IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 150 OF 2017

NTIGAHELA ELIAS.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Kigoma at Kigoma)

(Awasi, PRM, (Ext. Jur.))

dated the 7th day of May, 2009
in
(DC) Criminal Appeal No. 11 of 2008

.....

JUDGMENT OF THE COURT

27th April & 3rd May 2021

GALEBA, J.A.:

In Criminal Case No. 217 of 2005 Ntigahela Elias, the appellant, was convicted by the District Court of Kibondo at Kibondo on a charge of attempted armed robbery contrary to section 287B of the Penal Code [Cap 16 R.E. 2002] (now R.E. 2019) (the Penal Code) and was sentenced to fifteen (15) years imprisonment with 12 stokes of the cane.

The conviction and sentence were based on allegations of the prosecution that on 21.07.2005 at about 21:30 hours at Kiduduye village

within Kibondo District in Kigoma Region, the appellant attempted to steal one sack of maize from one Edson Birago, the victim, and during such attempt, he inflicted injury to the victim by cutting him with a machete on the head, the ear and at the neck, in order to obtain and illegally retain the said maize. At the trial, the appellant denied the allegations, but he was convicted and sentenced as indicated above.

Being aggrieved by the decision of the District Court, the appellant preferred Criminal Appeal No. 11 of 2008 to the High Court of Tanzania at Tabora but the matter was transferred for trial by S. J. Awasi PRM with Extended Jurisdiction (PRM (Ext. Jur.)). After hearing the appeal, the PRM (Ext. Jur.) dismissed it and upheld both conviction and sentence of the District Court. Still undaunted, the appellant has preferred this appeal.

The appeal was predicated on six (6) grounds, but for reasons that will be clear in this judgment, we will resolve the appeal based on the second ground of appeal only whose substance was that;

> *The first appellate court wrongly upheld conviction without taking into consideration the fact that the prosecution failed to prove the case beyond reasonable doubt.*

When this appeal was called on for hearing, the appellant appeared in person without legal representation and the respondent Republic had the services of Mr. Deusdedit Rwegira, learned Senior State Attorney. The appellant adopted his grounds of appeal and indicated to us that he preferred Mr. Rwegira to respond to the grounds first, so that he could rejoin.

At the outset, Mr. Rwegira supported the appeal because, according to him, the offence was not proved to the required standard. Clarifying his point, Mr. Rwegira contended that there were two charge sheets which were filed in the District Court. The first charge which was filed on 19.08.2005 had two counts one of wounding and another of burglary. He argued that, following institution of that charge, three witnesses, PW1, PW2 and PW3 testified in support of that charge on 22.09.2005. However, he added that, on 26.09.2005 the charge for wounding and burglary was abandoned and substituted with a new charge for attempted armed robbery upon which only PW4 testified and the prosecution closed its case.

Mr. Rwegira contended that in the circumstances, the evidence of PW1, PW2 and PW3 was erroneously taken into account when convicting the appellant for the offence of attempted armed robbery

because, that evidence was tendered before filing the charge for that offence. To bolster his argument, Mr. Rwegira relied on the case of **Richard Estomihi Kimei and Emmanuel Oforo Kimaro v. R,** Criminal Appeal No. 375 of 2016 (unreported). Finally, he moved the court to quash the conviction and to reverse the judgment of the High Court.

The appellant supported the submission of Mr. Rwegira and prayed for setting aside of his conviction, since he had served the full fifteen (15) years term in jail.

On our part, we have reviewed the record, and it is evident that on 19.08.2005 the appellant was arraigned in the District Court of Kibondo on a charge of burglary and wounding contrary to sections 294(1) and 288(1) both of the Penal Code respectively. When the matter was called on for hearing on 22.09.2005, PW1, Edson Birago, PW2, Mecrina Johnathan and PW3, Everina Sebushahu testified. After these witnesses had testified, Inspector Ulime for the prosecution prayed for an adjournment in order to call one remaining witness and the matter was adjourned to 26.09.2005 for continuation of hearing.

When the case was called on for hearing on the latter date (26.09.2005), Inspector Ulime for the prosecution prayed to abandon

the charge on record and substitute it with a new one. That prayer being lawful in terms of section 234(1) of the Criminal Procedure Act [Cap 20 R.E. 2019] (then R.E. 2002) (the CPA), he was permitted to present a new charge of attempted armed robbery thereby replacing that of burglary and wounding. After denial of the new charge by the appellant, the prosecution called PW4 Petro Luhanyula who gave his evidence, and immediately thereafter and without the prosecution re-calling PW1, PW2 and PW3 to testify in support of the new charge, it closed the prosecution case and a ruling on a case to answer followed. The appellant testified on 27.09.2005 and closed his defence.

What can be extracted from the above narrative is that, whereas PW1, PW2 and PW3 testified in support of a former charge for burglary and wounding, it is only the evidence of PW4 which was left to prove the charge of attempted armed robbery. Although that is what transpired, the judgment of the trial court heavily relied on the evidence of PW1, PW2 and PW3. That was procedurally erroneous.

The anomaly was not raised as a ground of appeal before the PRM (Ext. Jur.), but had he been keen in examining the record of the trial court, he would have discovered the error and rectified it. In this case, the PRM (Ext. Jur.) fell in the same trap as the lower court by upholding

the conviction and sentences meted upon the appellant based on the evidence, *inter alia,* of PW1, PW2 and PW3.

In our view, the law on the procedure on handling witnesses after filing an amended charge is fairly clear. It is generally contained in section 234 (1), (2), (a), (b) and (c), (3), (4) and (5) of the CPA and specifically for the scenario before us is subsection (5) of the above section which provides as follows;

> *"234 (1), (2), (3) and (4) N/A.*
>
> *(5) Where an alteration of the charge is made under subsection (1), the prosecution may demand that the witnesses or any of them be recalled and give their evidence afresh or be further examined by the prosecution and the court shall call such witness or witnesses unless the court, for reasons to be recorded in writing, considers that the application is made for the purpose of vexation, delay or defeating the ends of justice.*

What happened in the trail court in this matter, is that, the above procedure was not observed. This Court had opportunity to address almost a similar situation in **Ezekiel Hotay v. R**, Criminal Appeal No.

300 of 2016 (unreported), where, after quoting the above section, it stated that;

> *"According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge, the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. Failure to do so rendered the evidence led by the five prosecution witnesses to have no evidential value."*

Two points may be gleaned from the above quotation. **One**, is that, if the prosecution wants to rely on the evidence of witnesses who testified before a new charge was filed, then such witnesses must be recalled to give evidence on a new charge. **Two,** if such witnesses are not recalled to testify, like in this case, then their testimony has no evidential value in respect of the new charge. Other decisions of this Court on the same issue include **DPP v. Danford Roman @ Kanani and Three Others**, Criminal Appeal No. 236 of 2018 and **Godfrey Ambros Ngowi v. R**, Criminal Appeal No. 420 of 2016 (both unreported).

In the case before us, as PW1, PW2 and PW3 were not recalled after substitution of the former charge, it is our firm view, that their evidence did not have any evidential value to add to the proceedings. With that understanding, what remained in place as evidence on the prosecution side was only that of PW4. That evidence of PW4 did not have any evidential value or credibility because it was hearsay. We so hold because, according to PW4 himself at page 12 of the record of appeal; he was told by PW1 and PW2 that the assailant was the appellant. According to section 62(1)(a) of the Evidence Act [Cap 6 R.E. 2019], oral evidence must be direct in all cases and if it refers to a fact which could be seen, the relevant evidence must be of a witness who saw it. See also our decision in **Vumi Liapenda Mushi v. R,** Criminal Appeal No. 327 of 2016 (unreported) where it was stated that hearsay evidence has no evidential value.

Having discredited the evidence of PW4 as above, there remained no evidence to support the offence of attempted armed robbery. That conclusion offers a sufficient response to the second ground of appeal we paraphrased earlier on, which we resolve that indeed, the prosecution did not manage to prove the case beyond reasonable doubt.

As resolution of that ground is sufficient to dispose of the whole appeal, we find no need to venture into seeking to resolve other grounds.

For the above reasons, we allow the appeal and hereby reverse the decision of the PRM (Ext Jur.). As a result, we set aside the conviction of the appellant and since he has completed serving his imprisonment term, we make no order as regards his release from prison.

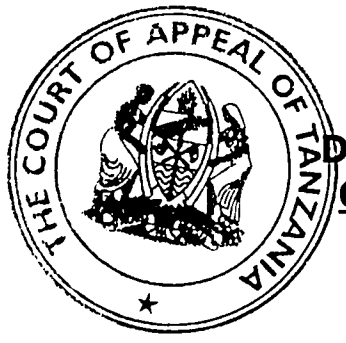
DATED at **TABORA**, this 1st day of May, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2021 in the presence of the Appellant in Person and Mr. Tito Ambangile Mwakalinga, 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