IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 6 OF 2019

KALI s/o KULWA @ NYANGAKA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Sumbawanga)

(Mambi J.)

dated the 22nd day of November, 2018
in
(DC) Criminal Appeal No. 52 of 2016
.....

JUDGMENT OF THE COURT

15th & 17th September, 2021

GALEBA, J.A.:

In Criminal Case No. 108 of 2015, Kali Kulwa Nyangaka, the appellant, was convicted by the District Court of Nkasi sitting at Namanyele on a charge of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002] (now R.E. 2019) (the Penal Code). He was consequently sentenced to thirty years imprisonment.

The brief facts material to the case in the trial court and ultimately, to this appeal is that sometime previous to 13th November 2015, Shigela Nchimbi Halawa, PW1 a peasant and pastoralist had sold

about 20 herds of cattle and was paid TZS. 18,000,000/= for the disposed livestock. Because of the presence of many guests at his home as there was wedding celebrations of his son, Liku Shigella going on, he decided to take the money to his friend who was living in another village called Nkata on 13th November 2015. On his way to Nkata, particularly when he reached Mfisi area, he met a motorcycle whose rider was the appellant ferrying two passengers one of whom being his own paternal uncle, one Charle Lupondije and another individual, he could not readily identify. The motorcycle stopped and Charle Lupondije greeted PW1 by giving him a hug. Suddenly, the appellant withdrew a machete and another person whose identity was not ascertained held an axe ready to attack him. He was placed in a state of imminent danger and confusion. Amidist the scuffle, the bandits invaded him and managed to snatch the said TZS. 18,000,000/= from PW1's pockets of his jacket. Simultaneously, to the sudden invasion of PW1, the latter raised alarm for assistance, in response to which Emmanuel Sabuni, PW3 who was working on his farm in the neighbourhood and James Stima, PW5, who was grazing livestock in the vicinity of the scene of crime, appeared to assist. Noting the duo coming to PW1's aid, the criminals hurriedly took to their heels, obviously, with the loot. Luckily, the thieves abandoned at

the scene of crime, the motor cycle with Registration No. MC 134 AUN, which had the name "Kali Kulwa", at the rear. Together with it, the thugs also left behind the axe, the machete and a metal bar used to sharpen iron tools like bush knives and machetes.

PW1 and PW3 took all that had been abandoned by the robbers at the scene of crime to Kate Police Station. When they got to the station, to their astonishment, they found the appellant already there reporting a different incident, which the police did not take seriously following the account of PW1 and PW3, on the robbery for which they were in possession of exhibits from the scene of crime including the motorcycle bearing the name of the appellant. The appellant was therefore arrested instantly and held in custody.

As indicated above his trial at the District Court yielded him a jail term of thirty years. His first appeal to the High Court was not successful, it was dismissed. Aggrieved by that dismissal, he has preferred the present appeal. The appeal is predicated on thirteen grounds, but for reasons that will soon become clear, we will neither reproduce them in this judgment, nor refer to the substance of all the grounds in details.

When this appeal was called on for hearing, the appellant appeared in person without legal representation but the respondent, Director of Public Prosecutions (the DPP) had the services of Mr. Paschal Marungu, learned Principal State Attorney. The appellant adopted his grounds of appeal and indicated to us that he preferred Mr. Marungu to respond to the grounds first, so that he could rejoin, if he would find it necessary.

At the outset, Mr. Marungu supported the appeal because, according to him, **first**, grounds 1, 2 and 3 raise valid issues of law, and **two,** the offence with which the appellant was charged, was not proved to the required standard such that grounds 11, 12 and 13 have merit.

Before he could take the floor to address the Court on the above grounds he was supporting, he submitted that grounds 4, 5, 6, 7, 8, 9 and 10 were all never raised in the High Court, in which case this Court has no jurisdiction to determine them. To support his contention, the learned Principal State Attorney referred us to this Court's decision in the case of **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018 (unreported), where it was held that this Court has no jurisdiction to entertain a factual issue that was not first raised and decided upon by the court from which the appeal emanates. With the latter submission

from the learned Principal State Attorney, we feel obliged, to consider the merits of his contention and make a decision on it first.

On the issue of new factual grounds as listed by the learned Principal State Attorney, we have critically reviewed them and we are in agreement with him that grounds 4, 5, 6, 7, 8, 9 and 10 raise new complaints on factual matters that were not raised and therefore not considered by the High Court for their determination. In the case of **Godfrey Wilson** (supra), this Court observed as follows on the same subject:

> *"After having looked at the record critically, we find that, as the learned State Attorney submitted, grounds Nos 1, 2, 3, 5, 6, 7 and 8 are new. With an exception of the 6th ground of appeal which raises a point of law, as was stated in* ***Galus Kitaya*** *and* ***Hassan Bundala's cases*** *(supra), we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, we refrain ourselves from considering them."*

In the appeal before us, as the grounds that were referred to us by Mr. Marungu are factual matters and were not raised or decided upon by the High Court, we are duty bound to refrain ourselves from considering them as we did in the cited case of **Godfrey Wilson** (supra).

Having trimmed down the grounds from thirteen to six, we will then proceed to determine Mr. Marugu's submission in respect of the first, second and third grounds of appeal which raise legal issues surrounding the legality of the charge sheet, a legal document upon which the entire trial of appellant was hinged. Depending on the outcome of the three grounds, we may or may not determine the 11th, 12th and 13th grounds of appeal.

Before getting to considering arguments of Mr. Marungu, for ease of comprehension and close follow up of arguments, we find it appropriate to reproduce the charge sheet subject of the appellant's complaints in the said three grounds of appeal. The charge sheet is contained at page 19 of the record of appeal and it is as follows;

"TANZANIA POLICE FORCE

STATEMENT SHEET

NAME, AGE OR NATIONALITY OF THE PERSON(S) CHARGED.

NAME: KALI S/O KULWA @ NYANGAKA

AGE: 34 YRS

TRIBE: SUKUMA

OCCP: PEASANT

RELLI: PAGANI

RESID: MFINGA RUKWA

*OFFENCE, SECTION AND LAW: ARMED ROBEY **(ROBBERY)** C/S 287**A** OF THE PENAL CODE (CAP 16 RE:2002)"*

STATEMENT OF OFFENCE: That KALI S/O KULWA @ NYANGAKA is charged on 13th day of November 2015 at about 17:00hrs at Kate village withing Nkasi District in Rukwa Region did steal Tsh. 18,000,000/= the property of SHIGELA S/O SHIMBI and immediately before and after that stealing did us bush knife "panga" to threaten the said SHIGELA S/O SHIMBI in order to obtain the said property.

STATION: NAMANYELE

*DATE: 2**6**/11/2015* *sgd*

PROSECUTOR"

[Emphasis added]

In the above quoted charge sheet, the word "**ROBEY"** after ARMED is crossed off and just above that crossed word, there is written in free hand the proper word **ROBBERY** that we have indicated in bold and brackets. Capital letter "**A"** next following 287 is inserted thereat by

free hand, although the figure 287 before the letter is typed. Finally in the last line of the charge sheet, there is a date, *2**6**/11/2015.* Although the whole date is inserted in free hand, the bold figure *"**6**"* after Arabic numeral 2, seems modified from the original either figure "5" or "0". In our view, the substance of the appellant's complaints in the 1st, 2nd and 3rd grounds of appeal is this:

> *"The learned High Court Judge erred in law for upholding conviction and sentence which resulted from a trial based on an incurably defective charge."*

In elaborating, the anomalies of the charge sheet, whose form and content has been reproduced above the learned Principal State Attorney was essentially concerned with the insertion of capital letter "**A"** next following section 287, and not so much on the other two anomalies. He contended that the charge was drawn showing that the appellant offended section 287 of the Penal Code and later and later capital letter "**A"** was inserted. He submitted, that the respondent was not aware of who did the insertion and when was it done, adding that, in any event, such an insertion ought to have been preceded by leave or an order of the trial court to amend or alter the charge under section 234(1) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA).

Mr. Marungu submitted that he reviewed the record of the trial court as contained in the record of appeal but he did not trace anywhere, where the prosecution prayed for leave to amend the charge. He argued further that he did not come across in the trial records any court order granting leave to make any alterations to the charge. His submission was, in effect, that if the appellant's original charge was preferred under section 287 of the Penal Code and not section 287A of the same Code, then at the time the charge was lodged, the statement of offence was not at harmony with the particulars beneath it, because section 287 creates an offence of attempted armed robbery not armed robbery which is an offence to which the particulars relate.

In any event, he argued, the alterations were illegal without any court order and in the circumstances, he moved the Court to hold that the charge sheet upon which the appellant was tried, convicted and punished was incurably defective. He beseeched us to hold that the defects in the charge cannot be glossed over or be cured under section 388 of the CPA and that this Court be pleased to follow its own precedent in the case of **Zebedayo Mtetemela v. R**, Criminal Appeal No. 484 of 2015 (unreported), where in similar circumstances, this Court observed that such alteration constituted a defect that was incurable. He

implored us to uphold the first, second and third grounds of appeal and allow the appeal, adding that since the conviction was based on an unlawful charge, the sentence that precipitated therefrom was equally illegal and it ought to be set aside after nullifying the whole trial proceedings.

When we inquired from the appellant, who had been attentively listening to the Principal State Attorney all along, whether he had anything to add or any comment, being a layman, he had nothing useful to improve on the submission of the respondent, rather he prayed for an early release from prison because he did not commit the robbery complained of.

In our view, the issue for determination in this matter, considering Mr. Marungu's submission, we think, is whether the defects that the learned Principal State Attorney pointed out in the charge sheet are offensive of the provisions of section 234(1) of the CPA and therefore incurably fatal to the extent that the situation cannot be remedied by section 388 of the CPA. We will in turn get to a focused deliberation in a quest to determine the issue identified above, and we will start with the said section of the CPA.

Section 234 of the CPA, which Mr. Marungu submitted that, it was breached. Section 234(1) and (2) (a) of the CPA provides as follows:

> *"234.-(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 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 this subsection shall be made upon such terms as to 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****;"*

[Emphasis added]

In view of the above provision, we are of the considered opinion that, once a charge is lodged, any amendment or alteration to be made on it, it must be with a prior permission of the court under the above quoted section, and when an amendment is effected then the altered

charge must be read over to the accused person for him to plead. As amply demonstrated above by Mr. Marungu, the prosecution themselves are not aware as to who, when and how the alterations were made to the charge sheet. There is too, no indication on record that any one from the prosecution prayed for any amendment of the charge and was allowed to effect the amendments. In the circumstances, we are in agreement with the learned Principal State Attorney that the provisions of section 234(1) and (2) (a) of the CPA were violated.

Fortunately, it is not the first time that this Court is facing the same scenario. In the case of **Zebedayo Mtetema** (supra), that was cited to us by the learned Principal State Attorney, the enabling provisions in the charge sheet had been written by hand and the alteration was not initialled by the person who effected it and there was no date of when the alteration was made. The alteration in that case, like in the case before us, was not made pursuant to any court order. After holding that the provisions of section 234(1) and (2) (a) of the CPA were offended, the Court zeroed down to the following position:

> *"In the instant case, there is no order of the court to make the alterations seen therein. Also, no signature and date when such alterations were made. It is very*

dangerous to rely on the unauthenticated alterations. Surely, the defect rendered the charge sheet incurably defective. We therefore find all the proceedings before the trial court and the High Court a nullity; we quash the conviction and set aside the sentence."

We will definitely adopt the above position as we go, but before that, we must also state that not only that section 234(1) and (2) (a) of the CPA was breached, but also section 135(a)(ii) of the same Act was not spared in the process. The latter section provides that:

"135. The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section—

(a) (i) N/A;

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, ***shall***

contain a reference to the section of the enactment creating the offence;"

[Emphasis added]

We have observed that the above provision was also offended because, the section under which the applicant was charged, was altered without first seeking and obtaining a court order under section 234(1) and (2) (a) of the CPA as observed earlier on.

For the above reasons we are satisfied that the charge upon which the appellant was tried, convicted and ultimately punished with a term of thirty years imprisonment, was incurably defective and cannot be saved with the provisions of section 388 of the CPA. As the charge, upon which the validity of the trial depended, was defective as observed, no competent appeal could have proceeded or stemmed from such proceedings. That is to say, seeking to consider or to determine grounds 11, 12 and 13 which grounds are challenging the said appeal, would be futile, worthless and inconsequential.

Consequently, we allow the appeal and nullify the entire proceedings of both the trial and the High Court including their respective judgments. In the same vein, we quash the conviction of the appellant and set aside the sentence of thirty years imprisonment that

was unlawfully imposed upon him. Eventually, we acquit the appellant and order his immediate release from prison unless he is held there for another lawful cause.

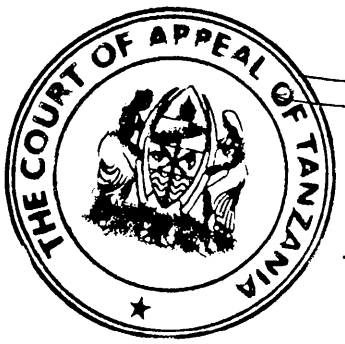
DATED at **MBEYA**, this 17th day of September, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 17th day of September, 2021 in presence of the appellant in person – unrepresented and Mr. Hebel Kihaka, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL