IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MROSO,J.A., KIMARO,J.A., And LUANDA,J.A.)

CRIMINAL APPEAL NO.65 OF 2007

FREDY STEPHANO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(MKWAWA J.)

dated the 4th day of October, 2005
in
Criminal Appeal No. 8 of 2005
.....

JUDGMENT OF THE COURT

30th June & 11th July, 2008

KIMARO,J.A.

The appellant, Freddy Stephano, was prosecuted in the District Court of Tanga for the offence of robbery with violence contrary to section 285 and 286 of the Penal Code, convicted, and sentenced to

a thirty year term of imprisonment. His appeal to the High Court was dismissed. Being dissatisfied with the decision of the High Court he has appealed to the Court.

The background to this appeal is that on 6th November, 2001 at about 1 p.m. Ally Rashid, the complainant in this case and others, were cutting grass for cattle in the bush. To facilitate transportation, the appellant was supplied with a bicycle by his employer, one Mariam Athuman Kupeza (PW2). No. E. 1384 D/C Musa (PW1) who was on duty at Chumbageni Police Station at that material time, on that day, was directed to go to Kange Police Post to collect a person who had been arrested by civilians.

On his arrival at the Police Post, he found the appellant and the complainant, and both were injured. The information supplied to PW1 by the complainant was that he was ambushed by the appellant and other culprits who ran away, hit by an iron bar on his head, and the bicycle that was supplied to him by his employer was taken by the other thugs who were with the appellant. The appellant and the complainant were both taken by PW2 to Chumbageni Police Station,

where he issued them with PF3 forms and they went for treatment. Apparently the complainant was not personally available to testify on how the offence was committed. The evidence was that he was returned to his home village and could not be traced. Instead, his statement which was recorded by D/C Mkwizu who was also not available to testify because he was on a long vacation, was tendered and admitted in evidence as exhibit P3 under section 34Bof the Law of Evidence, CAP 6 R.E.2002. The owner of the bicycle, apart from confirming that she owned the bicycle, also gave its value at the time she purchased it. She also explained about the serious condition in which she found the complainant when she visited him at Bombo Hospital where he was admitted. PW2 said she found the appellant unconscious and bleeding heavily.

In his defence the appellant said he was arrested by a mob as he was returning home from his *shamba* work, and was asked to show where he hid the bicycle. Since he knew nothing about the bicycle, the appellant said, he was seriously beaten by the mob, arrested and taken to the police station and later charged with the offence of robbery.

On the strength of the above evidence the trial court convicted the appellant and the High Court upheld the conviction.

The appellant in his seven grounds of appeal is basically complaining that the prosecution evidence was not sufficient to ground his conviction. At the hearing of the appeal he appeared in person and he chose not to elaborate them. He prayed that his appeal be allowed.

Mr. Oswald Tibabyekomya, the learned State Attorney who represented the respondent Republic in this appeal, did not support the conviction. He said it was the statement of the complainant (exhibit P3) which was used to ground the conviction of the appellant, but the statement did not meet the legal requirements for its admission in court as evidence. If the statement is expunged from the record, the learned State Attorney contended, the evidence which will remain will not be sufficient to ground the conviction of the appellant. He supported his submission by the case of **Mhina Hamisi Vs R** CAT Criminal Appeal No. 83 of 2005 (Tanga)

(Unreported). He supported the prayer of the appellant that the appeal should be allowed.

We are minded that this is a second appeal. The Court can only interfere with the findings of facts by the lower courts where there are misdirections or non-directions on the evidence -**The Director of Public Prosecutions Vs Jaffari Mfaume Kawawa** [1980] TLR 149.

The issue in this appeal is whether there was sufficient evidence to ground the conviction of the appellant. The learned State Attorney submitted, correctly in our view, that the statement of the appellant was basically the evidence upon which the conviction of the appellant was founded and the first appellate court upheld the conviction. But was the statement tenable in evidence?

With respect to the learned judge, we are of a considered opinion that this is a suitable case for re-appraisal of the evidence.

Section 34B (1) and (2) of the Law of Evidence Act, 1967 under which the statement of the complainant was admitted reads as follows:

> 34B (1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.
>
> (2) A written statement may only be admissible under this section ---
>
> (a) where the maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably

practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by any operation of the law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to tendered in evidence, a copy of the statement

is served by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him, before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

In the case of **Hamisi Mhina** supra the Court said that for a statement to be admitted in court in lieu of oral direct evidence, under section 34B (1) all the conditions stipulated in sub-section (2)(a) to (f) must be complied with. The statement of Ally Rashid, the complainant (exhibit P3) did not comply with all the conditions given in section 34B (2). We have carefully gone through it and we noted

that it is lacking the declaration required to be made under section 34B (2) (c). Even sub section (e) of section 34B (2) was not met as the record of appeal has no indication whatsoever, that a copy of exhibit P3 was served on the appellant before it was tendered in court as evidence, and hence he could not exercise the right conferred to him by sub section (e) of the same section.

Another aspect which still waters down exhibit P6 is that it was recorded by D/C Mkwizu who did not appear in court to testify as we have already indicated he was on a long vacation. Instead, PW1 tendered the statement in court. In such a situation, PW1 could not, with certainty, say that the appellant signed the statement or that it was read over to him, and he agreed with the contents because he was not the one who recorded it. In terms of section 69 of the law of Evidence Act, the proper person who should have tendered exhibit P6 was the maker of that document.

With these shortfalls in exhibit P6 we are satisfied that it was wrongly admitted in evidence. It is accordingly expunged from the record. Having expunged exhibit P6 from the record, the evidence

which remains is not sufficient to sustain the conviction of the appellant as both PW1 and PW2 did not witness the commission of the offence. Whatever they told the court on the commission of the offence will be hearsay evidence which has no evidential value.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison forthwith, unless he is withheld for other lawful cause. It is accordingly ordered.

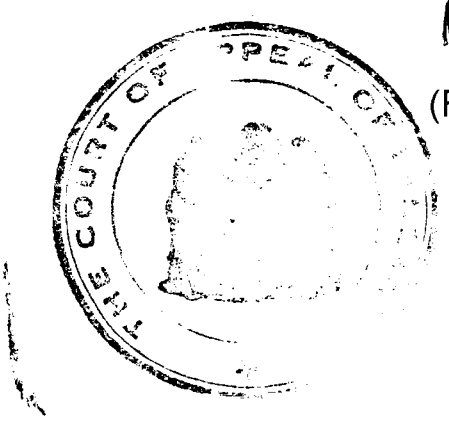
DATED at TANGA, this 3rd day of July, 2008

J.A, MROSO
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

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



(F. L. K. WAMBALI)
REGISTRAR