IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 138 OF 2008

DENIS ANTONY MAGABE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Lukelelwa, J.)

dated the 6th day of November 2007
in
(DC) Criminal Appeal No. 98 of 2005

JUDGMENT OF THE COURT

23rd & 29th November, 2010

ORIYO, J.A.:

The appellant, Denis Antony Magabe, was convicted of robbery with violence by the District Court of Iringa on 13 January 2005. The charge against him was preferred under sections 285 and 286 of the Penal Code, Cap 16, [R.E 2002]. Upon conviction, he was sentenced to fifteen (15) years imprisonment. Being dissatisfied, he unsuccessfully appealed to the High Court and hence this second appeal. At the hearing of the appeal, Mr. Vincent Tangoh, learned Senior State Attorney represented the respondent Republic while Mr. Justinian Mushokorwa learned counsel, advocated for the appellant.

Mr. Mushokorwa had filed three grounds of appeal but at the hearing, he sought and obtained leave of the Court to abandon ground 2 of appeal. The remaining two grounds of appeal were as follows: -

1. *Like the trial court, the appellate court did not adequately consider the defence case.*

2. *The appellate Judge ought to have faulted the trial court for not drawing an adverse inference against the prosecution for failing to summon a taxi driver and tendering the alleged seized weapons/items.*

We think that a brief account of the evidence before the trial court will be helpful.

The particulars of the offence in the Charge Sheet stated the following: -

> *"That Abraham s/o Nyenze and Dennis s/o Magabe are jointly and together charged on 17th day of October, 2004 at about 22.00 hours at Holiday Bar area within the Municipality, District and Region of Iringa did steal one handset make Siemens valued at shs. 85,500/= and shs. 5,000/= all total valued at shs. 90,500/= the property of one Elly s/o Mwakasege and that immediately before such*

defence cases. Like any other piece of evidence, the defence case should have been evaluated and the reasons for its rejection given. But this was not done in the trial court and it was not open for the High Court to do so because it was not the trial court. Further, the High Court and the trial court offended the mandatory provisions of section 312 (1) above. So the appellant's complaint in ground 1 was well founded.

In a similar situation in the case of **Hussein Idd** and **Another** v **R** [1986] TLR 166; this Court stated the following at page 169 thereof: -

> *"It seems clear to us that the judge dealt with prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result he rejected the alibi put forward as a deliberate lie. In our view this is a serious misdirection. The judge should have dealt with the prosecution and defence evidence and after analysing such evidence, the judge should then reach a conclusion. Here Accused 1 was deprived of having his defence properly considered by the judge. In the circumstances we think it is unsafe to let the conviction of Accused 1 stand."*

In the present appeal, we are satisfied that the failure by the trial court to consider the defence case is as good as not according a hearing

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to the accused and it is fatal, (see also the Court's decision in the case of **Godfrey Richard vs R**, Criminal Appeal No. 365 of 2008 unreported).

Having made the above decision with regard to the first ground of appeal, we do not think that it will serve any useful purpose to consider the remaining ground of appeal.

In the result, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. Unless the appellant is otherwise lawfully detained, he should be released forthwith from custody.

DATED at MBEYA this 26th day of November, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(E. Y. Mkwizu)
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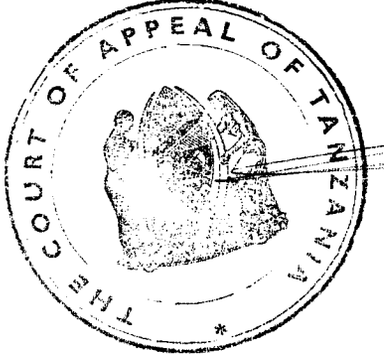

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