

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
HC.CRIMINAL APPEAL NO. 37 2020**

*(Arising from Criminal Case No. 181 of 2019 at the District Court of
Sengerema)*

FESTO MAJEE & ANOTHER APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last order: 30.03.2020

Judgment date: 17.04.2020

A.Z. MGEYEKWA, J

In the District Court of Sengerema, the appellants Festo S/O Majee and Matagiri S/O Pius were charged under section 287A of Penal Code Cap.16 [R.E 2019] as amended by Miscellaneous Amendment Act No.04 of 2004. The particulars of the offence are that on 2nd September, 2019 at about 02:00 hours at Ntamatemele area in Isaka Village within Sengerema

District in Mwanza Region, did steal cash Tshs. 500,000/=, one gun make Riffle No. A6986 valued Tshs. 1,060,000/= one laptop make HP valued at Tshs. 1,000,000/=, one phone make Techno valued Tshs. 160,000/= all totaling Tshs. 2,696,000/= the property of Hassan S/O Mussa @ Lumole, immediately before or after such stealing did use club and sword in order to obtain and retain the said property.

Both accused persons protested their innocence before the trial court. To be specific they denied the allegations of having been found in possession of the alleged phone. As aforesaid, however, the trial Court convicted them for the offence of armed robbery and sentenced to serve thirty years imprisonment and to compensate the victim a total amount of Tshs. 2,696,000/=. Dissatisfied the appellants filed a joint memorandum of appeal which contains six grounds of appeal which may conveniently be abridged into five of them as follows:-

- 1. That, the trial Court erred in law and facts to commit the appellants basing on several disparities between the charge sheet and the evidence which was tendered in Court.*
- 2. That, without prejudice afore ground No. 1; the appellants' conviction was unlawful based on the defective charge in that,*

it did not specify against whom the violence was threatened in obtaining the stolen loots.

- 3. That, the trial court erred in law and facts to rely on bare assertion of visual identification claims (and that of fluted and unfair identification parade) which is the description, thus uncogent and unreliable.*
- 4. That, unexplained delay for retrieval, arrest and arraign of the suspected appellants was not elaborated by any staff officer from BODACOM – a concerned subscriber Authority nor taken into account by the trial Court in resolving the fears of planting evidence and exhibits.*
- 5. That, the trial court erred in law and fact when did not subject the entire evidence into objective scrutiny and in thus wrongly moved with uncorroborated prosecution case/evidence which was not proved to the hilt as in contrast to the appellant.*
- 6. That, the trial Court erred to believe that the prosecution witnesses were credible regardless inconclusive process undertaken on the first felony report.*

At the date of hearing this appeal, the appellant appeared in person and fended for himself while Ms. Fyelegete, learned Senior State Attorney represented the Republic- Respondent.

The appellants had no much to say, they submitted that they are dissatisfied by the lower court decision hence they filed this instant appeal and prays this court to adopt their grounds of appeal.

Responding to the appellant submissions, Ms. Fyeregete supported the conviction and sentence for the reason she gives forth. Submitting for the first ground of appeal she refuted that there is a disparity between the charge sheet and the evidence on record, she said there was no any contradiction, therefore, this ground be disregarded.

As to the second ground of appeal, Ms. Fyeregete conceded that the charge sheet states the name of the victim but the particulars of the offence do not show the appellants used force against whom. She continued to submit that one of the ingredients in the armed robbery offences is to show to whom the force was used to but the same is curable under section 388 of the Criminal Procedure Act, Cap.20 [2019]. Ms. Fyeregete went on stating that although the charge sheet is silent but the prosecution case proved that the appellants stole used force to obtain the

stolen properties from PW1 and PW2. She added that it is in the court records that PW1 has explained how he was invaded and stole Tshs. 1,010,000/=, laptop, a gun, and one phone. PW2 also testified he was attacked on his face while asleep and he fainted. PW2 narrated how the bandits stole a laptop, money, and a gun. Ms. Fyeregete urged this court to find that the appellants are not prejudiced by any means since they were able to defend themselves.

Concerning the third ground of appeal, the learned Senior State Attorney refuted that the visual identification was weak; she said that PW1 testified that he heard the dog barking, he went outside the house and saw the appellants standing near the toilet and he asked Matigili what are you doing here? then the appellant hit PW1 and he fainted. She added that when PW2 was cross-examined by the appellant he said that he saw the appellant at Ubunje center and identified him by using lit of *chemli* which was bright enough to recognize the appellant. Ms. Fyeregete argued that there was no need to describe the appearance of the appellants because PW1 knew them before the commission of the crime therefore even the identification parade was not necessary.

Submitting for the fourth ground of appeal, she stated that after the commission of the crime the appellants run away, then the matter was

reported to the Police Station and the appellants were arrested after using the stolen phone. She stated that the phone was tendered and marked as Exh. P3, print out was admitted as Exh. P2 and a certificate of seizure was admitted as Exh. P1. She urged this court to disregard this ground of appeal.

As to the fifth and sixth grounds of appeal, she argued that the prosecution case was heavy enough to ground because appellants were identified and he knew him by his name. She went on stating that PW3 narrated how he traced the stolen phone and was able to arrest the first appellant and a certificate of seizure was tendered in court.

It was Ms. Fyeregete further submission that there is ample evidence that the appellants committed the said offence taking to account that they were found in possession of the stolen phone, cautioned statements of the appellants were tendered in court, and the fact that the appellants did not object. She insisted that the appellants have injured the victim therefore they were rightly convicted.

In his rejoinder, the second appellant denied having committed the offence and he also denied that the victim identified him. He prays this court to set him free.

In his brief rejoinder, the first appellant argued that he was arrested for another crime.

After listening carefully to the submission made by the appellants and learned Senior State Attorney for the respondent and upon careful traverse of the trial court record. I have come to a conclusion that the only issue for determination is ***whether the prosecution managed to prove their case beyond reasonable doubt.***

Addressing the first ground of appeal that the trial court erred in law facts to convict the appellants basing on several disparities between the charge sheet and the evidence on the court. I share the concern of the appellants that the charge sheet did not mention the name of the person against whom force was used in perpetuation of the charged offence. Ms. Fyeregete admitted that the charge sheet is silent against whom the force was used and urged this court to invoke section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019] or find that the evidence on record is heavy enough to prove the case. In my view, the first ground of appeal suffices to dispose of the appeal in its entirety for the reasons I endeavour to assign in the course.

The beginning point is the charge sheet under focus. I wish to reproduce it hereunder for ease of reference:-

" *STATEMENT OF OFFENCE* of Armed Robbery contrary to section 287A of the Penal Code Cap.16 Vol. I of the Laws as amended by Act No. 4 of 2004.

PARTICULAR OF THE OFFENCE: That FESTO S/O MAJEE and MATAGIRI S/O PIUS are jointly and together charged on 2nd day of September, 2019 at about 02:00 hours at Nyamatemele area in Isaka Village within Sengerema District in Mwanza Region did steal cash Tshs. 500,000/= one gun make Riffle No. A6986 valued Tshs. 1,060,000/= one Laptop make HP valued at Tshs. 1,000,000/= one phone make Techno valued at Tshs. 160,000.= all total valued of Tshs. 2,696,000/= the property of HASSAN S/O MUSSA @ LUMOLE ***immediately before or after such stealing did use force and panga to obtain and retain the said property.***

Signed at Sengerema this.....

Public Prosecution" [Emphasis added].

It is clear from the above quotation that the particulars of the offence omitted to mention the person against whom the said panga was

used to threaten, obtain and retain the allegedly stolen property, an aspect which is an essential ingredient of the offence under section 287A of the Penal Code Cap.16 [R.E 2019], the section, before being amended by Act No.3 of 2011, provided that:-

*" S. 278 A Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more persons **and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person**, commits an offence termed " armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment." [Emphasis is added].*

Ipso dure, the omission to mention the name of the person against whom force was used contravened the provisions of section 132 of the Criminal Procedure Act Cap.20 [R.E 2019] which provides that:-

" 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."

Similarly in the case of **Juma Maganga v R**, Criminal Appeal No. 427 of 2016, **Juma Ismail and Another v R**, Criminal Appeal No. 501 of 2015 and in the case of **Kashima Mnadi v R**, Criminal Appeal No. 78 of 2011 (unreported) it was held that:-

"Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate actual violence or threat to a person whom robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat but also (mention) the person on whom the actual violence or threat was directed."

Guided by the above authorities and it was observed in the case of **Juma Ismail** (supra), the justification for the requirement to disclose the essential elements of the offence in the particulars is to enable the accused person to understand the case he is faced with. This was clearly underlined in the case of **Isidory Patrice v R**, Criminal Appeal No. 224 of 2007 (unreported). The Court of Appeal stated that:-

"It is a mandatory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but 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 the essential elements or ingredients of the offence. This 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 mensrea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent especially required by law."

I wish to emphasize that the omission under focus in the instant appeal translates into the fact that the charge sheet lacked an essential ingredient of the offence of armed robbery, and is an incurably fatal, a defect which cannot be salvaged under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019].

In view of what I have found above, I proceed to quash the conviction and set aside the sentences which were meted out against the

appellants and direct their immediate release from prison unless they are being continually held for some other lawful cause.

Order accordingly.

DATED at Mwanza this 17th day of April, 2020.


A.Z Mgeyekwa

JUDGE

17.04.2020

Judgment delivered on 17th day of April, 2020 via audio teleconference, Ms. Fyeregete, learned State Attorney for the Respondent and appellant were remotely present.




A.Z Mgeyekwa

JUDGE

17.04.2020