IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 140 OF 2017

VENANCE SHIJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Tabora]

(Mujulizi, J.)

Dated the 21st day of April, 2010
in
Criminal Appeal No. 79 of 2018

.....

JUDGMENT OF THE COURT

11th & 17th December, 2020

WAMBALI, J.A.:

The District Court of Nzega which sat at Nzega convicted the appellant Venance Shija on his own plea of guilty on two counts. The respective offences were Burglary contrary to section 294 (1) and Armed Robbery contrary to section 285 and 286 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) for the first and second counts respectively. Consequently, the appellant was sentenced to imprisonment for 5 years and 30 years for the first and second counts respectively. Moreover, it was ordered by the trial court that the sentences should run concurrently.

It is not out of place to state that the appellant's plea was taken while at the hospital where he was admitted due to the injuries he sustained somewhere. Unfortunately, the cause of the injuries was, as per the record of appeal, not disclosed. Be that as it may, upon pleading guilty he was subsequently convicted and sentenced on the same day while in hospital as alluded to above.

As it were, the conviction and sentence did not satisfy the appellant. He, however, unsuccessfully appealed to the High Court. Noteworthy, the first appellate judge was conclusively satisfied that the appellant's plea at the trial court was unequivocal and thus, in terms of section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), he could not appeal against the conviction. He however observed that the appellant could only challenge the legality of the sentence imposed by the trial court. Nevertheless, in his determination, he was fully satisfied that the trial court perfectly imposed the proper sentence as required by the law in both counts. Ultimately, he dismissed the appellant's appeal as alluded to above, as he found no reason to interfere with the findings, convictions and sentences of the trial court.

The appellant was still not pleased by the decision of the High Court, hence this appeal. The appellant's dissatisfaction is expressed in his six grounds of appeal comprised in the two sets of the memoranda of appeal he lodged in Court earlier on. However, at the hearing of the appeal, it was agreed that essentially, the respective grounds of appeal can be compressed into two, namely:-

1. *That, the charge which was laid at the appellant's door was defective.*
2. *That the appellant's plea was unequivocal.*

The appellant appeared before us in person, unrepresented. On the adversary, the respondent Republic had the services of Mr. Tito Ambangile Mwakalinga, learned State Attorney.

When the appellant was asked to submit in support of the said grounds of appeal, he essentially urged us to consider them and determine the appeal in his favour. He also opted to let the learned State Attorney for the respondent Republic to respond to his grounds of appeal and retained the liberty to rejoin if necessary.

On his part, Mr. Mwakalinga rose to inform the Court that the respondent Republic supported the appellant's appeal based on the two grounds of appeal indicated above.

With regard to the first ground of appeal, the learned State Attorney conceded that the charge in respect of the second count of armed robbery was incurably defective because; first, the provisions of the law on which the charge was premised were not proper. He submitted that by the time the appellant was charged, that is, on 19th July 2004, an amendment had been made to the Penal Code in which the offence of Armed Robbery was specifically provided under section 287A by virtue of The Written Laws (Miscellaneous Amendments) (No.2) Act ("Act No. 4 of 2004"). In the circumstances, he categorically argued that the appellant was improperly charged under the provisions of sections 285 and 286 of the Penal Code instead of section 287A of that Act.

Second, Mr. Mwakalinga submitted that the defect in the charge with regard to the second count was further apparent by the fact that the particulars of the offence did not disclose the date and place where the crime was committed and the person who was threatened by the appellant using the alleged bush knife after the alleged stealing. In his submission, that was contrary to the settled position of the law. To support his stance,

he referred the Court to the decision in **Shaban Said Ally v. The Republic**, Criminal Appeal No. 35 of 2014 (unreported) at pages 10-11.

On the other hand, when we probed the learned State Attorney as to whether the charge in respect of the first count of Burglary was defective or otherwise, he did not wish to explain in details on the propriety of the reference to section 294(1) of the Penal Code without indicating the respective paragraphs (a) and (b) and subsection (2) of that section. However, he briefly stated that the particulars of the offence did not fully disclose the elements of the offence of Burglary.

Overall, he submitted that the charges in both counts were incurably defective to the extent that they caused miscarriage of justice on the part of the appellant.

Submitting with respect to the second ground of appeal, Mr. Mwakalinga briefly argued that as the charges laid at the appellant's door were incurably defective, the appellant's plea could not be unequivocal. He argued that apart from pleading guilty, the facts which were narrated by the prosecution did not disclose the ingredients of the offence charged and what really transpired in respect of both counts. In the event, the learned State Attorney prayed that the appeal be allowed on both counts. He

however left the issue of determining whether to order a retrial or to set the appellant at liberty to the discretion of the Court.

After the submission of the learned State Attorney, the appellant did not have anything useful to rejoin. He simply agreed with the stance of the respondent Republic counsel in supporting the appeal and pressed us to allow it and set him at liberty.

On our part, having heard the appellant and the learned State Attorney for the respondent Republic, we have no hesitation to state that the appellant's appeal is justified.

We entirely agree with Mr. Mwakalinga that the provisions of the law which were indicated in the charge sheet with regard to the offence of Armed Robbery were not proper. We entertain no doubt that, in view of the amendment introduced by Act No. 4 of 2004, section 285 of the Penal Code remained specifically providing for the definition of robbery while section 286 provided for the punishment of the offence of robbery. Basically, the proper provisions under which the appellant could have been charged on allegation of committing Armed Robbery is section 287A of the Penal Code as per Act No. 4 of 2004.

On the other hand, we are settled that the charge with regard to the second count was fatally defective as the particulars of the offence did not state the date and place when the offence was allegedly committed. More importantly, the particulars did not disclose the person on whom the dangerous or offensive weapon, namely, the bush knife was directed on the material day after the stealing. The requirement to state to whom the offensive weapon was directed to was emphasized by the Court in **Kashima Mnado v. The Republic,** Criminal Appeal No. 78 of 2011 (unreported), and reaffirmed in **Shabani Ally Said v. The Republic** (supra).

In the circumstances, we are settled that the charge in respect of the second count was fatally defective. It is beyond doubt that the said charge could not lawfully commence the trial against the appellant.

Furthermore, we are also of the settled view that the first charge on the offence of Burglary was incurably defective. We say so because the provisions of the law preferred by the prosecution was simply indicated to be section 294 (1) of the Penal Code. Unfortunately, the prosecution did not indicate whether the targeted offence was allegedly committed under paragraphs (a) or (b) of the section 294 (1) of the Penal Code.

We are however aware of the settled position of the law that in some instances, mere omission to cite one or some of the provisions in a particular section can be cured under the provisions of section 388 of the CPA [see **Jamali Ally @ Salum v. The Republic**, Criminal Appeal No.52 of 2017 (unreported)], among others. Nonetheless, in the present case, we are settled that the reference to either paragraph (a) or (b) of section 294 (1) of the Penal Code was important because according to the law, if the alleged offence is committed during the day under section 294 (1) (a) and (b) the offender is liable to imprisonment for fourteen years. On the other hand, if the offence is committed at night under the same section, that is, 294 (1) (a) and (b) of the Penal Code, in terms of section 294 (2) of the same Act the offender is liable to imprisonment for twenty years. For purpose of clarity, we deem it important to reproduce the respective provisions hereunder:-

> *"294-(1) Any person who-*
>
> *(a) breaks and enters any building, tent or vessel used as human dwelling with intent to commit an offence therein; or*
>
> *(b) having entered any building, tent or vessel used as a human dwelling with intent to*

commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it;

is guilty of house breaking and is liable to imprisonment for fourteen years.

(2) If an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years."

Equally important, in the present case it is noted that the particulars of the offence in respect of the first count was ambiguous and vague to the extent that they fell short of disclosing the ingredients of the offence of Burglary properly as required by the law. To be precise, the particulars did not disclose the exact nature of the offence which was committed in accordance with the law to facilitate a proper sentence of the appellant upon conviction.

At this juncture, it is pertinent to reiterate what the Court stated in **Isdori Patrice v. The Republic**, Criminal Appeal No.224 of 2007 (unreported), when it emphasized the importance of complying with the provisions of section 132 of the CPA thus:-

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with necessary mens rea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law".

We think it is in this regard that although the appellant was alleged to have committed the offence of burglary, the learned trial Senior District Magistrate convicted and sentenced him to 5 years and not twenty years as provided under section 294 (2) of the Penal Code. This illegality in the sentence which was imposed by the trial court might have been caused by the failure of the prosecution to cite fully the provisions of section 294(1) (a), (b) and (2) of the Penal Code and the insufficient particulars in the charge sheet.

Thus, in the circumstance of what transpired at the trial court concerning the plea and the defectiveness of the charge in this case, we are entitled to conclude that the appellant's plea could not be treated to be unequivocal. The complaint of the appellant in both the first and second grounds of appeal are thus justified. The appellant was certainly therefore entitled to appeal to the High Court both against the convictions and sentences, contrary to the finding and determination of the learned first appellate judge that he could only appeal against the sentence. Unfortunately, even the legality of sentence with regard to the first count of burglary that was imposed by the trial court was not considered by the learned first appellate judge.

In the event, we entirely agree that the holdings No. (ii) and grounds Nos. 1 and 4 in the case of **Laurence Mpinga v. Republic** (1983) TLR 166 squarely apply in the circumstances of this case that:-

> *"(ii) an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the conviction to a higher court on any of the following grounds:*
>
> *1. That, even taking into consideration the admitted facts, his plea was imperfect, ambiguous or*

unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;

2. *N/A*
3. *N/A*
4. *That upon the admitted facts he could not in law have been convicted of the offence charged".*

In the result, based on our deliberation above, we allow the first and second grounds of appeal as conceded and prayed by the learned State Attorney for the respondent Republic and supported by the appellant. We are settled that as the charge which was laid at the door of the appellant was incurably defective and could not commence a lawful charge, the apparent defects cannot be cured under the provisions of section 388 of the CPA. It is instructive to reiterate what the Court stated in the case of **Mussa Mwaikunda v. Republic** [2006] TLR 387 that:-

> *"It is always required that an accused person must know the nature of the case facing him and this can be achieved if the charge discloses the essential elements of the offence charged".*

Consequently, as the trial and the appellate proceedings were a nullity due to the incurably defective charge, in terms of section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E 2019, we nullify the proceedings of

both the trial and first appellate courts, quash convictions and set aside the sentences imposed on the appellant.

In the end, we are of the settled view that in the circumstances of this case, we cannot order a retrial as it will not be in the interest of justice. On the contrary, we order that the appellant be set at liberty unless otherwise lawfully held for other causes.

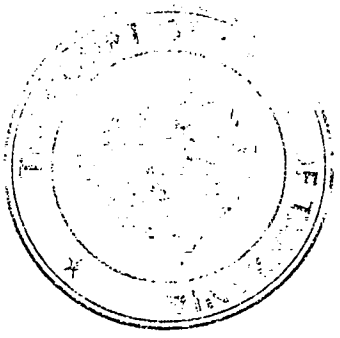
DATED at **TABORA** this 16th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 17th day of December, 2020 in the presence of the appellant in person and Mr. Tumain Pius Ocharo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL