IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 250 OF 2011

ZEFANIA SIAME.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Moshi, J.)

dated the 12th day of November, 1999
in
Criminal Appeal No. 82 of 1998

JUDGMENT OF THE COURT

13th & 16th October, 2014

KILEO, J.A.:

The appellant and two others were charged before the District Court of Mbozi at Vwawa of armed robbery contrary to sections 285 and 286 of the Penal Code. They were all convicted and each sentenced to 30 years imprisonment plus 12 strokes of the cane. Their appeal to the High Court was unsuccessful. The appellant being still aggrieved has preferred this second appeal.

It was alleged at the trial court that on 1st February, 1998 at about 23.00 hours, the appellants and his co-accused invaded a bar belonging

to one Brarmsiden s/o Sichone where they stole a radio cassette and some cash amounting to Tshs. 210,000/=. It was further alleged that immediately before or after the stealing they shot one bullet in the air in order to obtain or retain the said property.

The appellant appeared before us in person with no legal assistance. The memorandum of appeal he filed in Court on the 9th of October 2014 consisted of 9 grounds. At the trial he asked for, and was granted leave to submit additional grounds. Basically, his complaint against the findings of the 1st appellate court and the trial court was based on insufficiency of identification.

The respondent Republic on the other hand which was represented by Mr. Edwin Kakolaki, learned Principal State Attorney resisted the appeal submitting that there was sufficient evidence of identification of the appellant at the scene of crime. For reasons shortly to be revealed, we shall not need to discuss the sufficiency or insufficiency of identification or the other grounds of appeal which the appellant raised.

In the course of hearing the appeal, the Court suo motu asked the learned Principal State Attorney to comment on whether the charge that was laid before the appellant contained all the necessary ingredients of the offence of armed robbery to enable the appellant to make an informed defence.

The learned Principal State Attorney conceded that the person against whom the threat of or use of violence was directed was not mentioned in the charge sheet. He quickly however argued that the threat of violence against the property was mentioned in the charge sheet hence making it proper! With due respect to Mr. Kakolaki we do not think that threat of violence can be directed at property. You can only rob a person of his property but we do not think that the "threat of or use of violence can be directed at the property" in order to rob it.

This Court has held in a number of cases that the particulars of offence must state all essential ingredients to the offence charged short of which the charge will be rendered defective. See for example: **Nasoro Juma Azizi v. The Republic**, Criminal Appeal No. 58 of 2010 (unreported) **Musa Mwaikunda V R** [2006] T.L.R.387 and **Ally Ramadhan@ Dogo v. the Republic**, Criminal Appeal no. 45 of 2007 (unreported).

Section 285 of the Penal Code under which the appellant was charged states:

> **"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"

There is no gainsaying that from the wording of the above provision it is essential that the person against whom the threat or use of violence is directed be mentioned in the charge sheet.

The particulars of offence in the present case read as hereunder:

> *"That Nzenga s/o Mwashuiya, Zefania s/o Siame and Emmanuel s/o Mgode are jointly and together charged on 1st day of February, 1998 at about 23.00 hrs at Mbozi Mission village within Mbozi District and Mbeya Region, did steal one Radio Cassette Band 5 make sonic valued at Tshs. 100,000/- and cash Tshs. 110,000/- all to valued at Tshs. 210,000/- the property of one Brarmsiden s/o Sichone and immediately before or immediately after such stealing did shoot one bullet on the air in order to obtain or retain the stolen property."*

From the above particulars we can gather that the property that was stolen belonged to Brarmsiden s/o Sichone. We also know for a fact that Brarmsiden s/o Sichone who testified as PW1 at the trial was not at the scene of crime when the alleged robbery took place. Threat of violence could not therefore have been directed against him. In terms of section 135 (a) (iv) the prosecution ought to have drawn the charge in accordance with the second schedule to the Criminal Procedure Act. Section 135 provides:

"135. Mode in which offences are to be charged

The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–

(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;

(iv) the forms set out in the Second Schedule to this Act, or forms conforming to them as nearly as may be, shall be

used in cases to which they are applicable; and in other cases forms to the like effect, or conforming to them as nearly as may be, shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;

(v)....."

Item 8 of the second schedule gives the mode of a robbery charge as follows:

"A.B; on the.....day of. .....in the region of.....stole a watch and or immediately before or immediately after the time of such stealing did use personal violence on C.D."

In view of the above provided mode, we are of the settled view that the 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 of the offence. The proceedings in the two lower courts were, in view of our considerations above, a nullity. Acting under powers vested in this Court by virtue of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2002, we hereby quash and set aside all proceedings, judgment, conviction and sentence which emanated from a defective

charge. Since the charge was defective it would not be proper to order a retrial. In any case, the appellant has stayed in custody for a long time and a retrial would not be in the interest of justice. We, as a result, order the immediate release of the appellant from custody unless he is therein held for some lawful cause.

DATED at **MBEYA** this 14th day of October, 2014.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL