

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 22 OF 2020

(Originating from Criminal Case No. 702 of 2018 Ilala District Court)

HALFAN RAJABU @ MAGOMBA

@ BIDA @ HALIFA..... 1ST APPELLANT

ATHUMAN SHABAN @ MAUYA

@ ATHUMAN.....2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Order: 23/3/2020

Date of Judgement: 30/3/2020

JUDGMENT

MGONYA, J.

The District Court of Ilala - Samora convicted the Appellants **HALFAN RAJABU** and **ATHUMAN SHABAN** of **ARMED ROBBERY C/S 287 A of the Penal Code, Cap. 16 [R. E. 2002]** as amended by **Act No. 3 of 2011** and sentenced to thirty (30) years imprisonment.

The instant appeal is against the above mentioned decision above where they were convicted of The Appeal is against both conviction and sentence on the following grounds:

(1) That, your Honourable Judge, the learned trial Magistrate grossly erred in convicting the

Appellant where there was variance between the prosecution evidence and the charge sheet in regard to the date offence was allegedly convicted. (Reference to examination in chief of PW1, PW2, PW3 and PW4 by the prosecutor);

(2) That, the learned trial Magistrate erred in failing to assess validity of retracted caution statement Exhibit P1 obtained by PW5 where no inquiry was conducted as the same was obtained contrary to mandatory provisions of Criminal Procedure Act, (Cap. 20 R.E. 2002);

(3) That, the learned trial Magistrate erred in failing to realize huge contradictory of evidence of PW1 in regard to the amount of money allegedly stolen;

(4) That, the learned trial Magistrate erred in holding to in-credible and un-reliable visual identification of PW1, PW2 and PW3 against the Appellants at LOCUS IN QUO where they failed to describe the clothes/attires worn by Appellants;

(5) That, the learned trial Magistrate erred in presuming that the Appellants were the perpetrator of the crime where no evidence was led to suggest manhunt immediately after occurrence of the offence considering they were known before hand by PW1 very well;

- (6) That, the learned trial Magistrate erred in failing to realize discrepancies between PW1's evidence and the charge in regard to the type of phone allegedly stolen from him;**
- (7) That, the learned trial Magistrate erred in failing to realize contradictory evidence of PW2 in regard to the date offence was allegedly reported to have taken place. (Refer to examination in chief and cross examination of PW2 by prosecutor and 2nd accused respectively);**
- (8) That, the learned trial Magistrate grossly erred in failing to realize disparity between PW1's and PW2's evidence in regard to the place where the offence is allegedly occur. (Refer to cross examination and examination in chief of PW1 and PW2 by 1st accused and prosecutor respectively);**
- (9) That, the learned trial Magistrate erred in failing to realize wide disparity between PW1's and PW2's evidence in regard to who among Appellants was holding the alleged knife at the LOCUS IN QUO;**
- (10) That, the learned trial Magistrate erred grossly erred in convicting the Appellants based on unjustified corroborated prosecution evidence;**
- (11) That, the learned trial Magistrate erred in failing to appraise objectively credibility of the**

prosecution evidence before holding on it as basis for convicting both Appellants; and

(12) That, the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the Appellant beyond reasonable doubt as charged.

Ms. George averred that, after they have gone through the Appellants' 12 grounds of Appeal, and record of the lower court, Republic have come to the pronouncement to support the Appellants' Appeal by disposing only the 1st ground. Through this ground, the learned State Attorney informed the court that there was an immense departure of facts regarding to the date of offence from the Charge Sheet and the evidence/testimony delivered before the court during trial in the testimonies of the **PW1, PW2, PW3** and **PW4**. The learned Counsel submitted that, looking at accused persons' Charge Sheet the offence in issue is said to be conducted on **20/10/2018**.

On the contrary, the learned Counsel submitted that, going through the entire testimonies of PW1 to PW4, all these witnesses' states that the offence occurred on **12/10/2018**. Ms. George stated the interval on the dates to be huge and uncertain especially for a Criminal Offence. The learned Counsel further states the departure to be fatal taking into consideration that in every Criminal Case, proceedings/offence

emanates from the Charge Sheet, which now contradicts the testimonies of the witnesses which now renders the Charge Sheet defective.

The learned State Attorney referred the court to section **111 of Tanzania Evidence Act, Cap. 6 [R. E. 2002]**, which states that the proof of any Criminal Case before the court lies on Prosecution. From the same, it was expected Prosecution to forward before the court the evidence according to the particulars in the Charge Sheet. However, in failure to prosecute in that regard, Prosecution cannot claim to have not proved their case without leaving any doubt.

Submitting further, it is the learned State Attorney's assertion that, from the above explanation, it is obvious that out of different dates, the offence before the court was not proved beyond reasonable doubt and hence the charge sheet too was defective; whereas the said defect cannot be cured under the law and instead can give benefit of doubt the Appellants.

In cementing this position, the Learned State Attorney, referred this court to the Court of Appeal decision in ***Criminal Appeal No. 252/2011 at Mbeya on pg. 7 Fredy Mwakajilo Vs. Republic***, where the difference on dates to the Charge Sheet and witnesses testimonies' was incurable under the law.

It is from the above explanation, Republic declared to support the Appeal, and discharge themselves from pursuing

other grounds of Appeal on merits as the above single ground was enough to dispose of the appeal.

Indeed as well said by the learned State Attorney, Ms. George, the Appellants' Charge Sheet displays that the offence of armed robbery was committed on **20/10/2018**. However, referring to the testimonies by PW1 to PW4 respectively, they all states that the offence took place on **12/10/2018**.

From the above extract, it is clear that there is a huge confusion of facts in respect of the date for the offence before the court. That goes contrary to **section 135(a) (ii)** of the **Criminal Procedure Act**. Bearing in mind that it is the charge which lays the foundation of criminal proceedings, I find the issue of the proper date in a Charge Sheet to tally with the evidence before the court of utmost importance under the circumstances.

Together with the above provision, **section 132 of the Penal Code** requires the offence to be specified in the charge along with its **necessary particulars** which will reveal the nature of the offence charged. The said provision reads as follows:

"132: Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be

necessary for giving reasonable information as to the nature of the offence charged."

Likewise, **section 135(a) (ii) of the CPA** which is couched in imperative terms requires the statement of the offence to cite a correct reference of section of the law which sets out **or creates a particular offence allegedly committed**. The said provision states:

"135 (a) (ii): The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence end, if the offence charged is one created by enactment shall contain reference to the section of the enactment creating the offence. "

In the case of MUSSA MWAIKUNDA VS. REPUBLIC [2006] T. L. R. 387 (CAT at Mbeya) (Mroso, Nsekela & Msofe, JJA) when Appellant raised a defence of *alibi*, and upon detection of defective Charge it was held that:

"It is always required that an accused person must know the nature of the case facing him and this can be achieved if the charge disclosed the essential elements of the offence charged."

Going by the above provisions of law and precedent above, I take that **the date in a Charge Sheet** is one of the **necessary particulars** that needs to be specific for the Prosecution to table the offence before the court to be proved by the prosecution and attract necessary evidence for the offence to be proved. However, under the given circumstances it is clear that the defect that had occurred before the court is incurable and proves that the case at the trial court under the given circumstances was not proved beyond doubt to command conviction.

It is unfortunate that the issue we are addressing now on the defective Charge Sheet, as just determined, was not brought to the attention of the trial Magistrate. Had it been done, he/she would definitely have served the time for the matter coming this far.

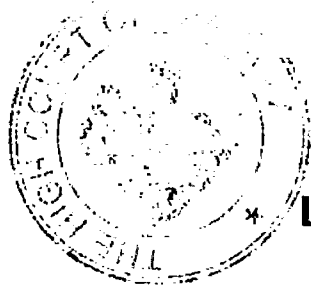
It is clear therefore that the Charge Sheet is incurably defective as such the proceedings are a nullity. In the event therefore I fully agree with the learned State Attorney in that aspect respectively.

All said and done, **I allow this appeal** for the reasons given above. Further, **I proceed to declare the proceedings of the District Court of Ilala - Samora in respect of the proceedings thereto, a nullity. The same are quashed and conviction and sentence set aside.**

The Appellants to be released from prison forthwith unless they are detained in connection with another matter.

Order accordingly.

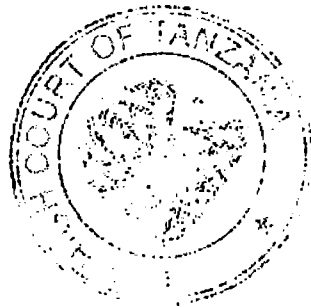
Right of Appeal explained.



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**L. E. MGONYA
JUDGE
30/03/2020**

COURT: Judgment delivered in the presence of Ms. Faraja George, State Attorney for the Respondent, in the absence of the Appellants, and Ms. Veronica, Bench Clarke in my chamber today 30th March 2020.



A handwritten signature in black ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA
JUDGE
30/03/2020**