IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 386 OF 2018

PETER EPHRAIM @ WASAMBO.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Mambi, J.)

dated 18th day of October, 2018
in
Criminal Appeal No. 53 of 2018

.....

JUDGMENT OF THE COURT

14th & 20th September,2021.

FIKIRINI, J.A.:

The District Court of Sumbawanga, sitting at Sumbawanga, convicted the appellant for the offence of armed robbery, contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] now [R.E. 2019]. He was sentenced to 30 years imprisonment. Aggrieved by both conviction

and sentence, he unsuccessfully appealed to the High Court, hence this second appeal.

Before the trial court, it was alleged that on the 17th day of January 2013 at around 20.00 hours at Kitete village within Sumbawanga District in Rukwa Region, the appellant stole one motorcycle make Sanya with Registration No. T995 CJT valued at Tzs. 2,000,000/= the property which Peter Sonkwe was entrusted by the owner, for hiring services, and immediately before and after such stealing the appellant used a knife to obtain and retain the said property.

The appellant denied the charge, and in proving their case, the prosecution summoned three witnesses. PW1-Peter Sonkwe a victim of the alleged armed robbery, had testified that on 17th January 2013 at 17.00 hours, the appellant, who was in a company of a boy aged about 7 years hired PW1, to take them to Kaengesa village, at an agreed fare of Tzs. 12,000/=, which PW1 did. After the boy was dropped off at Kaengesa, the appellant then asked PW1 to take him to Kitete Village at an agreed fare of Tzs. 20,000/=. The journey took off at around 20.00 hours and after

arriving in the bush area, the appellant threatened PW1 with a knife and ordered him to surrender the motorcycle. For fear of his life and frightened PW1 lost control over the motorcycle and they fell.

The appellant picked himself up and threatened to stab PW1 using a knife. In defence, PW1 used his helmet as a shield and fled to the bush. While in the bush he heard his motorcycle riding towards Kitete direction. He came out of the bushes and decided to walk up to Mwazye and Mbeya junction. On the way, he asked people he met as to the nearest Police station. Directed to Kaengesa Police station he went there and reported the incident and was issued with RB. This was followed by his arrest by the owner of the motorcycle. As a result, he was detained at the Police station for 5 days. He was asked to pay Tzs. 2,000,000/= the value of the motorcycle. He failed to pay the demanded amount, he thus surrendered his plot and a house.

In the days that followed, PW1 was informed by one Richard that the appellant was at Mwimbi. He went to Mwimbi and arrested the appellant.

PW2 one Daudi Cheka had testified that on 17th January 2013 while looking for a motorcycle for hire, he saw PW1 discussing with a client. PW1 informed him that he had been hired to go to Kaengesa. It was only later he heard that PW1 was robbed by the client who hired him.

PW3-G.4767 DC Franco an investigator in the case, his evidence was that he interrogated the appellant and recorded his cautioned statement. The cautioned statement was tendered and admitted in evidence as exhibit P1.

The appellant fended for himself during the defence case. It was his account that he was arrested on 11th December 2017 at Mwimbi village at 10.00 hours by Afande Mwenda on an allegation that he lost luggage of a passenger, in the name Georgina Kutazungwa, worth Tzs. 45, 000/=. After his arrest he spent 5 days in Police lock-up without seeing the complainant. He was later transferred to Kaengesa Police post where he spent 5 days before he was transferred to Laela Police post on 21st December 2017. He was at Laela Police post until 8 of January 2018 when he was transferred to Sumbawanga Police station, where his statement was recorded, the fact

which was refuted by the appellant. On 17th January 2018, he was formally charged for armed robbery, the charges which he declined to have committed.

As intimated earlier, this is the second appeal. In his six grounds of appeal filed, the appellant complained of the following:

1. *That, the High Court Judge erred in law and fact by dismissing the appellant's appeal without taking into account that the appellant was charged under a non-existent provision.*
2. *That, the appellant was convicted relying on a single witness PW1 only without any corroboration.*
3. *That, the said owner of the motorcycle by the name Inno a Police Officer was not called at the trial court to support the evidence of PW1.*
4. *That, exhibit P1 was admitted at the trial illegally without conducting inquiry against the law and the High Court Judge did not determine the issue on his judgment.*
5. *That, the defence of the appellant was not considered by the High Court Judge in his judgment.*

6. *That, since the beginning of the trial and in the first appellate court, the case against the appellant was not proved by the prosecution side as required by law.*

On the 14th September 2021, when the appeal came up for hearing, the appellant appeared in person unrepresented while Mr. Simon Peres learned Senior State Attorney and Ms. Shiyo Flavia learned State Attorney appeared for the respondent.

We asked the appellant, how he would wish to proceed with the hearing of his appeal and his response was, we adopt all his grounds of appeal and consider them.

On his side, Mr. Peres outright informed us that he supported the appeal. He went on contending that both before the High Court and this Court, the appellant even though the number of the raised grounds of appeal is 6, however, the 3rd ground of appeal before us was new and urged us not to consider it. To support his position, he referred us to the case of **Godfrey Wilson v R,** Criminal Appeal No. 168 of 2018 (unreported).

We considerately agree that this ground is new as was not raised before the two lower courts. It is a settled principle that a matter which was not raised and determined by the High Court cannot be entertained by this Court on the second appeal unless it involves a point of law. See also: **Hassan Bundala Swaga v R,** Criminal Appeal No. 385 of 2015, and **Nasib Ramadhani v R,** Criminal Appeal No. 310 of 2017 (both unreported). In **Hassan Bundala Swaga** (supra), we stressed that:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

The 3rd ground will thus not be entertained.

Concerning the remaining grounds starting with the 1st ground, that the charge was defective for being predicated on non-existing provision and that the statement of the offence as reflected on page 20 did not disclose to whom the force was directed. The learned Senior State Attorney

contended that it is a legal requirement under section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA), for the charge sheet and statement of offence to be precisely stated to allow the accused person to understand the charge preferred against him. Failure to disclose that is fatal. The learned Senior State Attorney cited to us the case of **Noah Paulo Gonde & Another v D.P.P,** Criminal appeal No. 456 of 2017 (unreported) to drive home his point.

To appreciate the point raised, we find it pertinent to reproduce the charges preferred against the appellant which was couched as follows:

"CHARGE

STATEMENT OF OFFENCE

***ARMED ROBBERY**: Contrary to section 287A of the Penal Code [Cap 16 R. E. 2002]*

PARTICULARS OF OFFENCE

PETER S/O EFRHRAHIMU @ WASAMBO

on the 17th day of January 2013 at Kaengesa village

within Sumbawanga District in Rukwa Region did steal one motorcycle make Sanya ***Reg. No. T 995 CJT*** *valued at Tzs. 2,000,000/= the property of Peter Sonkwe and immediately before and after such stealing they used a knife to obtain and retain the said properties."*

In the case of **Machemba Pastory v R,** Criminal Appeal No. 229 of 2017 (unreported), we were faced with the same scenario and we decided that:

"*Clear from the cited charge sheet, there was no mention of the person or persons against whom the said violence was directed. This was against the settled law as demonstrated in case law such as* ***Mawazo Juma v The Republic****, Criminal Appeal No. 208 of 2017, and* ***Joseph Maganga Mlezi v The Republic,*** *Criminal Appeal No. 536 of 2015 (both unreported). In the former case, we quoted the following passage from* ***Kashima Mnaeli v The Republic,*** *Criminal Appeal No. 78 of 2011 (unreported):- "Strictly speaking,* ***for a charge of any kind of robbery to be proper, it must***

contain or indicate actual personal violence or threat to a person whom robbery was directed. *Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat, but also the person on whom the actual violence or threat was directed."*

The significance of precisely stating the particulars of the offence of an armed robbery charge cannot be underrated. This means the person to whom the threat or violence was directed must be named. The rationale is the accused person must be availed with all the information necessary to enable him to understand the case against him and be able to mount his defence. Furthermore, failure to avail the accused person with such important information contravenes the dictates of section 132 of the CPA, as rightly submitted by the learned Senior State Attorney.

In the case before us, like in the above referred cases, it is clear that the particulars of the offence of armed robbery did not disclose such

aspect. The threat or violence used immediately before or after in order to obtain and retain the motorcycle stolen was not indicated to whom it was directed. Certainly, the accused person could not understand or appreciate the charge preferred against him or even fathom the alleged threat or violence without naming to whom the same was directed.

The defect, in our considered view, is incurable. Ordinarily, we would have ended up with this one defect as it would have sufficiently disposed of the appeal. However, we found it pertinent to examine the remaining grounds as well.

On the 4th ground that exhibit P1 was improperly admitted. The learned Senior State Attorney contended that after the objection from the appellant, the court should have conducted an inquiry. Failure to observe that has resulted in a procedural irregularity since the basis of arriving at the appellant's conviction was a result of the consideration of the exhibit. Had the two lower courts properly directed themselves, they would not have reached the decision now subject to this appeal. He urged us to expunge the exhibit.

After exhibit P1 is expunged, the learned Senior State Attorney submitted that the remaining evidence would be that of PW1, which is weak. PW1 did not state that he knew the appellant before. Also, there was no proof that he mentioned the appellant's name when he went to report the matter to any of the four different Police stations, namely Kaengesa, Laela, Mwimbi, and finally Sumbawanga Police station. Similarly, PW2 never indicated knowing the appellant previously. He identified him in court.

The learned Senior State Attorney, in addition, contended that the incident occurred in 2013 but the appellant was arrested in 2017, which raises doubt as to the veracity of PW1's account.

We are in complete agreement with the learned State Attorney's submission in support of the appeal. Looking at page 32 of the record of appeal, when clearing the appellant's cautioned statement for admission, the appellant objected to the admission on the ground that he was never afforded his rights. This means the appellant retracted his confession, the cautioned statement can no longer be said with certainty to have been

procured voluntarily. Under the circumstance, the trial magistrate ought to have conducted an inquiry to satisfy himself that the statement was made voluntary or not. In the case of **Daniel Matiku v Republic,** Criminal Appeal No. 450 of 2016 (unreported), the Court in its previous decision in **Twaha Ali & 5 Others v Republic,** Criminal Appeal No. 78 of 2004 (unreported) the Court held:

> *".....if that objection is made after the trial has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence.....Omission to conduct an inquiry in case an objection is raised is a fundamental and incurable irregularity because if the confession stands out to be crucial or corroborative evidence, an accused would be convicted on evidence whose source is doubtful or suspicious."*

The same issue was also discussed in the case of **Rashid & Another v Republic** [1969] E. A. 138, where the Eastern African Court of Appeal had observed:

> *"The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses if any."*

It was undoubtedly improper and a fatal irregularity for the trial court's failure to conduct an inquiry before admission of the cautioned statement. The statement improperly admitted has to suffer expunging from the record, the exercise which we right away do by expunging exhibit P1 from the record.

We have equally considered PW1's failure to mention the appellant's name when he for the first time reported the incident at Kaengesa Police station and later to the three other Police stations he visited. In the case of **Marwa Wangiti Mwita & Another v Republic** [2002] T. L. R. 39, the

Court discussing the ability to name the suspect at the earliest opportunity held that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

Failure to mention the appellant by name as the one who hired him on a fateful day has further blemished his already weak evidence after expunging exhibit P1. PW1 completely failed to explain how he recognized the appellant, was he his frequent customer, a neighbour, or a friend, to mention the few. Since there was no naming of the appellant at all, it thus makes it difficult to connect the appellant's arrest which occurred almost 4 years later to the commission of the alleged offence.

The 5th ground is that the defence was not considered. The learned Senior State Attorney conceded that the appellant's defence was never considered. He went on contending that the court needed to consider the defence case which has raised some doubts pricking the prosecution case.

Fortifying his position, he cited to us the case of **Hussein Idd & Another v Republic** [1986] T. L. R. 166.

We have gone through the record of appeal and it is indeed correct that both two lower courts did not consider the appellant's case. This is a misdirection. In the **Hussein Idd** (supra), encountered with the scenario the Court held:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

See also: **Joseph Leonard Manyota v Republic,** Criminal Appeal No. 485 of 2015 (unreported).

In conclusion, we agree that the prosecution has not proved the case against the appellant beyond reasonable doubt, the legal standard required in criminal cases. We thus allow the appeal, quash the conviction, and set

aside the sentence imposed against the appellant. We further order his immediate release from prison unless held for other lawful reasons.

It is so ordered.

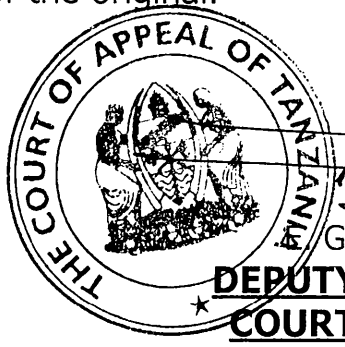
DATED at **MBEYA** this 17th day of September, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 20th day of September, 2021 in the presence of appellant in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for respondent/Republic for the appellant is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL