IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., MKUYE, J.A. And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 456 OF 2017

1. NOAH PAULO GONDE
2. RAMADHANI HASSAN .....APPELLANTS

VERSUS

D.P.P .....RESPONDENT

(Appeal from the decision of High Court of Tanzania at Mbeya)

(Levira, J.)

Dated on 08th day of September, 2017
in
Criminal Appeal No. 113 & 128 of 2016

.....

JUDGMENT OF THE COURT

30th March & 3rd April, 2020.

MKUYE, J.A.:

In the Resident Magistrates' Court of Mbeya at Mbeya, the appellants Noah Paulo Ngonde and Ramadhani Hassan (1st and 2nd appellants, respectively) together with another accused person (Goodluck Sheyo Samson former 1st accused) were charged with two counts; the first count being armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E 2002; and the second count being in possession of goods suspected to have been stolen or unlawfully acquired contrary to section 312(1)(a) of the Penal code.

Upon a full trial, they were convicted on both counts and were each sentenced to 30 years imprisonment for the 1st count; and 3 years imprisonment for the 2nd count which sentences were ordered to run concurrently.

The appellants being aggrieved unsuccessfully appealed to the High Court of Tanzania at Mbeya. Still protesting their innocence they have appealed to this court whereby each has fronted eight grounds of appeal of which for a reason to become apparent shortly, we do not intend to reproduce them.

When the appeal was called on for hearing, the appellants appeared in person, unrepresented; whereas Mr. Ofmedy Mtenga assisted by Ms. Prosista Paul Minja both learned State Attorneys entered appearance for the respondent/Director of Public Prosecutions.

When the appellants were given the floor to amplify their grounds of appeal they preferred to let the learned State Attorneys respond first and rejoin later if need would arise.

From the outset, Ms. Minja who took the floor sought and leave was granted by the Court to raise legal issues pertaining to the charge sheet. She contended that the charge which was laid against the appellants was

defective. Amplifying the said defects, the learned State Attorney submitted that, though the appellants were charged with the offence of armed robbery, the particulars of offence did not indicate to whom the weapons alleged to have been applied in effecting the commission of the offence of armed robbery were directed. In support of her argument, she referred us to the case of **Filbert Alphonce Machalo v Republic**, Criminal Appeal No. 528 of 2016 (unreported) in which the case of **Tayai Miseyeki v Republic**, Criminal Appeal No. 60 of 2013 (unreported) was cited with approval.

Additionally, in relation to the same charge sheet, Ms. Minja argued that there was variance between the particulars of the offence and the evidence in relation to the weapons used to threaten the victim. She said while in the charge sheet it is said that the iron bar and a machete were used, PW6 the victim, at page 33 of the record of appeal said that the robbers had a bag with two hammers. The learned State Attorney argued that if the charge is at variance with the evidence, it ought to be amended but in this case that was not done.

Still on the charge sheet, the Court required the learned State Attorney to comment on whether or otherwise it was proper to charge the appellants with both the offence of armed robbery and being found in

possession of goods suspected to have been stolen as distinct offences instead of in the alternating. The learned counsel was quick to argue that charging the appellants with the offences of robbery and being found with property suspected of having been stolen was a duplicity of charge. She was of the view that the 2nd count ought to have been brought as an alternative to the 1st count.

On account of such shortcomings, she said, the charge was incurably defective and further that the discrepancy between it and the evidence was not minor which ought to be resolved in favour of the appellants.

As to the way forward, in relation to the 2nd count, the learned State Attorney urged the Court to order an immediate release of the appellants from custody for the reason that they have completed to serve their sentence of three (3) years imprisonment.

In rejoinder, both appellants welcomed what was presented by the learned State Attorney without more.

We have anxiously considered the uncontested submission by the learned State Attorney. We wish to begin with the issue that the charge is defective for failure to indicate to whom the threat was directed. Ms. Minja

argued that failure to indicate the person to whom threat was directed in a charge of armed robbery was a defect which was fatal. Perhaps for better appreciation of how the charge was couched we need to reproduce the 1st count as follows:

"CHARGE

FIRST COUNT FOR ALL ACCUSED PERSONS

STATEMENT OF OFFENCE

ARMED ROBBERY *contrary to section 287A of the Penal Code [Cap. 16 R.E 2002].*

PARTICULARS OF OFFENCE

That ***GOODLUCK S/O SHEYO SAMSON, NOAH S/O PAUL GONDE and RAMADHAN S/O HASSAN*** *are jointly and together charged on 12th day of November, 2015 between 21:00hrs and 22:00hrs at KILIMO AREA within the Uyole suburb of Mbeya City, in Mbeya Region, did steal a three wheeler motorcycle commonly known as Bajaj with registration number MC 270 ACY and side number JUWB 170, driven by one* ***FRANK MWASALEMBO*** *and immediately before and after stealing they used*

an iron bar to and a machete to obtain and retain the said Bajaj."

One of the crucial ingredients of the offence of armed robbery in terms of section 287A of the Penal Code is the use by the assailants, in this case the appellants, of the threat or violence to the person on whom the offence is committed.

In the case of **Kashima Mnadi v Republic**, Criminal Appeal No.78 of 211 (unreported), the Court was confronted with a situation where the charge did not indicate the person to whom threat was directed and it held that:

> *"Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. Strictly speaking for a charge of any kind of robbery to be proper, it must contain or* ***indicate actual personal violence or threat to a person targeted to be robbed****. So, the particulars of the offence of robbery must not* ***only contain the violence or threat but also the person on whom the actual*** *violence or threat was directed. This requirement is provided under section 132 of the Criminal Procedure Act, Cap.20 R.E 2002*

so that to enable the accused person know the nature of the offence he is going to face."

The importance for including in the particulars of the offence of armed robbery, the person to whom the threat or violence is directed is to enable the accused who stands charged to understand the nature of the case he is facing. And failure to do so contravenes section 132 of the Criminal Procedure Act, Cap.20 R.E which in mandatory terms provides that the charge or information will be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

Cementing on the requirement of disclosing the essential elements of offence in the particulars of offence, the Court in the case of **Juma Maganga v. Republic**, Criminal Appeal No. 427 of 2016 (unreported), while citing with approval the case of **Isdory Patrice v Republic**, Criminal Appeal No.274 of 2007 (unreported) stated as follows:

"It is a mandatory requirement that every charge in a subordinate court shall not only contain a statement of the specific offence with which the accused is charged 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 essential elements or ingredients of the offence. The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove the accused committed the actus reus of the offence with the necessary mens area. Accordingly, the particulars, in order to give the accused a fair trial in enabling him prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."

In this case, it is evident that the particulars of offence in the 1st count of armed robbery did not disclose such aspect. The threat or violence or rather iron bar and machete allegedly used immediately before or after stealing in order to obtain and retain the stolen bajaj was not indicated to whom it was directed. It is difficult to figure out as to how the appellant could have understood that there was a threat or violence which was directed to the victim.

Such omission, no doubt rendered the charge sheet to lack essential ingredients of the offence of armed robbery which was incurable in terms of section 388 of the CPA.

Again, in relation to the same charge sheet, Ms. Minja also challenged the variance between the particulars of the offence and the evidence adduced in court. She said, while the particulars of the offence show that the appellants immediately before and after stealing used an iron bar and a machete to obtain and retain the stolen bajaj, PW6 said, the appellants took a bag with two hammers.

In the case of **Mohamed Juma @ Mpakama**, Criminal Appeal No.385 of 2017 (unreported) the Court grappled with akin similar scenario of discrepancy between the charge and the evidence, and it had this to say:

> *"We have carefully read the particulars of the third count of being found in unlawful possession of one arrow and one spear. The learned counsel is correct to point out on the divergence between the particulars of the offence and evidence of PW1 and PW2 on the type of weapons they found in the possession of the appellant. Apart from unresolved question of facts regarding whether the appellant was arrested inside the game reserve or along the road outside the reserve; we think, the discrepancy between the type of weapons mentioned in the particulars of the charge, and the weapons*

mentioned by the prosecution witnesses is not minor. It goes to the root of the third count."

Also in the case of **Masota Jumanne v Republic**, Criminal Appeal No.137 of 2016 (unreported) the Court dealt with a situation where the charge sheet was at variance with the evidence in relation to type of properties which were stolen from the complainant PW1.

It stated as follows:

> *"In a nutshell, the prosecution evidence was riddled with contradictions on what actually was stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge."*

Even in this case, we associate ourselves with the findings in the above cited cases. We entertain no doubt that in this case there was a discrepancy relating to the weapon that was alleged to be used to threaten the victim (PW6). While the charge alleges that the appellants used an iron bar and a machete in order to obtain and retain the goods, the evidence revealed that they had a bag with two hammers. More interestingly, PW6 did not even say that the said hammers were used to

threaten him. As was stated in **Masota Jumanne's** case (*supra*), the discrepancy was not minor contradictions. Indeed, we find that it went to the weight of evidence which did not support the charge.

Regarding the issue of framing two counts which were preferred against the appellants, it is true as was righty contended by Ms. Minja. In the 1st count the appellants were charged with armed robbery contrary to section 287A of the Penal Code; while in the 2nd count they were charged with being in possession of goods suspected to have been stolen or unlawfully acquired contrary to section 312(1)(a) and (b) of the same Penal Code. The appellants were charged with the 2nd count as they were alleged to have been found in possession of the bajaj which was stolen. Looking at the particulars of offence on both counts it is vivid that they relate to the same property.

This Court in the case of **Omari Mohamed China and 3 Others v republic,** Criminal Appeal No. 230 of 2004 (unreported) discussed the scenario where the 2nd appellant in that case was charged with armed robbery and the offence of being found in possession of goods suspected to have been stolen in the 5th count simply because he was found with some goods stolen in the course of robbery.

In that case the Court stated as follows:-

> *"The good mentioned in the particulars of the offence appear also in the armed robbery count. We pose and ask: Was the 5th count necessary? We think it was not necessary. It amounted to duplicity."*

In this case, it is without question that the particulars in the first count of robbery concerning the stolen property i.e the three wheeler motorcycle commonly known as bajaj with registration number 270 ACY and side number JUWB 170 are the same with those appearing in the 2nd count. Since the circumstances of this case are similar to what pertained in **Omari Mohamed China and 3 Others'** case, we are inclined to find that even in this case preferring the two counts based on similar particulars was unnecessary as it amounted to duplicity.

Looking at the totality of case at hand, we agree with Ms. Minja that the charge in relation to armed robbery was incurably defective. This was also enhanced with the variance between the charge and the evidence adduced in court. This means that the charge was not proved at the required standard.

As to the way forward, we, equally, agree with Ms. Minja that the appellants should be set free. We, thus, allow the appeal, quash the convictions and set aside the sentence of 30 years imprisonment.

We further order that, since the appellants have completed to serve the sentence of three years imprisonment in respect of the 2nd count, they be released forthwith from custody unless held for other lawful reason(s).

DATED at **MBEYA** this 3rd day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of April, 2020 in the presence of the appellant in person and Ms. Sara Anesius learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL