IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 312 OF 2018

SAMWEL PAUL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Luvanda, J.)

Dated the 17th day of September, 2018
in
Criminal Appeal Case No. 99 of 2018

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JUDGMENT OF THE COURT

19th March & 29th April, 2021

KOROSSO, J.A.:

In the District Court of Kinondoni at Kinondoni, the appellant was arraigned for the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 Revised Edition 2002 (the Penal Code). The prosecution case was that on the 23rd December, 2015 at Magomeni Kagera area within Kinondoni District in Dar es Salaam Region, the appellant did steal a motorcycle with Registration Number MC 682 AXH make Kinglion the property of Ramadhani Salehe and immediately before and after stealing did threaten William Joseph with a machete in order to obtain and retain the said property. The appellant denied the

charge and at the end of the trial, he was found guilty, convicted and sentenced to serve thirty (30) years imprisonment.

The prosecution case was unfolded by four (4) witnesses; William Joseph (PW1), Ramadhani Salehe Mtawa (PW2), F. 1379 D/C Ramadhani (PW3) and G. 7576 D/C Augustino (PW4)) and two exhibits, the cash sale receipt No. 2377 and registration card (exhibit PE1) and cautioned statement of the appellant (exhibit PE2). The brief background gathered from the record before us is that, on the 23rd December, 2015 at around 17.00hrs, the appellant and one Meshack who was not arrested, approached William Joseph (PW1), a rider of a motorcycle for hire popularly known as a *boda boda.* PW1 usually parked his motorcycle at Msikitini kwa Kudile. The appellant asked him to take him and his colleague to Magomeni Kagera for a fare of Tshs. 2000/-. PW1 obliged, and upon reaching the stated destination, the appellant, holding a machete ordered PW1 to surrender the motorcycle and hand it over, and PW1 who had first resisted, on seeing the machete dropped out of the motorcycle. Thereafter, the appellant and Meshack left the scene with the motorcycle. PW1 then rushed to a *boda boda* centre at Magomeni Kagera and informed some *boda boda* riders on what had transpired. A massive search ensued but was barren of

fruits. PW1 then reported the robbery to the owner of the stolen motorcycle; his boss, and subsequently, the matter was reported at the police station at Magomeni. PW1 was interrogated and locked up for an hour and then released. They went for further search of the appellant but failed to apprehend him. The appellant was arrested by area *Sungusungu* at midnight suspected of committing another crime and taken to the police station where he was put in custody and later arraigned.

The appellant pleaded not guilty to the offence charged. In his defence he narrated circumstances pertaining to his arrest. As stated above, at the end of the trial, the trial court found that the prosecution proved its case on the required standard, convicted and sentenced the appellant. Aggrieved, the appellant appealed to the High Court which dismissed his appeal. Still discontented, the appellant has come to this Court fronting four (4) grounds of appeal which when paraphrased state as follows:

1. That the first appellate court erred in law and fact when it upheld the conviction and sentence of the trial court against the appellant on a fatally defective charge predicated on a dead law.

2. That the first appellate court erred in law in upholding the conviction and sentence of the trial court against the appellant despite the fact that PW1 and PW2 were not recalled to testify upon substitution of the charge in contravention of the Criminal Procedure Act, Cap 20 Revised Edition 2002.
3. That the first appellate court erred in law and fact dismissing the appellant's appeal for want of merit while:

(a) None of the police officers from where PW1 and PW2 first reported the incidence testified that the appellant was named as the culprit.

(b) The prosecution side failed to lead investigatory evidence on how the appellant was arrested on the aftermath of commission of the alleged robbery having regard to the fact that the appellant was well known to the victim (PW1).

(c) The prosecution side failed to lead investigatory evidence to show concerted efforts which led to the arrest of the appellant and the search conducted to recover the stolen motorcycle and the alleged offensive weapons so as to connect him with the offence charged.

(d) PW3 testified without taking an oath contrary to the Criminal Procedure Act, Cap 20 Revised Edition 2002.

(e) PW1 failed to provide the description of the appellant when he reported the offence charged to the police.

(f) The prosecution failed to prove its case to the standard required.

4. That the first appellate court erred in law for failure to assess the prosecution evidence before relying on it as a basis of upholding the conviction and sentence against the appellant.

At the hearing of the appeal, the appellant who fended for himself was linked through the video conference facility from Ukonga Prison, while Mr. Gabriel Kamugisha, learned State Attorney, appeared for the respondent Republic.

The appellant fully adopted the memorandum of appeal and opted to let the learned State Attorney submit first and to have option to respond later if he finds the need to. On his part, Mr. Kamugisha resisted the appeal and fully supported the conviction and sentence against the appellant.

The learned State Attorney commenced his submissions by arguing the 2nd ground and ground 3(d) of the appeal together. He conceded to the complaints found in ground 3(d) that faults the

appellate court for upholding the conviction of the appellant notwithstanding the fact that PW3 testified without taking an oath and thus contravening the Criminal Procedure Act, Cap 20 Revised Edition (the CPA). He stated that the record of appeal does not show that before testifying PW3 a muslim, duly affirmed and he thus argued that this was in contravention of section 198(1) of the CPA. He further contended that by virtue of the said provision where someone testified without taking an oath or being affirmed it will be taken as if that person had not testified. The learned State Attorney argued that this being the case his evidence should be disregarded. However, he was quick to point out that even if the evidence of PW3 is disregarded, the prosecution case will not be negatively impacted because neither the trial nor the first appellate court relied on his evidence in convicting the appellant.

The learned State Attorney did concede to the appellant's assertions that PW1 and PW2 were not recalled to testify after the charge against the appellant was substituted by the prosecution side as expounded in the 2nd ground of appeal. Nevertheless, he argued that this anomaly is not fatal because the gist of the substituted charge was not related to the substance of the evidence given by the two witnesses

since the amendment which led to the substituted charge was only related to the date of the alleged offence. He contended that this being the case, there was no necessity to recall PW1 and PW2. He argued that the omission did not occasion any injustice for the appellant and is curable under section 388 of the CPA. To bolster his stance, he cited the case of **Godfrey Ambros Ngowi vs Republic**, Criminal Appeal No. 420 of 2016 (unreported) in which we referred to the decision of **Ramadhani Abdallah vs Republic** [2002] TLR 45 where the Court discussed the import of section 234 of the CPA when a new charge sheet is introduced and when substituting a charge sheet.

With regard to the 1st ground of appeal, Mr. Kamugisha urged the Court to dismiss this ground contending that it has no merit. He argued that the complaint is grounded on misapprehension of the law in view of the fact that section 287A of the Penal Code was introduced in the amendments ushered by Act No. 3 of 2011. He argued that since the offence charged against the appellant was committed in 2016 when the said Act was already in operation, by inserting "*as amended by Act No. 3 of 2011*" in the Statement of Offence in the charge sheet, it did not render the charge defective since the omission is curable under section 388 of the CPA especially considering that the charge sheet for all intent

and purpose is in line with section 132 of the CPA. To bolster this stance, he cited the decision of this Court in **Jamal Ally @ Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported).

The learned State Attorney implored the Court not to consider grounds 3(a), (b), (c) and (e) because they were neither canvassed or dealt with in the first appellate court nor do they contain points of law. He argued that when the said grounds are considered, it cannot be said they refer to any non-direction or misdirection of the evidence by the trial court and the High Court.

In elaboration of the 4th ground and ground 3(f) of appeal done conjointly, Mr. Kamugisha argued that the analysis of the evidence by the trial and the first appellate courts should not be faulted because the record of appeal illustrates that the prosecution did prove the case beyond reasonable doubt. He stated that the prosecution case was hinged on the evidence of PW1 who knew the appellant prior to the incident and recognized him as being the culprit who robbed him on the fateful day, the 23rd December, 2015 is reliable and credible and left no possibility of mistaken identity.

