IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 384 OF 2020

SIMEO STEPHANO @CHAUREMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates Court of Bukoba, at Bukoba, Ext. Jurisdiction)

(Luambano, SRM Ext. Jurisdiction)

dated the 30th day of April 2020
in
Criminal Appeal No. 10 of 2020

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JUDGMENT OF THE COURT

23rd & 29th November, 2021

KOROSSO, J.A.:

The appellant (who was the 1st accused then) and another person (who was the 2nd accused and was acquitted by the trial court) were in the District Court of Biharamulo, at Biharamulo charged for the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E 2020 (the Penal Code). It was alleged that on 10/11/2016 at about 2.00 hours at Katahoka Village within Biharamulo District in Kagera Region, the appellant and another did steal two solar panels, one car battery, 60 kgs of groundnuts, three torches, one motorcycle battery all being properties belonging to Stephano Misago and valued at Tshs.

534,000/=. It was further alleged that immediately after such stealing, they did use a home-made gun, known as *gobore* to threaten in-order to obtain the said properties. The appellant and his colleague pleaded not guilty to the charges.

The background of the case leading to the current appeal is that, Stephan Misago (PW1) a farmer and a resident of Katahoka village who had five houses in one compound together with a kraal, on 10/11/2016 in the night hours while asleep heard a call of an alarm from the area his children slept, while trying to get to the bottom of the issue, there was a gunshot and soon after, a window and then the door to his house were broken and he saw the 2nd accused enter the house and demand for money. While trying to convince him, there was no money, the culprit moved to another room where the children slept, and thus providing PW1 and his wife a leeway to escape from the area, which they did. Violeth Laurent (PW2)'s evidence supported that of PW1 on what transpired during the alleged incident. Similarly, while the robbery was ongoing, on the other side of the house, Piana Ntahadi (PW3) who slept with her aunt Agnes Joachim (PW4) and her sister one Fransisca was abruptly awakened from sleep by shouts of alarm from the sitting room and managed to see and recognize the appellant taking a battery

from the room. She stated to have seen the appellant in view of the light emanating from solar light bulbs. After the invaders had left, and people gathered to provide help, the incident was reported to police officers who were on patrol. Upon arrival at the crime scene, the police officers gathered information from the witnesses, and it is from the information they received which led to the arrest of the appellant and the 2nd accused person the following morning.

The appellant gave his testimony in defence as DW1 and disassociated himself with the charges against him. He stated that on the fateful day of the robbery he had slept at his homeplace and narrated the circumstances of his arrest next morning while at his shamba.

Having heard both sides, the trial court was satisfied that the prosecution had proved the case against the appellant, convicted and sentenced him to 30 years imprisonment while the 2nd accused was acquitted. Aggrieved, his first appeal heard and decided by Luambano, SRM Ext. J. was unsuccessful. The first appellate court sustained the conviction and sentence imposed also finding that the prosecution case was proven against the appellant to the standard required in that: **one**, the appellant identification n as being at the crime scene was watertight

with no room for mistaken identity and that the conditions for identification were favourable; **second**, the testimony of PW3 of having recognized the appellant, known to her prior to the incident was credible and properly taken in line with section 127(2) of the Tanzania Evidence Act, Cap 6 R.E 2002, now 2019 (the Evidence Act); and **third**, the complaints that the charge sheet was defective for failure to state the value of the properties alleged to have been stolen at the scene were misconceived, finding that, that fact was stipulated in the charge sheet.

Undaunted, but aggrieved by the decision of the first appellate court, the appellant processed an appeal to this Court through the memorandum of appeal that paraded six appeal which we shall not reproduce for reasons that three of the grounds were abandoned by the appellant when hearing of the appeal commenced. We find it prudent to reproduce only the grounds he proceeded to argue, which summarized, expound the following complaints: **one**, that the conviction was based on a defective charge which failed to mention the victim of the offence; **two,** failure of the prosecution to prove all ingredients of the offence charged; and **three**, faults lower courts for convicting him despite not being properly identified.

On the day the appeal was called for hearing, the appellant appeared in person, unrepresented and the respondent Republic was represented by Mr. Hezron Mwasimba, learned Senior State Attorney assisted by Mr. Joseph Mwakasege, learned State Attorney.

Having abandoned some of the grounds upon being granted to do so, the appellant proceeded to argue in essence complaints number one to three above. In amplifying on complaint number one, the appellant contended that the charge against him was defective for failure to disclose the name of the person who was threatened in line with the settled position of the law on the matter as found in the case of **Samwel Marwa Roswe @Massaba vs Republic**, Criminal Appeal No. 220 of 2014 (unreported) where the Court stated that, mentioning the victim alleged to have been threatened in the charge is a fatal anomaly since it denies the defence knowing vital information to prepare themselves.

Regarding complaint number two, the appellant argued that the evidence on his identification at the crime scene was insufficient to conclusively prove that he was the one there who committed the offence charged. He argued that the evidence of visual identification by PW3 relied upon by the lower courts did not fulfill the factors to be

considered to meet the standard of the appellant of proper and unmistaken identification. The appellant reasoned that going through the evidence of PW3 in the record of appeal, she only stated that there was solar light but did not expound on the extent and intensity of the said light available, the direction it spread and its scope when the alleged robbery took place. To cement this argument, he cited the case of **Machemba Paulo vs Republic**, Criminal Appeal No. 538 of 2015 (unreported) where the Court emphasized the importance of a witness stating the intensity of the light at the scene. Another case cited by the appellant was **Mabula Makoye and Another vs Republic**, Criminal Appeal No. 227 of 2017 (unreported), where the Court expounded on the standard required to be considered by courts when considering evidence on identification.

The appellant implored the Court to find that the evidence on his identification as being at the scene of crime by PW3 and PW4 lacked substance and was not up to the standard set by the law and the evidence that PW3 testified that she knew the appellant before should not by itself be taken as sufficient to prove that the appellant was identified as one of the culprits on the material day the offence charged was committed. He argued that the prosecution failed to give the details

and factors which led PW3 to recognize him, an essential requirement of the law.

On complaint number three that faults the lower courts for convicting the appellant when the prosecution failed to prove the case to the standard required, he argued that there was no cogent evidence to prove the case against him and thus urged the Court to allow his appeal and set him free.

Mr. Mwasimba, on the other hand submitted that he was in support of the appeal because the charge sheet was defective for failure to mention the name of the victim who was threatened when the offence was committed. He argued that the charge only names the owner of the properties stolen, who in his testimony never stated that he was threatened by a weapon and thus, the evidence presented in court did not cure the defect in the charge. In light of the highlighted shortcomings in the prosecution evidence, the learned Senior State Attorney argued that the prosecution side failed to prove the offence charged against the appellant and he thus urged the Court to allow the appeal. There was no rejoinder from the appellant.

Having carefully considered the uncontested submissions and the cited references on appeal from the appellant and the learned Senior

State Attorney, we find that the underlying issues for our determination are: **one**, whether the charge against the appellant was defective; and **two**, whether the charges against the appellant were proved beyond reasonable doubt. In determining issue number one, the appellant contention is that the charge was defective since the particulars of the offence did not show the name of the person whom the threats using a weapon were directed, an argument conceded by the learned Senior State Attorney.

We are constrained to revisit the law on how a charge should be framed as provided for by sections 132 and 135(a)(ii) of the Criminal Procedure Act, Cap 20 R.E. 2002, now 2019 (the CPA). Section 132 of the CPA provides for what the charge should contain, that is, a statement of the specific offence or offences for which the accused is charged, "*together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged*".

On the other hand, section 135(a)(ii) of the CPA provides on how the statement of offence should be framed and section 135 (a)(iv) expounds the contents of the particulars of the offence and that they should be set out in ordinary language with avoidance of technical

terms. In the case of **Isidori Patrice vs Republic**, Criminal Appeal No. 224 of 2007 (unreported) the Court stated:

> *"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. 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 with the necessary mens rea. Accordingly, the particulars, in order 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."*

To better appreciate how the impugned charge was couched, we are constrained to reproduce it as found at page 6 of the record of appeal (the record), thus:

CHARGE SHEET

NAME AND TRIBE OR NATIONALITY OF THE PERSON (S) CHARGED

1st Accd	***2nd Accd***
NAME: SIMEO S/O STEPHANO	*NAME: KAYANGI S/O PETRO*
TRIBE: HA	*TRIBE: HA*
AGE: 21	*AGE: 35*
OCC: PEASANT	*OCC: PEASANT*
RES: MTAKUJA- KATAHOKA	*RES: MTAKUJA-KATAHOKA*
REL: CHRISTIAN	*REL: CHRISTIAN*

***OFFENCE, SECTION AND LAW**: Armed Robbery C/S 287A of the Penal Code Cap 16 of the Law [R.E. 2002].*

***PARTICULARS OF THE OFFENCE**: - That SIMEO S/O STEPHANO and KAYANGI S/O PETRO are jointly and together charged on 10th day of November, 2016 at about 02:00hrs at Katahoka village within Biharamulo District in Kagera Region, did steal two solar panel, one car battery, 60 Kilogram of groundnuts, three torches, one battery of motor cycle all properties valued at Tshs. 534,000/= the property of STEPHANO S/O MISAGO and at or immediately before or immediately after such stealing did use homemade gun known as Gobore to threat in order to obtain the said properties.*

*STATION: **BIHARAMULO***

Signed

PUBLIC PROSECUTOR

***DATE**: 23/01/2017*

In a charge of armed robbery contrary to section 287A of the Penal Code, this Court in the case **Kashima Mnadi vs Republic**, Criminal Appeal No. 78 of 2011 (unreported) amply expounded on ingredients of charges of robbery, which we find in essence includes armed robbery by stating thus:

> *"... 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 targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat but also on whom the actual violence or threat was directed. The requirement is provided under section 132 of the Criminal Procedure Act, Cap 20 R.E 2002 so that to enable the accused person know the nature of the offence he is going to face."*

In the case before us, having revisited the charge sheet which we have reproduced hereinabove, there is no doubt that as it reads, it is only the name of the owner of the alleged stolen items, that is Stephano Misago, that is provided in the particulars of the offence apart from the names of the accused persons. However, the identity of the person against whom the violence was directed is not disclosed. This is clearly against the sample form, that is, Form 8 found in the second Schedule

to the CPA which prescribes the manner of stating the particulars for the offence of robbery in terms of section 135(a)(iv) of the CPA (see also, **Samwel Roswe @Masaba** (supra)).

Indeed, in the instant case, the threats or use of the weapon, alleged to be a homemade gun known as *gobore* immediately before the stealing in order to obtain and retain the stolen items prescribed therein in the charge did not show to whom the threats were directed to as also conceded by the learned Senior State Attorney to render it difficult to ascertain whether the appellant understood the person who was threatened.

It is now settled that an omission of such an essential ingredient in a charge of armed robbery renders the charge fatally defective and is incurable under section 388 of the CPA. (See **Isidore Patrice** (supra), **Samwel Marwa Roswe @Masaba** (supra) and **Noah Paulo Gonde and Another vs DPP,** Criminal Appeal No. 456 of 2016 (unreported) to name a few). We are constrained to find that for reasons stated above and having considered that the evidence presented by the prosecution does not disclose the person of whom the threats were directed against, a fact conceded by the learned Senior State Attorney in his submission,

consequently, we find the charge to be fatally defective and incurable under section 388 of the CPA. Thus, complaint number one has merit.

Although the above holding is sufficient to dispose of the appeal, we find it pertinent to address complaint number two and three together and in essence also address the second issue drawn, that is, whether the charge against the appellant was proved beyond reasonable doubt. As already discussed above, both the trial court and the first appellate court found that the case against the appellant was proven to the standard required. The main evidence relied upon was that of visual identification of the appellant by PW3 since PW1 and PW3 evidence did not testify as to his identification.

In the current appeal, there is no dispute that on the 10/11/2016 the house of Stephano Misago was broken into and various items were stolen as per the charge sheet. The main area of contention is whether the appellant was the one who committed the offence charged.

To prove the charges against the appellant, the trial and first appellate courts considered and determined that the appellant was sufficiently identified to have been at the scene of crime to dissuade any possibility of mistaken identity. The law on visual identification is to a great extent settled requiring that for conviction of an accused person

on the evidence of visual identification, the said evidence must be watertight since it is recognized as of the weakest kind and most unreliable.

In the celebrated case of **Waziri Amani vs Republic** [1980] TLR 250, guidelines on evidence related to identification were expounded such as consideration on the following: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. The Court also observed that the guidelines set are not exhaustive since other emerging relevant factors can also be considered (See also, **Kanganja Ally and Juma Ally vs Republic** [1980] TLR 270 and **Kenedy Ivan vs Republic**, Criminal Appeal No. 178 of 2007 (unreported))

In the current appeal, the evidence of PW3 was that she recognized the appellant as Simeo, a person she had occasion to meet or see around the area where they lived, and she had also informed PW4 of this fact. We find it pertinent to reproduce her evidence on this fact as found at page 15 of the record stating thus:

"... while sleeping I heard my sister from seating (sic) room raising alarm at the window, them I woke up, I saw one man coming to the room and my sister was pushing the door, it was not dark there was a solar light which was bulb, I went to seating (sic) room, I stood at the main door, then identified Simeo came in the house took the battery in the room. I only identified Simeo, he was in the red vest, Simeo is this 1st Accused in this Court he resides at Mnarani area, I use to see him several times when I went to fetch water going to school..."

Suffice to say, a further scrutiny of above excerpt on PW3's evidence reveals that in terms of the available light she only stated that there was solar light on the bulb but she did not expound further on the brightness, intensity or the reach of that light, only stating it was not dark. PW3 did not state how long she observed the culprit and the distance of observing him. According to her evidence, the time she observed the robbery she was coming from sleeping. Indeed, it is also in evidence that PW3 stated that she knew the appellant prior to the incident but as discussed in various decisions of this Court, that does not eliminate the possibility of mistaken identity. This Court had the opportunity of deliberating on a similar situation in **Boniface Siwingwa**

vs Republic, Criminal Appeal No. 421 of 2007 (unreported), the Court held:

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown, as is in this case, that the conditions for identification are not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."*

Therefore, under the circumstances, we are convinced that both the trial and first appellate courts did not properly direct themselves on the gaps in the evidence of PW3 on identification of the appellant. Apart from the weaknesses stated hereinabove, there is also the fact that the witness did not provide any details as she identified the appellant at the crime scene apart from saying she knew him from before. Taking all factors into account we cannot safely hold that the identification of the appellant was watertight and that all possibilities of mistaken identity have been eliminated. The doubts we have must be resolved in the favour of the appellant. (See **Harod Sekache @Salehe Kombo vs**

Republic, Criminal Appeal No. 13 of 2007 and **Said Chally Scania vs Republic**, Criminal Appeal No. 69 of 2005 (both unreported)). For the foregoing, complaints number two and three are found to have merit.

In the end, the appeal against the appellant is allowed. Henceforth, his conviction is quashed, the sentence set aside and we order his immediate released from prison custody unless he is otherwise held for other lawful purpose.

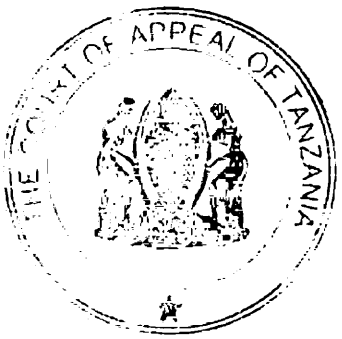
DATED at **BUKOBA** this 29th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 29th day of November, 2021 in the presence of the appellant in person and Mr. Emmanuel Kahigi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL