STEPHANO NDAGIZI AND JAMANNE SAID v REPUBLIC

COURT OF APPEAL OF TANZANIA

(Ramadhani, Mnzavas and Lubuva, JJA)

CRIMINAL APPEAL NO 24 OF 1992

December 13, 1993 – DAR ES SALAAM

(From the Judgment of the High Court of Tanzania at Dar es Salaam, Lugakingira, J)

Criminal Practice and Procedure – Charges – Robbery with violence and armed robbery – Two distinct offences attracting distinct punishments.

Criminal Practice and Procedure – Cognate offences and substituted conviction – Armed robbery and robbery with violence – Whether a conviction for armed robbery may be substituted for robbery with violence.

The house of one Ramadhani Hassani was broken into and some items stolen therefrom on account of which the two appellants were convicted by the District Court of Ilala of the offence of robbery with violence contrary to ss 285 and 286 of the Penal Code. Their appeal to the High Court of Tanzania failed. On further appeal they claimed they did not commit armed robbery so their punishment should have been fifteen and not thirty years.

Held:

(i) The charge confronting the appellants was robbery with violence contrary to s 285 of the penal code, not armed robbery contrary to ss 285 and 286; these are two distinct offences with two distinct punishments

(ii) Armed robbery, punishable with a minimum sentence of thirty years' imprisonment, is a more serious offence than robbery with violence, punishable with a minimum sentence of fifteen years' imprisonment; a conviction for armed robbery therefore, could not be legally substituted for robbery with violence;

(iii) For a sentence of thirty years' imprisonment to be imposed, the charge must be armed robbery.

Appeal against conviction dismissed; appeal against sentence allowed.

Cases referred to to:

(1) *Leonard Raphael and Another v Republic* Court of Appeal, Criminal Appeal No 4 of 1992 (unreported).

(2) *John Joseph Onenge and Another v Republic* [1993] TLR 131. A

Sengwaji, for the respondent.

Ramadhani, JA, delivered the following considered judgment of the court. B

On the night of 14 September 1990 the house of one Ramadhani Hassani (PW1) was broken into and some items of property belonging to him were stolen. The two appellants, Stephano Ndagizi and Jumanne Said, were identified by PW1, his wife, Zena Saidi (PW2), their tenant, Rajabu Mkwanyu (PW5) and by their neighbour, C Manoto Sylvester (PW3), to have been the offenders. So the two appellants were convicted by the District Court of Ilala at Kivukoni of the offence of robbery with violence contrary to ss 285 and 286 of the Penal Code. The appellants were sentenced to a term of imprisonment of thirty years each. D

They appealed to the High Court of Tanzania at Dar es Salaam (Lugakingira J) but they were unsuccessful. This is their second appeal and hence we shall deal with points of law only.

The appellants appeared in person but the respondent was represented by Mr *Sengwaji*, learned State Attorney. The appellants had E only one point of law in their six grounds of appeal. However, that one point is really crucial though it has not been properly articulated. In their ground number three, the appellants have complained against excessive punishment. They have pointed out 'thirty years imprisonment is a corporal punishment (sic) which is imposed for F only in the offence of armed robbery, not robbery with violence'. Admittedly the language is broken but the message is clear. They argue that there are two offences: armed robbery and robbery with violence and that the minimum punishment of thirty years is for the former, that is armed robbery. They went further to argue that the G word 'armed' has not been defined – probably they mean not defined under the Penal Code. However, they have pointed out that the definition of that word in the Arms and Ammunition Ordinance, cap 223 does not include 'panga, shoka, rungu, nondo or knife'. As those were the items it was said they had in their possession on the fateful night, they argued, they did not commit armed H robbery so their punishment should have been fifteen and not thirty years.

Mr *Sengwaji* started by challenging that reasoning. We are satisfied that in this appeal it is not necessary to determine whether or I not a person with any of the items enumerated by the appellants,

that is 'panga, shoka, rungu, nondo or knife', can be properly said to be armed. The real point of law is not whether the appellants were armed or not. Mr *Sengwaji* agreed with the court that the charge which confronted the appellants was robbery with violence c/s 285 of the Penal Code and not armed robbery c/s 285 and 286. These are two distinct offences: the former, that is robbery with violence, attracts a minimum punishment of fifteen years while the latter, armed robbery, is visited with a minimum of thirty years imprisonment. The charge has to be very categoric on the offence facing an accused person.

Here the charge was robbery with violence and the appellants were convicted of that despite the fact that the evidence shows that they carried some weapons. They were not charged with armed robbery. As armed robbery is more serious than robbery with violence, though cognate to it, legally there could not be a substituted conviction. So the conviction is of robbery with violence, punishable with a minimum of fifteen years and not thirty years.

We have already decided that for a sentence of thirty years imprisonment to be imposed, the charge must be armed robbery. This was in *Leonard Raphael and another v R* (1) following our earlier decision in *John Joseph Onange and another v R* (2).

Act 10 of 1989 has amended the Minimum Sentences Act 1972 by adding a new para *(hb)* to s 5 which reads:

> '*(hb)* Where any person is convicted of armed robbery the Court shall sentence him to imprisonment for a term of not less than thirty years.'

Thus, as we have already said above, there is a specific offence of armed robbery. However, the Second Schedule to the Criminal Procedure Act 1985 giving Forms of Stating Offences in Information does prescribe in item 8 the format 'Robbery with violence, contrary to s 285 of the Penal Code, Act 10 of 1989 has not added a new format of 'Armed Robbery, contrary to s 285 and 286'. It is easy to see, therefore, why those with the duty of framing charges have been repeatedly omitted to accused persons specifically with 'armed robbery'. We hope that the Director of Public Prosecutions will take the necessary steps to inform those who act on his behalf of these decisions and check against this mistake.

The appeal against conviction is dismissed but that against sentence is allowed. The sentence of thirty years given to the appellants is set aside and in its stead we order that they serve fifteen years imprisonment from the date they were sentenced.