IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 51 OF 2018

1. MSAFIRI s/o CHITAMA
2. STEPHEN CHARLES MWAKASOLA @ STEV ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Twaib, J.)

dated the 27th day of February, 2012
in
Criminal Appeal No. 44 of 2011
.....

JUDGMENT OF THE COURT

8th July & 5th August, 2020

MWARIJA, J.A.:

The appellants, Msafiri Chitama and Stephen Charles Mwakasola @ Stev (the 1st and 2nd appellants respectively) together with five other persons, Swalehe Omary (the 1st accused person at the trial), Bashiri Issa Hussein, Ramadhani Rajabu Lukuba, Benedicto Malaba and Albinus Manyama Makungu (the 4th – 7th accused persons respectively at the trial) were jointly charged in the District Court of Morogoro. They were charged

with six counts under two different legislation; the Penal Code [Cap. 16 R.E. 2002] (the Penal Code) and the Arms and Ammunition Act [Cap. 223 R.E. 2002].

On the 1st, 2nd and 3rd counts, they were charged with the offences of armed robbery, conspiracy to commit an offence and breaking into a building with intent to commit an offence contrary to sections 287A, 384 and 296 respectively, of the Penal Code.

It was alleged in the 2nd count, that on an unknown date, time and place, the appellants and the 1st, 4th – 7th accused persons (hereinafter the appellants' co-accused persons) conspired with eight other persons to break into the National Microfinance Bank (the NMB) building, Ruhembe branch, Kilombero District with intent to commit theft. In the 3rd and 4th counts, it was alleged that on 18/7/2008 at about 1:30 a.m. in the night, the appellants and their co-accused persons together with eight other persons broke into the NMB building, Ruhembe branch Kilombero and stole from therein one laptop computer valued at TZS 2,500,000.00 and immediately after such stealing, threatened the police officers who were at the bank area by firing four bullets at them in order to retain the stolen

property. It was alleged further that, they had in their possession, gas cylinders, craw bars, two nozzles and a scissor, the instruments of breaking.

With regard to the 5th and 6th counts, the prosecution alleged that on the same date and place at about the same time as in the 3rd and 4th counts, the appellants together with their co-accused persons and the eight other persons, were found in possession of one Pump Action Short Gun and a Pistol make Bereta without licence or permit as well as six rounds of ammunition without permit.

All of them denied all counts and as a results, the case proceeded to trial whereby the prosecution relied on the evidence of seven witnesses and six exhibits. At the close of the prosecution case, the trial court found that the evidence did not establish a *prima facie* case against the 6th accused person. He was found to have no case to answer and was therefore, acquitted. Later on, after a full trial the appellants and the 5th accused person who relied on their own evidence in defence and five exhibits, were found guilty of all counts. The 5th accused person was convicted in absentia because he escaped from police custody. They were

consequently sentenced each to 30 years' imprisonment and 12 strokes of the cane in the 1st count, 10 years' imprisonment on the 2nd, 5th and 6th counts and 7 years' imprisonment in the 3rd and 4th counts. The imprisonment sentences were ordered to run concurrently.

The appellants were aggrieved by conviction and sentence and therefore, appealed to the High Court. Save for reduction of the sentence of 10 years' imprisonment imposed on them as regard the 2nd count to that of 7 years' imprisonment, their appeal was dismissed. They were dissatisfied further hence this second appeal.

To appreciate the circumstances giving rise to the appellants' arraignment and conviction, it is instructive at this stage, to briefly state the background facts of the case. On 18/7/2008 during the night time at about 1:30 a.m., the NMB building, Ruhembe branch, Kilombero was broken into by a gang of bandits. They entered into the building after they had cut the padlocks of the rear entrance door. From the evidence, the police had prior knowledge of the bandits' plan to rob the bank. The information was given to the Morogoro Regional Crimes Officer by a police

officer, No. F. 7012 D/Cpl Emmanuel (PW5) who had also informed his colleague, PC Selemani.

According to his evidence, PW5 who used to be a guard at the bank's building together with PC Selemani was approached by some of the bandits and persuaded him to join them in their plan to rob the bank. He agreed with them but with the intention of curbing commission of the offence. He thereafter went on to attend the conspiratory meetings of the bandits and when the plan was ready, he informed the RCO about the planned date and the time of the raid. On that information, the RCO deployed a number of police officers around the bank's premises including PW5 and PC Selemani who were on duty as guards at the bank's building.

In the execution of their plan, the bandits arrived at the bank's premises in two motor vehicles, a pick-up having a registration plate No. STG 6154 and a taxi cab with Reg. No. T. 149 ATL. Having broken and entered into the bank's building and while in the process of starting to break the safe room, the police who were keeping surveillance on the bandits' movements intervened and ordered them to surrender and lie down. According to the prosecution evidence, the bandits did not obey the

police order, instead, they started firing bullets towards the police officers. It was then that an exchange of fire ensued resulting into the death of six bandits. At the end, whereas the 2nd appellant who was the driver of the taxi cab was arrested in that motor vehicle, the appellants and their co-accused persons were arrested later on different dates and at different places. They were charged as shown above.

In convicting the appellants, apart from the evidence of PW5, the trial court relied on the evidence of other six witnesses. The evidence which implicated the appellants with the offences charged was mostly that of PW1 No. D 7676 D/Cpl Emmanuel and PW6 No. E. 9776 D/Ssgt John. In their evidence, PW1 and PW6 testified that they recorded the cautioned statements of the 1st and 2nd appellants respectively. According to those pieces of evidence, the appellants confessed that they participated in the planning and commission of the offences charged. Their statements were admitted in evidence as exhibits P2 and P5 respectively.

There was also the evidence of PW2 who added that the 2nd appellant was in fact arrested while in the motor vehicle which he was driving and from which, as stated above, having arrived at the scene of

crime, one of the bandits disembarked carrying a gas cylinder. Furthermore, it was PW5's evidence that he identified the 2nd appellant at the scene of crime because he had known him before the date of the incident as one of the facilitators of the conspiratory meetings to which PW5 attended under the pretext of collaborating with them in the plan to rob the bank.

In his evidence, the 1st appellant did not dispute that he was arrested at the scene of crime. His defence was that being a taxi driver, he was hired from Dar es Salaam by one person called Juto to take his sick relative to a traditional healer at Kilombero. According to his evidence, he was arrested while he had parked the motor vehicle along the road waiting for his passengers to return from the traditional healer's place where the said Juto had taken her sister for treatment.

On his part, the 2nd appellant raised an *alibi*, stating that on the material date of the incident, he was in Dar es Salaam, having arrived from Mbeya where he went on 16/07/2008 to take his sick sister. He tendered some bus tickets to support his evidence.

The trial court was satisfied that the evidence of the prosecution witnesses as supported by the appellants' cautioned statements, sufficiently proved the offences with which the appellants were charged. It found that the cautioned statements were made voluntarily and thus convicted and sentenced them as earlier on stated. As alluded to above, save for the reduction of sentence as regards the 2nd count, their appeal to the High Court was unsuccessful.

In this appeal, whereas in his memorandum of appeal, the 1st appellant has raised eight grounds of appeal, the 2nd appellant has preferred a total of eighteen grounds in both his memorandum of appeal and a supplementary memorandum. He also lodged written submission in support of his grounds of appeal.

For the reasons which will be apparent herein, we do not intend to consider all grounds of appeal raised by the appellants. In the 1st grounds of their respective memoranda of appeal, the appellants contend that the learned 1st appellate Judge erred in upholding the decision of the trial court while their conviction was based on a defective charge. The 2nd appellant states as follows:-

"1. That the learned [magistrate] and the 1st appellate judge grossly erred in law in convicting the appellant on the basis of the defective charge"

On his part, the 1st appellant states as follows:-

"1. That the 1st appellate judge erred in law and fact [for having misdirected himself in upholding the 1st appellant's conviction and sentence] without taking into account that the charge sheet was incurably defective for duplicity whereby two distinct offences allegedly committed on two different dates [were] lumped together".

At the hearing of the appeal which was conducted through video conferencing, linked from Ukonga prison, the appellants appeared in person unrepresented. On its part, the respondent Republic was represented by Ms. Janethreza Kitaly, learned Senior State Attorney who was being assisted by Mr. Ramadhani Kalinga, learned State Attorney. When they were called upon to argue their grounds of appeal, the appellants opted to let the learned Senior State Attorney submit in reply to their grounds of appeal and thereafter make their rejoinder, if necessary.

At the outset, Ms. Kitaly informed the Court that the respondent was supporting the appeal. She agreed with the ground of appeal raised by the 2nd appellant that the charge was bad for duplicity, in that the same was drafted in an omnibus form by lumping the counts therein. However, before she could pursue that line of argument we wanted to satisfy ourselves on whether the trial court had jurisdiction to try the case. This was because, in terms of the provisions of s. 57 read together with the then paragraph 19 of the 1st Schedule to the Economic and Oganized Crime Control Act [Cap. 200 R.E. 2002] (hereinafter "the Act"), the 5th and 6th counts were economic offences which were at the material time, triable by the High Court sitting as an Economic Crimes Court.

Ms. Kitaly readily conceded that the District Court did not have jurisdiction because there was no certificate of the Director of Public Prosecutions (DPP) transferring the case to that court for trial in terms of s. 12 (3) of the Act. She therefore submitted that the appeal may be allowed. The appellants did not have anything useful in response, the issue being one which involved a point of law. They agreed with the learned Senior State Attorney and prayed to be released from prison.

As conceded by Ms. Kitaly, since the 5th and 6th counts with which the appellants were charged were, before the amendment of the Act by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2010, economic offences triable by the High Court sitting as an Economic Crimes Court in terms of s. 3 (1) and (2) of the Act, the District Court lacked jurisdiction. It was after the amendment in 2011 that paragraph 9 of the 1st schedule to the Act was deleted, thus removing those offences from the list of economic offences. Prior to the recent amendment by Act No. 3 of 2016, s. 3 (1) and (2) of the Act provided as follows:-

> *"3. ....*
>
> *(1) The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in in the High Court.*
>
> *(2) The High Court when hearing charges against any person for the purposes of this Act shall be an Economic Crimes Court."*

For the trial District Court to have acquired jurisdiction, the case should have been transferred to it by the DPP under s. 12(3) of the Act which states as follows:-

"12 (1). ....

(2). ....

(3) The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate."

Apart from lack of the certificate transferring the case to the trial court, the trial of the appellants was also conducted without the consent of the DPP which was a mandatory requirement under s. 26 (1) of the Act. That section prohibits the trial of any person for an economic offence without the consent of the DPP. It provides that:-

"26. -

(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions."

Given the above stated position of the law, it is obvious that the trial court acted without jurisdiction. In the case of **Abraham Adamson Mwambene v. The Republic**, Criminal Appeal No. 148 of 2011 (unreported), like in this case, the appellant was tried with both economic and non-economic offences by Sumbawanga District Court without the DPP's consent and without the certificate transferring the case to the District Court. Having considered the irregularities, the Court observed as follows:-

> *"There is no gainsaying that at the time when the appellant and his colleagues were prosecuted and tried for the armed robbery offences and those of being in unlawful possession of a firearm and ammunitions, all in one charge sheet, the latter two offences had yet to be dislisted from the Economic and Organized Crimes Control Act, Cap. 200* **....** *Under paragraph 19 to the First Schedule of the said Act, they were Economic Offences, only triable by the High Court sitting as an Economic Crimes Court. Subordinate Courts had no jurisdiction to try such offences unless and until the DPP or State Attorney duly authorized by him, had by certificate*

under his hand, ordered under s. 12 (3) that they be tried by such courts..."

The court observed further that a trial in respect of an economic offence may not commence under the Act save with the consent of the DPP. On those observations, the Court held that, since the appellant's trial violated *inter alia*, the mandatory requirements under s. 12 (3) and 26 (1) of the Act, such trial was a nullity *ab initio*. It cited among others, the case of **Nico Mhando and 2 others v. The Republic,** Criminal Appeal No. 332 of 2008 (unreported) in support of that finding.

Similarly, since in the present case, the trial court acted without jurisdiction, the trial was a nullity. In the circumstances, we hereby invoke the revisional powers vested in the Court by s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and hereby quash the proceedings and the judgments of both the trial court and the High Court. The appellants' convictions are similarly quashed and the sentences imposed on them are set aside. Considering the period spent by the appellants in prison as remandees from the date of their arraignment on 30/7/2008 because of being charged with unbailable offence of armed robbery and as prisoners, serving the illegal sentences from the date of their conviction on

11/11/2010, we decline to order a retrial. We thus order that they be released from prison immediately unless they are otherwise lawfully held.

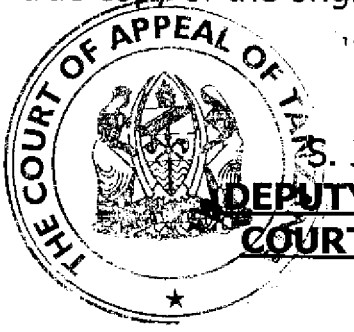
DATED at **DAR ES SALAAM** this 30th day of July, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Judgment delivered this 5th day of August, 2020 in the presence of the appellant in person-linked via video conference and Ms. Dorothy Masawe, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL