

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO.13 OF 2022**

*(Appeal from the decision of the District Court of Mkuranga at Mkuranga dated 4<sup>th</sup> day of March, 2021 Hon. H.I. Mwailolo – RM in Criminal Case No. 222 of 2020)*

**MUSA YUSUPH KIPENGELE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 21/09/2022*

*Date of Judgment: 3/10/2022*

**POMO, J.**

The Appellant, together with three others (DAUDI MOHAMED MASIMBA, ATHUMANI MAULIDI UBUGUYU @ OBAMA and SHABANI MALIKI ZEBEA), was arraigned before Mkuranga District Court (the trial

court) facing the charge of armed robbery contrary to **section 287A of the Penal Code CAP 16 of the law (R.E.2002) as amended by Section 10A of the Written Laws (Misc. Amendments) Act No.3 of 2011**. It was the particulars of the charge that, on 11<sup>th</sup> day of August, 2019 at Vikindu village within Mkuranga District in Coastal Region, the Appellant with his three co – accused unlawfully being armed with machete and knives did steal the properties valued in monetary term to be worthy Tshs 150,000/- the properties of one ALLY SELEMANI NGORONYA and before such stealing they threatened him by the said machete and knives in order to obtain and retain the allegedly properties.

In proving the charge against the appellant and the said three co – accused the Respondent herein paraded six witnesses (see pp. 20 – 57 of the typed trial proceedings) while on the side of defence case, four witnesses testified in court.

At the end, the trial court was satisfied with the prosecution evidence that the charge against the Appellant was proved beyond reasonable doubt hence found him guilty of the charge. He was then convicted and sentenced to serve a minimum statutory jail sentence of thirty (30) year for the offence of armed robbery. The three co – accused were acquitted for

lack of enough evidence to prove the charge against them. The judgment was delivered on 4<sup>th</sup> March, 2021.

Aggrieved by the trial court decision, the Appellant has lodged in this court this appeal which contains six grounds of appeal. The grounds of appeal, as presented by the Appellant in the memorandum of appeal, are hereby reproduced verbatim: -

- 1. That, the trial magistrate misdirected himself in law and facts after failure to be called the important witness security Ally Aidary Mzuzuri whereby in this case should be first accused as alleged of charge*
- 2. That, still the statement of Pw 6 where a security officer Ally Aidary Mzuzuri not determined that which accused was arrested the period of invading him and committed the offence of armed robbery as charged*
- 3. That, subordinate court Court Failure to determine that the prosecution had failed to prove the charged offence against the appellant beyond reasonable doubt*

4. *That, there was no certificate of seizure in court signed by me as to assent that the alleged appellant's big scissor prize, iron bar bisibisi and other tools they were used during commission of an offence*
5. *That, there was no free witness in this case where about despite in the alleged charge asserted people gathered when the Appellant was under arrest. Hence, why the prosecution side was added from gathered people the period under arrest appellant in order to prove alleged charge.*
6. *That, the learned magistrate grossly erred in law and facts for failure to be called necessary witness in order to determine the truth of cautioned statement of appellant, PW 4 he said that the period of interrogation with the appellant she was present as a free witness.*



When the appeal came for hearing on 21/09/2022 the Appellant appeared in person unrepresented while the respondent was represented by M/S Rose Ishabakaki, the learned State Attorney. The Appellant allowed the Respondent republic to begin arguing the appeal while reserving his right to rejoin.

In arguing the appeal, the learned state attorney, supported the appeal and submitted generally to the grounds of appeal.

It was her submission that while one ALLY SELEMANI NGORONYA is named in the charge sheet as the victim of the armed robbery to which the appellant faced the charge, that very person was not called in court to testify. She went on submitting that the evidence adduced in court shows that the one threatened is Ally Mzuzuri and not Ally Selemani Ngoronya. M/S Rose added that failure to mention in a charge sheet the person threatened during the commission of armed robbery can be cured depending on the circumstances of the case. One of such circumstances is where the one threatened comes in court to testify and the charge thereof can be cured through amending it. In support of the position, she cited the case of **Salehe Siasa Vs DPP, Criminal Appeal No. 281/2017 CAT at**



**Dar es Salaam (Unreported) at p.7.** This one is not such a case as the one threatened never came to testify.

The learned state attorney further contended that the statement of the one allegedly to be threatened was un-procedurally tendered in court contrary to **section 34B of the Evidence Act, [Cap 6 R.E. 2022]**. No ten days' notice was ever issued prior to its tendering, as such, the exhibit P.6 of Ally Mzuzuri was wrongly admitted by the trial court. The learned state attorney concluded on this by submitting the charge sheet failed to disclose the one who was threatened.

Again, M/S Rose pointed out that exhibit P.1 the Seizure Certificate, Exhibit P.4 Cautioned Statement of the Appellant were not read in court as shown under page 5 of the typed proceedings. Such a failure, according to her, is fatal and such exhibits deserve to be expunged from the court record. To fortify her argument, she cited to this court the case of **Wambura Kigingwa Vs R, Criminal Appeal No.301 of 2018 CAT at Mwanza (Unreported)** at pp.22 – 23.

Arguing on the evidence relied upon by the trial court to convict the appellant, M/S Rose, the learned state attorney pointed out that there was

no strong evidence to support the conviction. Persons who arrested the appellant were not called in court to testify save PW2 G.7715 D/C Albinus the one who re-arrested. It creates doubt as to why they were not called in court to testify. The learned state attorney rested her submission on the non-consideration of defence evidence by the trial court in its findings in that though was not considered, she contended that it is curable as this court is vested with power to re-valuate the trial court evidence on record and come up with its own findings.

Having elaborately so submitted, she supported the appeal and argued the court to allowed it.

When the Appellant was asked to respond, being a lay person, had nothing usefully to contribute. He prayed to the court his appeal be allowed.

Having heard the submissions by the learned state attorney, this court, keenly, have gone through the trial court records and noted that what is submitted by the learned state attorney is a true reflection on the trial court records. It is true the respondent's charge sheet against the Appellant and his co-accused named Ally Selemani Ngoronya as the person

who was threatened in the incidence of the alleged armed robbery but he was never called to testify in court. The case of **Salehe Siasa cited (supra)** support the stance argued by the learned state attorney. Again, the decision of the court of appeal in **JOHN SAYI @ SENGEREMA AND ANOTHER VS R, CRIMINAL APPEAL NO. 544 OF 2015 CAT AT TABORA (UNREPORTED) at PP. 8 – 11** extensively discussed on the fate of the charge sheet on armed robbery which does not disclose the person threatened with violence during the commission of the offence. The court concluded at page 11 thus: -

*'The rationale behind the requirement to disclose, in the particulars of the offence, the person against whom violence was used, is to afford the accused person sufficient information to enable him defend himself properly. The requirement is therefore founded on the principle of a fair trial. For this reason, the effect of the omission is to render the charge defective'. End of quote*





Again, it is true that the statement of Ally Mzuzuri was un-procedurally tendered and admitted in court since there was no prior ten days' notice issued which is against the dictate of **section 34B of the Evidence Act, [Cap 6 R.E. 2022]**. Equally so, exhibit P.1 the Seizure Certificate, Exhibit P.4 Cautioned Statement of the Appellant were not read in court as shown under page 5 of the typed proceedings. Guided by the court of appeal decision in **FALE SHIJA @ MIGUNGUMALO VS R, CRIMINAL APPEAL NO.555 OF 2020 CAT AT DODOMA (UNREPORTED)** from last paragraph of page 9 to first paragraph of page 10, the said exhibits are hereby expunged out of record.

In totality, the defect in the charge sheet on its failure to name the person threatened with armed violence, insufficient evidence upon expunging exhibits P.1 and P.4, failure to call material witnesses, the one who arrested the Appellant before his re-arresting, all these suffices to allow the Appellant's appeal. This is because, the remaining evidence on record can not support the charge, the charge which is , on the other hand, itself defective for non-disclosure of who was threatened with violence.

That said, the appeal is hereby allowed. The trial court judgment and sentence meted to the Appellant are hereby quashed and set aside.

In the event, this court orders the Appellant be released from custody with immediate effect unless is otherwise lawfully held.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 3<sup>rd</sup> day of October, 2022

**Musa K. Pomo**

**Judge**

This Judgment is delivered on this 3<sup>rd</sup> October, 2022 in presence of the Appellant and Rehema Magimbi, the learned Senior State Attorney, for the Respondent.



**Musa K. Pomo**

**Judge**

**3/10/2022**