

IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA
(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 35 OF 2018

EMMANUEL MAGEMBE1ST APPELLANT
JOSEPH DAUDI @ MASUNGA SAYI2ND APPELLANT
MRISHO IBRAHIM @ ABDALLAH3RD APPELLANT
MALENYA SAYI4TH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Makani, J.)

**Dated the 29th day of November, 2017
in**

DC Criminal Appeal No. 82 of 2017

JUDGMENT OF THE COURT

16th & 23rd August, 2021

LEVIRA, J.A.

In the District Court of Kahama District at Kahama (the trial court) Emmanuel Magembe, Joseph Daudi @ Masunga Sayi, Mrisho Ibrahim @ Abdalla and Malenya Sayi, the first, second, third and fourth appellants respectively were jointly and together charged and each convicted of three counts which occurred in the same transaction; to wit, Conspiracy to commit offence contrary to section 384, Stealing contrary to section 265 and Armed Robbery contrary to section 287A, all of the Penal Code Cap 16 R.E. 2002 [now R.E. 2019] (the Penal Code). They were each

sentenced to 7, 3 and 30 years imprisonment respectively in respect of the first, second and third counts. The appellants were aggrieved by both the convictions and sentences meted out by the trial court and thus they unsuccessfully appealed to the High Court of Tanzania at Shinyanga (Makani, J.) vide (DC) Criminal Appeal No. 82 of 2017 (subject of the present appeal), hence the present appeal. Before us each appellant has presented his own memorandum of appeal with almost common grounds which we do not intend to reproduce except the first ground appearing in the fourth appellant's memorandum of appeal which is crafted in the following complaint: -

"That, the charged offence against the appellant was duplex and defective since more than one offences which are separate with its ingredients were charged in single charge contrary to requirement of the law."

Before we embark to determine this ground which we think is sufficient in disposing of this appeal, we find it apposite albeit briefly to give the background facts of this case. It was alleged by the prosecution that on 22nd March, 2010 at unknown day time at Lake Oil Filling Station within Kahama District in Shinyanga region the appellants did conspire to steal a gun make Mark III with two bullets and cash money TZS. 4,700,000/= the property of Lake Oil Filling Station and Sekepa Security

Guard. They allegedly fulfilled their mission on the same day at about 3:30 hours they managed to steal one gun with ref. 00079249 CAR H2344 with two bullets the property of the said Lake Oil Filling Station and Sekepa Security Guard. It was further alleged that immediately before and after the time of such stealing, they used actual violence, iron bar and machete to intimidate the on-duty station workers Fahamu Yusuph (PW1) and Mariam Hamis (PW2). In their evidence PW1 and PW2 testified on how they were invaded, intimidated and terrified by those robbers who demanded money from them.

It was PW1's evidence that the robbers not only threatened him but also went to the extent of beating him with a panga until he surrendered to them TZS 4,700,000/= and they left. It was his further evidence that when all these happened to them the watchman was not around; he resurfaced after the incident telling them that he (the watchman) was hijacked. Eventually, the incident was reported to Kahama Police Station, investigation was conducted by Inspector Hatari Kisumo (PW4) and No. D9635 D/SGT Ephraim (PW5). The appellants were arrested and the stolen gun was recovered from the house of the fourth appellant and identified by Andrew Mashimba Kibela (PW3), the owner. The appellants were arraigned before the trial court facing

charges, convicted and sentenced as introduced above. In defence, they all denied to have committed the alleged offences.

At the hearing of this appeal the appellant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms. Salome Mbughuni learned Senior State Attorney who was assisted by Ms. Caroline Mushi, learned State Attorney.

The Court inquired from the appellants to know whether they were ready for the hearing and each of them was ready and adopted his grounds of appeal as part of his oral submission. Thereafter, each preferred to hear the reply from the respondent's side while reserving a right to make rejoinder.

Responding on the first ground of appeal in the fourth appellant's memorandum of appeal as quoted above, Ms. Mbughuni referred us to page 1 of the record of appeal where the charge sheet is found and admitted that it is defective as it contains three counts which were not supposed to be charged together. She submitted that it is settled position that if the offence has already been committed, accused persons cannot be charged with conspiracy. In this regard, she referred us to the case of **Steven Salvatory v. Republic**, Criminal Appeal No. 275 of 2018 (unreported) and argued that it was wrong for the

appellants to be charged with conspiracy. She said, the trial court and the High Court were wrong to convict the appellants of this offence and thus urged us to quash the appellants' convictions in respect of this offence.

Ms. Mbughuni went on to submit that another wrong as far as the charge sheet is concerned was to charge stealing and armed robbery together, which she said was duplicity. According to her, those offences were supposed to be charged in alternative because stealing is a cognate offence of armed robbery. It was her contention that by charging them together, it means that the appellants were prejudiced as they could not prepare their defense properly. In the circumstances, she implored us to exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to quash the appellants' convictions and set aside their sentences in respect of the offence of stealing; and at the same time, expunge it together with the offence of conspiracy from the charge sheet for it to remain only with one offence of armed robbery. She contended further that the prosecution had the obligation to amend the charge sheet so that it could remain with only the offence of armed robbery but, it did not.

However, she said, that defect is curable under section 388 of the Criminal Procedure Act, Cap 20 R.E. 2019, (the CPA).

Notwithstanding the above, Ms. Mbughuni submitted that it is wrong to order a retrial in the circumstances of this case because of the deficiency in the prosecution evidence. She submitted on this account that all the exhibits, including the recovered gun (exhibit P1) seizure certificate (exhibit P2) and the appellants' cautioned statements (exhibit P3) were un-procedurally tendered and admitted during trial. She referred us to the case of **Robinson Mwanjisi & Others v. Republic**, [2003] T.L.R. 218 in which the procedure of tendering and admission of exhibits in court is fully explained.

