**IN THE COURT OF APPEAL OF TANZANIA**
**AT SHINYANGA**

**(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 525 OF 2017**

**BALOLE SIMBA ........................................................................ APPELLANT**

**VERSUS**

**THE REPUBLIC ........................................................................ RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Shinyanga)**

**(Makani, J.)**

**dated the 29th day of July, 2016**
**in**
**DC Crimina Appeal No. 130 of 2015**

---

## RULING OF THE COURT

16th & 17th August, 2021

**MUGASHA, J.A.:**

The appellant was arraigned in the District Court of Maswa at Maswa as hereunder: -

> *"Tanzania Police Force*
> *Charge Sheet*
>
> *NAME – BALOLE S/O SIMBA*
>
> *AGE – 36 YRS*
>
> *TRIBE – MSUKUMA*
>
> *RESS – NJIA PANDA STREET*
>
> *OCC – PEASANT*
>
> ***OFFENCE, SECTION AND LAW:*** *Robbery with violence C/S 285 and 286 of the Penal Code (Cap 16 R.E. 2002)*

***PARTICULAR OF OFFENCE:*** *That BALOLE S/O SIMBA Charged on 23rd day of January, 2014 at about 1400 hrs at Unyanyembe street within Maswa District in Simiyu Region did steal two mobile phone make Nokia valued at Tshs 320,000/= and immediately before or immediately after did threaten to use actual violence to one LEAH D/O RUTAYUNGULWA.*

*Station – Police Maswa* ......................

*Dated 28/2/014* *Public prosecutor."*

The appellant did not plead guilty to the charge. Subsequently, in order to prove its case, the prosecution paraded three witnesses and tendered two exhibits. The evidence from the prosecution, was to the effect that, on the fateful day, Ms. Leah Lutayungulwa (PW1) a banker at National Microfinance Bank, Maswa Branch, together with fellow worker Godlove Moses Palanjo (PW2) were coming from lunch. As they reached near Mhagala dispensary the appellant surfaced, stopped PW1 and insisted that she talk to him. PW1 declined and opted to run away but was pursued by the appellant who grabbed her and tore her clothes which made PW1 to remain naked.

On seeing this, PW2 assisted by one Bakari s/o Rashid, successfully rescued PW1. However, the appellant, had forcefully taken two mobile phones which belonged to PW1. PW2 gave a similar insight adding that, after the matter was reported to the police although they were escorted to the

house of appellant to retrieve the phones they could not attempt to do so fearing the appellant who was armed with a machete. On 21/5/2014 the charge was substituted and it reads as hereunder: -

*"TANZANIA POLICE FORCE*

*CHARGE SHEET*

***NAME, TRIBE OR NATIONALITY OF THE PERSON CHARGED***

*NAME: BALOLE S/O SIMBA*

*AGE: 36 YRS*

*OCC: PEASANT*

*TRIBE: SUKUMA*

*RESS: NJIAPANDA*

***1ST COUNT***

***OFFENCE SECTION AND LAWS:*** *Robbery with violence C/S 285 and 286 of the penal code Cap 16 RE 2002.*

***PARTICULARS OF THE OFFENCE:*** *That BALOLE S/O SIMBA charged on 23/01/2014 at about 14:00 hrs at Unyanyembe Street within Maswa District in Simiyu Region did steal two mobile phones make NOKIA valued at Tshs 320,000/= and immediately before or immediately after did threatens to one use actual violence to one LEAH D/O RUTAYUNGILA.*

***2ND COUNT***

*OFFENCE SECTION AND LAWS: Indecent assaults on women C/S 135 (1) of the Penal code Cap 16 RE 2002.*

***PARTICULARS OF THE OFFENCE:*** *That BALOLE S/O SIMBA charged on same date, time and place at Maswa District in Simiyu Region unlawfully did indecently assaulted one LEAH D/O RUTAYUNGILA by catching her body without her concert.*

*STATION: POLICE MASWA* .....................

*DATE: 21/05/2014* *PUBLIC PROSECUTOR."*

In the substituted charge, another count of indecent assault was added. Thereafter, according to D/Sgt Gabriel PW3, the appellant was arrested on 27/2/2014 and upon being interrogated, in the cautioned statement, he confessed to have committed the offences.

In defence, the appellant denied the prosecution account. He told the trial court that, he was arrested by the police on 28/1/2014 and ordered to surrender the mobile phones which he obliged but was later charged. In the course of hearing the defence case, after the appellant's sister one Esther Simba, intimated to the court that, the appellant had mental illness the trial court invoked section 220 of the Criminal Procedure Act [ CAP 20 R.E. 2002] (the CPA) and committed him for medical examination but he was found to be mentally sound.

Believing the prosecution account to be true, the trial court convicted the appellant of robbery with violence and indecent assault to women. The appellant was sentenced to imprisonment for 20 years with 12 strokes of the cane in respect of the first count of robbery with violence, and a jail term of five years in respect of the second count.

Aggrieved with the decision of the trial court, the appellant appealed to the High Court. The High Court was satisfied that the appellant confessed to have committed the offence in the cautioned statement. However, the appeal was partly successful following a reduction of term of imprisonment to 15 years in respect of the offence of robbery with violence. Still undaunted, the appellant has preferred an appeal to the Court fronting two grounds in the Memorandum of Appeal. However, for reasons to be apparent in due course, we shall not reproduce the grounds of appeal.

At the hearing, the appellant appeared in person and the Republic had the services of Ms. Mercy Ngowi assisted by Mr. Jukael Jairo, both State Attorneys. Before hearing the appeal, it was brought to our attention by the learned State Attorney that, the trial was flawed with a procedural irregularity for non-compliance of the provisions of section 234 (2) (b) of the CPA following the substitution of the charge.

Upon being invited to address the Court, she submitted that after two prosecution witnesses had testified namely, PW1 and PW2, the charge was substituted on 21/5/2014 and another count of Indecent assault was added. However, she pointed out that the appellant was not addressed on his rights to have the witnesses who had testified recalled and examined. This was contended to have rendered evidence of PW1 and PW2 with no evidential value. On the way forward, she submitted that ordinarily, the shortfall would be remedied by a retrial but the same is not worthy on account of ailments in the prosecution case. On this she pointed out that the cautioned statement deserves to be expunged because at the trial, it was read out before being cleared for admission. To support the proposition, he cited the case of **ROBINSON MWANJISI VS REPUBLIC** (2003) TLR 218. Finally, she urged the Court not to order a retrial on account of discrepant prosecution evidence, and instead set the appellant at liberty.

On the other hand, the issue being a point of law, the appellant, being a lay person had nothing to add apart from asking the Court to set him at liberty.

Having considered the submission of the learned State Attorneys and the record before us, at the outset, we have to determine the propriety or otherwise of the trial which is a subject of the appeal.

As reflected at page 13 of the record of appeal, the charge which was substituted on 21/5/2014 added another count of indecent assault to women. Whenever a charge is substituted, section 234 (2) (b) of the CPA gives the following direction: -

> *"(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 prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*
>
> *(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for*

> *the purpose of vexation, delay or for defeating the ends of justice."*

The compliance of the cited mandatory provision was emphasised in the case of **EZEKIEL HOTAY VS REPUBLIC**, Criminal Appeal No. 300 of 2016 (unreported) as the Court said: -

> *"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. In failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value."*

[See also: **DPP VS DANFORD ROMAN @ KANANI AND 3 OTHERS,** Criminal Appeal No, 236 of 2018, **GODFREY AMBROS NGOWI VS REPUBLIC**, Criminal Appeal No. 420 of 2016 and **NTIGAHELA ELIAS VS REPUBLIC,** Criminal Appeal No. 150 of 2017 (all unreported)].

In the present case, although the substituted charge was read over to the appellant, he was not subsequently addressed on his right to have the two prosecution witnesses who had already testified be recalled so as to give

fresh evidence or be further cross examined. On account of the said omission, this rendered the evidence adduced by PW1 and PW2 with no evidential value. We thus remain with the evidence of PW3 adduced after substitution of the charge whereby he tendered the cautioned statement of the appellant and gave oral testimony.

Given the shortcomings in the procedure regulating substitution of charge which with respect, missed the eye of the High Court, it cannot be safely vouched that the conviction of the appellant was without blemishes. Ordinarily, the omission would have been remedied by a re-trial. However, having seriously considered the propriety of the retrial we think it is not worthy and we shall give our reasons.

The procedure for admission of a confession is regulated by the Evidence Act [CAP 6 R.E.2019] and case law. Therefore, like any other documentary evidence whenever it is intended to be introduced in evidence, it must be initially cleared for admission before it can be read out to the appellant. See: **ROBINSON MWANJISI AND 3 OTHERS VS REPUBLIC** (*supra*), **WALII KIBUTWA AND 2 OTHERS VS REPUBLIC,** Criminal Appeal No. 181 of 2006, **OMARI IDDI MBEZI VS REPUBLIC,** Criminal Appeal No. 227 of 2009 and **DALALI MWALONGO VS REPUBLIC,** Criminal Appeal No. 27 of 2017, (all unreported). In the matter at hand, the cautioned

statement of the appellant tendered by PW3 which was relied on to convict the appellant was not read out before being cleared for admission and this was irregular. This is glaringly so at page 14 of the record of appeal and as such, it was wrongly acted upon to convict the appellant and it is expungable.

The remaining evidence is that of PW3 which cannot ground the conviction because it is hearsay having narrated on what he was told by PW1 and PW2 adduced before the substitution of the charge and such, evidence as earlier stated, is of no evidential value. This renders PW3's account not corroborated and as such, it is unsafe to rely on it to ground the conviction. Therefore, in view of the foregoing, we agree with the learned State Attorney that a retrial is unworthy as it would be utilized by the prosecution to fill up the gaps at the first trial which is absolutely not in the interests of justice. We are fortified in that regard, in the light of the principles propounded in the case of **FATEHALI MANJI VS REPUBLIC** [1966] EA 341 whereby the Eastern African Court of Appeal stated:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by mistake of the trial court for which the*

*prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

On the way forward, we invoke our revisional power under section 4 (2) of the Appellate Jurisdiction Act, (Cap. 141 R.E. 2019) to nullify the proceedings and judgments of both the trial and first appellate courts. In result, we quash and set aside the conviction, sentence and order the immediate release of the appellant unless if he is held for another lawful cause.

**DATED** at **SHINYANGA** this 17th day of August, 2021.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

This Judgment delivered this 17th day of August, 2021 in the presence of Appellant in person, and Mr. Jukael Reuben Jairo learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**