

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NDIKA, J.A., LEVIRA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 566 OF 2017

1. JUMA CHARLES @ RUBEN
2. HASSAN IBRAHIM @ RAMADHANI MDACHI } **APPELLANTS**
VERSUS
THE REPUBLIC.....**RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Arusha)**

(Maghimbi, J.)

Dated 31st day of July, 2017
in
Criminal Appeal No. 54 of 2017

JUDGMENT OF THE COURT

22nd & 26th November, 2021

LEVIRA, J.A.:

The appellants, Juma Charles @ Ruben and Hassan Ibrahim @ Ramadhani Mdachi were arraigned before the District Court of Mbulu District at Mbulu (the trial court) facing the charge of armed robbery under section 287A of the Penal Code, Cap 16 RE 2002 as amended by Act No. 3 of 2011 [Now R.E. 2019] (the Penal Code). After a full trial, they were convicted and sentenced each to serve thirty years (30) imprisonment. Aggrieved by both the conviction and sentence, they unsuccessfully appealed to the High Court of Tanzania at Arusha vide

Criminal Appeal No. 54 of 2017. The decision of the High Court in that appeal is the subject of the current appeal.

Briefly, the factual background of this appeal is to the effect that; on 8th December 2016, Emmanuel Benjamini Landa (PW1), the motorcyclist, was hired by the appellants to take them to Yaedachini at Majuto's house. Upon arriving there, the first appellant demanded to be given the motorcycle with Registration No. MC 304 AXS make King Lion by PW1 so that he could go fetch his money from someone who was far from where they were, PW1 refused. After a few minutes, the second appellant got hold of PW1's neck and forced him to surrender the key to the first appellant. Being helpless, PW1 surrendered the motorcycle key to the first appellant who eventually left with the motorcycle. Thereafter, the second appellant disappeared in the bush leaving PW1 at the scene of the crime.

PW1 informed Abdul Malilo Laloya (PW2), the owner of the motorcycle about the incident. Ultimately, the incident was reported to Mwangeza Police Station. Upon reporting they were told by the Police Officer No. F8773 DC Simon (PW5) that there was a motorcycle recovered from the first appellant during his arrest and thus they were asked to check whether it was the one stolen from

PW1. Luckily, both PW1 and PW2 were able to identify the said motorcycle to be the one stolen from PW1, the property of PW2. The second appellant was arrested later in connection with this offence and was charged together with the first appellant. The appellants disassociated themselves from the charge leveled against them in their defence. However, the learned trial magistrate was satisfied that the prosecution proved their case against the appellants beyond reasonable doubt. Accordingly, they were convicted and sentenced as earlier on intimated. The appellants' first appeal to the High Court was not successful and hence the present appeal.

In their joint memorandum of appeal, the appellants have presented six grounds and one additional ground was introduced upon Court's leave during hearing of the appeal. For the reasons to come into light shortly, we shall not reproduce all the grounds of appeal presented before us except the first ground which states as follows:-

1. That, the first appellate Judge erred in law and in fact in not finding that the appellants were tried and convicted under a defective charge sheet.

At the hearing of the appeal before us the appellants appeared in person, unrepresented whereas, the respondent Republic had the services of Ms.

Adelaide Kassala, learned Senior State Attorney assisted by Ms. Grace Madikenya, learned State Attorney.

The first appellant submitted in support of the appeal to the effect that, the appellants were not properly identified both at the scene of the crime and during dock identification. His argument was based on the fact that the dock identification was not preceded by proper identification parade because during identification parade, the appellants were shown to the identifying witnesses before the parade was conducted.

Also, he submitted that the prosecution witnesses failed to establish the chain of custody of the allegedly stolen motorcycle (exhibit P1) and that there was no seizure certificate which was tendered in respect of exhibit P1. Generally, he argued that the prosecution witnesses were not credible and he thus urged us to find that the charge against them (the appellants) was not proved to the required standard. Finally, he prayed for the appeal to be allowed.

The second appellant supported the submission by the first appellant and urged us to set them free.

As it can be noted from the appellants' submissions above, nothing was said in support of the first ground of appeal.

In reply, Ms. Kassala supported the appeal; basically, on the first ground that the charge sheet was defective. She contended that the appellants were charged with armed robbery under section 287A of the Penal Code under which one of the ingredients is the use of offensive weapon before or after stealing. Nevertheless, she said, although the charge sheet shows that the appellants stole the motorcycle, it does not show that they used any weapon to acquire or retain that property. According to her, since the charge sheet omitted to indicate that the appellants used weapon as one of the ingredients of the offence of armed robbery, the charge sheet became fatally defective as it contravened section 132 of the Criminal Procedure Act, Cap 20 R.E. 2002 [now R.E. 2019] (the CPA). She thus urged us to allow the appeal, nullify the proceedings of both lower courts and set aside the appellants' sentences.

The appellants reiterated their prayers in chief in their rejoinder.

We wish to note at the outset that the appellants' complaint in the first ground of appeal was also raised as the first ground at the High Court. However, for unstated reason(s) the first appellate Judge did not determine this ground. As the second appellate court, our noble task is to deal with appeals from the decisions of the High Court and subordinate courts with extended jurisdiction in

terms of section 4(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA). However, since the complaint in this ground is based on a point of law, we shall determine it.

For appreciation of our determination of the question as to whether the charge sheet under consideration was fatally defective, we find it apposite first to reproduce it for ease of reference as hereunder:-

"IN THE DISTRICT COURT OF MBULU

AT MBULU

CRIMINAL CASE NO. OF 2017

REPUBLIC

V

1ST ACC:

NAME: JUMA S/O CHARLES @ RUBEN

TRIBE: MNYAKYUSA

AGE: 28 YRS

OCC: PEASANT

RESID: BABATI

2ND ACC:

NAME: HASSAN S/O IBRAHIM @ RAMADHANI @ MDACHI

TRIBE: MNYAMWEZI

AGE: 29 YRS

OCC: PEASANT

RES: BABATI

STATEMENT OF OFFENCE: *Armed robbery c/s 287A of the Penal Code Cap 16 R.E. 2002 as amended by Act No. 03/2011.*

PARTICULARS OF THE OFFENCE: *That JUMA S/O CHARLES @ RUBEN and HASSAN S/O IBRAHIM @ RAMADHANI @ MDACHI are jointly and together charged that on 8th day of December 2016 at about 11:00 hrs at Yaedachini village within Mbulu District and Manyara region did steal one motorcycle Reg. No. MC 304 AXS make King Lion from Emanuel s/o Benjamini and immediately before or immediately after the time of such stealing did threaten the said person in order to obtain or retain the said motorcycle.*

STATION: MBULU

DATE: 18/1/2017 *Sgd*

.....
"PUBLIC PROSECUTOR"

Section 287A of the Penal Code referred to in the statement of offence in the quoted charge sheet 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 added].*

According to the above provision, for the offence of armed robbery to be established the following three ingredients must be proved; to wit, **one**, the accused person must have stolen something; **two**, at or immediately before or after stealing, he must be armed with a dangerous or offensive weapon or instrument; and **three**, at or immediately before or after stealing, that person must have used or threatened to violence.

Drafting of a charge is a matter of law. No charge shall be valid unless it complies with the requirements of sections 132 and 135 of the CPA. In particular, section 132 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.”

It can be seen from the charge sheet reproduced above that the statement of offence states categorically that the appellants were charged with armed robbery contrary to section 287A of the Penal Code. The said provision is so specific as it states the elements of the offence of armed robbery as demonstrated above. However, the particulars of the offence reveal that the appellants stole a motorcycle with Registration No. MC 304 AXS from PW1 and immediately before or after such stealing, they threatened him in order to obtain and retain the said motorcycle without stating whether they were armed. Failure to state so rendered the charge sheet defective.

We are aware of the settled position that not every defect in the charge renders it fatally defective – See: **Jamal Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported), courts are also required to consider the evidence adduced so as to satisfy itself whether or not an accused person understood the nature of the charge laid against him/her. We have thoroughly gone through the entire record of appeal but we were unable to find any of the prosecution witnesses mentioning that the appellants were armed at the time of

commission of the offence. PW1 as the key prosecution witness stated at page 8 of the record of appeal about what happened on the fateful day. We shall let the relevant part of his evidence to speak for itself: -

*"On 8/12/2016 at 11:00 am I was at Yaedachini. I have my passenger who is **the first accused and his friend**. We had two motorcycles. They refused to hire another one so they convinced me to take all (sic) two in my motorcycle. I agreed and I took them to Yaedachini at Majuto's house. We stayed there for short while, then **1st accused demanded my motorcycle I refused totally... then the 2nd accused decided to apprehended me at my neck and told me he needed the key. ... so I gave him the said key and give (sic) to 1st accused. He took the said motorcycle and I remained in the hands of the 2nd accused for a time then he left me and ran away in the bush."***
[Emphasis added].

The above extract reveals that there was no use of offensive weapon or instrument when the motorcycle was allegedly being stolen by the appellants from PW1. To prove that the appellants intended to deprive PW1's possession of the motorcycle completely, PW5 stated in his evidence that they intended to sell the same to another person. We thus agree with Ms. Kassala that the charge

sheet did not indicate that the appellants were armed at the time of commission of the offence and the evidence on record did not prove so. Therefore, we are of the settled view that the charge sheet was fatally defective as it did not meet the requirements of the law under sections 132 and 135 of the CPA. More so because the same could not be rescued by the evidence on record as no one mentioned that the appellants were armed at the time of commission of the offence—See: **Fikiri Joseph Pantaleo @ Ustadhi v. Republic**, Criminal Appeal No. 323 of 2015 and **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2014 (both unreported). We entertain no doubt that the contents of the charge sheet together with the evidence adduced by prosecution witnesses were not sufficient for the appellants to understand the nature of the charge they were facing so as to mount a meaningful defence. In the premises, the trial was a nullity because it stemmed from a fatally defective charge as it is for the appeal before the High Court.

In the circumstances, we find merit in the first ground of appeal and thus we do not see the need to deal with other grounds of appeal as this alone disposes the appeal.

Consequently, we allow the appeal, quash the convictions and set aside the appellants' sentences. We order immediate release of the appellants from prison unless they are otherwise lawfully held.

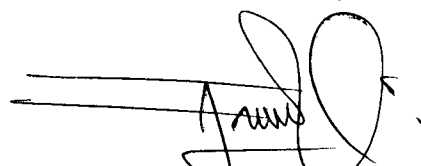
DATED at ARUSHA this 25th day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 26th day of November, 2021 in the presence of the Appellants in person, Ms. Tarsila Gervas and Ms. Grace Madikenya, learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.


E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL

