IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 59 OF 2021

(Arising from the Criminal Case No. 157 of 2019 from the District Court of Kilombero, at Ifakara)

SALUM ALLY @ KIVUKE .....1st APPELLANT
SAID NASSORO @LIGULWIKE.....2nd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

4th & 12th August, 2021

CHABA, J.

Formerly, the appellants and two others namely Nassoro Ramadhani and Said Shaibu, then the second and third accused persons respectively, were arraigned before the District Court of Kilombero, at Ifakara with one count of armed robbery contrary to section 287A of the Penal Code [Cap. 16 of the R.E. 2002] now [R.E. 2019].

The prosecution alleged that on 01/02/2019 around 19:30 hours at Kisawasawa area in Mang'ula within Kilombero District in Morogoro Region, four persons were alleged to have invaded at the premises of one Goagoa Rashid and steal cash money Tshs. 4,750,000/=, six different types of mobile phones valued at Tshs. 1,105,000/=, the total value being Tshs. 5,855,000/= all being the properties of one Goagoa

Signature .....

Rashid. Immediately before such stealing, the bandits did threaten the owner by using a firearm so as to obtain and retain the said properties.

Having denied the charge sheet read against them, a full trial was conducted and at the end of trial the appellants herein Salum Ally @ Kivuke and Said Nassoro @ Ligulwike (the 1st and 4th accused persons at trial) were found guilty of the offence, convicted and sentenced to serve thirty (30) years imprisonment. The 2nd and 3rd accused persons namely, Nassoro Ramadhani and Said Shaibu respectively, were acquitted.

Discontented by the trial court decision, the two convicts appealed before this court armed with seventeen (17) grounds of appeal. They filed a joint petition of appeal. Their grounds of appeal have been condensed as hereunder shown:

1. That, the trial court convicted the appellants while did not comply with the provisions of the law under section 192 of the Criminal Procedures Act [Cap. 20 R.E. 2019].
2. That, the prosecution case was not proved beyond reasonable doubt as reflected in the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, 16th and 17th grounds of appeal,
3. That, the trial court convicted the appellants whereas the charge sheet was defective as reflected on ground No.7.
4. That, the trial court erred in law and fact by convicting the appellants in violation of sections 231 (1) and 312 (1) both of the Criminal Procedure Act [Cap.20 R.E. 2019] as indicated in the grounds of appeal Nos. 14 and 15.

Signature .....

When this appeal was called on for hearing, the appellants appeared in persons, unrepresented. On the other hand, Mr. Ramadhani Kalinga, learned State Attorney entered appearance for the Respondent Republic.

Once the 1st appellant was given an opportunity to amplify his grounds of appeal, he submitted that he trusts this court. Being a layman, he prayed his appeal be allowed and the sentence imposed against him be set aside. He further prayed to adopt his grounds of appeal as the same are self-explanatory. The second appellant also had similar prayers.

At the outset, Mr. Kalinga resisted the appellants' appeal and sought not to support it. He commenced his oral submissions by stating that upon perusal to the grounds of appeal, he thought it prudent to argue these grounds of appeal in groups namely, Charge sheet, identification, Judgement and defence as the appellants complained that their defences were disregarded by the trial court magistrate.

Arguing in respect of the charge sheet, Mr. Kalinga contended that the same was properly framed in the letter and spirit of the law upon compliance with the provision of section 135 of the Criminal Procedure Act [Cap.20 R.E. 2019] (the CPA) read together with the 2nd Schedule to the CPA. He added that the statement of the offence similarly was properly stated, whereas the properties alleged to have been stolen on the material date, were all mentioned. The name of the victim was again included in the charge sheet. He further underlined that the law was complied with to the letter and spirit of the law from day one and that the trial court record reveals that the holding of preliminary hearing was

Signature .....

conducted accordingly. The evidence in record also throve in proving the allegation against the appellants.

As to the question of identification, Mr. Kalinga, placing reliance on the guiding principles articulated in the case of **Waziri Amani v. Republic [1980] T.L.R., 250,** had a view that the appellants were properly identified. He submitted that the identifying witnesses did manage to establish the identity of the culprits through electric bulbs that were around the scene of crime. More importantly, the appellants were not strange to the identifying witnesses. He went on to state that in the court record there are clear explanations as to how the PW1 managed to identify one culprit by the name of Saidi, herein the 2nd appellant (the 4th accused at trial) who used to run or do bodaboda business. That means he used to ferry passengers from one point to another within the locality. Such piece of evidence was supported by the evidence of PW2. He said, other prosecution witnesses who succeeded to establish the identity of the 1st and 2nd appellants are PW2, PW3 and PW4.

It was Kalinga's further submission that the evidence of PW5 shows that he supervised and conducted identification parade. In the course, PW2 succeeded to identify the 1st appellant. The learned State Attorney highlighted that though he believes that the guiding principle voiced in the case of **Waziri Amani** (supra) is sound in matters of evidence of visual identification of a culprit and it is now settled that the evidence of visual identification is of the weakest kind of evidence to be considered by the court, yet in the circumstance of this case, the appellants were satisfactorily identified.

Signature .....

With regards to the appellants complaint that the judgment of the trial court did not comply with the requirements of section 312 (1) of the CPA for lacking points of determination or issues, Mr. Kalinga quickly beseech the court to dismiss it forthwith. He said, the trial magistrate fully complied with the law.

The last complaint raised by the appellant through their grounds of appeal is that, the trial magistrate failed to consider the appellants evidence during their defence. On this facet, Mr. Kalinga contended that this allegation is devoid of merit, and it should be dismissed. He said, the judgment of the trial court considered the evidence adduced by the appellants. He further stated that even if the appellants' defence wouldn't have been considered, such ailment is curable under section 388 of the CPA. To end up his submission, Mr. Kalinga prayed this appeal be dismissed in its entirety on the ground that it lacks semblance of merits.

Following the respondent's submissions, the appellants did not have anything to add in re-joinder. They prayed to be released from prisons.

Upon considering the grounds of appeal, the impugned proceedings, judgment of the trial court and the submissions by the learned State Attorney, I am now able to determine this appeal. This being the first appeal, I am tasked to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at my own conclusions of fact. See the case of **Gody s/o Katende @ Godfrey Katende v. The Republic**; Criminal Appeal No. 399 of 2018: CAT - Iringa (Unreported).

Signature .....

The question which needs consideration, determination and decision thereon is whether or not the prosecution side proved their case to the required standards.

I will start with the question whether the charge was defective. It is trite law that a criminal trial is always initiated by a charge. The accused person(s) cannot receive fair trial if the charge initiating the criminal trial is defective. In the case of **Salum Yunusi Ngongoti & 2 Others v. The Republic**, Criminal Appeal No. 219 of 2018: CAT – Dar es Salaam (Unreported), the Court held inter-alia that:

> "A charge is the foundation of any prosecution facing an accused person, as it provides him with the road map of what to expect from the prosecution witnesses during the trial of his case."

In this appeal, the appellants through their petition of appeal have raised a point that the charge was defective for duplicity. On his part, Mr. Kalinga contended that the charge was properly drafted. In simple terms, duplicity is the error committed when the charge (known as a count) on an indictment describes two different offences. Thus, a charge is said to be duplex when it contains two separate offences in one count. The Court of Appeal in the case of **Ramadhani Mwanakatwe & Others v. Republic**, Criminal Appeal No. 198 of 2018: CAT – Dar es Salaam (Unreported), voiced that the substituted charge depicted that the appellants were charged with gang rape and unnatural offence. Then it made the following observations:

Signature .....

> "...a charge is said to be duplex if two distinct offences are contained in the same count or where an actual offence is charged along with an attempt to commit the same offence..."

In another case of **Noah Paulo Gonde & Another v. DPP**, Criminal Appeal No. 456 of 2017: CAT - Mbeya (unreported), the Court held among other things that, duplicity of charge can occur where there are two counts based on similar particulars.

Now back to our case, the test whether the charge levelled against the appellants or accused persons was defective for duplicity or otherwise, the facts of the case gleaned from the charge sheet may portray the true picture. For ease of reference, the charge read:

> "That SALUMU S/O ALLY, NASSORO S/O RAMADHANI, SAID S/O SHAIBU and SAID S/O NASSORO @ LIGULWIKE are jointly and together charged on 10th day of February, 2019 at about 19:30hrs at Kisawasawa – Mang'ula within Kilombero District in Morogoro Region did steal cash Money Tshs. 4,750,000/=, six different types of mobile phones valued Tshs. 1,105,000/=, total value Tshs. 5,855,000/= the property of one GOAGOA S/O RASHID. Immediately before such stealing did threaten the owner by a fire-arm in order to obtain the said property."

From the wording of the particulars of the offence, I have failed to comprehend as to what exactly the appellants are trying to suggest. In my view, there is nothing showing that the charge contains separate offences. In other words, there is nothing suggesting that there are two distinct offences in one count. The facts do establish the elements of the offence of armed robbery albeit in summary. Hence, ground No.3,

Signature .....

featured as ground No.7 in the appellants petition of appeal is devoid of merit.

Coming to the 2nd ground (featured as grounds Nos. 3rd, 4th and 12th in the petition of appeal) which are interrelated, the message that can be quickly deduced therein is that the trial court magistrate erred in law and facts to convict the appellants while there was variance between the charge and evidence on record. On the 3rd ground, the appellants contended that while the charge shows that the offence was committed on the 10th February, 2019 at about 19:00 hours, the prosecution evidence states that the offence was committed on the 14th May, 2019 at or about 19:00 hours. Similarly, on the 4th ground, it is evident from the charge sheet that the victim (PW1) whose properties valued at Tshs. 5,855,000/= were stolen, the prosecution evidence illustrates that the victim's properties valued at Tshs. 4,745,000/=. In addition, he was robbed 3 business cell phones, a wallet that contained a driving licence, identity card and one that had to enable him access and obtain ownership of a certain property. It is further stated that PW2 was robbed Tshs. 2,000,000/=, two bank cards, two mobile phones make Huawei type, whereas PW3 was robbed his Cash money valued at Tshs. 80,000/= and his mobile phone. All their properties were taken by the culprits.

These all to say the least, are nowhere to be found on the face of the particulars of the offence. On this point, it was Kalinga's argument that the prosecution evidence tallied with the particulars narrated in the charge sheet.

Signature .....

From the foregoing observations, I am of the view that it needs no *eagle's eye* for one to realize that there is variance between the charge and the prosecution evidence. Indeed, the date within which the offence is alleged to have occurred according to the charge sheet, varies with the date mentioned by the prosecution witnesses. Further, the particulars of the offence narrated in a charge sheet, is deficiency of the properties stolen and against the evidence on record. In particular, the charge does not show the properties of PW2 and PW3 which were alleged to have been stolen by the appellants. In the case of **Michael Gabriel v. The Republic**, Criminal Appeal No. 240 of 2017: CAT - Arusha (Unreported), the Court had the following to say; under section 234 (1) of the CPA, where in the course of trial, it transpires that there is variance between the charge and evidence, the charge may be amended. Failure to amend the charge under these circumstances has an effect of watering down the prosecution evidence i.e., the offence will remain unproved. Similarly, in this appeal the provision of law under section 234 (1) of the CPA was not utilized to salvage the situation as a result it watered down the prosecution evidence and signified that the offence of armed robbery was not proved.

Having found that the charge sheet which essentially initiates the trial, from the beginning transpired that there was variance between the charge and evidence adduced by the prosecution witnesses and taking into account that the provision of law under section 234 (1) of the CPA was not utilized to salvage the situation, it is sufficient to say that this ground alone is capable of disposing the entire appeal. I subscribe to the pertinent observations made in the case of **Michael Gabriel** (supra) that failure by the trial court to comply with the above aforesaid

Signature .....

provisions of the law it watered down the prosecution evidence. It thus goes without saying that in the circumstance of this case, the offence of armed robbery was not proved beyond reasonable doubt.

I am keenly aware that not every defect in the charge sheet would vitiate a trial. As to what effect the defect could lead, this would depend on the circumstances of each case. The overriding consideration being whether or not the defect worked to the prejudice of the person accused to commit the offence. Considering that the date stated in the charge sheet varies from that of evidence given by the prosecution witnesses as well the failure of the charge sheet to disclose the properties which were alleged to have been stolen by the appellants, in the eyes of the law this can be expressed that at the end of trial, the appellants did not receive a fair trial in court. In my view, the revealed shortcoming perhaps the same made the appellants failed to establish their defence properly due to difficulty and strains flawed by the charge sheet which indeed makes it fatal and incurable defect.

As to the remaining issues, I see no need to labour on them since my findings have revealed that a fatal irregularity ensued as hinted above which goes to the root of the case. The same rendered the whole prosecution's evidence a nullity and ought to have been nullified.

In the final analysis, I allow the appeal to the extent herein shown above. Hence, the conviction and sentence meted out against the appellants are quashed and set aside. I thus make an order for their immediate release from prisons unless they are otherwise lawfully held.

Order accordingly.

Signature .....

DATED at **DAR ES SALAAM** this **12th day of August, 2021**.

M. J. CHABA

JUDGE

12/08/2021

Court: Judgement delivered at my Hand and Seal of this Court in Chambers today on the 12th day of August, 2021 in the presence of the 1st and 2nd appellants, unrepresented, and Mr. Ramadhani Kalinga, learned State Attorney for the Respondent Republic.

M. J. CHABA

JUDGE

12/08/2021

Right of Appeal to the Court of Appeal (T) fully explained.

M. J. CHABA

JUDGE

12/08/2021

THE HIGH COURT OF TANZANIA

Signature .....