IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 20 OF 2022

ABDURAHIM RAMADHAN @DULLY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Arising from the decision of the Resident Magistrate's Court of Coast Region at Kibaha in Criminal Case No. 146 of 2020)

JUDGMENT

1st August & 5th September, 2022

KISANYA, J.:

Abdurahim Ramadhan @ Duly, the appellant herein, was charged with another person before the Resident Magistrate's Court of Coast Region at Kibaha, with the offences of armed robbery and grievous harm contrary to sections 287A and 225 of the Penal Code, Cap. 16, R.E. 2019 (now R.E. 2022, henceforth "the Penal Code"), respectively.

The particulars of the charge on the first count were to the effect that, on 21/06/2020, at Uwanja wa Star, Mlandizi area within Kibaha District in Coast Region, the appellant and his co- accused person did steal cash money the property of Ramadhani Jumanne, and a mobile phone make TECNO worth Tshs. 200,000/= the property of Mohamed Ramadhani, and that, immediately before such stealing, they applied violence to the said Mohamed Ramadhani by stabbing him with a knife on his nose in order to obtain the

stolen properties. With regard to the second count, it was alleged that, on the date and place stated in the first count, the appellant and his co-accused person, unlawfully did grievous harm to Mohamed Ramadhani by stabbing him with a knife on his nose and piercing him with a screwdriver (*bisibisi*) on his mouth.

The facts resulting into the case from which the appeal has risen were to the effect that; on 21/06/2020 around 1900 hours, Mohamed Ramadhani (henceforth "the victim" or "PW2") was heading to his father's house. He was invaded by three robbers. Being aided by an electricity light, the victim identified the appellant and his co-accused person on the account that he knew them before the incident. It was alleged that, upon invading the victim, the appellant and his allies hit him with the fists and threatened to stab him with the knife and screwdriver. They further grabbed from the victim cash money to the tune TZS 400,000.00, one mobile phone make TECNO worth Tshs. 200,000/. The appellant's co-accused was arrested on the same date, while the appellant was arrested few days later. The duo were charged of the offence of armed robbery and grievous harm to which they pleaded not guilty.

To prove the case against the appellant and co-accused, the prosecution relied on the testimonies of eight witnesses namely, PW1 Ramadhani Jumane Msuya, PW2 Mohamed Ramadhan Msuya, PW3 Awadhi

Juma Msuya, PW4 Kilindo Ahmed Ally, PW5 Bakari Omari Mbaga, PW6 Assistant Inspector Tamimu Risasi, PW7 Detective Constable Chipeta and PW8 Agness Pascal Msinzo. Given that the offence was stated to have been committed during the night, the evidence of visual identification of the appellant and co-accused was adduced by PW2. It was also supported by PW1, PW3 and PW6 who testified how the victims named the person who robbed him, immediately after the incident. Apart from the witnesses' oral testimonies, the prosecution tendered the medical examination report-PF3 (Exhibit P1) which shows that the victim had a cut wound in the mouth and blood stains.

In their respective defences, the the appellant and his colleague distanced themselves from the offences laid against them. While the appellant stated that he knew nothing about the said offences, his co-accused who testified as DW2 distanced himself from scene of crime on the date of commission of the offence. Further to this, DW2 called his father (DW1) who support his defence of alibi. In addition to the defence of alibi, DW1 testified that the offence was committed when the appellant's co-accused person was 16 years. He tendered in evidence, a certificate of birth of the appellant's co-accused to supplement his evidence (Exhibit D1).

After a full trial, the trial court found the appellant and his co-accused guilty as charged and convicted them. The appellant was sentenced to 30

years imprisonment on the first count and 3 years imprisonment on the second count. As regards the appellant's co-accused person, the trial court was convinced that he was a child. It went on dealing with him under the Law of the Child Act, Cap. 13, R.E. 2019. In so doing the trial court discharged him subject to execution of a bond to be of good behavior for a period of three years.

Aggrieved, the appellant has preferred the present appeal predicated upon four grounds of appeal to the effect that; *one,* the prosecution side failed to prove its case beyond all reasonable doubts; *two*, the trial court had no jurisdiction to determine the matter; *three*, the trial magistrate erred in law to convict the appellant basing on defective and unreliable PF3; and *four*, the prosecution failed to conduct an identification parade while the crime was committed during the night. With leave of the Court, the appellant addressed the Court on the additional ground, that the appellant was not accorded the right to cross examine his co-accused person.

When this appeal was called on for hearing, the appellant appeared in person and was represented by Mr. Muktar Hassan, learned advocate, whereas the respondent was represented by Ms. Fidesta Uisso, learned State Attorney.

In the course of hearing this matter, I probed the parties to address the Court on whether, it was proper for the prosecution to charge the

appellant and his co-accused with offences of armed robbery and grievous harm.

Having heard the submissions from the counsel for both parties, I find it appropriate to consider first the issue raised by the Court*, suo mottu*, and the first ground of appeal in which the appellant contended that the charge and evidence are at variance.

It is settled law in this jurisdiction that, any prosecution against an accused person is founded on a charge or information. It is also the charge which informs the accused person of what he should anticipate or expect from the witnesses to be marshalled by the prosecution. That being the position, an accused person has the right to know the particulars setting out the foundation or basis of the charge preferred against him. This requirement is premised on the provision of section 132 of the Criminal Procedure Code, Cap. 20, R.E. 2022 (the CPA) which reads: -

> *"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. [Emphasis Added].*

Apart from informing the accused person of the nature of the case laid against him, particulars of the charge form the basis of a fair trial and

enable the court to determine whether the evidence adduced proved the allegation stated therein. [See the case of **Herson Kasigala vs R**, Criminal Appeal No. 3 of 2020, CAT at Kigoma (unreported)].

Now, starting with the issue raised by the Court, *suo mottu*, it is common ground that the offences of armed robbery and grievous harm were lumped in the charge which gave rise to this appeal. It is also in evidence, both offences alleged to have been committed in the same course of transaction. Thus, they were based on the same facts. In their respective submission, the learned counsel were at one that, it was not proper for the appellant to be charged with the offence of armed robbery and grievous harm. However, Mr. Hassan was of the view that the said anomaly rendered the charge defective as the appellant was punished twice, while Ms. Uisso contended that the appellant was not prejudiced. She bolstered her argument by citing the case of case of **Raymond Mwinuka vs R**, Criminal Appeal No. 396 of 2017 (unreported). In that regard, the learned State Attorney asked this Court to revise and quash the appellant's conviction and sentence on the lesser offence of grievous harm.

I entirely agree with both counsel that given the circumstances of this case, it was not proper for the counts of armed robbery and grievous harm to be lumped together while the same were grounded on the same facts or particulars disclosed in the charge sheet. Similar stance was taken in the

case of **Anord Kagoma and Basili Philmoni vs R**, Consolidated Criminal Appeal No. 31 and 32 of 2016 (unreported) which was also referred to in **Herson Kasigala** (supra) where it was held that:-

> *"...an offence of armed robbery is committed when force, violence or threat is applied to a person he is targeted to be robbed. He might be maimed in the process. If that happens, as in this case, that is part and parcel of the offence of armed robbery. It was not proper to split the charge into two parts as was done in this grievous harm and armed robbery. It is one count-armed robbery."*

The question that arises is whether the said anomaly prejudiced the appellant. I have shown herein that, Ms. Uisso invited the Court to consider that the appellant was not prejudiced. I agree with her that, in the case of **Raymond Mwinuka** (supra), the Court of Appeal resolved to nullify and quash the conviction and set aside the sentence on the offence of grievous harm. In terms of the record, the said decision was delivered on 29th August, 2019. However, pursuant to the case of **Herson Kasigala** (supra) which was delivered 1st July, 2021, it is now settled that such defect is incurably defective on the ground that, the accused person is prevented from understanding the difference between the particulars of the two offences in order to prepare a good defence. The relevant part of the decision of the Court of Appeal reads: -

"It was a fatal irregularity which occasioned miscarriage of justice because it prevented the appellant from drawing a distinction between the particulars of armed robbery and those of causing grievous harm and arranging his witnesses accordingly. Because the trial court received all the evidence on basis of this confusion, section 388 of the CPA cannot cure the defect in the charge sheet. In the circumstances, the appellant was not afforded a fair trial."

Reverting to the case at hand, the particulars of offence for both counts were, among others, to the effect that, the appellant and his co-accused person stabbed Mohamed Ramadhan "with a knife on his nose". Being guided by the position stated in **Herson Kasigala** (supra), it is clear that the appellant could not make distinction of the particulars in respect of the offences laid against him. On the foregoing reason, I hold the view the charge laid against the appellant is incurably defective and that, it cannot be cured under section 388 of the CPA.

That ground is by itself sufficient to dispose of this appeal. However, there is yet another point that needs to be considered. As stated earlier on, it was submitted in support of the first ground of appeal that, the charge and evidence are at variance. Mr. Hassan contended, *inter alia,* the charge shows that the victim was stabbed with a knife, while the evidence given by the victim (PW2) is to the effect that he was hit with fists when the appellant

and his co-accused person were obtaining the stolen properties. Responding, Ms. Uisso conceded to the said variance.

However, the duo differed on the effect of the variance between the charge and evidence. The appellant's counsel was of the view that the variance connotes that the charge was not proved. He cemented his argument by referring this Court to the case of **Michael Gabriel vs R**, Criminal Appeal No. 240 of 2017 (unreported). On the other side, Ms. Uisso urged this Court consider that PW2 adduced evidence which proved all elements of armed robbery.

My starting point is to restate the position of law governing the issue under consideration. According to section 234(1) of the CPA, the proper recourse where the charge and evidence are at variance is to cause amendment of the charge. There is a list of authorities in which the above position was stated. Apart from the case of **Michael Gabriel** (supra), this position was stated in the case of **Issa Mwanjiku @ White vs R,** Criminal Appeal No. 175 of 2018 (unreported) when the Court of Appeal held:-

> *"We agree with Ms. Kambakono that in terms of section 234(1) of the CPA the prosecution ought to have moved the trial court to order amendment of the charge sheet and give the appellant opportunity to plead to the altered charge."*

As regards failure to amend the charge, which is at variance with the evidence, the law is further settled that, such omission renders the charge defective for want of evidence to prove the same. I am fortified, among others, by the case of **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2015 (unreported) where it was held:-

> *"If there is any variance or uncertainty in the dates then the charge must be amended in terms of section 234 of the CPA.* ***If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal****."* (Emphasize supplied).

At this juncture, it is worth noting that, pursuant to section 287A of the Penal Code, offence of armed robbery is proved by establishing that: one, the accused person stolen something; two, at or immediately before or after stealing, the accused person was armed with a dangerous or offensive weapon or instrument; and three, at or immediately before or after stealing, accused used or threatened to violence. [See also the case of **Juma Charles Reuben vs R**, Criminal Appeal No. 466 of 2017 (unreported)].

As rightly observed by the learned counsel for both parties, it was stated in the particulars of offence of armed robbery that, the appellant and his co-accused person applied violence to one Mohamed Ramadhani by stabbing him with a knife on his nose in order to obtain the stolen

properties. It is clear that the said particulars were related to the third ingredients of armed robbery. However, Mohamed Ramadhani (PW2) testified that he was hit with fists. He did not testify to have been stabbed with knife on his nose. This implies that there is a variance between the charge and evidence adduced. Much as the evidence on how the armed robbery was committed does not support what was alleged in the particulars of the charge, the prosecution ought to have amended the charge. Such anomaly cannot be cured by considering that the offence was duly proved by PW2 as contended by Ms. Uisso.

It is clear that the omission to amend the charge rendered the offence of armed robbery unproven. This is so because, there is no evidence to prove particulars which were made known to the appellant. Therefore, even if I was to consider the learned State Attorney's prayer nullifying and quash the appellant's conviction and sentence on the second count, I would have decided that the offence of armed robbery was not proved.

On the foregoing reasons, I find it not necessary to address other grounds of appeal because determination on the above two issues dispose the appeal. In the end result, I allow the appeal, quash the convictions and set aside the appellant's sentences. I further order

immediate release of the appellant from prison unless he is held for other lawful cause.

DATED at DAR ES SALAAM this 5th September, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered this 5th day of September, 2022 in the presence of the appellant, Mr. Muktar Hassan, learned advocate for the appellant and Ms. Fidesta Uisso, learned State Attorney for the respondent.

Right of appeal explained.

S.E. Kisanya
JUDGE