

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 77 OF 2020

(Originating from Criminal Case No. 191/2018 from Bagamoyo District Court at Bagamoyo)

KASSIM NASSORO @ MANGOMA1ST APPELLANT
ABDALLAH MOHAMED 2ND APPELLANT

Versus

THE REPUBLIC RESPONDENT

Date of last Order: 24/05/2021

Date of Ruling: 25/05/2021

J U D G M E N T

MGONYA, J.

In the District Court of Bagamoyo, Appellants, **KASSIM NASSORO @ MANGOMA** and **ABDALLAH MOHAMED** were charged and convicted for the offences of conspiracy and armed robbery contrary to **Section 287A of the Penal Code, Cap 16 [R. E. 2002]** and on **19th December 2018** were convicted and sentenced to serve jail sentence of 5 years each for the 1st count and 30 years imprisonment for the 2nd count; and further ordered that the sentences to run concurrently. Being aggrieved with both conviction and sentence, Appellants lodged a Petition of Appeal accompanied with the seven (11)

grounds of appeal that the trial court erred in law and facts in convicting the appellants based on:

- (a) Holding to entire prosecution evidence procured un procedural where there was serious none compliance with mandatory provision of section 210 (3) of Criminal Procedure Act, Cap. 20 [R.E. 2002] after receivership;***
- (b) Holding to motor vehicle exhibit P3 subject of the alleged armed robbery where PW1 and PW2, the alleged owner and victim of the robbery respectively did not identify the same before court for verification;***
- (c) Holding to PW3 evidence without warning himself, that she was a witness with interest to serve as the alleged stolen vehicle (exhibit P3) was found in her possession hence liable for prosecution;***
- (d) Holding to the plate Number (exhibit P5) and the vehicle (Exhibit P3) where their movement and storage (chain custody) was not established;***
- (e) Holding that PW3 identified second Appellant where she was not led to identify him by either pointing or touching him among others;***

- (f) Holding to identification parade from exhibit P4, tendered by PW4 and admitted un procedural where its contents was not read loud in court for its verification;***
- (g) Holding to un procedural identification parade conducted by PW4 against 2nd Appellant where rules and regulation of PGO 232 where contravened rules 1, 2 (c), 2 (N), 2 (S);***
- (h) Convicting all Appellants for conspiracy where no evidence was led to suggest that they ever converge to plan to Act unlawfully;***
- (i) Failing to appraise objectively credibility of prosecution evidence before relying on it as basis for conviction; and***
- (j) Holding that the prosecution proved its case against the Appellant beyond any reasonable doubt as charged.***

Whereof, the Appellants prays this Court to allow the appeal, quash conviction, set aside sentence and acquit them form prison.

At the hearing of this Appeal, via virtual court proceedings, Appellant represented themselves, while Ms. Imelda Mushi, the learned State Attorney, represented the Respondent, the Republic.

In the cause of submitting their appeal, Appellants at the outset did not elaborate on their grounds of appeal but pleaded the court to adopt the same for determination as they believe to have merits. Further to consider their appeal by allowing it and set them free so as they can re-join their families.

In her reply submission on the grounds of appeal, Ms. Imelda Mushi outright informed the court that Republic supports the appeal where the following were the reasons offered.

It was the Counsel concern that Appellants were brought to court with two counts of **conspiracy** and **armed robbery**. It is further the Counsel submission that in Armed Robbery as per provisions of section **287 of Penal Code [R.E. 2019]**, in order to prove the offence, prosecution has to prove **theft**, and that the offender had a **weapon** which was used before or after theft and that the same was used for **threatening**. It is the Counsel's concern that in the cause of proving the above criteria, particularly on theft, Republic failed to prove that Appellants stole PW1's vehicle.

The reason given by the learned State Attorney was that, **PW1** who was the victim in trial court's proceedings he testified to the effect that, his car was registered **T265 BZC Canter type**. However, **PW5** who was the Investigator before the Court testified that the vehicle which was subject to theft

was registered number **T860 ATV**; and he said when he went to the scene of crime, seize the vehicle and record the same in the certificate of seizure, the property seized was vehicle with registration number **T225 ABM**. To confirm the allegation, the court was referred to page 7 of the trial court's proceedings where Prosecution tendered Vehicle with registration number **T 525 ABM** for evidence.

It is from the above scenario, Ms. Mushi was of the view that the evidence from the Prosecution was not in collaboration by having different vehicle with **T525 ABM** as evidence in court while in the Seizure Certificate, the vehicle concerned was that with registration number **T 225 ABM**. Meaning that there is confusion of vehicle registration numbers to the one which was stolen seized; where the confusion brought doubt on part of prosecution in proving their case.

Learned State Attorney supported her concern with the ***Case of No. 50/2018 MSHEWA DAUDI VS. REPUBLIC*** from pages 8 and 9 where elements to prove Armed Robbery offence were stated.

Another offence to prove was Armed Robbery. The Counsel stated that, elements to the offence of Armed Robbery is to the effect that the robbers must have **weapon** in the cause of committing the crime. Regarding the instant case, Ms. Mushi referred this court to page 13 of the trial court's

proceedings particularly to the testimony of PW1 where nowhere in his entire testimony the witness demonstrated that Appellants had weapon apart from beating those who were in the car.

From the above, it is the learned State Attorney's concern and observation that in a cause of committing the offence of armed robbery, without the weapon, the offence of armed robbery cannot stand. Further, Ms. Mushi said, though Honorable trial Magistrate in page 4 stated that PW1 testified to the effect that he was invaded with people with bush knives and clubs; this statement is not found in his entire testimony at least as per the proceedings of the trial court.

It is from above observation Ms. Mushi concluded that during trial, indeed Prosecution failed to prove their case beyond reasonable doubt against the Appellants. Further, to that, counsel also concluded that in the event therefore, the 1st offence of Conspiracy too cannot stand.

From the above, Ms. Mushi declared Appeal to have merits and suggested for the Appellants release from prison.

In rejoinder of course Appellants joined hands with the state attorney observations.

After reading the grounds of appeal, listening to the submission made by the Counsel for the Respondent herein and perusal of the trial court's record, I find it pertinent to start

by putting things in the right perspective that there is no dispute that the alleged offence was committed in 2015 and as per the laws in this country, the offence of armed robbery was amended and re-defined by the Legislature in **2004** via the **Written Laws (Miscellaneous Amendments) (No. 2) Act 2004**. I am settled in my mind that, in 2015 when the charge sheet was crafted, the proper provision of the law for the offence of *armed robbery*, which the accused persons were supposed to be charged with, was Section **287A** of the Penal Code *as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act 2004*, where the offence of armed robbery is defined to mean:-

*287A. 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 company of one or more person** and at or immediately before or immediately after the stealing **threatens to use violence to any person** commits an offence termed "armed robbery" and on conviction is liable to imprisonment to a minimum term of thirty years with or without corporal punishment."*

Following, the above provision of the law, it is clear that the cited law in the charge sheet was proper to the effect that

Appellants were brought to court for the offence of Armed Robbery.

Again, following the above definition of the offence of armed robbery, it is clear that, **essential ingredients** for the offence of armed robbery were not indicated in the **in the** enter trial court's proceedings. This has been demonstrated by looking at the entire trial court's record/proceedings. In the case of ***MWAIMU DISMAS AND 2 OTHERS V REPUBLIC, Criminal Appeal No. 343 of 2009 (Unreported)***, the Court of Appeal while making reference to a number of its earlier decisions observed that:

"It is trite law that "robbery as an offence 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 the person on whom the actual violence or threat was directed..."[Emphasis added].

In another case of ***KANUTI S/O KIKOTI V REPUBLIC, Criminal Appeal No. 7 of 2013 (Unreported)***, the Court categorically stated that:

*"Where therefore, a charge of Armed Robbery or, as we have found above Attempted Robbery, **does not***

disclose the important element in question, the charge (sheet) is rendered fatally defective, the result of which the proceedings and judgment based on it become a nullity.” [Emphasis added].

The law is well established that, particulars of the offence of Armed Robbery shall disclose the essential elements or ingredients of the offence charged. (See other decisions of the Court of Appeal in **MUSSA MWAIKUNDA V REPUBLIC [2006] TLR 387** and **ISIDORI PATRICE V REPUBLIC, Criminal Appeal No. 224 of 2007**. Specifically in the case of **Isidori** the Court of Appeal stated *inter alia* that:

*"It is 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 that the accused committed the **actusreus** of the offence charged 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 specifically*

required by law. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed; they must be included in the particulars of the offence.” (Emphasis added)

The Court of Appeal further quoted the *Ratio Decidendi* enshrined in the case of **MUSSA MWAIKUNDA V. R, Criminal Appeal No. 174 of 2006** in which the same Court among others emphasized that,

“The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence.”

Going by the above authorities and the record of the case at hand, I find the charge before me to be defective in the sense that some of the essential ingredients of the offence of armed robbery, **threatens to use violence to any person** were not indicated in the particular of the offence.

To wind up my precedents though not monotonous, I would like to refer to the recent case of Court of Appeal, the case of **SHABANI SAID ALLY V. REPUBLIC Criminal Appeal No. 270 of 2018** where it was held that:

"It follows from the above provision of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:

- 1. There must be proof of theft; see the case of **Dickson Luvana v. Republic**, Criminal Appeal No.1 of 2005 (Unreported);*
- 2. There must be proof of the use of a **dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.***
- 3. That use of dangerous or **offensive weapon or robbery instrument must be directed against a person.** See: **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (Unreported)."*

I am aware that it is a principle of the law that, it is the charge sheet, which lays the foundation of the trial and as such, the charge sheet must contain sufficient particulars. However, unfortunate in this case, the foundation was laid down but was not supported by the evidence during trial.

From the above, I am satisfied that the Appellants were charged, and further convicted and sentenced for the offence which did not support the charge sheet to command conviction for the sentence that the Appellant obtained. Further, I join

hands with the learned State Attorney Ms. Mushi that the appeal has merits.

In the event and for reasons stated herein above, **I allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of both Appellants from prison, unless otherwise, lawfully held for some other cause.**

It is so ordered.

Right of Appeal explained.



A handwritten signature in blue ink, appearing to read 'L. E. Mgonya', is positioned above the printed name.

L. E. MGONYA
JUDGE
25/05/2021

Court: Judgment delivered in chamber in the presence of Ms. Imelda Mushi, State Attorney for the Respondent, the 1st and 2nd Appellant in person and Ms. Veronica, RMA this 25th day of May, 2021.

A second handwritten signature in blue ink, appearing to read 'L. E. Mgonya', is positioned above the printed name.

L. E. MGONYA
JUDGE
25/05/2021