In rejoinder, the appellant had nothing further to add apart from what he had narrated in his grounds of appeal and urged the Court to rely on those grounds and allow the appeal.

Having summarized the arguments and submissions from the appellant and the respondent Republic, we will start our deliberations considering the prayer put forward by the learned State Attorney that we should disregard some of grounds of appeal he fronted as being new grounds of appeal not canvassed in the first appellate court. The learned State Attorney implored us to disregard grounds 3(a), (b), (c) and (e). There are numerous decisions of this Court that have discussed and determined whether or not to consider new grounds of appeal which have not been dealt with by the first appellate court. The Court has consistently held that such grounds should not be entertained in the second appeal for lack of jurisdiction. In **Hassan Bundala @ Swaga vs Republic**, Criminal Appeal No. 386 of 2015 (unreported), the Court held:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised*

nor decided by neither the trial court nor the High Court on appeal."

(See also **Athumani Rashidi vs Republic**, Criminal Appeal No. 26 of 2016; **Kipara Hamisi Misagaa @Bigi vs Republic**, Criminal Appeal No. 191 of 2016 and **William Kasanga vs Republic**, Criminal Appeal No. 90 of 2017 (all unreported)).

Our perusal and scrutiny of grounds 3(a), (b), (c) and (e) has led us to find as rightly put by the learned State Attorney, that the said grounds were neither canvassed nor considered by the first appellate court and neither do they address points of law. On the authority of the cited decisions of this Court, it is clear that this Court lacks jurisdiction to determine the said grounds and we hold that grounds 3(a), (b), (c) and (e) are not properly before this Court and consequently, we shall disregard them.

Concerning the 1st ground of appeal that faults the High Court for upholding the conviction in the wake of a defective charge, we agree with the learned State Attorney that the complaint is misconceived being founded on misapprehension of the context of what was introduced by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011. We are aware that, it is a practice in such situations to add "*as amended by*

Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011" in the Statement of Offence, but we find failure to do so is not a fatal and does not go to the substance of the charges to warrant this Court to find the charge wanting for the following reasons.

First, section 287A of the Penal Code was introduced in the amendments ushered by Act No. 3 of 2011 and came into force on the 10th June, 2011. The offence charged against the appellant subject to the present appeal is said to have been committed in 2016, invariably when the amended provision was already in operation. Thus, citing section 287A of the Penal Code as the contravened provisions was proper. Nevertheless, we are alive to the fact that sections 132 and 135 (a) (ii) of the CPA govern the contents of charges and prescribes the manner and format they should be framed and there is a requirement for the statement of offence to refer to the correct section of the law which creates a particular offence alleged to have been committed. Another requirement is that the charge sheet is in general to conform, as nearly as possible, to the forms set out in the Second Schedule to the CPA, specifically Part 8 of that Schedule. We are of firm view that the charges against the appellant complied with the dictates of the said provision and the format aforementioned.

Second, it is important to also consider section 27 of the Interpretation of Laws Act, Cap 1 Revised Edition 2019 (the ILA) which states:

> *"Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof and unless the contrary intention appears, be construed as one with the amended Act."*

Recently, this Court had the opportunity to discuss the import of this provision in **Karimu Jamary @ Kesi vs Republic,** Criminal Appeal No. 412 of 2018 (unreported). In that case, the appellant faulted the trial and first appellate court for convicting him based on a charge that cited section 287A of the Penal Code without acknowledging the amending Act which introduced the provision, that is, the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011. The Court found this argument to be misconceived and to lack merit having regard to the provision of section 27 of ILA stating that:

> *"... the prosecution had no obligation to indicate that the appellant was charged under section 287A of the Penal Code as amended by Act No. 3 of 2011"*

Therefore, guided by the above principle, undoubtedly the complaint is misconceived since there is no requirement to cite the amending Act. In any case, in the instant case, we find, the particulars of offence were clear in terms of what offence the appellant was being charged with. For ease of reference, we replicate the statement of offence and the particulars thereto as follows: -

"CHARGE

STATEMENT OF OFFENCE

***ARMED ROBBERY**: Contrary to Section 287A of the Penal Code [Cap 16 R.E 2002].*

PARTICULARS OF OFFENCE

SAMWEL PAUL, on 23rd day of December, 2015 at Magomeni Kagera area within Kinondoni District in Dar es Salaam Region, did steal a motor cycle with Reg. No. MC 682 AXH make Kingiion the property of one RAMADHAN SALEHE and immediately before and after such stealing did threaten WILLIAM JOSEPH with a machete in order to obtain and retain the said property.

Dated at Dar es Salaam this 22nd day of June 2016.

Signed

STATE ATTORNEY"

Third, as rightly argued by the learned State Attorney, there is nothing which can be said to be irregular or improper in the way the

statement of offence is framed and the particulars of offence. We are satisfied that they fully informed the appellant of what he was being charged with to enable him to understand the nature and seriousness of the offence, that is; the offence of armed robbery. The particulars included all known essential ingredients of the offence of armed robbery. When this is taken with the evidence of PW1 who sufficiently gave evidence on how the motorcycle was stolen, the machete used to obtain and retain the motorcycle which was in his possession in effect expounded ingredients of armed robbery and thus removed any possible prejudices inferred. For the foregoing, we find the 1st ground of appeal to be devoid of merit.

On the 2nd ground of appeal as rightly conceded by the learned State Attorney, after the charge was substituted, PW1 and PW2 were not recalled to testify. Section 234 of the CPA states:

> *"(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of amendments of case unless, having regard to*

the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.

(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;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecutions shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

Our scrutiny of the record of appeal shows that on the 22nd June, 2017 the prosecution side prayed to substitute the charge against the appellant pursuant to section 234 of the CPA. Thereafter, the charge was read over and explained to the appellant (then the accused person) and he was asked to plead for which a plea of Not Guilty was entered. It is also noted that by that time already two prosecution witnesses had already testified, that is; PW1 and PW2. The record does not show that the appellant requested PW1 and PW2 to be recalled in terms of section

234(2)(b) of the CPA, neither does it show that the trial court did inform the appellant of this right to recall witnesses who had already testified before substitution of the charge.

In determining the grievance from the appellant, we are of the view that the issue to guide us on this is whether under the circumstances this anomaly was prejudicial to his rights. It is pertinent to understand that looking at the original charge sheet at pages 1 and 3 of the record of appeal, the difference is that while the original charge at page 1 of the record of appeal in the particulars of offence states that the offence charged was committed on the 23rd December, 2016, the substituted charge states it was on the 23rd December, 2015. Thus, in effect the differences is only on the dates. PW1's evidence was that the armed robbery incident was on the 23rd December 2015 and for PW2, it was on that date that he was informed by PW1 that his motorcycle had been stolen.

Undoubtedly, the substitution of the charge was found necessary after the prosecution discerned of the variance between the charge sheet and the evidence with respect to the date of commission of the offence. It is also a fact that section 234 (3) of the CPA aims at curing

anomalies found in the charge sheet related to the specified time the offence was allegedly committed. The said provision states:

> *"'Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."*

Whilst the above provision addresses the issue of time, and in the instant case it concerned a change of dates in the substituted charge, the Court has had occasion to consider the import of variance in dates. In **Damian Ruhele vs Republic**, Criminal Appeal No. 501 of 2007 (unreported), the Republic stated that the error in the date was most probably a slip of the pen. The Court held that the said variance in dates is curable under section 234 (3) of the CPA (See also **Maneno Hamza v. Republic**, Criminal Appeal No. 338 of 2014 (unreported)).

Under the circumstances, we find that failure to recall witnesses is curable since the substitution of the charge sheet did not in any way affect the substance of the evidence given by PW1 and PW2 and thus did not occasion any injustice on the part of the appellant. We are

fortified in this position by the fact that the date of commission of the crime was not an issue and there was no reliance on exactness of date in the charge on the part of the appellant. (See: **Osward Mokiwa @Sudi vs Republic**, Criminal Appeal No. 190 of 2014). At the same time, pursuant to section 234(3) of CPA, in effect there was no need to substitute the charge sheet since what was amended was only related to the date of commission of the crime. Therefore, we are of firm view that this 2nd ground lacks merit.

Regarding ground 3(d), the learned State Attorney conceded that the record of appeal does not show that PW2 was affirmed prior to testifying during trial and thus stated that his testimony should be expunged. From the record of appeal, we discerned that PW3 was a muslim and therefore was supposed to have been affirmed prior to testifying by virtue of section 198(1) of the CPA which provides that:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

The Court had occasion to discuss this issue when reiterating the importance of courts ensuring that witnesses are examined upon taking

oath or being affirmed, in **Richard Mlingwa vs Republic**, Criminal Appeal No. 11 of 2016 (unreported) and stated:

> *"With the exception of the evidence given without oath or affirmation by a child of tender years or an accused person who opts out of giving sworn or affirmed testimony under section 231(1) or section 293 of Cap 20 supra,* ***any evidence given without oath or affirmation is of no evidential value****..." (emphasis added)*

Consequently, there being no contention that PW3's testimony was neither given on oath or affirmation, it renders it without evidential value and we thus expunge it from the record. This renders ground 3 (d) to be meritorious. Nevertheless, perusing through the record of appeal neither the trial court nor the first appellate court considered the evidence of PW3 when convicting and upholding the appellant's conviction. In the premises, as rightly stated by the learned State Attorney, expunging the evidence of PW3 will not affect the prosecution case.

The 4th ground of appeal shall be discussed together with ground 3 (f) as the two grievances are similar; failure to analyse evidence by first appellate court and lack of evidence to prove the case beyond reasonable doubt. Our scrutiny of the record of appeal shows that in the

judgment of the High Court found at pages 61 to 67 that court did analyse the evidence adduced before the trial court and was satisfied with the credibility of PW1. The High Court also rightly expunged exhibit P2; the appellant's cautioned statement after finding irregularities in its admission. On the defence, the record of appeal shows that the appellant only narrated circumstances leading to his arrest and argued that he had been originally charged with stealing and then acquitted and then rearrested and charged with armed robbery; the subject of the instant appeal. The first appellate court duly considered the fronted defence of *autre fois acquit* and found it to lack substance failing to raise any doubts in the prosecution case.

PW1 gave evidence which showed that he knew the appellant prior to the incident as a young man selling marijuana close to the place where he parked the motorcycle at Msikitini kwa Kudile. That, the appellant with another person named Meshack hired him to go to Magomeni Kagera for 2000/- and on reaching there, he was ordered to get out of the motorcycle and threatened by a machete which made him surrender the motorcycle. PW1 narrated efforts he made to trace the appellant and the motorcycle until when the matter was reported to the Police station. From his evidence there is not doubt that all elements of

armed robbery were proved, and the fact that he knew the appellant prior to the incident was never challenged in the trial court. There was concurrent findings by the trial and the first appellate court on the credibility of PW1 which we have no reason to depart from. In the premises, for reasons stated above, the 4th ground and ground 3(f) fail being devoid of merit.

In the premises, for reasons expounded above, the appeal is devoid of merit and is hereby dismissed.

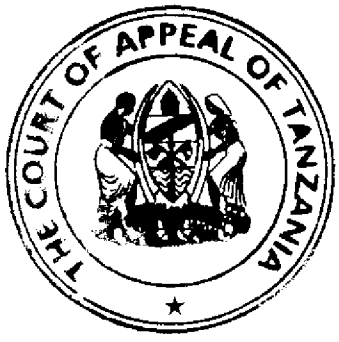
DATED at **DAR ES SALAAM** this 13th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 29th day of April, 2021 in the presence of the appellant in person through video conference linked from Arusha Prison and Ms. Ashura Mnzava, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL