IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 103 OF 2022

YUSUPH SAID HASSAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Arising from the decision of the District Court of Ilala at Ilala in Criminal Case No.618 of 2020)

JUDGMENT

11th November & 12th December, 2022

KISANYA, J.:

At the District Court of Ilala, the appellant, Yusuph Said Hassan and Ally Swaleh Ally (who is not subject to this appeal) were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16, R.E. 2019 (now R.E. 2022). It was alleged that on 15th December 2019, at Vingunguti area within Ilala District in Dar es Salaam the appellant and the said Ally Swaleh Ally stole cash money (Tshs. 310,000/=), the property of one Mohamed Rashid, and immediately before and after such stealing, they threatened the said Mohamed Rashid and Said Amir with a machete in order to obtain and retain the said property.

At his trial before the trial court, the appellant denied the offence. To prove the charge, the prosecution marshalled three witnesses, including the complainant Mohamed Rashid who testified as PW1. PW1 stated on oath that,

on the fateful day at 1800 hours, he and other family members gathered at his daughter's house for a birthday party. The appellant and other gangsters wielding machete raided the party. The appellant hit PW1 with the machete and snatched Tshs. 310,000/= and a bunch of clothes. PW1 was left unconscious and was later taken to hospital by his relatives. It was further testified by PW1 that he was able to identify the appellant that he was his neighbour.

PW1's evidence was supported by Saidi Amir Said (PW2) who was hired to play the music for the party. According to him, a group of about seven people invaded the ceremony and asked him the reason of stopping the music. Before he could give an explanation, he was hit with a bottle and his laptop was taken. There came PW1's wife one, Fatuma Zuberi (PW3) who told the trial court that PW1 was attacked with a machete and that he lost his Tshs.310,000/=

After the incident, PW1 was taken to Vingunguti Police Station where the matter was reported. He was issued with PF3 and referred to Kwa Mnyamani hospital for medical examination.

When called to his defence, the appellant gave an affirmed testimony. He firmly denied any role in the stealing of the money and armed robbery. He contended to have been arrested on 25/12/2019 when he was stopped by the group of people armed with local weapons who accused him of being a robber. The appellant further stated that he was charged with another offence vagabond at the Primary Court Buguruni on 27/12/2019. It was the appellant's

further contention that he remained in custody until 20/1/2020 when he was arraigned before the trial court with the offence armed robbery.

At the conclusion of the trial, only the appellant was found guilty, convicted and sentenced to serve thirty (30) years imprisonment. He was further ordered to pay compensation of Tshs. 310,000 in favour of the victim (PW1). As to the appellant's co-accused person, he was found not guilty and was acquitted.

The appellant was aggrieved by the decision of the trial court, hence the present appeal. His petition of appeal is predicated on five grounds of appeal which can be summarized as follows: -

1. *That, the trial magistrate grossly erred in both law and fact by convicting the appellant basing on recognition evidence of PW1 and PW3.*
2. *That the learned trial magistrate erred in both law and fact by convicting the appellant based on the evidence of PW1, PW2 and PW3*
3. *That, the learned trial magistrate grossly erred in both law and fact in convicting the appellant in a case where no arresting officer was procured to give evidence.*
4. *That, the learned trial magistrate grossly erred in both law and fact by relying on incredible and inconsistent evidence of PW1, PW2 and PW3 to convict the appellant.*

5. *That, the learned trial magistrate grossly erred in law and fact in convicting the appellant in a case that was not proved to the hilt.*

At the instance of the appellant, hearing of this appeal was conducted by way of written submissions. The appellant who represented himself, filed written submissions amplifying his grounds of appeal, whereas Ms. Gladness Senya, learned State Attorney presented written submissions on behalf of the respondent. In addition to the grounds of appeal, this Court implored the parties to address it on whether the charge and evidence were not at variance.

Having carefully examined the record and considered the submissions made by both parties, I am of the view that this appeal can be disposed of by addressing the issue of variance between the charge sheet and evidence.

In his written submission, the appellant did not address the foresaid issue. On the other hand, the learned State Senior Attorney conceded that the charge sheet and evidence were at variance. She expounded that it was stated in the charge that the appellant and his crew stole PW1's cash money amounting to Tshs. 310,000/= while evidence adduced indicated that the properties stolen were Tshs. 310,000, a bunch of clothes and laptop. She went on to point out that, the charge sheet stated that the victims (PW1 and PW2) were assaulted with a machete, whilst PW2 testified that he was assaulted with a bottle. It was her further contention that, PW2 testified that he was assaulted by someone else other than the appellant.

In view of the foregoing, Ms Senya argued that the charge sheet ought to have been amended under 234(1) of the Criminal Procedure Act [Cap. 20, R.E. 2019]. She further submitted that failure by the prosecution to seek leave to amend the charge rendered the defect fatal and prejudicial to the appellant. To bolster her argument Ms. Senya cited a number of cases these are, **Thabiti Bakari vs Republic**, Criminal Appeal No.107 of 2018, **Noah Paulo Gonde & Another vs Republic**, Criminal Appeal No.456 of 2017 and the case of **Abel Masikiti vs Republic**, Criminal Appeal No.24 of 2015 (all unreported). On that ground, the learned State Senior State Attorney supported the appeal. She, therefore, moved the Court to allow the appeal, quash the conviction and overturn the sentence. The appellant had nothing to rejoin.

On my part, it is trite law that a charge sheet is a foundation of any criminal trial. It is through the charge sheet that the accused person is informed of the nature and degree of the charge laid against him or her. The prosecution is then expected to prove the information and particulars stated in the charge read over to the accused person. See also the case of **Issa Mwanjiku @White vs Republic**, Criminal Appeal No.175 of 2018 (unreported) where the Court of Appeal held:-

> *"It is a settled position that a charge sheet is a foundation of a criminal trial. The purpose of charge sheet among others is to inform the accused person the nature and magnitude of the charge facing him with a view of enabling him/her to prepare his/her defence. The law requires the*

one who alleges to prove. In criminal charges, the prosecution side is duty bound to prove the charge against an accused person beyond reasonable doubt".

Reverting to the present appeal, I find it apt for better understanding of the discussion at hand, to reproduce the particulars of the offence of the charge filed before the trial court. The same reads as hereunder:-

"PARTICULARS OF THE OFFENCE

YUSUPH SAID HASSAN and ALLY SWALEH ALLY, *on 15th day of December, 2019 at Vingunguti area within Ilala District in Dar es Salaam Region, did steal cash money at Tsh.310,000/= the property of one* ***MOHAMED RASHID*** *and immediately before and after such stealing did threaten one* ***MOHAMED RASHID*** *and* ***SAID AMIR*** *with a machete in order to obtain and retain the said properties.*

In view of the position, the prosecution was duty bound to prove the above particulars of the offence preferred against the appellant. However, as rightly conceded by Ms. Senya, the evidence adduced before the trial court deviated from the particulars of the charge, as follows:

One, it depicted from the charge that the appellant and his co-accused person did steal cash money (Tshs. 310,000). However, PW1 stated on oath that "a bunch of clothes" was also stolen, while PW2 testified that his laptop was stolen. This implies that the charge sheet and evidence are at variance of the properties stolen from the victims.

Two, the charge sheet displays that the appellant and co-accused person threatened the victims (PW1 and PW2) with a machete in order to obtain and retain the cash money (Tshs. 310,000). On the other hand, it discerned from the evidence of PW1, PW2 and PW3, that PW1 was hit or assaulted with the said machete. Further to this, nothing to suggest that PW2 was threatened with the machete. His evidence was to the effect the bandits hit or attacked him with a bottle. Thus, the charge sheet and evidence are at variance on how the offence of armed robbery was committed.

In the circumstances, I entirely agree with the learned Senior State Attorney, the proper recourse was for the prosecution to pray to amend the charge under the provisions of section 234(1) of the CPA. The section provides:-

> *"Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just".*

The law is further settled that failure to amend the charge renders the charge unproved and is prejudicial to the accused. See for instance, the case of **Michael Gabriel vs Republic**, Criminal Appeal No.240 of 2017 (unreported) in which the Court of Appeal underscored that: -

> *"It was necessary to amend the charge because the evidence did not support the charge as regards the place at which the offence was committed. However, that was not done. The effect of the omission was to water down the prosecution evidence. Where, as a result of the variance between the charge and evidence, it is necessary to amend the charge but such amendment is not made, the offence will remain unproved"*

That stance was also stated in the case of **Thabiti Bakari vs Republic, (Supra)** where it was held that: -

> *"It is expected that when the prosecution becomes or is made aware of the variance between the charge and evidence, it was required to seek leave to amend the charge. In the instant case that was not done. It is well settled law that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly is leads to serious consequences to the prosecution case".*

In the present appeal, the prosecution did not seek leave to amend the charge after producing the evidence which deviated from the particulars from the charge sheet. Given that the issues of stolen property and use of violence

to obtain or retain stolen property are some of the ingredients of armed robbery, I hold the view that the evidence adduced by the prosecution did not prove the charge laid against the appellant. As the issue of charge sheet goes to the root of the case, I find it not necessary to consider other grounds of appeal.

In the event, I allow the appeal, quash the conviction and set aside the sentence and compensation order. I further order that the appellant be released forthwith unless he is not held behind bars for other lawful cause.

DATED at **DAR ES SALAAM** this 12th day of December, 2022.

S.E. KISANYA
JUDGE

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JUDGE