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

**(CORAM: KOROSSO, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)**

**CRIMINAL APPEAL No. 338 OF 2019**

**CHARLES AMBROSI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Mkapa, J.)**

**dated the 8th day of July, 2019**

**in**

**Criminal Appeal No. 62 of 2017**

**.....**

## JUDGMENT OF THE COURT

11th & 17th July, 2023

## KIHWELO, J.A.:

The appellant, Charles Ambrosi along with another person not part to this appeal, were arraigned before the District Court of Moshi for the offence of Gang robbery contrary to section 285 (1) (2) and section 287C of the Penal Code, [Cap. 16 R.E. 2002] (the Code). According to the particulars of charge that was laid before the court:

> *"Charles s/o Ambrosi and Patel s/o Yuda on the 8th day of January, 2016 at Kirua Vunjo area in the Rural District of Moshi in Kilimanjaro Region, did steal a motor cycle with Reg. No. MC 265 AUE make*

*KINGLION the property of one Fredirik s/o Jamary and immediately before or after such an act did use violence in order to obtain and retain the said property."*

They both denied the charges leveled against them and subsequently a full trial ensued whereupon the prosecution featured three witnesses, and exhibits namely, receipt for the purchase of the motorcycle, a motorcycle registration card and a motorcycle with registration No. MC 265 AUE.

In a nutshell, the case for the prosecution was to the effect that, on 18.01.2016 at around 01.00hrs, the appellant (PW1) who was sleeping alone in his house was awakened from his slumber by bandits who stormed inside his house by forcefully breaking the front door in order to gain entry. On entering the house, the bandits went straight to PW1's bedroom. Upon entering the bedroom, PW1 was able to identify the appellant using a solar lamp which was on the table near the bed where PW1 was sleeping, puzzled and terrified not knowing what to do.

Without further ado, the said bandits tied PW1 with curtains and demanded that he give them the motorcycle registration card and its keys, whereby PW1 dutifully obeyed by pointing where the briefcase with registration card for the motorcycle was. One of the bandits took the registration card and keys and they left with the motorcycle which was in

the sitting room. PW1 was able to identify the appellant who was wearing a black coat and trouser. PW1 further identified the appellant as a fellow villager who was born and raised at the same village.

A short while later, after their departure, PW1 raised an alarm whereupon his younger brother, Patrick Marenge (PW3) who lives nearby woke up and came for PW1's rescue but just to find out that PW1 was locked inside the house from the outside by the bandits who fled away. PW3 was joined by their mother who also lives nearby and heard PW1 who was screaming for help. PW3 and his mother opened the door to PW1's house and they found PW1 helplessly tied. PW3 untied PW1 who narrated to them the ordeal and mentioned the appellant as one of the culprits who robbed him. They then reported the matter to the village chairman but efforts to trace the bandits on that night including the appellant who was known even to PW2 proved futile.

The following day, PW1 reported the matter to Himo Police Station and it was after several days he received information from Himo Police Station that a motorcycle resembling his was found in Arusha, and he travelled to Arusha where he went to Arusha Central Police Station and identified his motorcycle and the appellant along with other accused who were held at police lockup. The motorcycle was taken to Himo Police Station for custody.

No. F.2657 D/SSGT Labulu (PW2) the police investigator who was working at Himo Police Station, testified that, on 22.01.2016 he received information from Arusha Central Police Station that there were suspects who were caught trying to sell the motorcycle suspected to be stolen from PW1. PW2 then went to Arusha and was shown the motorcycle which was positively identified by PW1 who produced receipt and card as evidence of ownership. According to PW2, the appellant was identified by PW1 at Arusha Police Station then the duo left back to Himo Police Station along with the suspects and the motorcycle which was later handed to PW1.

On the adversary side, the appellant gallantly denied the allegations leveled against him and stoutly defended his innocence. In his sworn testimony the appellant testified that the prosecution did not prove the case as required by the law pointing some weaknesses such as failure to call material witnesses to come and testify for instance, the police officer from Arusha who is alleged to have arrested and seized the motorcycle in question. He also pointed out some contradictions and inconsistences in the prosecution's evidence.

On the whole of the evidence, the trial court accepted as truthful the evidence by PW1, PW2 and PW3 to the effect that the appellant who was well known to PW1 was identified at the scene of the crime to be amongst

the intruders who perpetrated the robbery. The appellant's denial was rejected. In the upshot, the appellant was found guilty, but since the other co-accused was acquitted the trial court convicted the appellant for a minor offence of Burglary contrary to section 294 (2) of the Code and sentenced him to a term of twenty years imprisonment.

In protesting his innocence, the appellant lodged his first appeal before the High Court in Criminal Appeal No. 62 of 2017 (the High Court) which upon hearing the appeal on merit on 08.07.2019 the High Court (Mkapa, J.) dismissed the appeal in its entirety for being devoid of merit. Undeterred, the appellant lodged this second appeal.

In the appeal before us, the appellant initially amassed seven (7) grounds of grievance. However, when the matter came up for hearing, he prayed and was granted leave under rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to add other five (5) grounds of appeal. All in all, all the points of grievance when looked at critically both points of grievance boil down to six (6) substantive grounds as follows;

1. *That, the first appellate court erred in upholding the appellant's conviction without considering the fact that the circumstances at the crime scene were not favourable for proper identification.*

2. *That, the first appellate court erred in upholding the appellant's conviction without taking into-account that there was no evidence to prove that the appellant was found in possession of the alleged stolen motorcycle.*
3. *That, the first appellate court erred in upholding the appellant's conviction without considering that the prosecution did not produce material key witnesses to testify.*
4. *That, the first appellate court erred in upholding the appellant's conviction without considering that there was no chain of custody and the prosecution did not produce the seizure certificate.*
5. *That, the first appellate court erred in upholding the appellant's conviction without considering that the appellant's evidence was not considered.*
6. *That, the first appellate court erred in upholding the appellant's conviction without considering that the prosecution did not prove the case beyond reasonable doubt.*

Before the appellant started to argue his appeal, he allowed the learned Senior State Attorney to argue first, reserving his right of reply at a later stage if need would arise.

The respondent Republic was represented by Mr. Paul Kimweri assisted by Mr. Geofrey Mlagala, both learned Senior State Attorneys. Mr. Kimweri took the lead and premised his submission by not supporting the conviction

and sentence that was meted to the applicant by the trial court. He thus supported the appeal.

For his part, he supported the appeal on two main reasons. **One**, in his view, the charge sheet was defective because it did not disclose the name of the person to whom violence was directed, and **two,** his support for the appeal was based upon the fact that the trial court erred in substituting gang robbery for burglary which is not its cognate offence.

Addressing us on the first limb, the learned Senior State Attorney was fairly very brief and direct to the point. He contended that, the charge laid before the court was defective in that it did not indicate the person against whom the violence was directed to as contemplated by section 285 of the Code. In his view, this omission was a fatal irregularity which cannot be cured by the provisions of section 388 of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA). He therefore, impressed on us to invoke the powers bestowed upon the Court under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) to nullify and quash the proceedings and judgments of the two lowers courts and set aside the sentence. The learned counsel paid homage to the case of **Jumbo Abdallah v. Republic**, Criminal Appeal No. 205 of 2015 (unreported) to facilitate his proposition.

As a way forward, the learned Senior State Attorney argued that, having nullified and quashed the proceedings and judgments of the two lowers courts and set aside the sentence, the proper approach would be to order retrial, but that will depend upon the evidence on record. However, upon our prompting, he abandoned that track and admittedly argued, and rightly so in our mind that, having found that the charge laid before the trial court was defective, there is nothing upon which to order retrial.

In relation to the second limb, the learned Senior State Attorney submitted that, the learned trial magistrate invoked the provisions of section 300 (2) of the CPA to find that the appellant was guilty of Burglary contrary to section 294 (2) of the Code, which to the learned trial magistrate was a cognate offence to Gang robbery contrary to section 285 (1) (2) and section 287 C of the Code. However, the learned Senior State Attorney was of the view that, in order for the provisions of section 300 (2) of the CPA to apply the condition to be met is that the offence should not only be minor but rather it has to be cognate to the offence which the person stands charged with. In order to facilitate the proposition of his argument, the learned Senior State Attorney referred us to the Kenyan case of **Robert Ndecho and Another v. Rex** [1951] 1 E.A.C.A 171.

The learned Senior State Attorney, further referred us to the case of **Director of Public Prosecutions v. ACP Abdallah Zombe**, Criminal Appeal No. 358 of 2013 (unreported) for the proposition that in order for the two offences to be cognate in terms of section 300 (2) of the CPA, the minor offence must come from the same root with the major offence. He further argued that, by substituting the two offences it was illegal because their elements are quite distinct.

As to the way forward, the learned Senior State Attorney zealously submitted that, in his view, that will depend upon circumstances obtained in each particular case. He thus, rounded off by urging us to sustain the appeal.

The appellant had nothing more to say in rejoinder, apart from welcoming the learned Senior State Attorney's support of the appeal. He insistently implored upon us to allow the appeal and let him free.

From the foregoing submission of the learned Senior State Attorney and after our serious consideration of the judgments of both courts below, we, on our part, are of the view that this appeal can sufficiently be disposed of within a narrow circumference argued by the learned Senior State Attorney.

To begin with, we are in full agreement with the learned Senior State Attorney that the charge is conspicuously clear that, it did not indicate the person against whom the threat or violence was directed as required by section 285 of the Code. We agree with him that, one of the essential ingredients in the charge of armed robbery is the name of the person to whom the threats or violence was directed in the course of committing the offence. The learned Senior State Attorney argued that, this omission was a fatal irregularity which prejudiced the appellant, as such, it cannot be cured by the provisions of section 388 of the CPA. We wish to state more in sorrow than in fear that, we are not prepared to go along with his line of reasoning and the reason is not farfetched. The overriding objective principle which has now been enshrined under section 3A and 3B of the AJA as amended by the Written Laws (Miscellaneous Amendments) Act, No. 8 of 2018 calls upon the Court to avoid unnecessary technicalities and decide cases on consideration of substantial justice. This is not the first time the Court is confronted with this scenario, in the case of **Omari Said @Mami and Another v. Republic**, Criminal Appeal No. 99/01 of 2014 (unreported) we decidedly held:

> *"We have asked ourselves if this principle can be applied in the instant case. It is our considered view that the omission is not fatal as it can be cured under*

*section 388 (1) of the CPA. This is so because PW1 who was the victim of the offence testified before the trial court and explained how he was threatened by the thugs. Now, since PW1 testified before the appellants gave their defence, we are satisfied that they were aware as to whom the alleged threats were directed and therefore, when they gave their respective defences they had sufficient knowledge of the charge against them. They were thus not prejudiced anyhow. In its recent decisions, the Court has applied the overriding objective, one of them being* ***Jamal Ally @ Salum v. R****, Criminal Appeal No. 52 of 2017 (unreported)."*

Indeed, the record of proceedings bears out that, PW1 who was the victim of the crime testified before the trial court on page 17 of the record of appeal and explained how he was threatened and tied by the assailants. Thus, on the strength of the evidence on record and considering that PW1 testified and explained how he was threatened before the appellant gave his defence, we are satisfied that the appellant had sufficient knowledge of the charge against him and therefore not prejudiced. This limb of the ground has no merit.

We will now deliberate on the second limb in which the learned Senior State Attorney challenged the learned trial magistrate for invoking the

provisions of section 300 (2) of the CPA to find that the appellant was guilty of Burglary on the basis that it was cognate offence to Gang robbery which the appellant stood charged with.

On our part, we fully agree with the learned Senior State Attorney that it was erroneous for the learned trial magistrate to have substituted Gang robbery with Burglary as cognate offence merely because the offence was minor. For clarity and precision, we wish to let record of appeal on page 66 and page 67 paint a grim picture;

> *"As I have already pointed that gang robbery is only possible where the robbers are more than one. In this case evidence have not established the involvement of any other person. I find the offence proved is of Burglary contrary to section 294 (2) of the Penal Code, as the offence was committed at night by the accused breaking into a dwelling house and stolen there from.*
>
> *What is the stand of the law in the circumstances?*
>
> *The answer is in section 300 of the Criminal Procedure Act [Cap 20 R.E. 2000], which provides that if the accused person is charged with another offence, and the fact proved which reduces to the minor offence he may be convicted to that minor offence although he was not charged with it.*

*In my opinion the offence is minor where its sentence the presented sentence is lower than the other. In this case Burglary is minor to gang robbery. I thus invoke the powers raised (sic) in this court under section 300 (2) of the Criminal Procedure Act (Cap 20 R.E. 2002) to find the first accused guilty of an offence of Burglary contrary to section 294 (2) of the Penal Code [Cap 16 R.E. 2002]. I convict accordingly."*

The provisions of section 300 (2) of the CPA provides that:

*"300-(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

In the case of **Robert Ndecho and Another** (supra) which was cited by the learned Senior State Attorney, the erstwhile Eastern Africa Court of Appeal faced with analogous situation held that:

*"Where an accused person is charged with an offence he may be convicted of a minor offence although not charged with it,* ***if that minor offence is of a cognate character, that is to say of the same genus or species."*** [Emphasis added]

Luckily this Court has had occasion to pronounce itself on this issue in the case of **Director of Public Prosecutions v. ACP Abdallah Zombe**

(supra) in which we discussed at considerable length section 300 (2) of the CPA which is *pari materia* to section 181 (2) of the repealed Criminal Procedure Code, Cap. 20, citing the case of **Miswahili Mulugala v. R**, (1977) LRT No. 25 and subscribed to the position of the learned judge of the High Court as a correct position. The learned judge said:

> *"Although the subsection is seemingly general I think it has to be strictly construed. The test in my view should be whether the minor offence is accommodated in or cognate to the major offence before conviction can be entered for such minor offence. The word "cognate" is defined in the 1966 Impression of Chambers' Twentieth Century Dictionary to mean "of the same family, kind or nature: related or allied." And according to P.G. Osborn's Concise Law Dictionary, 1962 Impression, in Roman law the word "cognate" meant "persons connected with each other by blood." On this understanding, then, if a person is charged with but acquitted of attempted murder and evidence reveals that he used an unlicensed firearm, he cannot be convicted of unlawful possession of a firearm under the Arms and Ammunition Ordinance. The two offences are not cognate as they are products of different ancestors."*

The principle referred in the passage above which we fully subscribed as alluded to before, equally applies to the case before us in which we find and hold that the offence of Burglary although is minor offence to Gang robbery, but is not of cognate character, that is to say they are not the same genus or species and therefore section 300 (2) of the CPA is inapplicable.

On the basis of the above stated reasons, and considering that this aspect went unnoticed by the first appellate court, we agree and hold that the appellant was illegally convicted and sentenced to Burglary contrary to section 294 (2) of the Code.

The question that follows from the above is, what will be the way forward in the circumstances of this case. The learned Senior State Attorney submitted that, the way forward will depend upon the circumstances obtained. This takes us to another question as to whether the prosecution proved the case against the appellant beyond reasonable doubt. Put differently, can we say the evidence in the present case was such that it irresistibly pointed to the guilt of the appellant?

It is instructive that, the duty of the prosecution to prove the case beyond reasonable doubt is universal. In **Woodmington v. DPP** (1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the

case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219, the Court defined it to mean the case whose evidence is strong against the accused as to leave a remote possibility in his favour which can easily be ignored.

We hasten to state at this point that, the prosecution evidence in relation to the charge against the appellant was not proved beyond reasonable doubt. We will assign reasons for arriving at this conclusion. We are aware that the Court can act on the evidence of a single witness if that witness can be believed given all the surrounding circumstances, because, the truth is not discovered by majority vote and no particular number of witnesses is required to prove a particular fact. One solitary credible witness can establish a case beyond reasonable doubt. See, section 143 of the Evidence Act, [Cap. 6 R.E. 2019].

However, in this case, the police officer from Arusha who is said to have arrested the appellant with the stolen motorcycle could have been called to testify. He was a material witness to substantiate the prosecution case, but for unknown reasons he was not called to testify. A court may be

invited to draw a permissible adverse inference against the prosecution case where a crucial or material witness who could have testified against a critical or decisive aspect of its case is withheld without sufficient reason. There is, in this regard, an array of authorities in this aspect. See, for instance, **Aziz Abdallah v. Republic** [1991] T.L.R. 71, **Ali Amsi v. Republic**, Criminal Appeal No. 117 of 1991 and **Mwinyi Juma Raifaka v. Republic**, Criminal Appeal No. 8 of 1997 (both unreported).

Be that as it may, going through the entire evidence on record, surely there is no proof as to how the appellant was arrested in Arusha with the said stolen motorcycle. In this case it was not clear when, how and who arrested the appellant at Arusha. This creates doubts on whether the appellant was actually found in possession of the stolen motorcycle. Furthermore, the chain of custody of the alleged motor cycle is in question. The above doubts could have been cleared by the police officer from Arusha who arrested the appellant and seized the motor cycle. However, this witness was not produced to testify. Failure to call the police officer from Arusha to testify on those doubts entitles the Court to draw adverse inference and the logical conclusion is that the prosecution did not prove the case beyond reasonable doubts.

All said and done, we allow this appeal against conviction for burglary and sentence of twenty years imprisonment which are hereby quashed and set aside accordingly. The net effect is that the appellant shall be released forthwith from custody unless he is held lawfully for another cause.

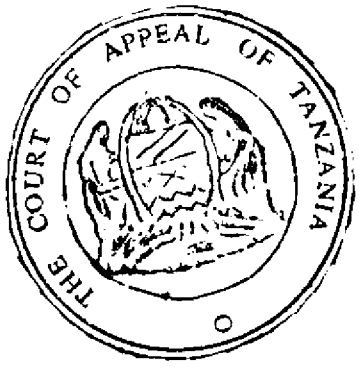
**DATED** at **MOSHI** this 15th day of July, 2023.

W.B. KOROSSO
**JUSTICE OF APPEAL**

P. F. KIHWELO
**JUSTICE OF APPEAL**

S.M. RUMANYIKA
**JUSTICE OF APPEAL**

The Judgment delivered this 17th day of July, 2023 in the presence of the appellant in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**