IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C. J., MMILLA, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 44 OF 2017

JAMES ANDREA @ MWENGE .... APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

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

(Mlacha, J.)

Dated the 9th day of November, 2016
in
Criminal Appeal No. 68 of 2016

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JUDGMENT OF THE COURT

24th & 27th March, 2020

MMILLA, J.A.:

James Andrea @ Mwenge (the appellant), was originally charged before the Resident Magistrate's Court of Mwanza at Mwanza with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by Act No. 3 of 2011. After a full trial, he was convicted and sentenced to thirty (30) years'

imprisonment. He unsuccessfully appealed to the High Court, Mwanza Registry, hence the present appeal to the Court.

The background facts of this case were briefly that, on 21.12.2014 at about 16.00 hrs, Maria Kazaramo (PW1), met the appellant at Sangabuye – Luashi village within Ilemela District in the Region of Mwanza, a person she had very well known because he was her village mate. Upon that encounter, the appellant attacked her with an iron rod and a pestle on the head, arm and other parts of her body, thereby inflicting serious injuries on her body. He then robbed her Tzs. 200,000/=. Following the injuries she sustained, PW1 fell down and lost consciousness.

Although it is not very clear, it appears that in the course of the attack, PW1 raised an alarm and several people rushed to the scene of crime and found her in an unconscious state. Juma Chandarua (PW2) was amongst the first few people to arrive thereat. He recounted that on arrival at that place, he found PW1 lying down bleeding and unresponsive, while the appellant was standing besides her holding a pestle. He asked the appellant what had happened; his response was that what he was seeing was what had happened. He then ran away.

PW2 called PW1's son one Mabula Kazaramo, after which they rushed the victim to Kayenze dispensary for medical attention, and subsequently to Sekou Toure Hospital.

The appellant was arrested on 29.12.2014 at Imalang'ombe area at Kayenze. As earlier on pointed out, he was charged with armed robbery as it were.

In his brief evidence in defence, the appellant denied involvement in the commission of charged crime. He told the trial court that he was not in Luashi village on 21.12.2014, but was somewhere else. Deplorably however, he did not specifically mention the place where he was. Likewise, he queried why he was not promptly arrested if at all he was truly the one who committed the said crime because he was in the village. He urged the trial court to find that the allegations against him were baseless and acquit him.

As earlier on hinted, after weighing the evidence it received from both sides, the trial court concluded that the prosecution had proved the case against the appellant beyond reasonable doubt. He was convicted

as charged and accordingly sentenced. Upon the dismissal of his first appeal to the High Court, he lodged the present appeal to the Court.

On the day of the hearing of this appeal, the appellant was absent. However, he was represented by Mr. Constantine Mutalemwa, the learned advocate who, upon receiving a letter from the appellant authorizing him to proceed in his absence, he prayed as such and we allowed him to proceed.

Mr. Mutalemwa predicated his submissions on a four point memorandum of appeal which was prepared and lodged by the appellant in person. A close scrutiny shows that in view of their relatedness, those grounds may be abridged into only two of them; **one** that, the prosecution did not prove the case against him beyond reasonable doubt; and **two** that, the case against him was not properly investigated. Nonetheless, Mr. Mutalemwa proposed to submit on the first ground only on account that it was sufficient to dispose of the appeal.

Having found from the Record of Appeal that the charge on which the appellant's conviction was based was introduced on 14.4.2015, but

was neither substituted nor read to him; Mr. Mutalemwa submitted that it meant the prosecution did not prove the case against him beyond reasonable doubt. He contended that in view of that defect, it was obvious that the appellant did not know the nature of the offence he was facing, so also that he was not afforded good chance of preparing his defence. He further submitted that for that reason, there was no fair trial. He therefore implored the Court to declare the trial court's proceedings and the judgment thereof a nullity, so also the proceedings and judgment of the High Court, since it was based on a nullity. He urged us to quash them all, set aside the sentence, and order a retrial.

On the other hand, Ms Mwamini Yoram Fyeregete, learned Senior State Attorney, who was assisted by Ms Sabina Choghoghwe, learned State Attorney, represented the respondent/Republic. On taking the floor, Ms Fyeregete hurried to inform the Court that they were supporting the appeal for the same reasons which were advanced by their learned brother, Mr. Mutalemwa. She said it was factual that after introducing a fresh charge sheet on 14.4.2015, the prosecution did not read it to the appellant as envisaged by section 228 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). That

being the case, she argued, it is beyond controversy that the trial was not fair. She pressed the Court to find that the proceedings and judgments before both the trial court and the first appellate court were a nullity, quash them, set aside the sentence and order a trial *de novo*.

Upon the Court's probing on whether or not the evidence on record was strong enough to sustain the appellant's conviction; Ms Fyeregete was unhesitant that the evidence of PW1 and PW2 was very strong, which is why, in the interest of justice, she held the view that a retrial would meet the requisite justice in the case.

Mr. Mutalemwa had nothing to add in rejoinder.

We have passionately considered the submissions of counsel for both sides. We hasten to state that we agree with their observations.

There is no dispute that the prosecution side made two substitutions of the charge in the case prior to introducing another fresh charge on 14.4.2015 respectively. The substitutions were made on 22.1.2015 and 4.3.2015. While the substituted charges on 22.1.2015 and 4.3.2015 were dutifully read to the appellant and his plea recorded, that was not done as regards the fresh charge introduced on 14.4.2015.

It was neither substituted nor read to him. As it turned out however, especially the evidence of PW1 appearing at page 6 of the Record of Appeal is in conformity with the particulars in that charge sheet of 14.4.2015, a fact which strongly suggests that the appellant's conviction was based on that charge sheet. That being the case, it is clear that because it was not read to him, he was definitely denied opportunity of knowing the nature of the charge facing him, therefore he was deprived chance to properly prepare his defence – See **Tizo William v. Republic**, Criminal Appeal No. 364 of 2017 (unreported). In the circumstances, Mr. Mutalemwa and Ms Fyeregete cannot be faulted in their common concern that the appellant was not fairly tried.

On what fair trial entails, we resort to what we said in the case of **Misango Shantiel v. Republic,** Criminal Appeal No. 250 of 2007 (unreported) which relied on **Musa Mwaikunda v. Republic** [2006] T.L.R. 387 in which again, the Court sought aid from the cases of **Regina v. Henley** (2005) NSWCCA 126 (a case from New South Wales Court of Appeal) and **R. v. Prosser** (1958) VR 45 at 48, in which the minimum standard which the trial court has to comply with, to show that the accused was afforded a fair trial were set out as follows:-

*"1. **to understand the nature of the charge**;*

*2. **to plead to the charge and to exercise the right of challenge;***

3. to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;

4. to follow the course of the proceedings;

5. to understand the substantial effect of any evidence that may be given in support of the prosecution; and

6. to make a defence to the charge." [The emphasis is ours].

In the present case, we need to emphasize that in order to create a conducive environment for a fair trial, when the prosecution substitutes a charge, that charge must be read out to the accused person and have his/her plea taken down. This is the essence of section 228 (1) of the CPA which provides that:-

"S. 228 (1): 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."

Where the charge may not have been read out to the accused person, the defect is grave and renders the subsequent proceedings in the trial a nullity – See the case of **Thuway Akonaay v. Republic** [1987] T.L.R. 92.

In the case of **Thuway Akonaay** (supra), the appellant was originally charged with threatening violence but that charge was withdrawn and a new charge alleging arson was substituted thereof. The appellant was not at all called upon to plead to the new charge. On first appeal, the judge said non-compliance with section 234 of the Criminal Procedure Act (now section 228 (1) of the CPA) was not fatal. On appeal to the Court, it was held that:-

> *"With respect, we think the first appellant judge was in error. It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity."*

In **Thuway Akonaay's** case (supra), support was drawn from the old case of **Akbarali Damji v. R.**, Cr. Appeal 220/56 reported in 2 T.L.R. 137 in which it was expressed that:-

> *"The arraignment of an accused 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."*

See also the case of **Jafari s/o Ramadhani v. Republic**, Criminal Appeal No. 311 of 2017 (unreported) in which it was emphasized that the defect for non-compliance with the provisions of section 228 (1) of the CPA "*vitiates all the subsequent proceedings in the trial and first appellate Court.*"

The position in the present case is similar to that which obtained in the cases cited above. It is vivid therefore that since the charge which was introduced on 14.4.2015 was not read out to the appellant, and no plea was entered and recorded in the record of proceedings; and because the appellant's conviction was anchored on that charge; it is definite that the omission was fatal and it vitiated the proceedings of the trial and the first appellate courts. In consequence, we declare the trial court's proceedings and the judgment that resulted therefrom a nullity, so also the proceedings and judgment of the High Court, since it was based on a nullity. We thus quash them all, set aside the sentence, and

order an expedited retrial before another magistrate, competent to do so. We also direct that in the event the appellant may be found guilty and convicted, the period which he has served in prison so far should be considered in sentencing. Meanwhile, the appellant shall continue to be in remand custody to await the said retrial.

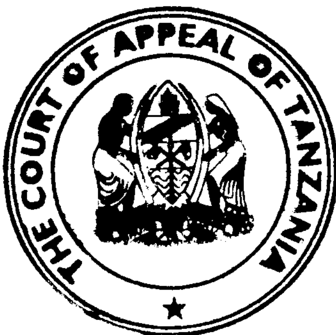
DATED at **MWANZA** this 26th day of March, 2020.

I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 27th day of March 2020, in the Presence of Mr. Costantine Mutelemwa, Counsel for the appellant and Ms. Lilian Meli State Attorney for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL