

TANZANIA / JUDGMENT

shabani rahisi vs republic

2015 tzca 574 9 october 2015

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9 October 2015

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: MBAROUK. J.A. MJASIRI, J. A. And MMILLA. J.A.^ CRIMINAL APPEAL NO. 207 OF 2015 SHABANI RAHISI..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mtwara) (Mzuna, J.) dated 19th day of September, 2014 in Criminal Appeal No. 13 of 2013 JUDGEMENT OF THE COURT 5th & 9th October, 2015 MBAROUK, J.A.: Shabani Rahisi, the appellant in this appeal, was charged and convicted by the District Court of Newala at Newala for the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16 of the Laws (R.E. 2002). He was sentenced to fifteen (15) years imprisonment and corporal punishment of twelve (12) strokes of the cane. His appeal before the High Court of Tanzania at Mtwara (Mzuna, J.) was dismissed, and the original charge of robbery with violence was substituted with that of armed robbery and the sentence was enhanced to that of mandatory thirty (30) years imprisonment with twelve (12) strokes of the cane. Still aggrieved, the appellant has preferred this second appeal. In this appeal, the appellant who fended for himself filed a memorandum of appeal which contained three grounds of complaint. But in essence, they boil down to one major ground that the trial magistrate and the first appellate High Court Judge erred in law and fact by relying on the evidence of PW1, PW2 and PW3 on identification which was not watertight. When the appellant was given a chance to elaborate his grounds of appeal, he opted to allow the learned State Attorney to submit first. On his part, Mr. Paul Kimweri, the learned Senior State Attorney who appeared for the respondent / Republic initially indicated not to support the appeal, however, in the course of hearing the appeal, when he was asked by the Court as to whether the appellant was properly charged, the learned Senior State Attorney conceded that the charge was defective. The issue which prompted the Court to raise the matter suo moto, was to the effect that section 132 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) was contravened. While the charge is silent as to who was the owner of the bicycle, it clearly state that the handbag, a mobile phone make Nokia and air time vouchers belonged to Grace Bakari (PW1). We are of the opinion that the appellant ought to have been charged with two counts, because the alleged stolen properties belonged to two different persons. For ease of reference, we have found it prudent to reproduce the charge sheet which appears as follows:- TANZANIA POLICE FORCE CHARGE SHEET NAME, TRIBE OR NATIONALITY OF THE P E R S O N S CHARGED.

NAME..... SHABANI S/O RAHISI AGE.....27 YEARS TRIBE.....MAKONDE 3
OCC..... PEASANT RELIGION.....MUSLIM RES.....LIKUNA OFFENCE
SECTION AND LAW: robbery with violence c/s 285 and 286 of the Penal Code Cap 16 of the laws
(R.E. 2002). PARTICULARS OF OFFENCE: That SHABANI S/O RAHISI charged in the 28h day of
April, 2010 at 15 hours at Likuna village within Newala district in Mtwara region robbed a bicycle
make phoenix valued at Tsh. 128,000/=, a hand bag which inside they were cash money Tshs.
8,000/= a mobile phone make Nokia valued at Tshs. 52,000/= and two voucher which make a total
amount of Tshs. 190,000/= from one GRACE D/O BAKARI and immediately before such stealing
did assault the said GRACE D/O BAKARI by using hand. Station..... Newala Date:
02/06/2010 PUBLIC PROSECUTOR Looking at the particulars of the offence, the issue as to who
was the owner of the alleged stolen bicycle is not stated. Even if such owner was to be stated, the
charge sheet would still have been defective for being duplex as the stolen properties belonged
two different persons. This means the particulars of the offence in this case have failed to give
reasonable information as to the nature of the offence charged against the appellant as required
by section 132 of the CPA, which provides as follows:- "Every charge or information shall contain,
and shall be sufficient if it contains, a statement o f 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.) It is now
settled that a person accused of an offence must know the nature of the charge facing him as per
a principle of a fair trial. The prosecution and the trial court are duty bound in making sure that
the charge against the appellant is correct before the commencement of the hearing. To
emphasize the duty of the prosecution to file a charge correctly, this Court in the case of
Mohamed Kaningo v. Republic, [1980] TLR 279 observed as follows:- "It is the duty of the
prosecution to file the charges correctly\ those presiding over criminal trials should\ at the
commencement o f the hearing, make it a habit o f perusing the charge as a matter of routine to
satisfy themselves that the charge is laid correctly, and if it is not to require that it be amended
accordingly" (Emphasis added.) In the instant case the main defect found in the charge sheet was
to combine two incidents of robbery in one count leading to duplicity. As shown in the
particulars of the offence in the charge sheet, on one hand it is shown that there has 6 been a
robbery of a handbag, mobile phone (Nokia) and vouchers from PW1. On the other hand, the
same particulars have shown that there has been a robbery of a bicycle but the owner was not
stated. In essence, as the stolen properties belonged to two different persons, the charge sheet
ought to have contained two distinct counts. To put them together renders the charge sheet
duplex which is a serious irregularity as it has violated the requirements of the provisions of
section 132 of the CPA. The defects found in the charge sheet clearly shows that on one hand the
prosecution has failed to consider its duty to file the charge against the appellant correctly,
whereas on the other hand, the trial court has also failed to peruse the charge and satisfy itself
that the charge was correct. Having conceded to the defects in the charge sheet raised by the
Court suo motu, the learned Senior State Attorney urged us to find them fatal as they cannot be
cured under section 388 of the CPA. For that reason, he prayed us to invoke section 4(2) of the
Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA) and nullify the
proceedings and judgments of both the trial court and the High Court and set aside the sentence

imposed on the appellant and finally set the appellant free. Under normal circumstances, according to the decision of the erstwhile Court of Appeal for Eastern Africa in the case of *Fatehali Manji v. R* (1966) EA 343, a re-trial is ordered when the original trial was illegal or defective. But in the instant case, even if the original trial was defective, we decline to order a re-trial because, after having looked at the evidence relied upon by the prosecution, we have found it insufficient to prove the case beyond reasonable doubt. The insufficiency of the prosecution's evidence is based on two points. One, is that of inadequate identification at the scene of crime where the prosecution relied on the insufficient evidence of PW1, PW2 and PW3. Looking at their evidence, there is no clear description of the appellant which gives room for mistaken identity on the part of the appellant. Two, there has been no clear description of the alleged stolen properties i.e the bicycle, handbag, mobile phone 8 (Nokia) which are considered to be common items, hence they needed to be given a clear description of their special marks. Failure to give such special marks creates doubt as to whether they were genuinely owned by the victims in that robbery. There is a plethora of authorities on this point where this Court has held that it is unsafe to rely on the evidence where no description of special marks have been given. For example See

- *Godfrey Lucas v. Republic*, Criminal Appeal No. 151 of 2014 and *Kirajagaye s/o Joachim and Another v. Republic*, Criminal Appeal No. 289 of 2010 (both unreported) to name a few. In the event and for the reasons stated herein above, we agree with the learned Senior State Attorney that the defects found in the charge sheet render it fatally defective and cannot be cured under section 388 of the CPA. The result of which renders the proceedings and judgment based on it to become a nullity. We also agree with him that we are justified to invoke the revisional powers conferred on us under section 4(2) of the AJA and quash the proceedings and judgment of the trial court 9 which leaves the proceedings and judgment of the High Courts with no legs to stand. We are therefore constrained to nullify the same and the sentence imposed on the appellant is set aside. Having done so, we order for the appellant's immediate release from prison unless he is otherwise lawfully held for some other cause. DATED at MTWARA this 7th day of October, 2015. M. S. MBAROUK JUSTICE OF APPEAL S. MJASIRI JUSTICE OF APPEAL B. M. K. MMILLA JUSTICE OF APPEAL I certify that this is a true copy of the original. SENIOR DEPUTY REGISTRAR COURT OF APPEAL 10

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Prepared on 14 October 2026 · Esheria