

TANZANIA / JUDGMENT

# thabit bakari vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MUGASHA. J.A.. KOROSSO. 3.A.. And KITUSI. J.A.1 ) CRIMINAL APPEAL NO. 73 OF 2019 THABITI BAKARI..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam) (Mpngqllji, JQ dated the 8th day of March, 2019 in Criminal Appeal No. 107 of 2018 JUDGMENT OF THE COURT 30\* April, & 17th June, 2021

KOROSSO. J.A.: This is a second appeal by the appellant, Thabit Bakari. He was aggrieved by the judgment of the High Court sitting at Dar es Salaam which dismissed his appeal from the judgment of the District Court of Temeke at Temeke. The appellant was arraigned and convicted with the offence of armed Robbery contrary to section 287A of the Penal Code, Cap 16 Revised Edition 2002 (the Penal Code). This was after a full trial and the trial court was satisfied that on the 26th October, 2016 at Tuangoma Malele Secondary School area within Temeke District in Dar es Salaam a Region, the appellant did steal one motor cycle with Registration No. MC 721 BJC make bajaj boxer the property of Augustino James Hemei (PW3) and immediately before such stealing did cut one Alfani Ally Mkandabwe (PW1) with a machete (panga) on his head in order to obtain and retain the stolen property. He was sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed hence this second appeal. The prosecution relied on evidence from PW1, the rider of the stolen motorcycle who testified that on 26th October, 2016 he and his motorcycle were parked at his usual place to await customers when a customer (allegedly the appellant) emerged and asked for one Hamis @Madenge also a bodaboda rider. On being told that Hamis was absent, the appellant hired PW1 to take him to Tuangoma on an agreed fare of Tshs. 6000/=. The trip ensued and on arrival at the place of destination, the appellant informed PW1 that he was meeting his fiancée and asked PW1 to wait. PW1 left the motorcycle and went aside to smoke a cigarette and on returning back, he found the appellant waiting. When PW1 started to switch on the motorcycle he was hit twice on his back with a knife by the appellant. A fracas ensued, and at first PW1 overpowered the appellant and pushed him down. Then the appellant managed to get up and hit PW1 who started running while being chased by the appellant. The appellant managed to catch him and strangled him until PW1 lost consciousness. Sometime later, PW1 regained consciousness and dragged himself to an area near a school and shouted for help. Some students heeded the call and assisted him by calling his fellow bodaboda

drivers. When his colleagues arrived at the scene, they took him to the police station, where he was provided with a PF3 and thereafter he went to the hospital. PW1 was discharged from hospital the next day. On 12th November, 2017 while at home, PW1 saw the appellant riding a motorcycle and attempted to stop him, but the appellant did not heed to the call. PW1 then shouted "thief" "thief" which pulled a crowd who apprehended the appellant and started beating him. It was PW1 who beseeched the crowd not to kill the appellant, and subsequently the appellant was taken to the police station, and put into custody. Other evidence included that of F. 8556 D/C Ismail (PW2) who testified how he recorded the statement of the appellant and how the investigation led to trace the whereabouts of the stolen motorcycle, which he learnt was sold and taken to Mtwara. 3 In defence, giving an affirmed testimony the appellant denied the offence charged and narrated circumstances of his arrest on 12th November 2016, his arraignment in court initially charged with the offence of obtaining money by false pretence and which was later amended to charges of armed robbery, for which he was convicted and sentenced. As mentioned above, after a full trial, on being satisfied that the prosecution proved their case, the appellant was convicted as charged and sentenced accordingly. His appeal to the High Court was unsuccessful, the decision of the trial court was upheld. The appellant filed eighteen (18) grounds of appeal against the High Court decision. Ten (10) grounds were fronted in the memorandum of appeal lodged on 14th January, 2016 and eight (8) grounds of appeal are found in the supplementary memorandum of appeal filed on the 11th June, 2020. For reasons which shall be apparent shortly, the grounds of appeal shall not be reproduced. When the appeal was called on for hearing, the appellant appeared in person and fended for himself. When given an opportunity to amplify on his grounds of appeal, he adopted the grounds found in the two memoranda of appeal and opted to await to rejoin after the submissions of the learned State Attorney. On the part of the respondent Republic, Ms. Mkunde Mshanga, learned Senior State Attorney entered appearance and commenced by stating that the appeal was not resisted on account that they agreed with the complaints raised by the appellant that the prosecution did not prove their case beyond reasonable doubt. She contended that the evidence on identification of the appellant was unsatisfactory to meet the set standard and incapable of removing doubts of possibility of mistaken identity. Ms. Mshanga argued that PW1's evidence which was relied upon to prove identification of the appellant failed to provide or describe the circumstances which led him to identify the appellant whom he had met for the first time on the date of the incident. To bolster this assertion, the Court was referred to the holding in the case of Mabula Makoye and Another vs Republic, Criminal Appeal No. 227 of 2017 (unreported). Regarding complaints on variance between the charge with the evidence presented in court, the learned Senior State Attorney argued that the particulars of the offence differ with the evidence of PW2 and PW3 in what was stolen. She argued that whilst the prosecution witnesses testified that a motor cycle was stolen, assertions which were substantiated by Exhibit P3 the motorcycle Registration card, on the other hand, the particulars of the charge sheet state what was stolen to be, a tricycle. Ms. Mshanga thus argued that in the context of the variance of the charge and the evidence, it means that the prosecution failed to prove their case and thus prayed that the appeal be allowed. In a brief rejoinder, the appellant apart from being appreciative of the learned State Attorney submissions, predictably agreed with the arguments she fronted before the Court. He then, reiterated his

prayer that all his grounds of appeal be considered, the appeal be allowed and he be set free. Having carefully gone through the grounds of appeal, submissions and cited references we find it apposite to start with the 5th ground of appeal found in the memorandum of appeal which addresses variance between the charge and prosecution evidence. The ground of appeal reads: "5. That, the first appellate Judge erred in law and fact by failing to realize that the particulars of offence stated in the charge sheet varies with the evidence on record as:

- (i) Time of incident not indicated in the charge sheet 6 (ii) The name of PW1 in the court records before delivering his oral testimony under oath differs with the name mentioned in the charge sheet. (Hi) No evidence on record to show that PW1 sustained injuries on his head neither did he show the trial court any injury on his head. (iv) Alleged (machete) was not tendered in evidence, and neither is there any evidence to show appellant/his premises was searched for the alleged offensive weapon nor any plausible explanation given by the prosecution for its failure to tender the same". At this juncture for ease of reference, we find it appropriate to reproduce the charge sheet (page 1 of record of appeal). ARMED ROBBERY; Contrary to Section 287A of the Penal Code [Cap 16 R.E 2002] as amended by Act No. 3 of 2011. pABTTCHLARS QF OFFENCE THABIT BAKARI on 20th day of October, 2016 at Tuangoma Malele Secondary area within Temeke District in Dar es Salaam Region did steal one motor tricycle with Reg. No. MC 721 BJC make Bajaj Boxer the property of one AUGUSTINO JAMES HEMEDI and immediately before such stealing did cut one ALFAN ALLY MKANDAMBWE with a machete on his head in order to obtain the said property." In discussing this ground, a perusal of the charge sheet and the evidence presented by the prosecution to prove their case, what is apparent, as also conceded by the learned Senior State Attorney is variance between the charge sheet in the particulars of the charge as it relates to what was stolen and the evidence presented by the prosecution side. As can be discerned from the above excerpt, the particulars of offence show that what was stolen on the material day is a tricycle bajaj, while the evidence of PW1 and PW3 shows it is a motorcycle which was stolen. PW1 stated: "... I am a rider of MC 721 BJC Boxer red in colour... on 20th October, 2016 at 7.45hrs. I received a customer herein accused Thabit, he came and asked for Hamis @Madenge who was also a rider that used to hire... I told him Madenge was not around, and he asked me to take him to Tuangoma... We started our journey to Tuangoma; he said he was going to take his 8 fiancée and that he will take her and come back with him. At Tuangoma, he called her and said we should wait. I went to buy a cigarette when I came back I found him there... I was to take the key from the motorcycle. He came and hit my back with a knife twice..." [emphasis added]. During cross examination, it comes clearly that what was stolen was a motorcycle when PW1 states: " Yes. I know you are charged for stealing the motorcycle it was about 21.45 hours when I was robbed". With respect to PW2, the investigator, his testimony also discusses tracing the stolen motorcycle up to Mtwara. On the part of PW3, he testified to be the owner of the alleged stolen motorcycle with Registration No. MC 721 BJC Boxer red in colour and that PW1 was the rider. Therefore, clearly what was stolen on the fateful day was a motorcycle whose rider was PW1 and not a tricycle bajaj as found in the charge sheet. Therefore, as conceded by the

learned Senior State Attorney the prosecution evidence is at variance with the charge in respect of the 9 stolen item. Although section 234 (1) of the CPA allows amendment, the prosecution did not do so. Section 234(1) of CPA reads: - " Where in any stage o f the trial it appears to the court that the charge sheet is defective; either in substance or ii in form, the court may make such order for alteration o f the charge either by way o f amendment o f the charge or by substitution or additional o f new charge as the court thinks necessary to meet the circumstances o f the case unless, having regard to the merit o f the case, the required amendments cannot be made without injustice; and ail amendments made under the provisions o f this sub section shall be made upon such terms as the court shall seem just" it is expected that when the prosecution becomes or is made aware of the variance between the charge and evidence, it was required to seek leave to amend the charge. In the instant case this was not done. It is well settled that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case. This stance has been restated in various decisions of this Court including 10 Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017, Noah Paulo Gonde and Another vs Republic, Criminal Appeal No. 456 of 2017 and Issa Mwanjiku @ White vs Republic, Criminal Appeal No. 175 of 2018 (all unreported). In the latter case, where the Court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the type of properties which were alleged to have been stolen from the complainant PW1, the Court stated that: - " We note that, other items mentioned by PW1 to be among those stolen like, ignition switches o f tractor and Pajero were not indicated in the charge sheet In the prevailing circumstances o f this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard" In the instant case, we entertain no doubt that there was variance between the charge and the evidence on the item alleged to have been stolen from PW1. Consequently, the prosecution case, as conceded by the learned Senior State Attorney was not proved to the required standard. In the premises, we find this ground to have merit. ii Having found that the charge was at variance with the evidence adduced in court, the issue left for determination is what are the consequences thereto. Undoubtedly, a charge sheet is a basis of a criminal trial. Its purpose among others being to inform the accused person the nature and magnitude of the charge facing him to enable him/her to prepare his/her defence. In criminal charges, the prosecution side has the duty to prove the charge against an accused person beyond reasonable doubt and this burden never shifts. In Abel Masikiti vs Republic, Criminal Appeal No. 24 of 2015 the Court observed as follows: "If there is any variance or uncertainty in the dates then the charge must be amended in terms o f section 234 o f the CPA. I f this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal Being guided by the excerpt from the above decision and as we have amply demonstrated, certainly, we believe even though in the instant appeal the variance is not in dates but items stolen, the consequences should be the same. As rightly stated by the learned Senior State Attorney, the variance in the particulars of the offence on 12 the item alleged to be stolen and there being no amendment to the charge, means that the charge against the appellant was not proved. In the end, this suffices

to dispose of the appeal, and we find no need to determine the remaining grounds of appeal. For the foregoing reasons, the appeal is allowed, the conviction is hereby quashed and sentence set aside. The appellant to be removed from custody unless other wise held for other lawful purposes. DATED at DAR ES SALAAM this 19th day of May, 2021. S. E. A. MUGASHA JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL The judgment delivered this 17th day of June, 2021 in the presence of the appellant in linked through video conference to Ukonga prison and Ms. Violeth David, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

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