IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J.,MBAROUK, J.A. And LUANDA,J.A.)

CRIMINAL APPEAL NO 266 OF 2014

1. BALTAZAR GUSTAF.....APPELLANT

2. ANTHONY ALPHONCE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(JUNDU, J.)

dated the 24th day of July, 2006
in
Criminal Appeal No. 79 of 2004

JUDGMENT OF THE COURT

20th & 28th October, 2014

OTHMAN, C.J.:

The appellants, Baltazar Gustaf and Antony Alphonse were charged with armed robbery c/ss. 285 and 286 of the Penal Code, Cap 16 R.E. 2002 at the District Court of Rombo at Mkuu. Following a trial, they were each convicted and sentenced to a term of thirty years imprisonment. Aggrieved, they first appealed to the High Court (Jundu, J. as he then was), which on 24/07/2006 dismissed their appeal. Undissuaded, they have now preferred this second appeal.

At the hearing of the appeal, on 20/10/2014, the appellants, appeared in person, unrepresented. The respondent Republic was represented by Ms. Neema Mwanda, learned Principal State Attorney.

Having examined the record and taking into account the parties submissions, in our respectful view, Ground 2 of the appellants' joint memorandum of appeal is sufficient to determine the appeal. As expressed by the appellants, this ground is to the effect that:

> *The first appellate Judge erred in law and fact for holding the decision, finding and conviction pronounced by the Learned trial District Magistrate, yet the charge sheet had not disclosed fully the particulars of the offence of armed robbery.*

In their written submission, the appellants argued that the particulars of the charge sheet for the offence of armed robbery c/ss. 285 and 286 of the Penal Code did not give them reasonable information as to the nature of the offence charged as it was not specified against whom the use or threat to use actual violence was perpetrated. That this was contrary to the requirement of section 132 of the Criminal Procedure Act, Cap 20 R.E.

2002. That the charge was rendered defective as an essential ingredient of armed robbery c/ss. 285 and 286 of the Penal Code was absent.

In response, Ms. Mwanda, who resisted the appeal readily conceded that the charge sheet did not mention PW3, Emil Satorini against whom the prosecution had alleged that the 1st appellant had pointed a *gobore* at, during the armed robbery. That instead, it had only referred to PW4, Soteri Aniseti, the owner of the eight (8) iron sheets that the appellants had stolen from the roof of his house. Ms. Mwanda contended that this minor defect was curable under section 388(1) of the Criminal Procedure Act.

Responding to a question by the Court, whether or not it was also proper for the learned trial Magistrate to enter the appellants' conviction under section 235 of the Criminal Procedure Act, and not sections 285 and 286 of the Penal Code that they were charged with, Ms. Mwanda submitted that the law is that an accused is convicted of the offence he or she is specifically charged with and not under a generalized provision like section 235. That the appellants were convicted of something that in law does not exist. The trial court was thus not correct in convicting the appellants, an error that the High Court did not address. She invited us to use the Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act,

Cap 141 R.E. 2002 to quash the proceedings and judgment of the High Court and to remit the case file back to the District Court for it to enter a proper conviction against the appellants according to the law.

In fairness, the appellants did not raise this ground of appeal before the High Court for its determination. However, in our considered view, as it is a point of law and one that essentially centres on an accused's basic rights and guarantees to a fair trial in a criminal case, we are compelled to take it up.

Section 132 of the Criminal Procedure Act mandatorily requires every charge sheet or information to contain a statement of the specific offence or offences an accused is charged with, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The law is well-established that the particulars of the charge sheet shall disclose the essential elements or ingredients of the offence charged. (See: **Mussa Mwaikunda V.R.** [2006] TLR 387; **Isidori Patrice V.R.**, Criminal Appeal No. 224 of 2007, CAT, unreported).

Going by the record, the appellants were specifically charged with armed robbery c/ss. 285 and 286 of the Penal Code. Section 285(1) provides:

"285.(1) Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, ***uses or threatens to use actual violence to any person*** *or property* ***in order to*** *obtain or* ***retain the thing stolen or to prevent or overcome resistance to its being stolen or retained****, is guilty of "robbery". (Emphasis added).*

In relation to section 285, in **Zubell Opeshutu v.R.**, Criminal Appeal No. 31 of 2003 (CAT, unreported), the Court stated:

"A pre-requisite for the crime of robbery is that there should be violence to the person of the complainant*. There must be evidence to establish that the appellant used or threatened to use any actual violence to obtain or retain the stolen property". (Emphasis added).*

In **Kashima Mnadi v.R.,** Criminal Appeal No. 78 of 2011, CAT, (unreported) we reiterated:

"Strictly speaking for a charge of any kind of robbery to be proper, it must contain or indicate

actual personal violence or threat to a person on whom 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 offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed" *(Emphasis added).*

As pointed out by the appellants and conceded by the respondent Republic, PW3 the alleged victim of the use or threat of use of actual violence by the assailants in order for them to retain the eight (8) stolen iron sheets was not named in the particulars of the offence in the charge sheet. An essential ingredient of the offence of armed robbery was thus omitted, rendering the charge fatally defective. Occasioning a failure of justice for not disclosing an essential ingredient of the offence charged, with respect, the defect could not be cured under section 388(1) of the Criminal Procedure Act. Accordingly, we find merit in this Ground 2 of

appeal. This in itself would have been sufficient for the Court to dispose of the appeal.

However, a subsidiary issue arises. Another serious discrepancy that we could not have failed to notice was the appellants' purported conviction by the District Court. It was entered under section 235 of the Criminal Procedure Act, and not sections 285 and 286 of the Penal Code, the offence (i.e. armed robbery) they were specifically charged with. We fully agree with Ms. Mwanda that, with respect, the District Court seriously mis-directed itself in convicting the appellants on section 235 of the Criminal Procedure Act, which is a general provision directing the trial court to proceed to the conviction of the accused after hearing both the complainant and the accused person and their witnesses and the evidence. The appellants were thus convicted on a wrong provision. As entered, the appellants' conviction by the District Court cannot stand. In law, they remain unconvicted. With utmost respect, this serious misdirection ought to have been noticed and corrected by the High Court.

In the result and for the foregoing reasons, we are constrained to invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act (*supra)* and proceed to quash all the proceedings and

judgment of the High Court. Similarly, we also quash all the proceedings, judgment and sentence of the trial court and remit the file back to the trial Court for the Director of Public Prosecutions (D.P.P.) to act as appropriate on the charge sheet preferred against the appellants on 13/5/2003 and according to the law. The interests of justice requires the matter to be attended to with dispatch by the D.P.P. Account should also be taken that the appellants have been in custody from 18/01/2003 to date, a period of eleven (11) years and about nine (9) months.

DATED at **ARUSHA** this 27th day of October, 2014.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL