

**IN THE COURT OF APPEAL OF TANZANIA  
AT Mtwara**

**(CORAM: KEREFU, J.A., RUMANYIKA, J.A. And MGEYEKWA, J.A.)**

**CRIMINAL APPEAL NO. 396 OF 2021**

**RAMADHANI HAMISI MKWEMBYA @ KIGI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**[Appeal from the Judgment of the High Court of Tanzania at Mtwara]**

**(Laltaika, J.)**

**Dated the 8<sup>th</sup> day of June, 2022**

**in**

**Criminal Appeal No. 3 of 2022**

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**JUDGMENT OF THE COURT**

29<sup>th</sup> May & 4<sup>th</sup> June, 2024

**MGEYEKWA, J.A.:**

The appellant, Ramadhani Hamisi Mkwembya @ Kigi was arraigned at the District Court of Kilwa Masoko at Kilwa, tried and found guilty of the offence of armed robbery contrary to sections 287 A of the Penal Code. It was alleged that on the 2<sup>nd</sup> day of January, 2021 at Somanga village within Kilwa District in Lindi did steal cash money Tshs. 1,015,000/=, one cell phone make Tecno F1 valued Tshs. 180,000/= all properties valued Tshs.

1,196,000/= the property of one Binas S/O Halid Moladi, and immediately before and after such stealing, did grievous harm to the said person with a knife in order to retain the stolen property.

The appellant denied the offence, prompting the prosecution to call five witnesses whose evidence was amplified by a documentary exhibit. The prosecution case, presented the following narrative: on material date, Binasi Aldi Moradi, the victim (PW1) went to Amini Jaffar Ibrahim's place, commonly known as Mtipesa, and found his friend washing dishes. While waiting for his friend, he fell asleep. Suddenly, PW1 was aroused from the sleep after the appellant attacked and grabbed his neck. PW1 stated that, the appellant demanded money from him. PW1 struggled to rescue himself, unfortunately, the appellant overpowered him and managed to steal Tshs. 1,000,000/= and two mobile phones. PW1 screamed for help but without success as he finally became unconscious.

A moment later, Ramadhani Yasini Hussein (PW2), who was at the clubhouse, responded to the alarm, tiptoed toward the scene of the crime only to learn of the robbery incident. PW2 testified that he saw the appellant attacking PW1 with a knife and cut him on his hand, PW1 was in critical condition. PW2 alerted the police who came to the scene of crime

and took PW1 to the hospital for medical examination and treatment. It was the further testimony of PW2 that, he managed to identify the appellant with the aid of electricity lights that illuminated the scene of the crime.

The narration of Amini Jaffar Ibrahim (PW4) was similar to PW2's story. He was at the scene of the crime, heard people screaming, and saw the appellant attacking PW1 with a knife. PW4 testified that following the appellant's threat and his known conducts of harming others, he did not try to rescue PW1.

G3232, CPL. Adslaus Kilaka Masaba (PW5), received the victim accompanied by PW4, PW1 had injuries on his body and he was bleeding. PW5 asked PW4 what had befallen PW1, he was informed that the appellant attacked and stabbed PW1 with a knife. PW5 issued a PF3 and the victim was taken to the hospital. Later, PW5 headed to the scene of the crime, but the appellant had already left. On 18<sup>th</sup> April, 2021, they managed to arrest the appellant on at the grocery where he went to have dinner. He alleged that he was tortured at the police and forced to admit the offence which he denied.

The evidence of PW1 was supported by Alfred Michael, a Medical Officer (PW3) from Tingi Health Centre. On 2<sup>nd</sup> January, 2021, PW3 examined the victim and observed that PW1 had injuries on his face, neck, back and stomach. PW3 supported his evidence with the victim's PF3, which was admitted in evidence as exhibit P1.

The appellant's defence was a general denial of liability. He raised a defence of *alibi* and adduced that, on the fateful date he was at Namjate village at Ruangwa in Lindi Region where he was doing mining activities until 8<sup>th</sup> April, 2021 when he returned to Somanga. Then, he was arrested and charged at night by the police officers.

In its judgment, the trial court was satisfied by the prosecution case. In consequence, it convicted and sentenced the appellant to thirty years imprisonment.

Dissatisfied, the appellant appealed to the High Court. The first appellate court was convinced by the version of the prosecution witnesses and, accordingly, the learned Judge upheld the conviction and the corresponding sentence.

Still discontented, the appellant has appealed to this Court on a second appeal. In his memorandum of appeal, he raised seven grounds, which may be paraphrased as follows; **one**, the appellant was convicted for the offence of armed robbery while the facts of the case relate to the offence of stealing and or grievous harm; **two**, the appellant was convicted for armed robbery while PW4 did not prove the ingredients of the offence charged; **three**, the charge sheet indicated that the appellant stole Tshs. 1,015,000/= while PW1 the victim, testified that the appellant stole Tshs. 1,000,000/=; **four**, the PF3 was un-procedurally admitted in evidence; **five**, the appellant was charged with armed robbery while PW4 testified that the appellant injured PW1 by using a bush knife; **six**, that there was variance between the charge and the evidence adduced before the trial on the time when the incident was committed; and **seven**, the prosecution did not specify the description of the alleged stolen properties.

At the hearing of the appeal, the appellant appeared in person. Besides adopting the grounds of appeal, the appellant opted to hear first the submissions of the respondent while reserving his right to rejoin if need arises.

On the adversary side, Mr. Credo Rugaju and Ms. Faraja George, both learned Senior State Attorneys appeared for the respondent Republic.

At the very outset, Mr. Rugaju expressed his stance that, the respondent did not support the appellant's appeal. He started his onslaught by submitting that, all seven grounds of appeal submitted by the appellant in this appeal are not worth consideration by the Court because they raise new issues which were neither raised nor determined by the first appellate court. He placed reliance on the decision of **Zakaria Samwel Kasuga v. Republic**, Criminal Appeal No. 457 of 2021 [2023] TZCA 196 (24 April 2023 TanzLII), and **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 [2021] TZCA 156 3 May 2021 TanzLII). He thus implored us to disregard them unless they involve points of law. Upon being probed by the Court, Mr. Rugaju conceded that the third and fourth grounds of appeal raise legal issues.

The learned Senior State Attorney thus addressed us only on those three grounds namely: the third; a complaint on the variance of the charge sheet and evidence on record, the fourth; the PF3 was not read over in court and lastly, whether the prosecution proved the case beyond reasonable doubt.

On the third ground of appeal, while acknowledging that the amount and the number of phones stolen in the charge sheet and evidence were at variance. He clarified that the charge sheet shows that the appellant did steal cash money Tshs. 1,015,000/= while PW1 testified to the effect that the appellant did steal Tshs. 1,000,000/=. He further contended that, PW1 testified that his two mobile phones were stolen by the invader without mentioning the make of the phones, but the charge sheet indicated one phone make Tecno. On being probed by the Court, Mr. Rugaju conceded that, whenever such variance occurs, the prosecution is required to amend the charge sheet but in the present case the charge was not amended. It was his view that, the contradictions are minor, not prejudicial to the appellant and the defects are curable under section 388 of the CPA.

Moving to the fourth ground of appeal, the learned Senior State Attorney prefaced his submission by arguing that the appellant's complaint is unfounded because the PF3 was read over in court. To bolster his submission, he referred us to page 17 of the record of appeal and implored us to find that the ground of appeal with no merit.

Mr. Rugaju continued to submit that the respondent proved the case beyond reasonable doubt. He clarified that, PW1 proved that the appellant

did steal his money and phones and his narration was supported by PW2 who witnessed when the appellant stabbed PW1 with a knife. To reinforce his proposition, he cited the case of **Makende Simon** (supra).

Conversely, Mr. Rugaju submitted that the evidence of prosecution witnesses was credible and reliable. That, it sufficiently proved that the appellant was seen and identified at the scene. He relied on the Court's decision in **Waziri Amani v. Republic** (1980) TLR 250 for the proposition that the evidence of the prosecution left no doubt as to the correct identity of the appellant.

In conclusion, the learned Senior State Attorney prayed that the appeal be dismissed.

In his brief rejoinder, the appellant insisted that there was a variance between the charge and the evidence. Elaborating on the said variance, the appellant submitted that the particulars of the offence showed that the alleged robbery occurred on 2<sup>nd</sup> January, 2019, but this allegation was different from the evidence of PW2 and PW5. He clarified that PW2 testified that the incident occurred on 1<sup>st</sup> January 2019, while PW5 at page 22 of the same record of appeal testified that the incident occurred on 1<sup>st</sup> to 2<sup>nd</sup>



January, 2021 and he was arrested in 2020. He further contended that he was not caught in possession of the alleged stolen properties. Upon being probed by the Court on whether his previous case indicated at page 26 of the record of appeal was similar to the one at hand, he contended that he was once arrested and charged with an offence of grievous bodily harm but he was set free.

We have considered the grounds of appeal and submissions from both parties. However, before we proceed to determine the merit of this appeal, it is crucial to state that, we are in accord with Mr. Rugaju that, on a second appeal, an appellant should not be allowed to sneak in new grounds which were not raised and considered by a first appellate court. Mr. Rugaju beseeched us to disregard the first, second, sixth, and seventh grounds of appeal, as we hereby do since the said grounds are new which were not raised and determined by the first appellate court and are not on point of law.

Our starting point, is the third ground, the appellant is alleging variance between the charge sheet and the prosecution evidence. We note that, the prosecution conceded to this discrepancy but propounded that it was a minor error that can be cured under section 388 of the CPA since the

appellant was not prejudiced. We shall move to determine whether the alleged variance exists and if so, whether it is curable under the law. We prefer, at first, to reproduce particulars of offence as per the charge sheet hereunder:

**" PARTICULARS OF OFFENCE"**

*RAMADHANI S/O HAMISI MKWEMBYA @KIG on the 2<sup>ND</sup> day of January, 2021 at Somanga village within Kilwa District in Lindi did steal cash money Tshs. 1,015,000/= . One cell phone make Tecno F1 valued Tshs. 180,000/= all properties valued Tshs. 1,196,000/= the property of one Binas S/O Halid Moladi, and immediately before and after such stealing, did grievous harm to the said person with a knife in order to retain the stolen property.*

*Dated at Kilwa this 05th day of April, 2021*

*Signed Public Prosecutor*

The above particulars clearly show that the appellant was charged for stealing Tshs. 1,015,000/= and one phone make Tecno the properties of PW1. It is settled position that a charge sheet is a foundation of criminal trial whose purpose is to inform the accused person of the nature and magnitude of charges brought against him to enable him adequately

prepare his defence. This position was well elaborated by the Court in a plethora of authorities to that effect. See amongst others, **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported) and **Faraja Kazimoto Tomas v. Director of Public Prosecution**, Criminal Appeal No. 63 of 2023 [2024] TZCA 301 (6 May 2024 TanzLII).

In the present case, the variance is on the amount and number of phones alleged to have been stolen by the appellant from PW1 as elucidated in the particulars of the offence and the evidence on record. The particulars of the offence indicate that the appellant did steal Tshs. 1,015,000/= and one phone. Whilst PW1 testified that the appellant stole Tshs. 1,000,000/= and two cellular phones from him. For ease of reference, we reproduce relevant part of PW1's testimony hereunder:

*"At 03:00 hrs in the midnight, I went to my friend's place to rest. My friend Amini has a business of selling chips. I found my friend washing dishes, I waited for him to finish washing dishes so that we can go to rest, in the course, I fell asleep, a person named Kigi appeared and held me tight on my neck and commanded to surrender money. I had Tshs.*

*1,000,000/= by that time and two cellular phones,  
Kigi threatened me with a knife..."*

Deducing from the above excerpt, we agree with both parties that the particulars in the charge sheet vary from the evidence adduced before the trial court. We expected that the owner of the stolen properties would have been the one to prove the amount of money and the number of the stolen mobile phones, unfortunately, this was not the case in the instant appeal. Therefore, it is our settled view that the variance of the charge sheet and evidence on record are not minor and it goes to the root of the case. It leaves a lot to be desired on the prosecution's case.

It is a common ground that when there is variance or uncertainty in the charge sheet, the proper remedy is to amend the charge under section 234 (1) of the CPA. In the case at hand, the prosecution ought to have moved the trial court to amend the charge sheet and give the appellant an opportunity to plea to the altered charge. Failure to amend the charge sheet is fatal and prejudicial to the appellant. It was echoed in the case of **Thabit Bakari v. Republic**, Criminal Appeal No. 73 of 2019 (unreported) that: -

*" It is well settled that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case."*

See also **Mashaka Bashiri v. Republic**, Criminal Appeal No. 242 of 2017 [2021] TZCA 25 (19 February 2021 TanzLII) and **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 [2020] TZCA 1801 (6 October 2020 TanzLII).

Being guided by the above findings, certainly, in the present case, the charge sheet was not amended. In such circumstances the charge remains unproven. Therefore, we find this ground meritorious.

The third ground of appeal could suffice to dispose the appeal, however, for completeness, we feel obliged to address the remaining two grounds of appeal raised by the appellant.

On the fourth ground of appeal, the appellant complained that the PF3 was not read out in court after its admission. We think this ground should not detain us. As rightly submitted by Mr. Rugaju, this ground is baseless because the record of appeal specifically at page 17 clearly indicates that after its admission, the PF3 was read out in court.

Next for our consideration is whether the prosecution did prove the case beyond reasonable doubt. In the present case, the prosecution was required to establish the essential ingredients of the offence of armed robbery. In discussing the ingredients of armed robbery, the Court in **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 [2019] TZCA 459 (11 December 2019) TanzLII, cited the case of **Fikiri Joseph Pentaleo @ Ustadhi v. Republic**, Criminal Appeal No. 323 of 2015 [2016] TZCA 2070 (13 September 2016 )TanzLII, it held that:

*"Next we agree with Ms. Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purpose of instant appeal, the main elements constituting offence of armed robbery under section 287A are first, stealing. The second element is either using firearm to threaten in order to facilitate the stealing."*

Equally in the case of **Dickson Joseph Luyana & Another v. Republic**, Criminal Appeal No. 1 of 2005 (unreported), the Court held that:

*"The prosecution has to adduce evidence to establish the essential ingredient of the offence,*

*that is whether actual violence was used to obtain or retain the thing stolen. The nature of violence must also be proved. A prerequisite for the crime of robbery is that there should be violence to the person or the complainant...."*

The above excerpt indicates clearly that, in proving the offence of armed robbery, the key ingredients of armed robbery is stealing coupled with the use of actual violence or threats to use the actual violence to any person or property in order to obtain or retain the stolen property. In determining whether or not the ingredients of armed robbery were proved, we have thoroughly perused the evidence adduced before the trial court and noted that, the element of stealing was not proved to the standard required by the law. The prosecution did not prove if the alleged stolen properties were two mobile phones and cash money Tshs. 1,015,000/=.

More so, in the instant case, the alleged owner of the stolen phones did not mention the make of the phones or any peculiar mark to prove his ownership of the alleged stolen properties. The appellant was required to prove that the stolen properties in the possession of the accused constitutes the subject of the charge against the accused. See the cases

of **Joseph Mkumbwa and Another v. Republic**, Criminal Appeal No.94 of 2007) [2011] TZCA 118 (23 June 2011 TanzLII) and **Alex Joseph Kasharankoro v. Republic**, Criminal Appeal No. 156 of 2013 (unreported).

Apart from the failure of the alleged owner of the stolen properties to mention the make of his mobile phones, there was no sufficient proof that the alleged stolen properties belonged to the complainant, PW1. We also find it disturbing that it is not in evidence that PW2, PW3 and PW4 who were at the scene of the crime, proved that PW1's phones were stolen. We note that their testimonies are equally deficient. Without these linkages, the entire prosecution case was bound to crumble. Had the trial and the first appellate courts scrutinized the evidence on record sufficiently, it would have concluded that the ingredients of stealing were not established.

All said and done, we find and hold that there is nothing on record, except mere suspicions, to implicate the appellant with the offence of armed robbery. Accordingly, we are in all fours with the appellant that, the prosecution did not prove the case beyond reasonable doubt. We, thus find the complaint under consideration is with merit.



In the premises, we find the grounds of appeal meritorious and consequently, allow the appeal. The conviction against the appellant is quashed and the sentence meted out is set aside. We order that the appellant be released forthwith from prison unless he is otherwise lawfully held.

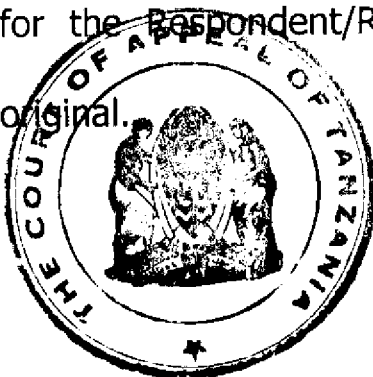
**DATED at MTWARA** this 3<sup>rd</sup> day of June, 2024.

R. J. KEREFU  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

A. Z. MGEYEKWA  
**JUSTICE OF APPEAL**

The Judgment delivered this 4<sup>th</sup> day of June, 2024 in the presence of the Appellant in person un represented and Mr. Jagad Jilala, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "A. L. Kalegeya".

A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**