IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 82 OF 2023

(Originating from Criminal Case No. 39 of 2022 in the District Court of Ludewa at Ludewa)

FREDRICK MATIYA MGAYA----------1ST APPELLANT

JUNKEN MGAYA----------2ND APPELLANT

VICTORY CHARLES MKALAWA----------3RD APPELLANT

ANDREA BAHATI MSANGA----------4TH APPELLANT

WESTON MWINUKA @ DUKE----------5TH APPELLANT

VERSUS

REPUBLIC---------- RESPONDENT

JUDGEMENT

Date of Last Order: 08/04/2024

Date of Judgment: 03/05/2024

A. E. Mwipopo, J.

Fredrick Matiya Mgaya, Junken Mgaya, Victory Charles Mkalawa, Andrea Bahati Msanga, and Weston Mwinuka @ Duke, the appellants, were among the persons charged at the District Court of Ludewa at Ludewa for

the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2022. It was alleged that the appellants and two other persons, on 19th of October, 2022, at Ibumi Village within Ludewa District in Njombe Region, jointly and together stole sand mixed with gold valued at Tanzania shillings 8,600,000/= the property of Alfred Andrew Komba and immediately before, during and after such stealing they did grievous harm to the said Alfred Andrew Komba by using sword on his right leg in order to steal and retain the said stolen properties. The appellants pleaded not guilty to the offence. The prosecution paraded five (5) witnesses to prove their case, and each accused testified on oath in their defence. The trial District Court acquitted two persons among the accused persons, convicted all appellants for the offence of armed robbery as charged, and sentenced each appellant to serve 30 years imprisonment. The decision of the trial District Court did not satisfy all appellants, and they filed the present appeal.

The petition of appeal filed by the appellants contains six grounds of appeal as follows:-

1. *That the trial Magistrate erred in law and fact for convicting the appellants without considering that the prosecution did not produce*

material key witnesses to testify and hence failed to prove their case in a required standard.

2. *That, the trial Magistrate erred in law and fact for convicting the appellants without taking into account that there is no evidence adduced to prove that the appellants were found in possession of the alleged sand mixed with gold valued at shillings 8,600,000/=.*
3. *That, the trial Magistrate erred in law and fact in convicting the appellants since no evidence adduced by the respondent before the trial court shows how and to which extent the appropriate criminal procedures were followed from the point the matter was taken to the police station for investigation to the point where the appellants were taken to court.*
4. *That, the trial Magistrate erred in law and fact by convicting the appellants based on the weakness of their evidence and not the strength of the respondent's evidence, which is contrary to the law.*
5. *That, the trial Magistrate erred in law and fact by convicting the appellants based on the defective charge, which is bad for duplicity.*
6. *That, the trial Magistrate erred in law and fact by convicting the appellants without considering that the case was not proved beyond reasonable doubt.*

Advocate Gervas Semgabo represented all appellants at the hearing, and Mr. Alfred Stephano, State Attorney, represented the respondent. The court invited the counsels from both sides to make their submissions.

Mr. Gervas Semgabo abandoned the 4th ground of appeal as found in the petition of appeal, submitted jointly on grounds No. 1 and 3, and submitted separately the remaining grounds of appeal. On the 1st and 3rd grounds of appeal, he said that the prosecution failed to bring material witnesses to prove their case, and the procedure for taking the appellants to the police until they were brought to the trial court was not followed. The law is settled that failure to bring material witnesses to testify may make the court draw adverse inferences to the prosecution as it was held in the **Baya Lusana vs. Republic**, Criminal Appeal No. 593 of 2017, Court of Appeal of Tanzania at Mwanza, (unreported), at page 12, and **Charles Ambrosi vs. Republic**, Criminal Appeal No. 338 of 2019, CAT at Moshi, (unreported) at page 16 and 17. In this case, the trial court's record revealed that some material witnesses, such as the doctor who examined the persons injured and a police officer who investigated the case, were not called as witnesses. Alfred Andrew Komba, Winifrida Mwenda, Alfredy Luoga and Amosi Luoga were injured during the incident, as seen on page 36 of the typed proceedings. It was important to bring the doctor as a witness to prove the injuries victims sustained, and he could have tendered the medical report.

The counsel said the evidence in the record shows that after the incident, the victim reported to the acting Hamlet chairman before they reported to the police station. At the police station, they were given PF3, and they went to the hospital for treatment. These witnesses did not tender PF3 to prove they were treated at the hospital. Page 34 of the typed proceedings of the trial court shows that on 08th day of May,2023, the prosecution tried to bring two witnesses to testify, among them Dr. Hellen Kadege. However, Dr. Hellen Kadege did not testify as she was sick, so the case was adjourned. Dr. Hellen Kadege never testified until the prosecution closed their case. No reason was provided for the prosecution's failure to bring the medical doctor as a witness. The witness may have evidence which contradicts the prosecution's story.

He said the investigators are usually called as witnesses in serious offences such as armed robbery. The police investigator was not brought to court to testify, and the prosecution provided no reason for failure to call the investigator as a witness. The evidence shows the incident being reported to the Ludewa Police Station by the injured persons. The prosecution's evidence is silent on the date the appellants were arrested, the circumstances of their arrest, if they were found with the stolen property,

the persons responsible for arresting the appellants, and where the appellants were arrested. The investigator could resolve all these questions. In the cited case of **Charles Ambrosi vs. Republic** (supra), from pages 16 to 18, the trial court held that failure to bring an investigator was fatal irregularity and was among the grounds for quashing the conviction and sentence imposed by the trial court.

Arguing the second ground of appeal, he said that there is no evidence in record proving that the appellants were found in possession of sand containing gold worth shillings 8,600,000/=, or if they have already sold the sand. The same raises doubts on the prosecution's case. In **Jonathan Joseph vs. Republic**, Criminal Appeal No. 391 of 2020, Court of Appeal of Tanzania at Bukoba, (unreported), on page 9, it was stated that the rule of practice is where witnesses testify on a document or an objection which could subsequently be tendered as exhibit the procedure is not simply to refer to it. The witness has to produce or describe it physically, and the exhibit can be admitted as an exhibit. In this case, PW1 testified that what was stolen was sand containing gold worth Tanzania shillings 8,600,000/=. But, PW2 testified on page 21 of the proceedings that what was stolen was gold worth shilling 8 600,000/= and sand containing gold worth shillings

8,600,000/=. There was an apparent contradiction between what was stolen from the evidence of PW1 and PW2. No reason was provided for the failure of prosecutions to tender the said sand containing gold or gold. Thus, the prosecution's case is doubtful for failure to tender the gold or sand containing gold allegedly stolen during the incident.

The counsel's submission on the 5th ground of appeal is that the charge sheet was defective due to duplicity. The statement of the offence in the charge sheet shows the appellants were charged with armed robbery contrary to section 287A of the Penal Code, Cap. 16 R. E. 2022. The particulars of the offence show the appellants did grievous harm to Alfred Andrew Komba by using a sword on his right leg to steal and retain sand mixed with gold valued at Tanzania shillings 8,600,000/= the property of Alfred Andrew Komba. The particulars of the offence contain the offences of grievous harm and armed robbery. Grievous harm is not an ingredients in the armed robbery offence, but an independent offence found under section 225 of the Penal Code. The punishment for grievous harm is up to 7 years. The act of joining the offence of armed robbery and grievous harm together makes the charge defective and affects the principles of fair trial. In the case of **Kauto Ally vs. Republic** [1985] TLR 183, the High Court held that the

charge sheet, which puts three acts together, is bad for duplicity. In this case, the charge sheet has lumped two offences together, which is bad for duplicity. The appellants were prejudiced as they failed to understand the charge in order to allow them to prepare their defence.

It was the appellant's submission on the last ground of appeal that the prosecution had a duty to prove the offence without a doubt. The position was stated in **Christian Kade and Another vs. Republic** [1992] TLR 302. The prosecution's case was not proved without doubts for failure to bring material witnesses to testify and failure to prove that the appellants were found in possession of the sand mixed with gold, which is the subject matter of the case. Further, there are inconsistencies between the charge and the evidence adduced in court regarding the owner of the stolen sand mixed with gold. The charge sheet shows the owner is Alfred Komba (PW1), but PW1 testified that he is an employee of Hassan, the owner of the stolen gold sand. Another inconsistency in the charge sheet is that the particulars of the offence show that Alfred Komba was the person who was injured during the incident. However, the evidence the prosecution's witnesses adduced does not show if Alfred Komba was among the persons injured. PW5, on page 35 of the proceedings, said the injured people during the incident were Winifred

Mwenda, Amos Luoga and Alfred Luoga. There is no person named Alfred Komba among the people injured.

He said another inconsistency between the charge and the evidence is the weapon used during the incident. The particulars of the offence in the charge show the weapon used was a sword. However, the evidence adhered to by witnesses shows the weapon used was a machete. Those inconsistencies make the prosecution case very doubtful, and the case was not proved according to the standard of the law. The exact position was stated in said **Musa Soweni vs. Republic**, Criminal Appeal No 93 of 2020, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), on page 6, it was held the law is settled that a charge which has material conflict with the witnesses testimonies shakes credence of the prosecution case and renders the prosecution case not proved to the required standard. The prosecution failed to tender exhibits found at the scene of the crime. PW4 testified that at the scene of the crime, they found sleepers, a cap, and a Jacket alleged to belong to the suspects. PW5 said during cross-examination that he saw a machete at the crime scene. All these exhibits were not tendered in court. The counsel prayed for the appeal to be allowed.

In his reply, Mr. Alfred Stephano submitted on the 1st and 3rd grounds of appeal that the doctor who examined witnesses and investigator of the case were not material witnesses to this case due to the nature of the offence. The doctor who treated the victim could not prove any element of the offence, hence he/she was not material witnesses. The same is for the tendering of medical report. It does not prove any ingredient of the offence. On the part of the investigator, he was not a material witness to this case as he did not arrest the appellants with anything connecting them to the offence. All appellants admitted in their testimony that police arrested them. The appellants testified about how, when, and where they were arrested. There is no such dispute in the record. The circumstances of this case are distinguished from the cited case of **Charles Ambrosi vs. Republic** (supra). In the cited case, the police officer arrested the accused persons with the stolen goods. In this case, the appellants were not arrested with any stolen gold sand.

He said the law does not provide for the number of witnesses the party has to bring to prove its case under section 143 of the Evidence Act. The prosecution has a duty to bring material witnesses who could prove its case. PW1 and PW2 are credible witnesses, and the trial court believed their

evidence. Only when there is reason not to believe PW1 and PW2 can the court discredit them. The first and second grounds of appeal have no merits.

Arguing the 2nd ground of appeal, the counsel said the stolen gold sand was not tendered. The gist of the prosecution's evidence from PW1 and PW2 is that the appellants were seen stealing the sand, and they used force to steal and retain the sand. The appellants were not arrested with the sands. It is not possible to tender something which was not found. The cited case of **Jonathan Joseph vs Republic** (supra) is distinguishable from this case as in the cited case, the accused person was found in possession of government trophies, while in this case, the appellants were not found in possession of the stolen sand, which is the subject matter of the armed robbery. PW1, PW2, and PW3 said the appellant stole the sand containing gold, which is the stolen property in this case. On the contradiction alleged to be on page 21 of the typed proceedings, PW2 was testifying about not being an expert in estimating if what was stolen was gold or just sand. He said he knew the sand containing gold worth Tanzania shilling 8,600,000/= was stolen.

Submitting the 5th ground of appeal, the counsel said there is no duplicity of the offence in the charge sheet. The word "grievous harm" was

used to show the act done to the victim. Even the evidence the prosecution adduced did not prove the offence of grievous harm. The appellants were convicted for the offence of armed robbery. Nowhere in the record were the appellants charged, tried or convicted for an offence other than armed robbery. The appellants understood the offence they were facing and could defend themselves. The appellants were not prejudiced. The prosecution evidence proved there was stealing of sand containing gold, the weapons were used to steal or retain the sand gold, the appellants stole the sand gold by actually using weapons. The case of **Kauto Ally vs. Republic** (supra), cited by the appellants, is irrelevant to this case as, in this case, there is no duplicity of the offences in the particulars of the offence. The 5th ground of appeal has no merits.

In the last ground of appeal, the counsel for the respondent said there was no major contradiction between the charge and evidence adduced. The case was proved without doubt. There was a variance in the name of Alfred Komba as the owner of the stolen goods in the particulars offence and evidence adduced. The charge sheet shows in the particulars of the offence the owner of the stolen sand gold is Alfred Komba, while the evidence of PW4 (Hassan) shows he is the owner of the mine and stolen sand. The

inconsistency of the owner's name of the stolen sand does not change the fact that the gold sand was not stolen. The evidence proved that the sand was stolen. PW1 testified that his name is Alfred Andrew Komba on page 12 of the typed proceedings.

The counsel for the responded said regarding the claim for inconsistencies in the type of weapon used that swords and machetes are dangerous weapons. These two weapons looks similar. One of the ingredients of the offence of armed robbery is using a dangerous weapon. Despite the presence of the contradiction of the weapon used between sword and machete, the contradiction does not go to the gist of the case that the dangerous weapon was used during the armed robbery incident. On the failure of the prosecution to bring a sleeper, cap, and machete under the circumstances of the case, the counsel said there is nothing to show that the things found at the crime scene were used or connected to the offence committed. Thus, things found at the crime scene were not material to the case without proof that they were used or connected to the offence. The appellant never cross examined prosecution's witnesses about the use of the weapon during the armed robbery incident. The appellants' identification at the crime scene was not an issue at the trial court or in this appeal. He said

if this court finds the inconsistencies fatal, it should use its revisional powers under section 388 of the Criminal Procedure Act and find that they have not prejudiced the appellant.

In his rejoinder, Mr. Semgabo insisted that the doctor was an important witness as the particulars of the offence show Alfred Komba sustained grievous harm during the armed robbery incident. PF3 was also crucial in showing the type of injuries the said Alfred Komba sustained, as the doctor was not called as a witness. The prosecution's evidence is silent if the appellants were found with the stolen sand containing gold. In his submission, the counsel for the respondent raised for the first time during the appeal that the appellants were not found with stolen property. The same is not coming from prosecution's witnesses. The Republic's counsel admitted the presence of inconsistency between the name of the owner of the stolen property in the charge and the evidence adduced by witnesses. For that reason, the offence was not proved. The weapon used differed from what was stated by the witnesses and what was in the particulars of the offence. The counsel retaliated his submission in chief.

The court is called upon to determine whether the appeal has merits. In determination of the appeal, I will start with the issue of defectiveness of

the charge, which is the fifth ground of appeal in the petition of appeal. The counsel for the appellants had two points on the issue. He said the charge was bad for duplicity for putting up together the armed robbery and grievous harm in the particulars of the offence, and there was a variance between the particulars of the offence and the evidence adduced. He said the mistakes have prejudiced the appellants who failed to prepare their defence. In contention, the counsel for the respondent said using the word "grievous harm" was to show the act done to the victim, and it was not a new offence. The appellants understood the offence they were facing and they defended themselves. There is no variance between the charge and the evidence adduced. The evidence on record proved the ingredients of the armed robbery offence. The variance, if any, were minor and did not prejudice the appellants.

According to section 128 of the Penal Code, it is a complaint or charge which initiates any criminal case in court. The charge must states the accusation against the accused person upon which he or she has to defend. Section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2022, (CPA), provides that the charge must specify offence(s) and necessary particulars. The section reads:-

"132. 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".

It is mandatory under section 132 of the CPA for a charge to contain a statement of the specific offence together with particulars necessary for giving reasonable information about the nature of the offence charged to be disclosed. For a better understanding of how the charge was made in this case, I will reproduce part of it as follows hereunder:-

"

CHARGE

STATEMENT OF OFFENCE

ARMED ROBBERY: Contrary to section 287A of the Penal Code [Cap. 16 R.E. 2022]

STATEMENT OF OFFENCE

Fredrick S/O Matia Mgaya, Ally S/0 Christian Mligo, Junken S/O Jofrey Mgaya, Victory S/O Charles Mkalawa, Andrea S/O Bahati Msanga, Weston S/O Laurence Mwinuka @ Duke and Bisheni S/O Zephania Haule, on 19th day of October, 2022, at Ibumi Village within Ludewa District in Njombe Region, did steal sand mixed with gold valued at Tshs. 8,600,000/= the property of one Alfred S/O Andrew Komba, and immediately before, during and after such

stealing, did grievous harm to the said Alfred S/O Andrew Komba by using a sword on his right leg in order to steal and retain the stolen property.

Dated at Ludewa this ***21st day of November, 2022.***

.....

PUBLIC PROSECUTOR"

I agree with the counsel for the appellants that the charge was bad for duplicity. The statement of the offence revealed that the appellants were charged for the offence or armed robbery contrary to section 287A of the Penal Code. The particulars of the offence lumped together with the ingredients of the offence of armed robbery and grievous harm. The particulars show that the appellants did steal sand containing gold and immediately before, during and after such stealing did "grievous harm" to Alfred S/O Andew Komba by using a sword on his right leg in order to steal and retain the stolen property. Since the appellants were charged with the offence of armed robbery, the prosecution was duty bound to show in the particulars of the offence that there was an act of stealing. Immediately before, during or after the said stealing, the perpetrator was armed with any dangerous or offensive weapon or instrument, and used or threatened to

use actual violence to obtain or retain the stolen property as it was held in the case of **Haji Said Seleman vs. Republic**, Criminal Appeal No. 98 of 2020, Court of Appeal of Tanzania at Dar Es Salaam (Unreported), the Court of Appeal. In **Kashima Mnadi vs. Republic**, Criminal Appeal No. 78 of 2011 (unreported), among others, the Court of Appeal emphasized that:-

> *"Having carefully read the charge reproduced supra and the cited section, we are of the settled view that the charge is incurably defective. It is incurably defective because the essential ingredient of the offence of robbery is missing. Strictly speaking, for a charge of any kind of robbery to be proper, it must contain or indicate actual violence or threat to the person to whom the robbery was committed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the robbery offence must not only contain the violence or threat but also (mention) the person on whom the actual violence or threat was directed."*

According to the decision in **Kashima Mnadi's** case, a robbery charge must contain or indicate actual violence or threat to the person for whom the robbery was committed. A robbery offence cannot be committed without the use of actual violence or threat to the person targeted to be robbed.

The particulars of the offence in this case contain some of the ingredients for the offence of armed robbery such as the act of stealing, the perpetrators were armed with swords which is dangerous weapon, and they used it to obtain and retain the property subject matter of the armed robbery. The particulars of the offence were missing one ingredient, the use or threat to use actual violence to obtain the stolen property. The word "grievous harm" used to show the extent of injury of the victim of the violence. It does not show precisely the act which was used or the threat which was used to obtain and retain the stolen property. It shows the extent of the harm sustained by the victim. In **Mussa Mwaikunda vs. Republic [2006] TLR 387**, the Court of Appeal, while dealing with similar circumstances to the issue at hand, held that:-

> *"... It is interesting to note here that in the above charge sheet, the particulars or statement of offence did not allege anything on threatening, which is the catchword in the paragraph."*
>
> *The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing this in mind, the charge in the instant case ought to have disclosed the aspect of threatening, which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case*

facing the appellant was not adequately disclosed to him. The charge was, therefore, defective in our view."

Thus, the charge was defective because the particulars of the offence were missing one important ingredient of armed robbery.

Further, as correctly stated by the counsel for the appellants, grievous harm offence is found under section 225 of the Penal Code, and its punishment is seven years imprisonment. Section 5 of the Penal Code defines grievous harm to mean any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or any permanent or serious injury to any external or internal organ or sense. Lumping the word grievous harm in the particulars of the offence showed the extent of the harm the victim sustained, which was not an ingredient of the armed robbery offence. The charge for the armed robbery offence contained in its particulars of the offence some ingredient and information about the armed robbery offence committed and grievous harm, which is another offence. The same is true for the duplicity of the charge.

Section 133 (2) of the CPA provides that where more than one offence is charged in a charge or information, a description of each offence so

charged shall be set out in a separate count. In **Director of Public Prosecutions vs. Pirbaksh Asharaf and 10 Others**, Criminal Appeal No. 345 of 2017, Court of Appeal of Tanzania at Dodoma, (unreported), it was held:-

> *"A charge is said to be duplex if, for instance, two distinct offences are contained in the same count, or where an actual offence is charged along with an attempt to convict the same offence."*

In this case, the two offences of armed robbery and grievous harm were lumped together instead of each offence being set in a separate count. In **Kauto Ally vs. Republic, [1985] T.L.R.183**, it was held that:-

> *"Lumping of separate and distinct offences in a single count may render a charge bad for duplicity."*

Thus, the charge was defective by lumping together the offence of armed robbery and grievous harm.

Mr. Semgabo said there is a variance between the particulars of the offence and the evidence adduced. Mr. Alfred Stephano admitted the presence of the variance between the charge and the evidence adduced and said the same was not fatal as the appellants were not prejudiced. With due respect, I differ with the state attorney. The particulars of the offence stated

that the owner of the gold sand is Alfred Andrew Komba. However, Alfred Andrew Komba (PW1) testified that he was working as a watchman in the mine located at Mpanga Ibumi, where the robbery occurred, and his boss was Hassan. Hassan Venamunzi Msigwa (PW4) testified that he owns the gold mine at Ibumi Village, where the robbery occurred, and the gold sand was stolen. The evidence adduced revealed that the owner of the gold mine where the sand containing gold was stolen was PW4 and not PW1, as stated in the charge. Another variance is the charge states that during the robbery incident Alfred Komba got grievous harm, but the evidence in record from PW1, PW2, PW3 and PW5 shows PW1, PW2, PW3 and Alfred Luoga were attacked and got injuries. Also, the evidence in record shows the culprit had machetes, but charge sheet states they had swords. The inconsistencies are not minor. They goes to the gist of the armed robbery case regarding the person whom the property was stolen during the incident, the persons whom violence was used by culprit to obtain the property and the weapon used.

The defects in the charge discussed have prejudiced the appellants as they could not know the nature of the offence, hence infringing the principle of fair trial. In **Director of Public Prosecutions vs. Pirbaksh Asharaf and 10 Others**, (supra), it was held that a person accused of an offence

must know the nature of the charge facing him per the principle of a fair trial. The exact position was stated in the case of **Mohamed Koningo vs. Republic [1980] T.L.R** that;

> *"The basic principle of our criminal practice is that the accused must know clearly what the charge against him is so that he can prepare his defence accordingly."*

Also, the fact that there was variance between the charge and the evidence adduced by prosecution's witnesses means the case was not proved to the required standard. Thus, the 5th ground of appeal has merits.

Consequently, the issue of the defectiveness of the charge has disposed of the appeal because the charge was fatally defective, and there was a variance between the charge and the evidence. I find no need to discuss the remaining grounds of appeal. Accordingly, I allow the appeal. The proceedings of the trial court are hereby nullified, the conviction of all appellants is quashed, and the sentence imposed is set aside. The appellants shall be released immediately from custody unless held for other lawful reasons. It is so ordered accordingly.

Dated at Iringa this the 03rd day of May, 2024.

A.E. MWIPOPO

JUDGE