 16th August, 2016 was substituted on 21st September, 2016, but the appellant was not called upon to plead to the new or substituted charge. It was his argument that this is fatal and an incurable irregularity in terms of section 234 (2) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2019. On that account, Mr. Ndunguru

submitted that the proceedings before the trial court as well as those at the first appellate court were a nullity. He thus implored us to invoke the powers of revision bestowed upon the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA) to nullify the aforesaid proceedings and judgments of both courts' below, quash the conviction and set aside the sentence meted out against the appellant. On the way forward, the learned Senior State Attorney urged us to order a retrial.

On his part, this being a legal issue, the appellant did not have much to say other than supporting the submission made by Mr. Ndunguru but he opposed a prayer for a retrial as he argued that, since the pointed out anomaly was not occasioned by him, he should not be penalized. On that account, he urged us to set him at liberty as, he said, he has been in prison for four (4) years.

Having perused the record of appeal and considered the submission made by the parties, the main issue for our consideration is whether the omission to call upon an accused person to plead to a new, altered or substituted charge renders a trial a nullity.

Pursuant to section 228 (1) of the CPA, it is a mandatory requirement of the law that when the accused person appears in court he shall be asked whether he admits or denies the truth of the charge. The said section provides that: -

> *"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."*

Furthermore, the law also, under section 234 of the CPA, allows charges to be altered or amended. However, section 234 (2) (a) of the same provision, as argued by Mr. Ndunguru, imposes a duty on a trial court, after substituting a charge to take a new plea of the accused to a new or altered charge. Section 234 (2) (a) of the CPA provides that:-

> *"(2) Subject to subsection (1), where a charge is altered under that subsection –*
>
> *(a)* ***the court shall thereupon call upon the accused person to plead to the altered charge."*** *[Emphasis added].*

The above quoted provision is couched in a mandatory tone and does not give an option to the trial court not to comply with it. This Court in several occasions has interpreted the said provision and provided guidance

on its applicability. For instance, in **Thuway Akonaay v. Republic** [1987] T.L.R. 92, the Court emphasized that:-

> *"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so, renders a trial a nullity."*

In that case the Court also quoted, with approval a head note from a decision in **Akbarali Damji v. Republic**, 2 T.L.R. 137 where it was also emphasized that:-

> *"The arraignment of an accused person is not complete until he has pleaded. Where no plea is taken, the trial is a nullity.* ***The omission is not an irregularity which can be cured*** *by section 346 of the Criminal Procedure Code (now section 388 (1) of the Criminal Procedure Act)." [Emphasis supplied].*

See also the cases of **Athumani Mkwela and 2 Others v. Republic,** Criminal Appeal No.173 of 2010 and **Shabani isack @ Magambo Mafuru and Another v. Republic,** Criminal Appeals Nos. 192 & 218 of 2012 (both unreported).

Now, in the case at hand, it is on record that the appellant was arraigned and his plea was taken on 16th August, 2016 pursuant to section

228 (1) of the CPA. However, on 21st September, 2016, the charge was substituted to add the second accused. The said substituted charge was read over to the second accused only and he was required to plead thereto. The appellant, though present in court, was not called upon to plead to the new or substituted charge, hence non-compliance with the provisions of section 234 (2) (a) of the CPA.

Being guided by the above cited authorities, we are in agreement with the learned Senior State Attorney that failure by the trial court to observe the requirement imposed under the said provision vitiated the entire trial hence renders the trial proceedings a nullity. So were the proceedings and judgment in the appeal before the High Court, as they stemmed from null proceedings.

That being the position, we hereby invoke the revisional powers under section 4 (2) of the AJA and nullify the proceedings and the judgments of both the trial court and the High Court, quash the appellant's conviction and set aside the sentences imposed on him.

On the way forward, ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial as prayed by Mr. Ndunguru. Nonetheless, there are

some factors which have to be considered before an order for a retrial is made. The guidance, which in our view did sum up the criteria for ordering a retrial or not, was given in the case of **Fatehali Manji v. Republic** [1966] EA 343 when the Court stated that: -

> *"...In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;* ***each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.****" [Emphasis added].*

See also cases of **Selina Yambi and Others v. Republic**, Criminal Appeal No. 94 of 2013 and **Salum & Another v. Republic,** Criminal Appeal No. 119 of 2015 (both unreported).

Following the above authorities, we hasten to remark that this is not a fit case to make an order for a retrial. Upon dispassionately scrutinizing

the entire evidence on record from either side, we were able to note other irregularities and unfolded deficiencies in the prosecution evidence which shade doubts that if given the opportunity there is likelihood for the prosecution filling in gaps. Certainly, there is no prosecution eye witness who testified to have seen the appellant stealing the said stolen motorcycle and the same was not tendered before the trial court as an exhibit. In addition, PW1 who claimed to be the owner of it did not sufficiently establish positive identification of the same. PW1 further produced the Motorcycle Registration Card (exhibit P1) which was un-procedurally handled as it was not read out and or explained to the appellant after its admission in evidence.

Furthermore, the appellant's cautioned statement (exhibit P2) which was relied by the trial court to convict the appellant was also un-procedurally handled as, after its admission in evidence, it was not read out and or explained to the appellant. Having regard to these shortfalls and considering the guidance given in **Fatehali Manji** (supra) and taking into account that the appellant has already served the substantial part of the sentence meted out by the District Court and revised by the High Court, we do not find it appropriate to order for a retrial.

In the event, we order the immediate release of the appellant from prison forthwith unless he is held for some other lawful cause.

DATED at **MTWARA** this 20th day of November, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of November, 2020 in the presence of the Appellant in person and Mr. Wilbroad Nduguru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL