

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB-REGISTRY
AT DODOMA**

DC CRIMINAL APPEAL NO. 06 OF 2023

*(Originating from Criminal Case No. 27 of 2021 in the Resident Magistrates' Court of
Singida at Singida)*

**1. SAMSON MOSES DANIEL @ JADU
2. SALUM RAMADHANI
3. MOHAMED HAMU
4. BATAZARI SEBASTIAN**

..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13th July & 31st August, 2023

HASSAN, J.:

The appellants herein appeared before the District Court of Manyoni at Manyoni where they were jointly charged with armed robbery contrary to section 287A of the Penal Code [Cap 16 R. E 2019]. It is in the particulars of offence that, on 6th day of May, 2021 during night hours at Ikungi Ward, Ikungi Division within Ikungi District, Singida Region the Appellants steal 13 bags of sugar weighing 25kgs each valued at Tshs

845,000/=, 25 bags of wheat valued at Tshs 875,000 and 4 boxes of chocolate biscuits valued at Tshs 152,000/=, all properties valued at Tshs 1,872,000/=. The properties of one Samwel Benedictor and immediately before and after such act they did threat one Mustapha Mohamed by using iron bars and machetes in order to obtain and retain the said properties.

When the charge was read over to the appellants at the trial court, the appellants denied the charge. The prosecution, thereafter, called a total of eight (8) witnesses, who testified against the appellants who entered their defence without calling any witness on their case. At the conclusion of trial, the appellants were convicted and sentenced to serve thirty (30) years imprisonment. Aggrieved, the Appellants preferred an appeal on the following grounds:-

- 1. That, the Honourable trial magistrate erred in law for convicting the Appellants basing on the evidence which were at variance with the charge.*
- 2. That, the Honourable trial magistrate erred in law and fact for invoking the doctrine of recent possession in convicting the Appellants for armed robbery by conducting that they were the Appellants who sold those stolen properties to PW4 and other persons who were found in possession of them and not*

considering the fact that the prosecution failed to prove if the alleged properties belonged to the complainant.

- 3. That, since PW6 was not familiar with the Appellants, the identification which was done by him in the police motor vehicle was in violation of the Identification Parade Guidelines as per the Police General Order (PGO).*
- 4. That, the Honourable trial magistrate erred both in law and fact for failure to consider the defence evidence of the Appellants as regards the contradictory testimonies of PW1 and PW2, their reliabilities, the date of their and arraignment in the court of law.*
- 5. That, since it was testified that the Appellants confessed to the Police Officer to have committed the crime after their arrest, and no caution statements were tendered in court, the Honourable trial magistrate erred in law and fact for failure to draw an adverse inference inference as against the prosecution side.*
- 6. That, the Honourable trial Magistrate erred in law for admitting the certificates of seizure which were taken in contravention of the law.*

When the appeal came for hearing, the Appellants were both represented by Mr. Godfrey Martin, Learned Counsel whereas the respondent Republic had the service of Mr. Francis Kesanta, Learned State Attorney. Parties herein prayed to proceed by way of written submissions. The Parties complied to the order of preference in filing their written submissions.

Submitting in support of the appeal, the Appellant dropped the 4th and the 6th grounds of appeal and proceeded with the remaining 4 grounds of appeal.

Submitting on the 1st ground of appeal, the Appellants stated that, there was variance between the charge and the evidence adduced by the prosecution witnesses in the trial court. And that, the charge was not amended during trial to cure such defect contrary to section 234 of the Criminal Procedure Act, [Cap 20, R. E 2022]. That, the offence that the Appellants were charged with was allegedly committed on the 6th day of June, 2021 during night hours while the evidence adduced by PW1, PW2, PW3, and PW4 was to the effect that the offence was committed in the 6th day of May, 2021.

They submitted further that, the Appellants were arrested on the 8th day of May, 2021 why were they arraigned in court on the 8th day of June, 2021, that is one month later. The Appellants cited the case of **Director**

of Public Prosecutions v Yussuf Mohammed Yussuf, Criminal Appeal No. 331 of 2014 and **Damas Mgova v The Republic, Criminal Appeal No. 13 of 2022** (both unreported) to support his point of variation of dates.

On the second ground of appeal, the Appellants submitted that the trial magistrate erroneously convicted the Appellants by invoking the doctrine of recent possession without having first proving the essential ingredients thereof. That, despite the fact that the Appellants were not found in possession of the alleged goods, PW4 and other people found with the goods were not jointly charged with the Appellants. That, for the doctrine of recent possession to apply as a basis of conviction it must be proved that, (i) the property was found with the suspect (ii) the property is positively proved to be the property of the complainant (iii) the property was recently stolen from the complainant (iv) the stolen thing constitutes the subject of the charge against the accused. They further submitted that, these elements were expounded in the case of **Joseph Mkumbwa & Samson Mwakagenda v Republic, Criminal Appeal No. 94 of 2007** which was quoted in the case of **Augustino Mgimba v Republic, Criminal Appeal No. 436 of 2016** (both unreported).

The Appellants further submitted that a cash sale receipt (Exhibit P1) was issued to Daniel Dule and not the victim of crime. Thus the stolen consignment did not belong to the victim of crime as alleged.

Submitting on the third ground of appeal the Appellants stated that, identification of the 1st and 2nd Appellants done by PW6 in Police Patrol Car was in violation of the Identification Parade Guidelines. The Appellants added that such identification did not follow any of the guidelines laid down under Order 232 of the PGO. That, the identifying witness Juma Omary Ngoyi (PW6) did not know the Appellants, he was detained as a suspect after the Appellants were arrested and taken to the police motor vehicle he found the 1st and 2nd Appellants under restraint and was asked to identify them forthwith. The Appellants cited the case of **Lauriano S/O Alubano @ Ntalamingwa v Republic, DC Criminal Appeal No. 29 of 2021** (unreported) to cement their submissions.

The Appellants submitted on the 5th ground of appeal that, since it was the evidence of the investigation officer, Mathew Peter Ngusa (PW3) that the Appellants confessed to him to have committed the crime after he had interrogated them, that officer ought to have recorded their confession as per section 27(1) of the Evidence Act, R. E 2019. They cited the case of **Hosea Francis @ Ngala & Maria Hosea @ Ulanga v The Republic, Criminal Appeal No. 408 of 2015.**

The Appellants finalized their submissions by praying that the appeal be allowed and conviction be set aside.

On their part, the Respondent submitted against the first ground of appeal that, there is no variance of evidence and the charge. That, variance in dates and month in a charge and evidence is a curable defect as it does not go to the roots of the case at hand as stated in the case of **Iddy Salum @ Fredy v Republic, Criminal Appeal No. 192 of 2018** (unreported). That, the same is provided under section 234(3) of the Criminal Procedure Act [Cap 20 R. E 2022].

Submitting against the second ground of appeal, the Respondent argued that the prosecution side succeeded to prove that the complainant, PW1 was the owner of the stolen properties since he also tendered the sale receipt (Exhibit P1).

On the third ground of appeal, the Respondent submitted that the prosecution witness PW6 was familiar with the Appellants since he was the eye witness who saw the 1st and 2nd Appellants with the stolen properties and they instructed him to find customers.

On the fifth ground of appeal the Respondent submitted that, it is not mandatory under the law to tender the accused persons cautioned statement before the court.

In the light of what submitted by parties, and having carefully gone through the available record, I will only base my determination of the appeal on the first ground of appeal on variance of dates of commission of the crime between the charge sheet and the evidence adduced by prosecution witnesses which suffices to dispose this appeal, and therefore I will not determine the remaining three grounds of appeal.

In the instant appeal, the date in which the appellants are alleged to have committed the offence as per the charge sheet before the trial court is at variance with the evidence adduced by the prosecution side against them. The prosecution side arraigned eight (8) witnesses who all alleged that the Appellants committed the offence of armed robbery at the night hours on 6th day of May, 2021, while in the charge sheet it was alleged that the Appellants committed the crime on the 6th day of June, 2021. Prosecution ought to have prayed to the court to amend the charge under section 234 of the Criminal Procedure Act [Cap 20 R. E 2019] to reflect the evidence adduced, if at all the prosecution had noted that there was an error or the charge was defective. The duty which they failed to discharge. What is seen in the charge sheet is a handwriting slashing the month June replacing it with May with no justification since in the original record there is no prayer for amendment of the charge as so required by

the law. More so, there is no sign or date of a person who altered that charge sheet to show who and when such alteration have been affected.

It is the law that in any criminal charges prosecution must lead evidence disclosing the offence was committed on the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable for being unproved, unless the same is amended under section 234(1) of the CPA, thus entitle the accused to an acquittal. In **Issa Mwanjiku White v The Republic, Criminal Appeal No. 175 of 2018** (unreported) it was held that:-

"As intimated earlier, failure to amend the charge sheet is also fatal and prejudicial to the appellant and in our considered opinion, it is not curable under section 388(1) of the CPA."

The basis of amendment of the charge sheet if there is an error or the charge being defective was laid by the court **Halid Hussein Lwambano v The Republic, Criminal Appeal No. 473 of 2016** (unreported) where it was held that:-

"It is the settled position that the prosecution must lead evidence showing that the offence was committed on the date alleged in the charge sheet to which the person accused will be expected to know and prepare his reply."

It is to say finally that; the prosecution case was not proved to the standard required. I therefore agree with both the appellants in their first ground of appeal that there was variance of dates between charge sheet and the evidence.

In consequence thereof, the appeal has merit and is accordingly allowed. The conviction and sentence met to the Appellants is thus quashed and set aside respectively. I order release of the Appellants unless, lawful held.

It is so ordered.

DATED at DODOMA this 31st day of August, 2023



A handwritten signature in blue ink, appearing to read "S. H. Hassan", is written over the seal.

S. H. Hassan

JUDGE

31/08/2023