IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: JUMA, C.J., MKUYE, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO 3 OF 2020

HEBRON KASIGALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. A. Matuma, J.)

dated the 11th day of November, 2019

in

DC. Criminal Appeal No. 30 of 2019

JUDGMENT OF THE COURT

29th June & 1st July, 2021

JUMA, C.J.:

The appellant, Hebron s/o Kasigala and King s/o Kasiya (who is not a party to this appeal), were jointly and together, charged with two counts of armed robbery (contrary to section 287A of the Penal Code Cap 16 R.E. 2002 [now R.E. 2019]) and burglary (contrary to section 294(1)(a)(b) and (2) of the Penal Code Cap 16 R.E. 2002 [now R.E. 2019]). In the same charge sheet, the appellant alone faced a third count of causing grievous harm contrary to section 225 of the Penal Code Cap 16 R.E. 2002 [now R.E. 2019].

The particulars of armed robbery were that during night hours on 10/02/2018 at Malagarasi area in Kibondo District in Kigoma Region, they stole from Efransia d/o Mhelela, one HP laptop, a BOSS television, two mobile phones (an HTC and a SAMSUNG), and Tshs. 480,000/= in cash. And, immediately before and after stealing, they used a piece of metal to threaten and beat the owner Ms. Mhelela to obtain the stolen items. The particulars of the offences of burglary in the second count, and grievous harm, in the third count, were as follows:

> *"2nd COUNT*
>
> ...
>
> *PARTICULARS OF OFFENCE*
>
> *That HEBRON S/O KASIGALA and KING S/O KASIYA on 10th day of February 2018 during night hours at Malagarasi area within Kibondo District in Kigoma Region did break and enter into the house of one EFRANSIA D/O MHELELA with intent to commit an offence therein, the act which is unlawful.*
>
> *3rd COUNT*
>
> *PARTICULARS OF OFFENCE*
>
> ...
>
> *That HEBRON S/O KASIGALA stand charged on 10th day of February 2018 during night hours at Malagarasi area within Kibondo District in Kigoma Region did unlawfully cause grievous*

harm to one EFRANSIA D/O MHELELA by beating her on various parts of a body by using a piece of metal namely square pipe and cause her to suffer bodily injuries."

While the trial court acquitted his co-accused KING S/O KASIYA, it convicted the appellant and sentenced him to serve thirty (30) years in prison in respect of the first count of armed robbery. It sentenced the appellant to serve seven (7) years in prison for the second count of burglary and five (5) years for causing grievous harm. The trial court ordered the sentences to run concurrently.

While dismissing the appellant's first appeal, the High Court only varied the punishment for burglary, from seven years which the trial court imposed, to five years.

Brief background evidence leading up to this second appeal was that the complainant Efransia d/o Mhelela (PW2) and her family were asleep when they heard some noise on their main door. With the security lights on, she looked out through the window and saw the appellant's co-accused trying to climb over a wall. When PW2 screamed out for help, the intruders blew out the security lights. Soon after that, PW2 was surprised to see the appellant already inside her room, wielding a square pipe. As PW2 held on

to her eight-month-old baby, the appellant demanded mobile phones and cash. The appellant took mobile phones (HTC M valued Tshs. 800,000/=) and Samsung Galaxy (valued Tshs. 420,000/=). He also took away a TV set and a laptop. Later, neighbours who heard her screams arrived and took her first to the police station and later to the hospital for treatment.

Happiness d/o Mikonko (PW3) recalled that night when she was living together with her friend PW2, in the latter's rented house, when she too heard screams. She woke up from her sleep to find the appellant holding a square pipe and beating up PW2. According to PW3, their neighbors later arrived and took them to a police post at Kibondo, where the police gave them a PF3 for treatment in the hospital.

On arrival at the hospital, Dr. Ezra Mutiba (PW1) received PW2. According to PW1, the patient was in great pain. Her right leg was wounded, and bruises on her chest. After administering painkillers and antibiotics, PW1 filled the PF3 form, which he tendered as exhibit P1.

Meanwhile, detective corporal Ally (PW6), an investigation officer, testified on how he arrested the appellant on 19/2/2018. He explained how together with the appellant, he went to the appellant's girlfriend's house

and recovered two mobile phones (HTC and Samsung), earlier stolen from PW2's house.

The trial magistrate concluded that the appellant had a case to answer and put him to his defence from the prosecution evidence. The appellant gave a sworn testimony blaming PW2 for framing him up. He denied ever being at PW2's house that night. He stoutly denied that through his girlfriend, he gave the mobile phones (HTC and Samsung) he had stolen from PW2 back to detective corporal Ally (PW6).

In convicting the appellant and acquitting his co-accused, the learned trial magistrate (E.R.M. Marley—DRM) addressed the two main issues, of whether witnesses identified the appellant at the scene of the crime, and whether the appellant committed the offences of armed robbery, burglary, and grievous harm. In finding that witnesses had positively identified the appellant, the trial magistrate was sure that PW2 and PW3 identified the appellant.

Upon his conviction, the trial magistrate ordered the appellant to suffer concurrent sentences of thirty years in prison for the first count of

armed robbery, seven years imprisonment in the second count of burglary, and five years for the third count of causing grievous harm.

Aggrieved by the decision of the trial district court, the appellant filed his first appeal in the High Court at Kigoma where he in essence, complained that the prosecution did not prove the ingredients of the offence of armed robbery. He was also disaffected with the conclusion that witnesses had identified him at the scene of the crimes. The High Court (Matuma, J.) dismissed the appeal but reduced the sentence for the second count of burglary from seven to five years.

The appellant was not satisfied with the dismissal of his appeal. He filed this second appeal to this Court based on six grounds of appeal.

At the hearing of this appeal, the appellant appeared in person, albeit remotely by video link to Bangwe Prison Kigoma. Mr. Adolf Maganda, Senior State Attorney, assisted by Mr. Yamiko Mlekano, Senior State Attorney, Mr. Shaban Juma Masanja and Ms. Happiness Mayunga, State Attorneys; appeared for the respondent Republic. The appellant adopted his grounds of appeal and preferred first to hear the learned State Attorneys' submissions on his grounds of appeal.

Mr. Masanja, learned State Attorney, supported the appeal but on the ground of defective charge sheet, which is a different ground from those which the appellant had earlier preferred. The learned State Attorney elaborated the defect arguing that it was not appropriate in the circumstances of this case, for the prosecution to lump the counts of armed robbery and causing grievous harm on the appellant where these two counts were in fact based on identical set of facts in the particulars of the counts. The learned State Attorney referred us to the case of **ANORLD KAGOMA & BASILI PHILIMON V. R.,** CONSOLIDATED CRIMINAL APPEALS NO. 31 & 32 OF 2016 (unreported) where the Court abhorred the that style of drafting charge sheets:

> *"...an offence of armed robbery is committed when force, violence or threat is applied to a persons he is targeted to be robbed. He might be maimed in the process. If that happens, as in this case, that is part and parcel of the offence of armed robbery. It was not proper to split the charge into two parts as was done in this grievous harm and armed robbery. It is one count-armed robbery."*

We must point out in retrospect that, Ms. Edna Makala, learned State Attorney raised the issue of defective charge sheet before the first

appellate High Court when she supported the appellant's first appeal. She had pointed out that the first count of armed robbery should not have been charged cumulatively with the third count of grievous harm. To support her stance, Ms. Makala had referred the learned Judge, to the case of **ANORLD KAGOMA & BASILI PHILIMON** (supra), which prohibits the prosecution from splitting the particulars of armed robbery into two offences of grievous harm and armed robbery. However, Matuma, J. did not have the benefit of accessing that decision. He observed that: *"...although she did not supply it to me so that I could read it on my own. I will therefore not consider it as I am not aware of its contents and the facts therein."*

In this second appeal, Mr. Masanja urged us to invoke our revision jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), to nullify the proceedings of both trial and first appellate courts because they were predicated on a defective charge where the count of armed robbery was wrongly split into two counts, to create causing grievous harm. He urged us to allow the appeal and set free the appellant.

It is common ground that Mr. Masanja, learned State Attorney submitted that the charge which the appellant faced, did not meet the threshold this Court specified in **ANORLD KAGOMA & BASILI PHILIMON** (supra). As this Court restated earlier in **MATHAYO KINGU V. R.** CRIMINAL APPEAL NO. 589 OF 2015 (unreported), a charge or information in a criminal trial, is the foundation of any prosecution facing an accused person. A charge provides the accused a road map of what to expect from the prosecution witnesses during his trial. The accused is entitled to particulars that identify the "act, matter or thing" that is said to provide the foundation for the charge: **JOHNSON V MILLER** (1937) 59 CLR 467. Particulars are necessary in order to inform the accused of the case that he or she will face and allow the court to link the evidence that is given with the allegations in the charge-sheet or indictment: **JOHNSON V MILLER** (supra). Adequate particulars are essential to a fair trial. The degree of particularisation required depends on the nature and circumstances of the offences charged. No single approach to particularisation will be sufficient for every case: **VEYSEY V R** (2011) 33 VR 277.

For our purposes, section 132 of the Criminal Procedure Act Cap 20 R.E. 2019 underscores the need for sufficiency of the "particulars" of an

offence, to give reasonable information to an accused person to prepare his defence and indeed afford him a hearing that is clear and fair:

> *132. 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.* [Emphasis Added].

The first count of armed robbery and the third count of causing grievous harm were cumulative. Ordinarily, there is no harm for these two counts being cumulative as long as their particulars of the offence are distinct and give the accused person clear information necessary to prepare for his defence. However, in the instant appeal before us, the first count of armed robbery and the third count of causing grievous harm were based on almost identical particulars of facts, thereby denying the appellant the clarity he needed for his defence. In the particulars of armed robbery in the first count, the prosecution employed the phrase: *"using a piece of metal, known as a square pipe"* The prosecution employed similar phrase to particularise the third count of causing grievous harm. If we may use

our decision in **ANORLD KAGOMA & BASILI PHILIMON** (supra) to illustrate our point, beating up the victim using a piece of square pipe is an integral ingredient of armed robbery without which the first count cannot stand. We agree with the learned State Attorney that it was not appropriate for the prosecution to use the same particulars of *piece of metal, known as a square pipe* as an essential ingredient in the third count of causing grievous harm. This is to basically split up the particulars of armed robbery into two offences of grievous harm and armed robbery.

It was a fatal irregularity which occasioned miscarriage of justice because it prevented the appellant from drawing a distinction between the particulars of armed robbery and those of causing grievous harm and arranging his witnesses accordingly. Because the trial court received all the evidence on basis of this confusion, section 388 of the CPA cannot cure the defect in the charge sheet. In the circumstances, the appellant was not afforded a fair trial.

We shall as a result, exercise our powers of revision under section 4(2) of the AJA, nullify the proceedings and judgment of the trial and first appellate courts, quash the conviction and set aside the sentences imposed

upon the appellant. In the circumstances of this case, we shall not order a retrial.

In the result, the appellant's appeal is merited. He shall be set free immediately, unless he is lawfully held.

DATED at **KIGOMA** this 1st day of July, 2021.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This judgment delivered this 1st day of July, 2021 in the presence of the Appellant in person by video link from Bangwe Prison in Kigoma and Mr. Shaban Juma Masanja and Ms. Happiness Mayunga, State Attorneys, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.

E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL