IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 154 OF 1994

BETWEEN

ROBINSON MWANJISI ..... 1ST APPELLANT
LAISON SIWALE ..... 2ND APPELLANT
SALUM ASAJILE ..... 3RD APPELLANT
DOMINIC EMMANUEL ..... 4TH APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Mbeya)

(Mchome, J.)

dated the 11th day of March, 1994

in

Criminal Appeal Nos. 63 and 71 of 1993

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The four appellants, Robinson Mwanjisi, Laison Siwale, Salum Asajile and Dominic Emmanuel, who were at the trial first, third, fourth and fifth accused respectively, were before the District Court of Mbeya convicted on one count of conspiracy to commit an offence and four counts of robbery with violence. They were sentenced to three years imprisonment each for the conspiracy and thirty years on each of the robbery counts, all terms running concurrently. They appealed to the High Court which dismissed their appeals. In doing so, the court also admitted in evidence cautioned statements made to the police by Mwanjisi and Siwale which had been excluded by the trial court.

.../2

There were seven accused persons originally. It is desirable to mention the rest as it will be necessary to refer to them in the course of this judgment. The second accused was Emmanuel Paramani. He was similarly convicted and sentenced at the trial but was acquitted on appeal to the High Court. The sixth accused was Greyson Mwakalinga. His conviction at the trial was upheld by the High Court but he died after instituting an appeal to this Court. The seventh and last accused, Asajile Mwaijulu, the father of the fourth accused (and third appellant herein), faced a separate charge of receiving stolen property. He was acquitted at the trial.

The robbery took place at Ifwekenya DANIDA Water Project Camp in Chunya District on the night of 12/13.2.92. Masked men armed with a gun invaded the camp around midnight and made away with an Isuzu lorry TZ 19810, a motor cycle TX 18491 and four mattresses, all properties of DANIDA, as well as a Seiko watch, the property of PW3 Selemani Haizuru, a driver at the camp, and two radios and an amount of cash, the property of PW6 Abuu Mkungume, a foreman at the camp PW3 and PW6 were severely assaulted in the process and a bullet was fired in the air to scare off any intervention.

The first appellant (and first accused) is a brother of PW2 Job Mwanjisi, the proprietor of a transport business at Mbalizi on the outskirts of Mbeya municipality. He owned a Land Rover pick up MB 3459 with which the first appellant used to transport passengers for hire. On the afternoon of 12 February the first appellant drove to Chunya with passengers but although he was expected back the same day, he never returned. On the night of 17 February some police officers based at Inyala police post were patrolling along the Mbeya/Iringa road when they came upon a parked Land Rover facing in the Mbeya direction. They passed

.../3

it but then became suspicious and reversed. When they drew closer to it, the Land Rover took off at a tremendous speed. After a short chase it stopped and its occupants jumped out and disappeared into the night. It was MB 3459, the property of PW2. It was loaded with various motor vehicle parts, later identified as of an Isuzu lorry. Under the driver's seat was a shotgun, a Greener No. 10318. The Mbeya police were informed and collected the Land Rover and its load. Investigations led to the discovery of more parts. On 14 March the investigating officer, PW1 D.C. Clemence, recovered the engine block, mattresses, etc. at a house near the Mbeya airport and the motor cycle from the seventh accused's house. We will come to the details later. On 19 March he recovered a chassis, cabin, two doors, mudguards, fuel tank, etc., from the bush near Nyololo village at Sao Hill in Iringa region. Meanwhile, the first appellant surfaced at Dar es Salaam where he conveyed himself at Magomeni police station and was duly detained in custody. He was later collected by PW1. The other accused were picked up at various places in Mbeya between March and May and the entire group were accordingly charged.

The appellants appeared in person before this Court. A ground of appeal common to all is that Mchome, J. on first appeal erred in law in admitting in their absence the statements recorded by the police from the first and second appellants. There is merit in this ground. At the trial the prosecution sought to introduce the statements in evidence but the trial magistrate, while remarking that the statements were voluntarily made, declined to admit them on the ground that they were exculpatory. Mchome, J. seems to have found them both inculpatory and exculpatory and, taking the view that they were improperly excluded, went ahead and admitted them on the strength of subsection (1) of section 33 of the Evidence Act, 1967. However, he did so in the absence of the appellants and their advocates, and had this to say:

.../4

I called up this case in order to admit the evidence which was improperly rejected. Neither the appellants nor their advocates appeared on that date when I admitted these confessions as Court Exhibits 1 and 2 respectively. I found it safe to do so in their absence because at the trial the appellants were represented by learned counsel who had all the opportunity to scrutinise the confessions and argue against their admission and convince the trial magistrate in their favour. In their confessions the appellants confessed to have participated in the commission of this crime in different capacities and implicated the other co-accused except the seventh accused.

Although the learned judge gives the impression that the appellants and their advocates were required to appear but did not appear when he admitted the statements, the original record gives quite a different picture. Hearing of the appeal before the High Court took place on 14.9.93 when judgment was reserved. Six months later, on 4.3.94 to be exact, the record has this:

4.3.94
Coram: L.B. Mchome, J.
For Appellants: Absent
For Respondent: Mr. Mwaikolo

Court: While I was preparing this judgment I found that the 1st and 3rd accused persons' cautioned statements to the police were improperly rejected admission by the trial court. I hereby order the State Attorney to produce them in court.

Mr. Mwaikolo: I hereby produce the cautioned statements as exhibits.

.../5

Court: Marked as Court Exhibits 1 and 2 respectively.

Sgd. L.B. Mchome
Judge
4.3.94

It is apparent from the foregoing that the learned judge never gave the appellants or their advocates the opportunity to be heard before admitting the statements. The statements amounted to additional evidence and it seems that in dispensing with the presence of the appellants and their advocates the judge relied on subsection (3) of section 369 of the Criminal Procedure Act which states:

> (3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

The basic rule in this subsection is, to our minds, that the accused or his advocate has to be present where the High Court decides to take additional evidence; in certain circumstances, however, the court may proceed in the absence of the accused or his advocate. What are those circumstances? To discover this, section 369 has to be read as a whole. Subsection (4) thereof provides that evidence taken in pursuance of the section shall be taken as if it were evidence taken at a trial before a subordinate court. One implication of this subsection is that when taking additional evidence the High Court may dispense with the presence of the accused or his advocate in the same circumstances as a subordinate court may in a trial. Apart from warrant offences where under section 193 the accused may plead guilty to a charge in writing, a subordinate court may

dispense with the presence of the accused in two ways. First, under section 197 (a), it may so dispense with the accused's presence where it considers that by reason of the accused's disorderly conduct before the court, it is not practicable for the evidence to be given in his presence. It should be emphasized that the accused has to manifest his disorderly conduct before the court in order to exclude his presence. Under paragraph (b) of the same section a subordinate court may again dispense with the presence of the accused if he cannot be present for reasons of health but is represented by a counsel and has consented to the evidence being given in his absence. A subordinate court may also dispense with the presence of the accused in the circumstances set out under section 226 (1). That is where following an adjournment the accused does not appear for hearing or continuation of hearing. None of these factors obtained in this case and we think the decision by the learned judge to dispense with the presence of the appellants and their advocates was an improper exercise of discretion.

There was yet another reason in this case for the appellants and their advocates to be present when the statements were admitted. We think, with respect, that although the trial magistrate considered the statements to be voluntary, their voluntariness was in fact hotly contested, the defence counsel contending that the first and second appellants were "strongly tortured." This issue was not resolved in the appropriate manner for as far as the record goes the trial magistrate did not hold any trial-within-a-trial. He simply proceeded to this surprising ruling:

> Now reverting back to the case at hand, the above named accused persons claimed to have been severely tortured by the police when their respective statements were being extracted from them. But to the surprise of the court, they did not inform the court of the nature of the torture which

.../7

> the police levelled on them at the material time. It doesn't suffice, I venture to think, for the accused persons to just allege that they were tortured without further proof of the matter. Their claim is therefore rejected for that reason.

We say this is a surprising ruling for the accused were not given the opportunity to be heard on the nature of the torture levelled at them. Moreover, the burden of proving the voluntariness of the statements was upon the prosecution and no onus lay on the defence to prove their involuntariness. Section 27 (2) of the Evidence Act, 1967 is clear on that. Neither the prosecution nor the defence was heard on the question and we think it correct to say that the ruling of the learned resident magistrate was without legal basis.

In view of this state of affairs, it is equally surprising that the learned judge on first appeal regarded the statements as voluntarily made. We think, with respect, he would not have taken that view had he correctly directed himself on the record. If upon doing so he was still intent on admitting the statements, he could do so only after holding a trial-within-a-trial and establishing their admissibility. As it is now, the admission of the statements was illegal and not authorised by any law.

One other matter requires to be put right. It is noted that the statements were read out before the trial court although they were subsequently rejected, a practice unfortunately common in trials before subordinate courts. Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial. If the document is ultimately excluded, as happened in this case, it is difficult for the

.../8

court to be seen not to have been influenced by the same.

In the light of the foregoing, Court Exhibits 1 and 2 are expunged from the record and there will be no further reference to them.

A ground common to the first and third appellants only is that the trial was unlawful, it having taken off contrary to the provisions of subsection (4) of section 225 of the Criminal Procedure Act. Subsection (4) declares unlawful the adjournment of a case for an aggregate exceeding sixty days except, on each aggregate, upon a certificate by the Regional Crime Officer, a State Attorney and the Director of Public Prosecutions. The question was raised before and considered by the High Court where Mchome, J. had this to say:

> My interpretation of this section is that what is not lawful is not "to hear" a case after sixty aggregate days have expired but what shall not be lawful is "to adjourn" a case after the expiry of sixty days if the exceptional circumstances have not been complied with.

The judge then cited subsection (5) of section 225 and continued:

> Nowhere in this section is it implied or expressed that a hearing after the expiry of the sixty days is a nullity. Otherwise subsection (5) would have been useless as it does not bar subsequent charge on the same facts.

We agree with the learned judge. The two subsections mean that an adjournment should not be granted to the prosecution after the elapse of an aggregate of sixty days in the absence of the requisite certificate, but the court should press on with the hearing. If the prosecution is

.../9

unable to proceed with the hearing, e.g. for investigations being incomplete or witnesses being unavailable, the court should discharge the accused. Our view, however, is that the omission to discharge the accused where he ought to be discharged is only an irregularity but it does not affect the jurisdiction of the court to try the case or, as Mchome, J. put it, what is unlawful is to adjourn but not to hear the case. We think, moreover, it is an irregularity of little or no consequence since discharging the accused would not operate as a bar to subsequent proceedings against him for the same offence. The purpose of section 225 generally and subsections (4) and (5) in particular is to expedite trials but not to clear accused persons from criminal liability. We find no merit in this ground of appeal.

We will now turn to consider the cases of the individual appellants. The first appellant claimed at the trial that after dropping his passengers at Chunya he decided to sleep there. While still there he was pounced upon by four armed bandits who forcefully took his ignition keys, tied his hands and legs, blindfolded him and drove him for a long time in a Land Cruiser until 5 a.m. when they released him at Mburahati in Dar es Salaam. The courts below did not believe this story and we think rightly so. It does not make sense at all for carjackers to burn fuel for hundreds of kilometres just for getting the victim out of the way. There was, on the other hand, sufficient evidence to connect the first appellant with the crime. He was the driver of MB 3459 and drove to Chunya on the material day. Four days later the vehicle is found loaded with dismantled parts which were definitely identified by PW3 as of the stolen lorry. Indeed there was no dispute about the ownership of all the parts as well as the motor cycle which were restored to DANIDA very early in the trial with the unanimous agreement of the defence. Thirdly,

.../10

this appellant never reported back to his brother, PW2, about any misadventure for all the period he went missing. To crown it all, he virtually admitted to some aspects of the offence. On 31 March he told PW1 that there was a person at Nyololo village who saw all the accused when they were engaged in dismantling the lorry. He took PW1 to the village at a tearoom run by Fatuma Nziku and Chiku Nziku who both remembered him. Of course it would have been better to conduct an identification parade and to summon the two women or one of them to testify, but we still think this was a significant and relevant episode.

The first appellant contended that PW1 should not have been believed because he was the investigator and had an interest in the outcome of the trial. There is no merit in this. The purpose of investigation is to collect facts and later to give evidence. There is no law or authority which declares an investigator incompetent to testify. The case of Komanya v. Republic, (1971) HCD n. 278, to which the first appellant referred, is not such authority. Apart from being a criminal proceeding involving some aspects of circumstantial evidence, it says nothing about investigators as witnesses. We think on the whole there is no merit in the first appellant's case.

The case of the remaining appellants may be taken together as the evidence against them was interwoven and came from PW1, PW3, PW4, PW5, PW9, PW10 and PW13. PW4 Bosco Peter Lukuhi and PW5 Upendo Lukuhi, husband and wife, were resident at the airport area in Mbeya municipality. Their premises consisted of two houses, one in front and another at the back. They occupied the back house. We shall term the front house the "Airport house." In February 1992 the second appellant and the sixth accused rented the Airport house consisting of two rooms and a sitting room at 1,200/= p.m. On one occasion PW5 saw the two bring mattresses

.../11

there. Then on 14 March she saw heavy metal objects being unloaded into the house from a white pick-up. There was indeed more evidence that the Airport house was being used as a transit point and appears to have been rented in fact for that purpose. PW9 Buka Mwasalemba, driver of a Fiat pick-up MB 4060 was in February hired by the third and fourth appellants as well as the sixth accused to ferry various Isuzu components, which included a gear box, from the third appellant's house at Ilemi to Iwambi at the seventh accused's house. As stated earlier, the seventh accused is the third appellant's father. On another occasion PW9 was hired by the same persons to transfer the gear box from the seventh accused's house to the Airport house. On all occasions he was paid by the third appellant. Then came 14 March. On that day the third and fourth appellants as well as the second and sixth accused hired PW10 Christopher Mwakalinga, driver of a Toyota pick-up TZ 88766, to ferry from the seventh accused's house to the Airport house an engine block, differential, cylinder head, air cleaner and other components which he recognized as Isuzu parts. They found the second appellant standing outside the Airport house and unloaded the items into the house. That was the occasion witnessed by PW5. In the afternoon of the same day the police arrived at the house. The second appellant and the sixth accused were inside as well as the third appellant who used a frequent the house. PW5 was also at home. Apparently the three saw the police in good time and PW5 saw them run in different directions. The police arrived only to find the doors ajar and they do not appear to have taken notice of PW5 because PW1 said: "Nobody was at home." In one room the police found three mattresses (Exh. P7), a blanket and two bed sheets and in the second room they found the engine block and other accessories (Exh. P9). Earlier on the same day they had gone to the seventh accused's house and recovered the motor cycle (Exh. P4).

.../12

At the trial PW3 identified in Exh. P7 the mattresses taken from his room as well as Exhs. P4 and P9, pointing to the service number on the engine block. The fourth appellant was arrested on 24 May after a chase in which he was shot in the leg. He was then found with a Seiko watch (Exh. P11) which was identified by PW3 because of his initials "S.H" inscribed at the back and the glass.

The courts below believed the prosecution witnesses that the second, third and fourth appellants were in possession of the various items either at the Airport house or at the seventh accused's house. In the light of the evidence just reviewed, we have no cause to differ. It has not been demonstrated to us that there was any misdirection or non-direction as would have led to a perverse finding. The matters raised by these appellants are so trivial as not to deserve attention. We are satisfied that these appellants were similarly properly convicted for the robberies and that all the appellants were properly convicted on the conspiracy charge.

The appeal is dismissed in its entirety.

DATED at DAR ES SALAAM this 13th day of July, 2001.

R.H. KISANGA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR