IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 435 OF 2017

MASUMBUKO MHOJA .....1ST APPELLANT
EMMANUEL DANIEL.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 4th day of August, 2017
in
Criminal Appeal Nos. 121 & 122 of 2015

JUDGMENT OF THE COURT

8th July & 10th August, 2022

KAIRO, J.A.:

In the District Court of Shinyanga at Shinyanga, the above-named appellants were charged of the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). They both pleaded not guilty to the charge.

Upon a full trial, they were convicted and each sentenced to serve thirty (30) years imprisonment with an addition thereto, twelve (12) strokes of the cane. According to the trial court order, six (6) strokes to be inflicted

when entering the prison, and the rest to be inflicted upon completion of the jail sentence.

Being aggrieved, the appellants unsuccessfully appealed to the High Court of Tanzania at Shinyanga. Still determined to protest their innocence, they are now before the Court seeking to challenge both the conviction and sentence imposed by the trial court and upheld by the first appellate court.

For obvious reasons that will shortly come to light, we shall neither reproduce the factual background of this appeal nor the grounds of appeal thereof. Suffices to state that each appellant has lodged a separate memorandum of appeal whereas the first appellant has fronted nine grounds and the second appellant came up with six grounds.

When the appeal was called on for hearing, the appellants appeared in person, unrepresented. On the other hand, Ms. Verediana Mlenza, learned Senior Stat Attorney, teamed up with Ms. Rehema Sakafu and Mr. Jukael Reuben Jairo, both learned State Attorneys to represent the respondent Republic.

Prior to the commencement of the hearing of the appeal on merit, the court *suo motto* probed the parties on the propriety of the charge leveled

against the appellants, specifically on the fact that the particulars of the offence did not state to whom the threat or actual violence was directed to. We thus invited the parties to address the Court on the point of law raised.

The appellants being laypersons had nothing useful to comment on the raised legal issue.

Mr. Jairo on his part readily conceded that indeed the particulars of offence in respect of the charge laid at the door of the appellants did not mention the person to whom the iron bar in the case at hand was directed to. However, according to him, the anomaly was cured by the witnesses' evidence. He contended that the particulars of offence were clear and enabled the appellants to fully understand the nature and seriousness of the offence they were tried for, notwithstanding the pointed-out anomaly. He referred us to the case of **Masalu Kayeye v. Republic,** Criminal Appeal No. 120 of 2017 to reinforce his arguments.

We wish to point out that it is a legal practice that, a point of law once raised, it has to be determined first before embarking on determining the appeal on merit. We shall abide with that settled practice in this appeal

despite the rival submissions from the parties concerning the merit of appeal.

As earlier stated, the appellants have been charged of armed robbery under section 287A of the Penal Code. To appreciate the discussion to follow, we find it apposite to revisit the said provision which provides as follows:

> *"287A. 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].

Our understanding of the quoted provision is to the effect that among the requirements for the charge of armed robbery to stand is the presence of a threat or use of violence being one of the essential elements, and further, to show in the particulars of offence the person to whom that threat or violence is directed. Short of it the charge is rendered defective. The

cases of **Kashima Mnadi v. Republic,** Criminal Appeal No. 78 of 2011 and **Angulile Jackson @ Kasanya v. DPP,** Criminal Appeal No. 162 of 2019 (both unreported) are relevant as far as this this position is concerned.

In **Kashima Mnadi** (supra) the Court, when faced with a situation where the particulars of offence in a charge did not indicate the person to whom the threat or violence was directed, stated as follows: -

> *"Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. 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 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.*** *This requirement is provided under section 132 of the Criminal Procedure Act, Cap. 20 R.E 2002 so that to enable the accused person know the nature of the offence he is going to face."* [Emphasis added].

Flowing from the cited case, the importance of including in the particulars of the offence of armed robbery, the person to whom the threat or violence is directed is to enable the accused who stand charged to understand the nature of the case he is facing. The decision in the cited case went further and categorically stated that, failure to do so, contravenes section 132 of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the CPA) which is couched in mandatory terms. Essentially, the provision provides that the charge or information will be sufficient if it contains, a statement of the specific offence or offences with which the accused persons is charged of, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The Court in the case at hand observed that the charge omitted the said essential elements. For ease of reference, we take liberty to reproduce the particulars of the offence which is at issue in this appeal. The same is crafted as here under:-

PARTICULARS OF OFFENCE

MASUMBUKO S/O MHOJA and EMMANUEK S/O DANIEL in or about the 14th day of April, 2011 at or about 20.00hrs at Mapinduzi Primary School area

within the Municipality and Region of Shinyanga did steal a mobile phone make NOKIA the property of one MWASHAMBA D/O TAMBWE and before the time of stealing and immediately after the time of stealing did use a piece of iron bar in order to steal the said mobile phone."

It is evident from the quoted excerpt that though it is stated therein that the appellants used the piece of iron bar so as to steal the mobile phone, but it is not disclosed whether the said iron bar was used for threatening or actual violence was exerted. But further to whom the use of the piece of iron bar was directed to, which legally is a fatal infraction with an effect of rendering the charge unproven see: **Hassan Iddi Shindo and Another v. Republic**, Criminal Appeal No. 324 of 2018 (unreported).

With that omission, it cannot be safely said that the particulars of the offence as quoted in the above excerpt availed the necessary information in in terms of the necessary elements of the offence to enable the appellants understand the nature of the offence they were facing so as to give an informed defence.

Cementing the requirement of disclosing the essential elements of the offence, the Court in the case of **Juma Maganga v. Republic,** Criminal

Appeal No. 427 of 2016 (unreported) quoted the case of **Isdory Patrice v. Republic,** Criminal Appeal No. 274 of 2007 (unreported) where it had this to say:

> *"It is a mandatory requirement that every charge in a subordinate court shall not only contain a statement of the specific offence with which the accused is charged such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.* ***It is now trite law that the particulars of the charge shall disclose essential elements or ingredients of the offence.*** *The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove the accused committed the actus reus of the offence with the necessary mens area. Accordingly, the particulars, in order to give the accused* ***a fair trial in enabling him prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*** [Emphasis added]

Mr. Jairo on his part did not dispute that the particulars of offence in the case at hand omitted to disclose to whom the threat or violence was directed to. However, according to him, the said anomaly was cured by the

evidence adduced by the prosecution witnesses. The issue for determination therefore is whether or not the anomaly can be cured by the evidence. We have gone through the case of **Masalu Kayeye** (supra) referred to us but with due respect to Mr. Jairo, we find it distinguishable. We shall explain: In that case, the appellant was charged with the offence of rape under section 130 (1) (2) (b) and 131 (1) of the Penal code under which the prosecution is required by law to prove lack of consent on the part of the victim apart from proving penetration. However, the evidence adduced revealed that the victim was a child of 11 years, thus proof of her consent was irrelevant. Further, her testimony was taken after a *voire dire* test was conducted, as such, the section under which the appellant was charged was incorrect. Nevertheless, the Court observed therein that, the charging provision was incorrect but the evidence adduced by the prosecution witnesses were informative enough to enable the accused understand the nature of the offence and thus prepare his defence.

However, in the case at hand, the infraction lies with the particulars of the offence as it failed to indicate to whom was the threat or violence directed to. It is now settled that, where a charge quotes an incorrect provision of law, as it was in the cited case, or citing of an inapplicable

provision in the statement of the offence, the flaw is curable under the provisions of section 388 (1) of the CPA. This position was stated in the case of **Juma Ally @ Salim v. Republic,** Criminal Appeal No. 52 of 2017 (unreported) into which the charging provision was problematic but the particulars of the offence and evidence led by the prosecution witnesses were found to be informative enough to enable the accused person to understand the nature of the charge and defend himself. Unlike in this case where the omission to disclose to whom the threat was directed to during the commission of the alleged robbery was held, in our various decisions, to be fatally defective and cannot be cured. [See **Kashima Mnadi v. Republic, (supra), Menziru Amri Mujibu & Another v. Republic,** Criminal Appeal No. 151 of 2012 (unreported) and **Angulile Jackson @ Kasanga v. DPP,** Criminal Appeal No. 162 of 2019 (both unreported)].

On that account, we find that the charge is defective for failure to disclose to whom the threat was directed in the particulars of offence, and further that the anomaly cannot be cured by evidence as stated by Mr. Jairo. It follows that the judgments of both the trial court and the first appellate court are null and void *ab initio*. Consequently, we are constrained to invoke our revisional powers bestowed on us under the provisions of the

Appellate Jurisdiction Act, Cap 141 R.E. 2019 and nullify the proceedings, quash the judgments of both the trial and the High Court, and set aside the sentence imposed against Masumbuko Mhoja and Emmanuel Daniel. We further order both appellants to be released from prison forthwith unless they are otherwise held for other lawful reason.

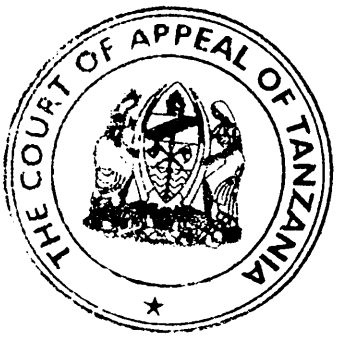
DATED at **SHINYANGA** this 2nd day of August, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 10th day of August, 2022 in the presence of Appellants in persons and Mr. Nestory Mwenda, State Attorney for the Respondent/Republic both connected via Video Conference facility from Shinyanga High Court is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL