IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: MUGASHA, J.A. MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 287 OF 2020

ERASTO JOHN MAHEWA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision and Order of the High Court of Tanzania at Moshi)

(Kingwele, PRM, Ext. Juris.)

dated the 29th day of May, 2020
in
Criminal Appeal No. 2 of 2020

JUDGMENT OF THE COURT

27th & 29th September, 2023

MUGASHA, J.A.:

In the District Court of Moshi at Moshi, the appellant, Erasto John Mahewa was charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002. It was alleged that, on the 15/8/2017 at Majengo area within the municipality of Moshi in Kilimanjaro Region, the appellant did steal an assortment of house hold items worth TZS. 435,000.00 and cash money TZS. 90,000.00, the properties of one Simphoroza John Akaro. And, immediately before or

after such stealing, did use a bush knife to threaten the said Simphorosa John Askaro in order to obtain and retain the said property.

The appellant denied the accusations. In order to prove its case, the prosecution lined up six witnesses and tendered a certificate of search and seizure (Exhibit P1). The appellant was a sole defence witness. From a total of six witnesses the prosecution account was briefly to the effect that: On the material date at night hours, while asleep at her residence, Simphoroza John Akaro (PW2) heard footsteps in the sitting room. She woke up and switched on a solar lamp. Suddenly, the door of her room was kicked, opened and the appellant allegedly stormed therein, stabbed her eye and she was ordered to surrender a mobile phone which she obliged. Then, the appellant demanded to be given TZS, 20,000,000.00 but PW2 managed to give him only TZS. 20,000.00. He collected other properties and left. Thereafter, PW2 raised an alarm which was responded to by some neighbours who rushed to the scene to rescue her and took her to the hospital where she was attended and her left eye was removed.

According to PW2, the appellant was a neighbour and familiar to her for a period of four months. Thus, aided by solar light which illuminated a room, she had an encounter with the appellant in an

incident which lasted for thirty minutes; she managed to identify the appellant. According to PW2 the stolen items were eleven.

The matter was reported to the police and according to the investigator, G.2002 DC Muchunguzi (PW1), in a search conducted at the appellant's house, about ten items were retrieved and from the place of work of the appellant's wife. As for those who happened to be present during the search, according to Emersiana Shirima (PW3), six items were retrieved whereas Timoth Maxwell Ngoda (PW4) the appellant's landlord, stated that during the search, eleven items were retrieved.

In his defence, the appellant generally denied to commit the offence and pointed out discrepancies in the evidence of the prosecution. He claimed to have been at his residence attending his son who was circumcised. He also told the trial court that, it is PW3 the chairlady of the street who informed him about what had befallen PW2 and that she was taken to the hospital. At the end, the trial court found that his defence did not raise any doubt to controvert the prosecution evidence. Consequently, he was convicted and sentenced to serve thirty years imprisonment. His first appeal to the High Court was dismissed, hence the present appeal on the following eight points of grievance.

However, for reasons to be apparent in due course the disposal of this appeal hinges on the determination of solely the first ground of appeal as hereunder:

1. *That the 1st appellate court with extended jurisdiction grossly erred both in law and fact hold in failing to that there was variances between the testimonies of PW2 and PW5 and note hold the charge sheet on what was stolen from them. They were very specific on the items stolen, but some of the items were not included in the charge sheet hence the prosecution evidence is not compatible with the particulars in the charge sheet rendering the charge to be incurably defective.*

At the hearing of the appeal, the appellant who appeared in person, unrepresented adopted the grounds of appeal without more. He reserved a right to rejoin if need arises. The respondent was represented by Ms. Revina Tibilengwa, learned Principal State Attorney who co appeared with Ms Elianenyi Njiro who addressed the Court.

On her part, at the outset, Ms. Njiro supported the appeal on the ground that the charge against the appellant was not proved beyond reasonable doubt. She attributed this to the variance between the charge and the evidence adduced on the offensive weapon used to

assault the victim and what was actually stolen from her. She submitted that, given that the use of offensive weapon is one of the crucial ingredients of the offence of armed robbery, while the charge shows that the weapon used to threaten and assault the victim was a bush knife, the victim testified that the appellant used a club to hit her.

As to the element of stealing, she contended that it was also not proved because the list of stolen items stated by PW2 at page 29 of the record of appeal is not compatible with what is listed in the charge. That said, she argued that, despite the variance as depicted in PW2's account, the charge was not amended and as such, since stealing was not proved, the charge of armed robbery was not proved to the hilt. With this submission, she urged the Court to allow the appeal and set the appellant at liberty.

The appellant had nothing useful to rejoin besides, subscribing to the submission by the learned Senior State Attorney and he urged the Court to set him at liberty

After careful scrutiny of the submissions of the parties, the record before us and the points of grievance, the issue for determination is

whether the charge against the appellant was proved beyond reasonable doubt.

We have gathered that, ground under discussion is new which was not initially raised before the first appellate court. It is trite law that the Court will not entertain and determine new grounds which were not raised before the first appellate Court. However, this ground involves a point of law touching on misapprehension of the evidence resulting to the improper or rather faulty conviction. Thus, this Court has jurisdiction to entertain it and if necessary to interfere with the findings of facts on the two courts below. See: **DPP VS JAFFAR MFAUME KAWAWA** [1981] T.L.R. 149, **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009 and **ISAYA MOHAMED ISACK VS REPUBLIC** Criminal Appeal No. 38 of 2008 (both unreported).

In the ground under discussion, the appellant is faulting the two courts below for grounding the conviction despite the variance between the charge and the prosecution evidence on what was actually stolen from the victim in the alleged armed robbery incident.

It is trite law that, the allegations contained in the charge must be supported by the prosecution account so as to prove the charge beyond

reasonable doubt. The variance between the charge and the evidence adduced can be remedied before the end of the trial by invoking the provisions of section 234 (1) of the Criminal Procedure Act [CAP 20 R.E 2022] to amend the charge for cases triable by the subordinate courts like the present one. Where the variance remains unchecked, the adverse effect is that the prosecution case will be rendered not proved.

In the present case, the charge laid at the appellant's door shows that the items alleged to have been stolen from PW2 were: cash money TZS 90,000.00; six pairs of vitenge (wax); vitenge; khanga, bedsheets, migororo, blanket, mirror cut, a blanket and mobile phone black Itel. However, in the evidence of PW2, the stolen items were: six pairs of vitenge wax, six pairs of bedsheets, two migororo, seven pairs of Khanga and four pairs of vitenge, six pillow cases, trouser, sweater and blanket, instrument used to cut mirrors, screw driver and solar lamp.

That apart, PW5, the victim's husband came with a list of different items of allegedly stolen properties such as, two masai sheets blue and red in colour; two pink bedsheets; two green bedsheets and its pillow cases; a bedsheet with flowers pink –yellow; one blanket having drafts of white, brown and blue one sweater resembling with national flag; piece of cloth trouser; five pillow cases red in colour; six coach cloth red

in colour; six coach cloth white in colour; mobile iphone itel black colour; two bush knives; two screw drivers, item to cut glasses; club; thirteen keys; sword in its cover and solar lamp.

Apparently, even those who happened to be present during the search that is, PW1, PW3 and PW4, each had his/her own account as to the list of stolen items which altogether was not in harmony with the alleged stolen items as listed in the charge. In the premises, the prosecution evidence varied with the charge on what was actually stolen from PW2 in terms of quantity, nature and other items were not mentioned in the charge.

Under the circumstances, it was incumbent on the prosecution to seek leave of the trial court to amend charge pursuant to section 234(1) of the CPA. However, this was not the case and yet, regardless of the variance, still the two courts below were satisfied that the charge was proved to the hilt. Failure to seek leave to amend the charge was fatal and prejudicial to the appellant leading to serious consequences rendering the charge not proved beyond reasonable doubt. See **MASHAKA BUSHIRI VS REPUBLIC**, Criminal Appeal No. 242 of 2017, **MOHAMED JUMA @ MPAKAMA VS REPUBLIC,** Criminal Appeal No. 385 of 2017 (both unreported).

Moreover, as correctly submitted by Ms. Njiro, another variance is in respect of the weapon used to injure the victim at the alleged robbery incident. Whereas in the charge it is indicated that a bush knife was used to assault the victim, PW2 who was the victim gave a different account having stated that the appellant assaulted her with a club. This also went unchecked as the prosecution never attempted to amend the charge to remedy the variance.

Thus, given the incompatibility between the charge on the offensive weapon used to injure the victim and the stolen items, the crucial elements of stealing and the use offensive weapon used were not proved at all. In this regard, the charge of armed robbery was not proved against the appellant. The glaring variance missed the eyes of the two courts below which was, with respect, occasioned by omission to scrutinize the adduced evidence *vis a vis* the charge otherwise they would not have concurred in the findings of guilt against appellant for the charged offence of armed robbery.

In the circumstances, since the determination of the ground under discussion is sufficient to dispose of the appeal, we allow the appeal,

quash the conviction and set aside the sentence meted on the appellant and order his immediate release unless, if held for other lawful cause.

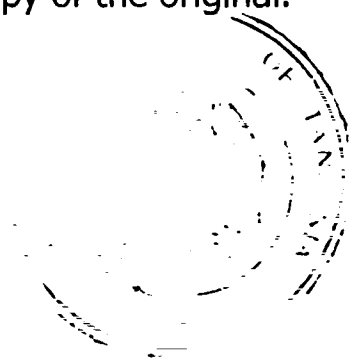
DATED at **MOSHI** this 28th day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2023 in the presence of the Appellant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL