IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(DAR ES SALAAM SUB-REGISTRY)

CRIMINAL APPEAL NO. 200 OF 2022
(Originating from Criminal Case No.41 of 2021 in the District Court of Kibiti at Kibiti)

JINASA KAYENZI MASANJA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 24/10/2023
Date of Judgement: 30/10/2023

MWAKAPEJE, J.:

The District Court of Kibiti convicted the appellant of the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 [R.E. 2022]. The said Court sentenced him to fifteen years imprisonment. Since he believes to be innocent, he therefore lodged his appeal to this Court. He appealed against the conviction and sentence.

The appellant's appeal contained five grounds as follows;

1. *That the trial Court erred in law and fact by convicting the appellant on the offence of armed robbery while the same was not proved against him as the prosecution witnesses were in variation with the charge.*

2. *That the trial Court erred in law and fact by convicting and sentencing the appellant while it was not clear where the complainant was robbed as the prosecution witnesses contradicted themselves.*
3. *That the trial Court erred in law as fact by convicting and sentencing the appellant where there was no proof that he was interrogated for the offence of armed robbery by the arresting officer who did not testify.*
4. *That the trial Court erred in law and fact by convicting and sentencing the appellant in a case where the trial magistrate denied him a fair trial as the substance of the charge was not explained to him before he defended himself.*
5. *That the trial Court erred in law and fact by convicting the appellant in a case where the prosecution failed to prove their case beyond reasonable doubt.*

Before discussing the said grounds of appeal, it is prudent to consider, in a nutshell, the facts which prompted the prosecution of the appellant.

It is stated that on 10 March 2020 at Mkupuka within Kibiti District in Coast Region, the appellant fraudulently and without bonafide claim of

right, stole **Tanzania Shillings 4,000,000/=** the property of Shilinde Ruyombia. It is further stated that he used a knife to obtain the said money. The appellant pleaded not guilty, which compelled the prosecution to bring two witnesses namely: Shilinde Ruyombi (PW1) and Shinje Makanja (PW2) to prove the case against him.

PW1 testified that sometime on 8 March 2020 at Lukongo guest house in Ikwiriri, he met with the appellant who introduced himself as a witch doctor and cleared one's misfortune. PW1 agreed to be treated by the appellant to get rid of his misfortune. When treatment commenced, he was informed by the appellant and his colleague that he was not supposed to see anyone. While there, he had to communicate with PW2 for him to bring to him **Tsh. 700,000/=** for buying cattle. Later on 10 March 2020, PW1 was taken to the forest to remove the said misfortune and that is where the appellant in the company of his fellow, took a knife and threatened to kill PW1. Thereafter, they robbed him of **Tsh. 4,000,000/=** and a mobile phone.

On the other hand, PW2 testified that on 09 March 2020, he was called by PW1 who informed him that had met with a witch doctor who wanted to treat him (PW1). He was then asked by PW1 to go with the witch doctor to withdraw money and send it to him (PW1). PW2 was

thereafter told by the appellant that he (PW2) had been given money (through the hand of the appellant) by for PW2 to go and find shelter. On 10 March 2020 when he went back to the guest house where PW1 was, PW2 never saw them i.e. PW1 and the appellant. He then returned home, where he later received a call from Police Officers who told him that PW1 had been robbed of all the money.

In defending himself, the appellant testified that the whole case was fabricated. He was arrested on 10 June 2020 at Namtumbo where he stayed up to 13 June 2020 then handed to Kibiti Police Officers without being told the charges he was facing. He demanded to know the purpose of the said money but in vain. He further denied having business with PW1. He also denied committing the alleged offence.

Following the evidence at hand, the trial court proceeded to convict and sentence the appellant accordingly. Aggrieved with the decision, he therefore appeals to this Court.

This appeal was argued by way of written submissions whereby during the hearing both the appellant and respondent adopted their respective written submission. In the appeal, the Respondent was represented by Mr. Clarence Mhoja, learned State Attorney while the appellant was unrepresented.

In his first ground of appeal, the appellant contended that the offence of armed robbery was not proved against him as the evidence of prosecution witnesses contradicted the charge sheet. He stated that in a charge sheet, it is indicated that PW1 was robbed of **Tshs. 4,000,000/=** and a mobile phone. He further stated that the charge was defective as it did not contain enough information that could help him prepare for his defence. To cement his argument he relied on the case of **Hussein Kausar Rajan V. Republic Criminal Appeal No. 670 of 2020** (unreported) and the case of **Leornard Raphael and Another V. Republic. Criminal appeal No.41 of 1992** (unreported). In these cases, it was stated that where in the course of the trial the evidence is variant with the charge and the same disclosed an item not in the charge, the remedy was to amend the charge to bring it in line with the evidence as far as section 234 of the Criminal Procedure Act (CPA) Cap. 20 [RE. 2022] is concerned.

The appellant went on to state that, this position was also stated in the case of **Issa Mwijaku @ White V. Republic, Criminal Appeal No. 175 of 2018** where it was found that the prosecution evidence was not compatible with the particulars in a charge sheet to prove the charge to the required standard.

On the other hand, the Respondent Republic was of the view that there was no variance between the evidence and the charge. According to the Respondent's written submission, the charge sheet contained all the information required as per sections 132 and 135 of the Criminal Procedure Act.

On the second ground of appeal, the appellant contends that the prosecution witness contradicted themselves as to where the said offence was committed and who was present at the scene. The appellant stated that according to the testimony of PW1, robbery was committed in the bush while he was with the appellant alone. However, in cross-examination on page 7 of the typed proceedings, PW1 stated that when he was robbed PW2 was present. The testimony of PW2 was, however, that he was told to wait and leave home just to be informed by police that his friend PW1 had been robbed. To support his argument, he relied on the case of **Goodluck Kyando V. Republic [2006] TLR 363** as to the unreliability of the witnesses.

The Respondent in reply to this ground of appeal contended that there was no contradiction between the testimonies since PW1, as the victim of the crime stated that he was robbed in the bush and was alone with the appellant.

The appellant on the third ground of appeal stated that there was no proof that he was interrogated for the offence of armed robbery since the arresting and investigation office never testified in Court to clear the doubt that he had been arrested for the offence. In addition, there is no cautioned statement of the appellant admitted in Court to prove that he was interrogated.

In reply to this, the respondent relied on section 143 of the Evidence Act, Cap 6 [R.E 2019] which stipulates that there is no particular number of witnesses required to prove a case. According to the Respondent, even PW1 was enough provided he had original, genuine, credible and reliable evidence. In support of his contention, he relied on the case of **Mbaraka Ramadhani @ Katundu vs Republic (Criminal Appeal No. 185 of 2018) [2021] TZCA 27 (18 February 2021 TanzLII).**

In the fourth ground of appeal, the appellant stated that he was denied a fair trial as the charge was not explained to him before his defence contrary to the provisions of section 231(1) of the Criminal Procedure Act. In support of his contention, he relied on the cases of **Frenk Benson Msongole vs Republic (Criminal Appeal 72 of 2016) [2019] TZCA 317 (19 August 2019 TanzLII); Maduhu Sayi @ Nigho vs Republic (Criminal Appeal 560 of 2016) [2020] TZCA**

1723 (17 August 2020 TanzLII); and **Mabula Julius & Another vs Republic (Criminal Appeal 562 of 2016) [2020] TZCA 1739 (20 August 2020 TanzLII).** According to the referred cases, the appellant was of the view that failure by the trial Court to re–explain the substance of the charge prejudiced him.

The respondent in challenging this ground of appeal was of the view that it is not mandatory, though prudent, for the appellant to be reminded of his charge.

Arguing on the fifth ground, the appellant was of the view that the prosecution failed to prove the case beyond reasonable doubt while quoting the case of **Malik George Ngendakumana vs Republic (Criminal Appeal 353 of 2014) [2015] TZCA 295 (24 February 2015)** where it was stated that the duty of the prosecution was to prove that the offence was committed and that the appellant committed the same. He further referred to the case of **Woolmington v. DPP (1935) AC 462 and Mohamed Said Matula v. Republic [1995] T.L.R. 3,** that the prosecution must prove every fact in issue in the case if they are to service conviction.

On the other hand, the Respondent was of the view that according to Section 110 of the Evidence Act, the prosecution must prove the case

to the required standard and that according to the evidence available in the present case, the strength of the same is on PW1.

Having considered the facts and submissions of the parties to this appeal and in responding to the grounds of appeal herein, the main issue is whether the prosecution case was proved beyond reasonable doubt. These grounds will be answered as I go through the grounds of appeal and being the first appellate Court, I had time to go through and evaluate the evidence of the case adduced in the trial court.

Before answering the grounds of appeal raised, I would for justice purposes, consider the first and second grounds of appeal together. The appellant contended that there was a variance between the charge sheet and the evidence adduced. In dealing with this, I would first like to consider a charge and its elements.

It is an undisputed fact that the law and case law in Tanzania have already laid down, as a matter of principle, how and what should a charge contain. Section 132 of the CPA explicitly provides what should be contained in a charge sheet. The said section provides that:

"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 supplied].*

It is from these premises that we have the objective of a charge which is to give reasonable information to the accused as to the nature of the offence he is charged with. The same was well elaborated by the Court of Appeal of Tanzania in **Isidori Patrice vs Republic, Criminal Appeal No. 224 of 2007 [2007] TZCA 2 (30 October 2007 TanzLII)** and in the case of **Magesa Chacha Nyakibali and Another versus The Republic; Criminal Appeal No. 307 of 2013, CAT at Mwanza (Unreported).** The court established that:

"Particulars of any charge must disclose essential ingredients of offence. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the particulars, to give the accused a fair trial in enabling him to prepare his defence,

must allege the essential facts of the offence and any intent specifically required by law."

That being the case on the requirement and ingredients of a charge, it goes without saying that it is therefore crucial for the evidence of the prosecution side to be in line with what the accused person is charged with. If the evidence does not correspond to the charge sheet, then the prosecution's case is questionable. This position was stated in the case of **Issa Mwanjiku @ White vs Republic (Criminal Appeal 175 of 2018) [2020] TZCA 1801 (6 October 2020 TanzLII),** where the Court of Appeal noted that:

".....items mentioned by Pw1 to be among those stolen like ignition key switches of tractors and pajero were not indicated in the charge sheet. In the prevailing circumstances of the case, we find that the prosecution evidence is not compatible with the particulars of the charge sheet to prove the charge to the required standard."

Now coming to our present appeal, the charge sheet is as quoted hereunder:

PARTICULARS OF THE OFFENCE

.....

STATEMENT OF THE OFFENCE.

That Jinasa S/o Kayenzi Masanja charged on the 10th day of March 2020 at Mkupute within Kibiti District of Coast Region fraudulently and without claim of right steal ***Tshs 4,000,000/=*** *the property of Shilinde s/o Ruyombia before and after such stealing did use a knife to threaten the victim to obtain the said"*

According to this charge sheet, the statement of the offence makes it clear that what was stolen by the accused from PW1 was only money i.e. **Tshs 4,000,000/=**. Now when one visits the testimony of PW1, there is an addition of "a phone" which the accused is purportedly to have stolen. At the end of page 6 and the beginning of page 7 of the typed proceedings on the very top in the first line, PW1 stated that they robbed him **4,000,000/= million.....[Emphasis Supplied]**

"plus a mobile phone....."

I agree with what has been stated by the appellant that there is variance in the testimony of PW1 on the addition of an item stolen which was not in the charge sheet. The law requires such variations to be rectified in a charge sheet to give the appellant a chance to plead to the

amended charge per section 234(1) of the CPA. This was not done in the case at hand.

To my knowledge, the learned State Attorney who prepared the reply submission missed the appellant's point and misdirected himself. He was talking about where the incident took place, while the appellant was talking of additional stolen items which were not in the charge. According to the position in **Mwanjiku's case** (*supra*), this is fatal and the first ground is answered in the favour of the appellant.

Not only there was variation between the charge and the evidence, but the appellant on the second ground of appeal, contends that there were variations in the testimonies of the two prosecution witnesses who tendered their evidence in the trial court. This was as far as where exactly the said offence was committed and who was with PW1 when he was being robbed.

This fact is portrayed by two prosecution witnesses. At first, PW1 stated that he was alone in the bush when he was robbed as indicated on page 6 of the typed proceedings. Secondly, on cross-examination, which doubt was not cleared by the Prosecutor, he stated that he was robbed in the presence of PW2 as shown on page 7 of the typed proceedings. On

his part to the contrary, PW2 himself stated that he was informed by the police that his friend was robbed on page 8 of the proceedings.

Furthermore, inconsistencies are vivid when one considers the robbed money at the time of contact with PW1. How much money did PW1 have, how much was brought to him by PW2, was the same brought by PW2 or did the latter go to withdraw together with the Appellant? On this fact alone, there are so many questions that are not answered.

It is an established principle of law that, where the testimonies by witnesses contain inconsistencies and contradictions, the court must address the inconsistencies and resolve them where possible (**see Mohamed Said Matula vs. R. [1995] TLR 3 (CA).** In the present appeal, it is evidenced that the trial magistrate never dealt with these contradictions and inconsistencies as was directed in the case of **Mohamed** (*supra*). I therefore agree with the appellant on his ground of appeal that there were inconsistencies in evidence by the prosecution witnesses. Hence the appellant is to be given the benefit of the doubt.

About the number of witnesses brought by the prosecution in the third ground of appeal, I agree with what has been submitted by the Respondent. As correctly submitted by the learned State Attorney in his written submission, and according to section 143 of the Evidence Act, Cap.

6, the number of witnesses does not matter in proving a case beyond a reasonable doubt:

> *"S. 143. Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."*

However, it is my considered opinion that in the circumstances of this case and the nature of the same, there missed some key witnesses whose absence drew adverse inference, in that, what was stated by the appellant in his defence was true. In the case at the trial court, there was neither an arresting officer, investigator nor police who cautioned and recorded the statement of the appellant as far as Section 131 of the CPA is concerned, who came to testify in court. The Respondent merely states that the strength of the case at hand was on PW1.

In the case of **Aziz Abdalla v. Republic [1991] TLR 71 (CAT)** it was stated that:

> *"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution"*

As I went through the proceedings of the case in the trial court, it was evidenced that after the two prosecution witnesses tendered their

evidence, a police officer who was mentioned during the preliminary hearing never attended court proceedings. No reasons as to their non-appearance were produced. After several adjournments, the prosecution decided to close its case.

The question I remained with before concluding is the fourth ground of appeal where the appellant contended that a charge was not explained to him before his defence contrary to section 231(1) CPA. In reply to this ground, the Respondent in his written submission, stated that the procedure is not mandatory but it is prudent to do so.

Following the reply by the Responded, I am obligated to reproduce the section as follows:

> *"S.231(1). At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either about the offence with which he is charged or about any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted* ***the court shall again explain the substance of the charge to the accused and inform him of his right—***

a) to give evidence whether or not on oath or affirmation, on his behalf; and

b) to call witness in his defence,

and ***shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer, and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.****" (Emphasis supplied).*

To me, the construction of this provision is mandatory on the face of it, unlike what is stated by the learned State Attorney in his submission. Further, according to section 53(2) of the Interpretation Act:

"53(2) Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

Courts, therefore, under section 231(1) are conferred with a duty to inform the accused of his rights before he starts defending himself. This duty must be performed. The intendment of the legislature was to enable the accused person to exercise his constitutional rights including that of a fair trial.

As propounded in various decisions of the Court of Appeal, and as rightly cited by the appellants in the cases of **Frenk Benson; Maduhu Sayi @ Nigho;** and **Mabula Julius & Another (*supra*)**, failure to comply with such mandatory provisions prejudices the accused person.

This Court therefore responds to the fourth ground of appeal in the affirmative that indeed, the appellant was curtailed of his rights, and that the name that appeared on the defense is different from what is on the charge sheet, hence prejudiced.

All said and done, and looking at the circumstances of the case, I agree with the appellant in his contention that the charge against him was not proved beyond reasonable doubt. As one considers the facts herein, there are a lot of unanswered questions, which makes holes in the prosecution case.

In the upshot therefore, I allow this appeal for the reasons given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

THE HIGH COURT OF TANZANIA

G.V. MWAKAPEJE
JUDGE
30/10/2023

Right to appeal explained

Judgment is delivered in Court this 30 day of October 2023 in the presence of the Appellant and Clarence Mhoja, learned State Attorney for the Respondent.

THE HIGH COURT OF TANZANIA

G.V. MWAKAPEJE
JUDGE
30/10/2023