IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 333 OF 2018

ANOLD ELIA FIKIRI.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from RM'S Court of Mbeya Extended jurisdiction at Mbeya)

(Hon. G.N Herbert –SRM Ext, J)

dated the 17th day of July, 2018

in

Criminal Appeal No. 2 of 2018

JUDGMENT OF THE COURT

15th & 17th September, 2021

MUGASHA, J.A.

In the Resident Magistrates' Court of Mbeya at Mbeya, the appellant was arraigned as hereunder:

"STATEMENT OF OFFENCE
GANG ROBBERY, Contrary to Section 286 (1) & (2) and 287 (C) of the Penal Code [CAP 16 R.E 2002] as amended by section 10 & 10 B of the Written Laws (Miscellaneous Amendments) Act, 2011.

PARTICULARS OF THE OFFENCE: -

ANORD ELIA @ FIKIRI on the 13th day of May, 2017 at Iwambi area within the City and Region of Mbeya did steal from one OSIAH S/O ELIAH @MWARUANDA One million two hundred and ten thousand shillings (Tshs 1,210,000/=) and immediately before and after stealing did use actual violence to the said ANORD ELIA @ FIKIRI in order to obtain and retain the property stolen.

Dated at Mbeya this 19th day of June, 2017

Sgd

CATHERINE GWALTU

SENIOR STATE ATTORNEY

The appellant denied the allegation subsequent to which the prosecution paraded two witnesses in support of its claims. In a nutshell, a brief account of the prosecution account was to the effect that, on the fateful day around 10.00hrs, the appellant withdrew a sum of TZS. 1,000,000/= at the National MicroFinance Bank Automated Teller Machine at Usongwe Branch at Mbalizi. Then, he boarded a motor vehicle which was driven by the appellant so that he could be taken home. In the said motor vehicle, there were two other persons, a woman and a man. According to PW1, the appellant intimated to have an emergency at Iwambi and requested the appellant to accompany him and PW1 obliged. While enroute to Iwambi, the appellant together with his

friends snatched PW1's bag which contained money he had withdrawn from the bank, threw him outside the car and drove off. Throughout the trial, PW1 testified that the appellant was not a stranger as he knew him before the incident. However, although on the same day he reported the fateful incident to a ten cell leader and Mbalizi police station, he did not mention the appellant to be the assailant. Later, on 16/5/2017, upon the direction of the Deputy OCCID the appellant was arrested by the police while at his residence. According to the evidence of PW2, the appellant admitted to have defrauded the appellant and shared the loot with his colleagues.

In his defence, the appellant dissociated himself from the prosecution's accusation and protested his innocence. He told the trial court that he was arrested by three police officers who approached him requesting to hire his car but on being told that the car had a mechanical defect they opted to take him to the police station. At the police station the appellant denied to have defrauded PW1 and told the police that he had an agreement with PW1 who had agreed to provide a sum of TZS, 2,500,000/= for the project of cultivating watermelons. Ultimately he was arraigned in court.

On the whole of the evidence, the trial court accepted as truthful the prosecution version found the appellant guilty, convicted and sentenced him

to imprisonment for thirty years. The appellant unsuccessfully appealed to the High Court where the conviction and the sentence were confirmed hence the present appeal. In the Memorandum of Appeal, the appellant raised five grounds of complaint. He also raised two additional grounds in Supplementary Memorandum of Appeal. In a nutshell, the appellant seeks to fault the first appellate court for upholding the trial court's conviction despite the unreliable testimonies of the prosecution witnesses and a defective charge.

At the hearing of the appeal, the appellant adopted the grounds of appeal in the memoranda and opted to initially hear the submission of the learned Senior State Attorney while reserving the right of rejoin if need would arise. Mr. DeusDedit Rwegira, learned Senior State Attorney who represented the respondent, at the outset intimated to us that he was not supporting the appeal. He opposed the appellant's complaint on a defective charge, arguing that the omission to mention other assailants involved in the gang robbery incident and the person to whom the violence was directed is remedied by the victim's account who at the trial testified to have been attacked by more than one person and that the appellant was not a stranger to him. In this regard, the learned Senior State Attorney argued,

the omission in the stated charge is curable under the provisions of section 388 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) and in the overriding objective principle. To support his propositions, he cited to us the cases of **BAHATI MAKEJA VS REPUBLIC,** Criminal Appeal No 118 of 2006 and **JAMALI ALLY @ SALIM VS REPUBLIC,** Criminal Appeal No. 52 of 2016 (both unreported). It was also Mr. Rwegira's submission that, in the wake of strong testimony of the victim, the charge against the appellant was proved beyond reasonable doubt and as such, the conviction is justified. Finally, Mr. Rwegira urged the Court to dismiss the appeal in its entirety. On the other hand, the appellant being a layperson had nothing useful to add apart from praying that the appeal be allowed and he be set at liberty.

We are aware that, this being a second appeal, the Court rarely interferes with the concurrent findings of fact by the Courts below. This was emphasized in the case of **DIRECTOR OF PUBLIC PROSECUTIONS VS JAFARI MFAUME** [1981] TLR 149 as the Court among other things held:

> *"...This is a second appeal brought under the provisions of section 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies where there are no misdirections or non-directions on the*

evidence by the first appellate Court. In cases where there are misdirections or non-directions on the evidence a Court is entitled to look at the relevant evidence and make its own findings of fact."

We shall accordingly be guided by the said settled principle in determining the present appeal.

We have carefully considered the record and the submission of the learned Senior State Attorney which partly hinges on the issue of the defective charge sheet and its effects on the trial which constitutes the second ground of the appellant's complaint in the supplementary memorandum and indeed a point of law for the Court's determination. On this account, we had earlier reproduced the charge sheet which shows that, the appellant was charged with gang robbery contrary to sections 286 (2) of the Penal Code which categorically stipulate as follows: -

"(2) Where ***two or more persons steal*** *anything, and at or immediately before or immediately after stealing,* ***use or threaten to use actual violence to any perso****n or property in order to obtain or retain the things stolen commit any offence of gang robbery."*

[Emphasis supplied]

The bolded expressions are among the crucial elements of the offence of gang robbery which must be stated in the particulars of the offence in order to enable an accused person to understand the nature of the charged offence. However, in the case under scrutiny only one assailant was mentioned and the person to whom the violence was directed not mentioned and instead, the name of the appellant is reflected in the charge as the victim of the alleged violence. While the burning issue is as to what is tied to the said shortcoming, it should be recalled that, Mr. Rwegira contended that the omission is curable under the provisions of section 388 (1) of the CPA.

In the case of **DEUS KAYOLA VS REPUBLIC**, Criminal Appeal No. 142 of 2012 (unreported) the Court was confronted with a situation whereby the charge of rape was challenged for being preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). The Court made a following observation:

> *"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131(1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he*

was charged with the offence of raping a girl of 12 years old."

The above decision was cited in another case of **JAMALI ALLY @ SALIM VS REPUBLIC** (supra), whereby the Court was confronted with a situation whereby the provision under which the appellant was charged was not properly cited. The Court among other things, stated:

"In the instant appeal before us, the particulars of the offence were very clear in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age."

In yet another case of **KHAMISI ABDEREHEMANI VS REPUBLIC**, Criminal Appeal No.21 of 2017 (unreported), the Court had to resolve a contentious issue whereby the statement of offence in the charge under which the appellant was arraigned for rape cited sections 130 (1) (2) (e) and 131 (1) instead of the proper sections 130 (1), (2) (b) and 131 (1) of the Penal Code. In addressing the anomaly, the Court concluded that, the defect was curable under section 388 of the CPA as it did not prejudice the appellant because the

particulars of the offence in the charge sheet were sufficient to inform the appellant on the nature of the offence he was facing.

It is thus, settled law that non citation of a proper provision of the law under which the person is charged, can be remedied in the particulars of the offence which must sufficiently state the elements of the offence so as to inform the accused the nature of the offence charged. Therefore, in our serious considered view, this being the charge of gang robbery with the particulars of the offence omitting to state other assailants apart from the appellant and the person against whom the violence was directed, the present case is distinguishable from what we said in the cases of **JAMALI ALLY @ SALIM VS REPUBLIC** (supra), **KHAMISI ABDEREHEMANI VS REPUBLIC** (supra) and **DEUS KAYOLA VS REPUBLIC** (supra). We are fortified in that account because the circumstances of the matter under scrutiny are close to what transpired in the case of **MUSSA MWAIKUNDA VS REPUBLIC** (supra) where the particulars of the charge omitted to allege 'threatening' which is an essential ingredient to the offence of attempted rape. Having seriously reflected on the effect of such omission the Court stated as follows:

> *"...the issue is whether the charge facing the appellant was curable under section 388 (1) of the Criminal*

Procedure Act, 1985. With respect, we do not think that it was curable. We say so for two main reasons. ***One, since threatening was not alleged in the particulars of the offence the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, as already stated, the complainant did not state anywhere in her evidence that she was threatened by the appellant. If she had alleged any threat may be there could have been room for saying that the appellant knew the nature of the case that was facing him."***

[Emphasis ours]

In the case at hand, in the wake of the missing crucial elements constituting the offence of gang robbery to which the appellant stood arraigned, the appellant was not sufficiently informed as to the nature of the offence charged which is contrary to the provisions of sections 132 and 135 (a) (i) of the CPA which regulate the content and the manner in which a charge must be drawn. We do not agree with Mr. Rwegira's suggestion that the shortfall can be remedied by the victim's testimony and we say so because of the contradictory account of the prosecution on the accusations against the

appellant. While PW1 claimed to have been gang robbed, PW2 had a different version as he categorically stated that upon interrogation at the police station, the appellant admitted to have defrauded the victim. This cements the fact that, the defective charge did not place the appellant in a position to make an informed plea and he might as well have pleaded to a totally different offence.

Apparently, it really taxed our minds as to why the prosecution did not invoke section 234 of the CPA to seek leave to amend the charge so to include the missing crucial essential elements of the charged offence throughout the pendency of the trial which reigned for about five months. This leaves a lot to be desired. It follows that, the omission in the particulars of the charge unduly prejudiced the appellant and the trial was vitiated and so are the proceedings and the judgment of the first appellate Court which are a nullity. In this regard, the omission is fatal and we do not agree with the learned Senior State Attorney that, it is curable under the provisions of section 388 (1) of the CPA as it occasioned a failure of justice and it cannot be safely vouched that the appellant was fairly tried. In the case of **BAHATI MAKEJA VS REPUBLIC** cited to us, the Court addressed the magnitude on the consequences of trial court addressing an accused person who is represented by an advocate on the manner of giving his defence after the close of the prosecution case which is

not the case here. Similarly, in the wake of an incurable omission to list crucial elements of the offence charged, the overriding objective principle cannot be invoked and to do otherwise would be condoning contravention of the statutory provisions and besides, this Court has on several instances emphasized that the principle should not be applied blindly as seems to be suggested by Mr. Rwegira in the present case.

Apart from the aforesaid, even if the charge was properly framed, we have gathered that the prosecution account did not prove a charge against the appellant. It is glaring on the record that, although PW1 testified that the appellant was not a stranger and it being that the offence is alleged to have been committed at 17.00 hrs. in broad day light, failure to mention the appellant to be the assailant at the earliest opportunity be it to the ten cell leader or the police leaves a lot to be desired. This renders PW1's account unreliable and not trustworthy and the two courts below misapprehended the nature and quality of the evidence which was acted upon to ground the conviction of the appellant. This necessitated the Court's intervention as stated earlier to look at the relevant evidence and make our own findings of fact.

In view of the aforesaid, we find the appeal merited and it is allowed. Thus, the conviction is quashed and the sentence is set aside. We as well,

nullify the proceedings and judgment of the first appellate court as they stem on null trial proceedings and judgment based on the defective charge. Consequently, we order the immediate release of the appellant from custody unless if he is held for some other lawful cause.

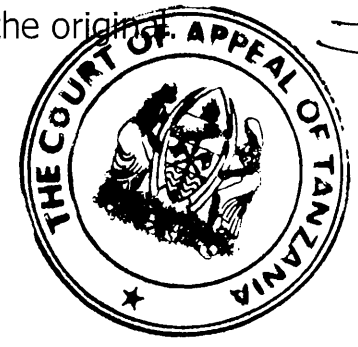
DATED at **MBEYA** this 17th day of September, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This judgment delivered this 17th day of September, 2021 in the 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