

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 393 OF 2016

*(an appeal from the judgment of Kilombero District Court delivered by Hon.
Lyon RM on 27th April, 2016 in Criminal Case No. 271 of 2015)*

SAMSON FESTO @ PUCHU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

8th and 28th June, 2018

BANZI, J.:

The appellant along with four others appeared before the District Court of Kilombero on a charge containing two counts namely; Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] for all five persons and Possession of Goods Suspected to have been Stolen contrary to section 312(1)(b) of the Penal Code [Cap. 16 R.E. 2002] against the appellant only.

At the end of the trial, the appellant was convicted and sentenced to thirty (30) years imprisonment for the 1st count while four others were

acquitted. Dissatisfied with conviction and sentence the appellant preferred an appeal to this Court.

The historical background prompted the conviction of the appellant is that, on 21st August, 2015 around 0100 hours five persons armed with bush knives ambushed the house of Siyabuni Mwaipopo (PW3). The appellant and other two entered into one of the rooms where Azania Mwaipopo (PW4) and Sakina Mogoda (PW5) were sleeping, while the other two remained outside. Upon entering, they covered PW4 and PW5 with bed sheets and threatened to kill and rape them if they will raise an alarm. However, PW4 and PW5 managed to identify the appellant and his colleagues as the lights were on. They stole various properties and went away. Appellant and his colleagues were arrested and on 21st September, 2015, Inspector Joseph Elias (PW1) conducted the identification parade whereby PW3 and PW4 identified the appellant. The identification parade registers were tendered and admitted collectively as exhibit PE1.

In his defence, the appellant vehemently denied any involvement in the commission of the offence. He claimed to be arrested on 2nd September, 2015 by a group of people while on his way to his relatives.

The appellant who was unrepresented has raised seven grounds in his petition of appeal. However, all grounds are circling into the question of defective charge and evidence of identification. At the hearing, the appellant had nothing to add whereas he prayed that this court considers his grounds of appeal and set him free.

The respondent Republic was represented by Mr. Bryson Ngidos, the learned State Attorney who on the outset indicated to support the appeal.

To substantiate his stance, Mr. Ngidos began to attack the charge which in his view was fatally defective. He further argued that, the particulars on armed robbery offence did not show the person against whom the threat was directed. The omission renders the charge defective as it lacks one of the essential ingredients of offence. He concluded by saying that, the conviction of the appellant cannot stand on a defective charge. In support of his argument he cited the case of **Zefania Siame v Republic**, Criminal Appeal No. 250 of 2011 CAT (unreported).

On the issue of identification, the learned State Attorney submitted on both visual identification and identification of stolen property. To start with identification of stolen property, Mr. Ngidos contended that, PW3 failed to

identify his bag before it was found to a woman whose name was not disclosed. Also there was no certificate of seizure to prove that the appellant was found with the stolen properties.

So far as visual identification is concerned, the learned State Attorney submitted that, the appellant was not properly identified. PW4 and PW5 failed to disclose source of light and its intensity which assisted them to identify the appellant. In attacking the identification parade, he submitted that, the same does not serve any purpose as there was no prior descriptions of the appellant given before his arrested. He referred the case of **Gwisu Nkonoli and Three Others v Republic**, Criminal Appeal No. 359 of 2014 CAT (unreported). In the event, he prayed that this appeal be allowed by quashing the conviction and setting aside the sentence.

Having closely examined the trial court records and the submission by Mr. Ngidos learned State Attorney, I inclined to agree with him that, the conviction of the appellant was based on the fatally defective charge.

Let me start by looking at the nature of the charge on the first count which the appellant had to answer in the trial court. The charge on the first

count was laid under section 287A of the Penal Code [Cap.16 R.E. 2002] as amended. The section provides that;

*"A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or **immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property**, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment" (emphasis supplied).*

From the wording of above quoted provision, it is quite clear that the person against whom the threat or use of violence is directed must be mentioned in the charge sheet.

In the case at hand, the particulars of offence were couched in the following manner as quoted hereunder:

"That Samson s/o Festo @ Puchu, Issa s/o Salum Lipiki, Juma s/o Hamza Kitowelo, Mohamed s/o Rashid Lipiki and Michael s/o Said Ngaugula, are jointly and together charged on 21st day of August, 2015 at or about 01:15hrs at Kibaoni area within Kilombero District in Morogoro Region did steal two laptop type Dell valued at

*Tsh.1,400,000/=, one laptop type HP valued at Tsh.700,000/=, one bag valued at Tsh.50,000/= four dot's of vitenge (sic) type wax valued at Tsh.240,000/=, two vitenge clothes (sic) valued at Tsh.96,000/=, two mobile phone type TECNO valued at Tsh.80,000/=, one digital camera type conica valued at Tsh.500,000/=, one hand drier valued at Tsh.150,000/=, one school bag valued at Tsh.30,000/=, cash box keys valued at Tsh.500,000/= and cash money Tsh.70,000/= All total valued at Tsh.3,816,000/= the property of Syabuni s/o Mwaipopo and **immediately before and after such stealing did threaten by using bush knife in order to retain or recover the said properties**" (emphasis is mine).*

From the above particulars, it is apparent that the person against whom the threat or use of violence is directed was not mentioned.

The Court of Appeal in a number of cases held that the particulars of offence must state all essential ingredients of the offence charged short of which the charge will be rendered defective. (Refer the cases of **Kashima Mnadi v Republic**, Criminal Appeal No.78 of 2011 CAT (unreported), **Nasoro Juma Aziz v Republic**, Criminal Appeal No. 58 of 2010 (unreported) and **Musa Mwaikunda v Republic** [2006] TLR 387).

More so, in the case of **Zefania Siame v Republic**, Criminal Appeal No. 250 of 2011 CAT (unreported) at page 6 it was held that:

".....we are of the settled view that failure to mention the person against whom the use of or threat of violence was directed rendered the charge fatally defective. Since the charge sheet was defective it was wrong for the learned judge on first appeal to sustain a conviction based on a charge which lacked an essential ingredient".

As said earlier, in our case at hand it is evidently shown that the person against whom the threat or use of violence was directed was not mentioned in the particulars of offence. This omission not only renders charge defective but also incurable under section 388(1) of the Criminal Procedure Act [Cap.20 R.E. 2002].

Turning to the issue of identification, as correctly submitted by the learned State Attorney, PW4 and PW5 claimed to identify the appellant with the aid of light which was on, but they failed to disclose its source and intensity. Disclosure of source of light and its intensity are among the requirements need be stated by the witness when testifying on the issue of identification. This position was underscored in the case of **Said Chaly Scania v Republic**, Criminal Appeal No. 69 of 2005 CAT (unreported).

Apart from that, PW4 and PW5 did not give detailed descriptions of the appellant before they had opportunity to see him on identification parade. The position of Court of Appeal in the **Adriano Ayondo v Republic**, Criminal Appeal No. 29 of 2009 CAT (unreported) was that for any identification parade to be of any value, the identifying witness must have earlier given a detailed descriptions of the suspect.

In the instant case, PW4 and PW5 failed to comply with the prerequisite condition of giving detailed description of the appellant before the identification parade was conducted, as a result the identification parade in the instant case has no any evidential value.

The other pointed submitted by Mr. Ngidos, was identification of stolen property. First of all, there is material contradiction on PW2's evidence as to where they found the stolen bag. At first he named the school boy who was given the same by his mother but later when he wanted to tender the bag and other properties he stated that, all were found with the appellant. This contradiction cast doubt on prosecution evidence considering the fact that, certificate of seizure was not tendered and neither the school by nor his mother were called to testify.

Delivered this 28th day of June, 2018 in the presence of Bryson Ngidos
the learned State Attorney for the respondent and the appellant in person.



**I.K. BANZI
JUDGE
28/06/2018**

Right of appeal explained.



**I.K. BANZI
JUDGE
28/06/2018**