Specifically on exhibit P2, she argued that if the same will be expunged from the record, it means there will be no proof of the gun which was recovered from the house of the fourth appellant.

Another shortcoming as far as the prosecution case is concerned according to Ms. Mbughuni, is weak identification evidence as the source of light at the scene of crime was not well stated by the identifying witnesses.

She concluded her submission urging us to allow the appeal, quash the convictions, set aside the sentences and set all the appellants at liberty on the first ground, which she said, touches all of them. She did not see the need of arguing other grounds of appeal as that alone is sufficient to dispose of the appeal.

In rejoinder, the appellants unanimously joined hands with Ms. Mbuguni and each of them prayed the Court to allow the appeal and to be set free by the Court.

We have carefully considered the submissions by the parties, record of appeal and the ground of appeal alluded to above. The question we need to determine in this appeal is whether the appellants were fairly tried having been charged and convicted on a defective charge. It is common ground that the charge is a foundation of criminal proceedings upon which a criminal case is built (**Hebron Kasigala v. Republic**, Criminal Appeal No. 3 of 2020; **Rajab Khamis @ Namtweta v. Republic**, Criminal Appeal No. 578 of 2019; **Samwel Lazaro v. Republic**, Criminal Appeal No. 2017 and **Maweda Mashauri Majenga @ Simon v. Republic**, Criminal Appeal No. 255 of 2017 (all unreported).

In the current appeal the charge sheet which made a foundation of the proceedings before the trial court contained three offences which occurred in the same transaction. The offence of conspiracy to commit armed robbery was charged together with armed robbery, the offence which allegedly was agreed to be committed by the appellants. In the circumstances, we agree with Ms. Mbughuni that since the intended offence was said to have been committed, it was wrong for the conspirators to be charged again with conspiracy having been fulfilled their mission. In this respect, while dealing with a situation where the appellants were charged and convicted with conspiracy and armed robbery in **Magobo Njige & Another v. Republic**, Criminal Appeal No. 442 of 2017 (unreported), the Court stated as follows: -

"It is settled law that, the offence of conspiracy cannot stand where the actual offence has been committed. In this regard it was not proper to charge and convict the appellants of the offence of conspiracy."

In the light of the above decision, we restate that it was wrong in law to charge and convict the appellants of conspiracy and armed robbery in the same charge as conspiracy is an offence capable of standing on its own.

As regards the third count of stealing we as well agree with Ms. Mbughuni that in the circumstances of the current case, it was not supposed to be charged separately from armed robbery. We say so because for the offence of armed robbery to stand, it is a mandatory requirement that theft must be proved as a necessary ingredient. The offence of armed robbery is created under section 287A of the Penal Code which provides: -

*"A person **who steals anything**, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property commits an offence of armed robbery and shall on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment".*
[Emphasis added].

Since stealing is a cognate offence to armed robbery, it ought not to have been charged together with armed robbery in the circumstances of the present case. This is due to the fact that stealing is within armed robbery and thus a clear demarcation could not be drawn in the

particulars of the offences to enable the appellants properly defend on each of them without difficulties and making repetitions.

Generally, it is our observation that the charge sheet which was a foundation of criminal trial against the appellants was duplex and hence defective. The Court had the opportunity to discuss the term duplex in ***Director of Public Prosecutions v. Morgan Maliki & Nyaisa Makori***, Criminal Appeal No. 133 of 2013 (unreported), and it stated that: -

"...A charge is said to be duplex if two distinct offences are contained in the same count or where an actual offence is charged along with an attempt to commit the same offence."

See also: **Director of Public Prosecutions v. Pirbraksh Asharaf & 10 Others**, Criminal Appeal No. 345 of 2017; **Issa Juma Idrisa & Another v. Republic**, Criminal Appeal No. 218 of 2017; **Ramadhani Mwanakatwe & 3 Others v. Republic**, Criminal Appeal No. 198 of 2018; and, **Adam Angelius Mpondi v. Republic**, Criminal Appeal No. 180 of 2018 (all unreported).

We observe further that despite the defects in the charge sheet placed before the trial magistrate, there was no order for amendment made to comply with the requirements of section 234(1) of the CPA

which allows amendment to be done in any stage of the trial; in the following terms: -

" where in any stage of the trial, it appears to the court that the charge sheet is defective, either in substance or in form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or additional of the new charge as the court thinks necessary to meet the circumstances of the 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 the subsection shall be made upon such terms as the court shall deem just."

It is so unfortunate that in the current case the record is silent as to whether or not the prosecution or trial court noticed the defects during trial. Worse enough, with respect, even the first appellate court did not notice this defect. We entertain no doubt that being found guilty and convicted on a defective charge, the appellants were not fairly tried by the trial court and the decision of the High Court confirming their convictions and sentences was without any legal justification. In addition, we take into consideration that Ms. Mbughuni highlighted to us that the prosecution had no sufficient evidence to sustain the appellants'

convictions following procedural irregularities in tendering and admission of exhibits during trial and poor identification of the appellants at the scene of crime. In totality, we find that the appellants faced illegal and unfair trial which at any rate cannot attract an order for a retrial. We therefore allow the sole ground of appeal.

In the circumstances, we allow the appeal, nullify the proceedings of both courts below, quash the convictions and set aside the sentences imposed upon the appellants. We order their immediate release from the prison unless they are otherwise lawfully held.

DATED at SHINYANGA this 20th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 23rd day of August, 2021 in the presence of appellants in person and Mr. Jukael Ruben Jairo, learned State Attorney for the respondent/Republic is hereby certified the true copy original.


D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL