IN THE HIGH COURT OF TANZANIA

AT TANGA [SITTING AT KOROGWE]

CRIMINAL APPEAL NO. 48 OF 2012

[Originating from Korogwe District Court at Korogwe in Criminal Case No. 33 of 2012]

YAHAYA ATHUMANI MWALIKO.......................................APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

U. MSUYA, J.

In this appeal, the appellant Yahaya Athumani Mwaliko is challenging both conviction and sentence. He was convicted of Armed Robbery and grievous harm by the Korogwe District Court contrary to sections 287A and 225 of the Penal Code [Cap.16 R. E. 2002], respectively. The particulars of the two offences were that the appellant together with Sadiki Hassain who was acquitted on 22/03/2012 at about 1.00 hours at Mwalam- Tabora village within Korogwe District in Tanga Region stole cash Tshs. 683,000/=, two bags with 8 pieces of shirts, 5 pairs of long trousers, 1 pair of shirts, 5 pairs of

long trousers. Other items alleged to be stolen included 1 pair of shoes, 6 hoes, 2 pick axes, 4 bush knives all valued at Tshs. 983,000/=. the properties of Hamayani Sikoyi and Elias Hoseliani. It was alleged that in the course of stealing the above named properties, the appellant and Sadiki Hassani used actual violence in order to obtain them.

It was further alleged in the second count that in the course of stealing the appellant and his co-accused cut the owners of alleged stolen properties with a panga which led them to sustain or suffer grievous harm.

Briefly, it was established in record that in 2011, Lomaiyani Sikoi [PW1] purchased six acres of land from the appellant. This piece of Land is within Korogwe District. The appellant did not show boundaries of the purchased piece of land to PW1. PW1 frequently reminded the appellant to show him the boundaries but the appellant refused. The matter was reported to Mwalan-Tabora Village Executive Officer and later on to Mgombezi Police Station. Following a report, the appellant was traced and ordered to show PW1 the boundaries in the presence of his family members and village Executive Officer. The schedule to that effect was fixed but the appellant did not comply with it. It is on record that on 21/3/2012 around 6.30 pm, the appellant went to the place where PW1 was living and asked his whereabout. The appellant also told PW1's colleagues-Loitu Mkeo, Elishadani Masekori and Elias Loserian

that PW1 will be ambushed. It is further on record that PW1 met the appellant on the same day and the appellant conveyed the same message to him. That in the following day [i.e 22 .03.2012] during the night PW1 and his colleagues were ambushed and their various items were stolen. PW1, PW2 Elias Hoserian, PW3 - Elishadari Kijivai testified that the appellant was among the eight bandits who invaded them. In the course of invasion, PW1 was cut with a panga and sustained grievance harm. The incident was reported to police officers at Mgombezi police post where PW1 was issued a PF3 to go to Magunga hospital for treatment. F.3692 D/C Cherera [PW4], a police officer from Korogwe police station investigated the matter, charged the appellant together with Sadiki Hassain and arraigned them in the District Court of Korogwe at Korogwe.

The appellant and his co-accused denied the charge, but after full trial he was the only one found guilty, convicted and sentenced to serve 30 years imprisonment for the offence of armed robbery and 5 years in jail for the offence of grievous harm. The sentence was ordered to run concurrently. The appellant was also ordered to pay Tshs. 983,000/= to the victim for the property stolen.

The appellant was aggrieved with both the conviction and sentence hence preferred this appeal. His memorandum of appeal contain eight grounds but essentially, the appellant is complaining that the case against him was not proved beyond all reasonable doubt and that he was not properly identified at the scene of crime.

His appeal was not opposed by Mr. Mfinanga Learned State Attorney who appeared for the Republic at the date of hearing the same.

As correctly submitted by Mr. Mfinanga this appeal has merits because of the following reasons.

One, the offence of armed robbery was not disclosed in the charge sheet. This is because the particulars of offence reveals that the appellant used actual violence in order to obtain the stolen properties. The charge sheet in respect of the first count i.e armed robbery ought to have disclosed the nature of the weapon used in the course of committing the offence.

It should be borne in mind the purpose of a charge is to inform the accused and the court, with sufficient clarity, the allegations against the accused. The accused is-entitled to know beforehand what he is up against so that he is not taken by surprise. This enables him to prepare his defence.

Not only that, the charge as well enables the court to know whether or not it has jurisdiction to inquire or try the case. It as well enables the court to control the proceedings by confining the evidence and arguments to what is alleged in the charge and what is disputed. See MAGISTRATES MANUAL – B.D CHIPETA at chapter two on charges.

Therefore the omission of the type of the weapon used in the commission of the offence of Armed Robbery renders the charge defective. That is due to insufficient particulars which could clearly show the accused the nature of the offence he is charged with, so that he can be able to follow clearly the proceedings and prepare his defence.

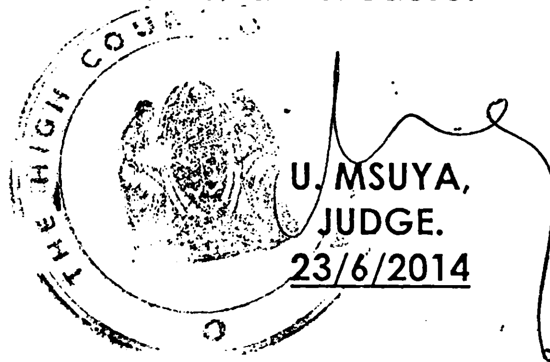
The nature of the defect cannot be cured under section 388 of the Criminal Procedure Act, R. E. 2002 as the appellant was not given a fair trial, which is against the Cardinal Principles of fair trial stipulated under provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended from time to time.

Two, the appellant was not properly identified. The evidence on record shows that the appellant was alleged to be one of the bandits and it was alleged that he was identified by a torch light which was in the hands of the bandits. Under normal circumstances if the torch was held by the identifying people, it could have been easy to identify the bandits. But due to the fact that the torch was held by the bandits it would have been not proper to identify the appellant. Moreover, there is no evidence on record which indicates the intensify of the identifying torch. That is to say, the prosecution witnesses did not describe the nature of light which aided the victim to identify the bandits. This was contrary to the principles of proper identification as established in the case of ***Waziri***

Amani V.R [1980] T. L. R. 250. In that regard, the appellant was mistakenly identified.

Three, he evidence on record reveals that the appellant was connected with the charged offences on suspicious grounds. This is because the evidence of PW1 clearly demonstrates that the appellant threatened or informed him that he will be invaded. It is a well principles of law that scipicious however strong it is cannot be the basis of conviction. For that matter, the appellant was wrongly convicted on the basis of bear assertion.

From the above analysis the conviction is quashed and the sentence is set aside. The appellant should be released immediately unless otherwise held for a lawful cause.



U. MSUYA,
JUDGE.
23/6/2014