IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A., And LEVIRA, J.A.)

LINKED WITH UKONGA CENTRAL PRISON VIA VIDEO CONFERENCING FACILITY

CRIMINAL APPEAL NO. 322 OF 2017

RENATUS NICOLOUS MAKENGE @ RWAGACHUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, J)

dated the 18th day of July, 2017
in
(Criminal Appeal No. 173 of 2015)

JUDGMENT OF THE COURT

5th & 21st May, 2020

LEVIRA, J.A.:

In the District Court of Temeke at Temeke (the trial court), the appellant, Renatus Nicolous Makenge @ Rwagachuma was charged with armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002 (the Penal Code) in Criminal Case No. 813 of 2012. We note at the outset that, during trial the prosecution side presented two different charge sheets against the appellant. The first charge sheet which indicated only one count of armed robbery was admitted on 10th

December, 2012. At page 7 of the record of appeal, the said charge was read over to the accused (appellant) who denied it and the trial court entered a plea of not guilty. However, it is apparent on the record that, the said charge sheet was cancelled and marked substituted on a date which was not indicated. The other charge sheet is found at page 3 of the record of appeal. The same contains four counts of armed robbery contrary to section 287A of the Penal Code.

According to the record, after a full trial, the appellant was purportedly convicted of an offence of armed robbery contrary to section 28 (1) of the Penal Code as amended by Act No. 3 of 2011 and sentenced to serve 30 years in prison. Aggrieved, the appellant unsuccessfully appealed to the High Court (Ndyansobera, J.) vide Criminal Appeal No. 173 of 2015. Undauntedly, the appellant has presented this second appeal before us challenging both the conviction and the sentence.

In his memorandum of appeal, the appellant preferred six grounds which may conveniently be reduced into the following four grounds: **First,** that his conviction was based on a defective charge which was not read over to him during trial. **Second,** that the trial court relied on

an illegally obtained and un-procedurally tendered cautioned statement (exhibit P8) to convict him. **Third,** that his conviction was equally based on a weak identification evidence. **Fourth,** that, in general the prosecution evidence was unreliable and it was wrong for the trial court to ground conviction on such evidence. For those grounds, the appellant is challenging the decisions of both the trial court and the first appellate court which dismissed his appeal in its entirety.

During trial the prosecution side alleged that the appellant on 25/11/2013 around 19:00 hours being armed with pistol and panga robbed at the house of Gianluigi Bisognin located at Block No. 8 Kimbiji Ngomanya Kigamboni area within Temeke District in Dar es Salaam Region. It was further alleged that, by using the said weapons, the appellant threatened and forced the owner of that house to give him some money and finally he managed to steal from him Tshs. 3,200,000/= and other items including Rifle make 375 with 40 ammunition. The facts of case reveal further that, apart from the properties of the owner of the said house, while in the same area the appellant also stole other properties belonging to Mohamed Maliki Shao, Bernad Pangan and Ally Kirugutu after having threatened them with the said weapons and big stick. To prove the charge against the appellant,

the prosecution called a total number of nine witnesses and tendered ten exhibits. The trial court having been satisfied that the prosecution proved its case beyond reasonable doubt proceeded to convict the appellant as earlier on indicated.

At the hearing of this appeal through video conferencing, the appellant appeared in person, unrepresented, whereas the respondent/ Republic had the services of Mr. Ramadhani Kalinga, assisted by Ms. Chesensi Gavyole, both learned State Attorneys. The appellant adopted his grounds of appeal as part of his oral submission and reserved his right of making a rejoinder after hearing submission by the learned State Attorney.

On his part, the learned State Attorney supported the second ground of appeal which is merged in the first extracted ground of appeal right away. It was his submission that the charge sheet appearing at page one of the record of appeal had one count and the same was read over to the appellant during trial. He submitted further that the said charge sheet was substituted and the charge sheet containing four counts of armed robbery against the appellant was preferred at page 3 of the record. However, he said, the other charge was not read over to

the appellant as required by the law. This omission, he said, amounts to procedural irregularity contravening section 234 (2) (a) of Criminal Procedure Act, Cap 20 RE 2002 (the CPA). He contended that, failure to read out the charge to the accused vitiates the proceedings. To support this position, he cited the case of **Director of Public Prosecutions v. Danford Roman @ Kanani and 3 others,** Criminal Appeal No. 236 of 2018 (unreported) in which the Court cited with approval the case of **Thuway Akonnay v. Republic** [1987] T. L. R. 92 where it was held 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".*

The learned State Attorney also referred us to page 87 of the record of appeal where the trial court entered conviction of the appellant of armed robbery without indicating the count. According to him, this is a clear indication that the second charge was not read over to the appellant. He thus urged us to find so and allow this appeal, nullify the proceedings of the lower courts and set aside the appellant's sentence. He also urged us to exercise our power under section 4 (2) of the Appellant Jurisdiction Act, Cap 141 (the AJA) and order the case file to be remitted to the trial court for retrial.

In his rejoinder the appellant reservedly conceded to the learned State Attorney's submission as he argued that, the retrial order will serve no useful purpose because there is no sufficient evidence on the record which can be acted upon by the trial court to ground his conviction. It was his further argument that, ordering retrial will be like giving the prosecution an opportunity to fill in evidential gaps as he said, he was not properly identified by PW1 at the scene of crime and during identification parade; and, there is no sufficient evidence to ground conviction. He went on stating that if the trial court committed any procedural irregularity, he should not be punished for that mistake. Finally, he prayed for his appeal to be allowed and the Court order his immediate release from prison.

Having considered the submissions by both sides and the record of appeal, we are convinced that the appellant has raised a very important legal point in his second ground of appeal, which we think is capable of disposing of this appeal. We agree with the learned State Attorney that plea taking is a very essential stage in any trial because it lays a foundation. With this position in our mind, we are going to determine whether or not the appellant was properly tried.

We had an opportunity to go through the record of appeal and we agree with both parties that, on 10th December, 2012 the charge sheet which contained one count of armed robbery was read over to the accused person who was required to enter his plea. Upon his response, the trial court entered a plea of not guilty to the charge. The prosecution side informed the trial court that investigation was not complete and therefore the trial was adjourned to 24th December, 2012. However, we note that, the charge sheet which was read over to the accused was cancelled and substituted on unknown date. The other charge comprising of four counts of armed robbery was preferred against the appellant. However, the record is silent as to its admission as there is no endorsement on top of it. Not only that, but also in our thorough perusal of the record of appeal we did not find anywhere indicating that the appellant was called upon to enter his plea to the said charge.

What can be gathered from the record is that, after entering appellant's plea to the first charge sheet, the trial court continued with the proceedings till to the end and upon relying on the evidence adduced before it, the trial magistrate composed a judgment in which he purportedly convicted the appellant of the offence of armed robbery without specifying under which count. We note that, at the beginning of

the judgment, the trial Magistrate indicated that the appellant was charged of the offence of armed robbery contrary to section 287A of the Penal Code under which he entered a plea of not guilty. However, he convicted him under section 28(1) of the Penal Code as amended by Act No. 3 of 2011. The uncertainty of appellant's conviction suggests and we agree with the learned State Attorney that, the other charge was not read over to the appellant. Section 234 (2) 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".*

The above quoted provision is couched in a mandatory form and does not give an option to the trial court not to comply with it. We are therefore in agreement with the learned State Attorney that, failure by the trial court to observe the requirement imposed in the said provision vitiated the proceedings. We also subscribe to what the Court stated in **Thuway Akonnay v. Republic** (supra) and hold that, failure by the trial court to take the appellant's plea after substitution of the first charge sheet rendered the trial a nullity; hence, the appellant was not properly tried.

In the circumstances, we decline the invitation by the appellant who urged us to set him free on account that ordering retrial is not an ideal decision. We have reasons and we shall explain. **First,** as we have already stated, the trial court failed to observe the mandatory requirement under section 234 (2) (a) of the CPA, meaning that, it is as good as the appellant was not tried for the charged offence. **Second,** the evidence which the appellant urged us to find insufficient was adduced without legal base. As a result, even the trial court failed to direct its mind on a proper count which was purportedly proved while convicting the appellant. **Third**, in the circumstances of this case it cannot be said with certainty whether or not the evidence is insufficient because even the decision of the trial court does not indicate which charge between the two it dealt with. We say so because, the proceedings on the record are the continuation of the plea taken in respect of the first charge which was cancelled and substituted living the other charge sheet unattended.

It is equally important to note that, although the High Court dismissed the appellant's appeal on account that the charge against him was proved beyond reasonable doubt, its decision was more problematic. This is so because at the beginning of the decision, the first

appellate Judge indicated that the appellant was charged with four counts of armed robbery contrary to what was presented in the Petition of Appeal and the decision of the trial court which he was dealing with. In the said Petition of Appeal, the appellant indicated that he was charged with and convicted of armed robbery just like in the impugned decision of the trial court. This confusion in our view was a result of the existence of the other charge sheet which was left unattended as indicated above. As a result, the decision of the High Court was also uncertain.

We are, therefore, of the considered view that, the circumstances of the appeal before us are peculiar in such a way that we cannot blindly conclude that, ordering a retrial may be an opportunity for the prosecution to fill in evidential gaps as the appellant would wish. We are mindful that a retrial is ordered only when the original trial was illegal or defective as in the case at hand. Having considered what transpired in this case, we think that justice will be done if we order for retrial. To back up our decision we subscribe to the position of law established by the defunct Court of Appeal for Eastern Africa in the case of **Fatehali Manji v. The Republic** [1966] EA 341 where it was held 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 shall be ordered; ***each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."***

[Emphasis added]

We are of the further view that since the appellant has been in prison from 27th March, 2013 to-date serving his sentence, it will also be in the interests of justice to consider the whole period in case of conviction in a new trial.

For the foregoing reasons, we allow the appellant's second ground of appeal which was merged in first extracted ground of appeal. In exercise of our revisionary powers under section 4(2) of the AJA, we quash the conviction, nullify and set aside the entire proceedings of both lower courts. We order a new trial before another magistrate with

competent jurisdiction. We further order that the said new trial should be speeded up and in case of conviction, the period which the appellant has already spent as a prisoner should be taken into consideration in his sentence. In the meantime, the appellant should remain in custody to await for a retrial.

Order accordingly.

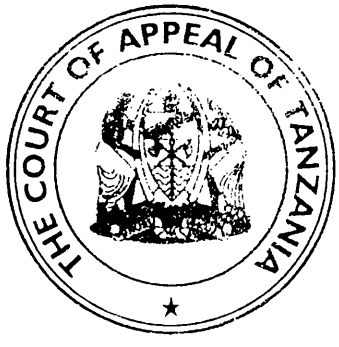
DATED at **DAR ES SALAAM** this 18th day of May, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of May, 2020 in the presence of the Appellant appeared in person and Ms. Sylivia Mitanto, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL