

TANZANIA / JUDGMENT

paulo apolo vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: MJASIRI, J.A., MASSATI, 3.A. And MUGASHA, J.A.) CRIMINAL APPEAL NO. 260 OF 2015 PAULO APOLO APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the decision of the High Court of Tanzania, at Dar es Salaam) (Massenqi, J.) dated the 18th day of May, 2011 in HC. Criminal Appeal No. 145 of 2010 JUDGMENT OF THE COURT 17th & 23rd May, 2016

MASSATI, 3.A.: On 16/1/2008, PAULO APOLO (the appellant) was made to appear before the District Court of Ilala, at Samora, Dar es Salaam, to answer to some criminal charge. According to the charge sheet dated 16/1/2008, the charge laid before his door was that of Robbery with violence, c/s 285 and 286 of the Penal Code, Cap 16 of the laws. To that charge, he pleaded not guilty. But after taking the plea, the Public Prosecutor informed the trial court that:-

"Investigation is not complete. However, I pray to amend charge on the next court session as the particulars of the offence indicate that it's (sic) armed robbery and its (sic) robbery with violence." Come 30/1/2008, the prosecutor prayed:- "/ pray to substitute charge by substituting the offence the accused person is supposed to be charged with. Court: Substituted charge read over and explained to accused person in the language he understand (sic) and plead (sic) thereto."

Again, the appellant pleaded not guilty to the substituted charge. However, the substituted charge is nowhere to be found in the record of appeal. On 5/3/2008 the trial began. The prosecution closed its case on 10/12/2008; and on 24/7/2009, the appellant gave his defence. In the opening sentence of its judgment, the trial court stated that the accused person was charged of "Robbery c/s 287 of the Penal Code or amended by Act 4 of 2004. At the end of its judgment, the trial court found that all the ingredients of the offence were proved; and that he used violence to accomplish his intention. It is only in the sentence that the term "Armed Robbery" appears. On appeal, the appellant challenged his conviction for the offence of robbery with violence c/s 285 of the Penal Code. In her judgment, the learned judge on first appeal analyzed the elements of the offence of robbery with violence, and concluded that: "It is therefore obvious the prosecution evidence has proved both ingredients which constitute the offence of robbery." In his notice of appeal to this Court, the appellant had intimated his intention to appeal against a conviction for Armed Robbery c/s 287 A of the Penal Code. We have deliberately highlighted the background above in order to show the confusion besetting the trial of the appellant, which is compounded

by the absence of the "substituted charge sheet" in the record of appeal. It is this confusion which has formed the appellant's first ground of appeal. In his own words this ground reads as follows:-

1. That, the Honourable first appellate judge had grossly erred both in law and fact where the charge preferred to the appellant had no locus stand in law after been substituted from the record and no other charge sheet to any offence was filed in record to constitute and either legalise the conviction and sentence relied upon by the court, though irregularity procedure against, way occasioned. Apart from this ground, the appellant has also raised four other grounds of appeal, which for reasons that will be clear shortly, we will not go into. At the hearing of the appeal, the appellant appeared in person, and adopted his memorandum of appeal, but allowed the respondent/Republic to begin to address the Court while he reserved his right to reply. Ms Rachel Magambo, the learned Senior State Attorney appeared for the respondent. She supported the appeal on the first ground. She submitted that the absence of the substituted charge sheet in the record has brought about considerable confusion, so much so, that it, is not clear under which provision of the Penal Code, the appellant was charged with and convicted. It was equally difficult for this Court now, without seeing the substituted charge sheet, to determine whether the appellant was properly charged and convicted, she submitted. In view of this irregularity, she prayed for an order of a retrial. On his part, the appellant was opposed to the proposed order for retrial because the charge was trumped up, and there was no evidence sufficient to connect him with the offence. So, he prayed that he be set free. There is, according to the record, no dispute, that, the appellant was first charged with robbery with violence, and that this charge was later substituted. There is also no dispute that the substituted charge is not in the record of appeal. The issue therefore, is what is the effect of the substituted charge missing from the record of appeal? Rule 71 (1) (b) of the Court of Appeal Rules requires, among other things that the record of appeal shall contain copies of "the information, indictment or charge". The purpose of a record of appeal is to enable the Court of Appeal have access to all the proceedings and documents that are necessary in the determination of an appeal. The charge sheet or information is a vital document in a criminal proceeding because it institutes a criminal case. Its purpose is to give intimation to the accused of clear, unambiguous and precise notice of the nature of the accusation that he is called upon to meet in the course of a trial. This is an essential component of any fair trial (See MUSSA MWAIKUNDA vs R. (2006) TLR 387. On the other hand, the purposes of appeals in criminal cases are:
 - i. to protect appellants against prejudicial legal errors in the proceedings leading to conviction and against verdicts unsupported by sufficient evidence. ii. authoritatively to develop and refine substantive and procedural doctrines of criminal law; and iii. to foster and maintain uniform, consistent standards and practices in criminal cases. (See AMERICAN BAR ASSOCIATION <http://www.abanet.org>). In the present appeal, the appellant has complained that the learned judge on first appeal, wrongly convicted him on a charge which was already substituted. We think the complaint is justified. As intimated above, although the charge was substituted, and the trial court convicted the appellant of Armed Robbery, in the absence of the substituted charge we are unable to say whether the charge was proper. We also believe

that it was the absence of the "substituted charge" which led the first appellate court to dismiss the appeal against conviction for the offence of robbery with violence which had already been substituted. The net effect is that the High Court confirmed a conviction which was not there. The trial court on the other hand, proceeded to convict the appellant on a charge sheet which was probably substituted but not endorsed and received on record. It is as good as if there was no charge. In the totality of the circumstances and in particular, the absence of the copy of the charge sheet which was allegedly substituted, this Court has been disabled from performing its primary duty, that of examining if there were any errors in the charges which were prejudicial to any of the parties. In the light of our observations above we can only say with certainty that we are not sure whether the appellant received a fair trial. So his conviction is not safe. We thus allow the appeal and nullify all the proceedings of the trial court and the High Court on first appeal. We know that neither the prosecution nor the appellant are to blame but considering the seriousness of the offence and the time that the appellant has already spent in custody, we think that it would be in the interests of justice to order a retrial. Accordingly, we order that the appellant be retried with immediate dispatch. Should it be followed by another conviction then the time that he had already spent in prison should be taken into account in the new sentence. Order accordingly. DATED at DAR ES SALAAM this 18th day of May, 2016. S. MJASIRI JUSTICE OF APPEAL S. A. MASSATI JUSTICE OF APPEAL S.E.A. MUGASHA JUSTICE OF APPEAL ?* f* e is a true copy of the original. Z. A. MARUMA DEPUTY REGISTRAR COURT OF APPEAL

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