IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO.168 OF 2006

JUMA LIMBU @ TEMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court

of Tanzania at Mwanza)

(Mchome,J.)

dated 16th February, 2006

in

Criminal appeal No.73 of 2004

.....

JUDGMENT OF THE COURT

29th September & 6th October, 2010

KIMARO, J.A.:

In the District Court of Mwanza at Mwanza, the appellant and four others were jointly charged with the offences of conspiracy to commit a felony contrary to sections 384 of the Penal Code [CAP 16 R.E.2002] and armed robbery contrary to sections 285 and 286 of the same law. They

were all convicted of both counts and each was sentenced to serve three years imprisonment for the offence of conspiracy and thirty years for the offence of armed robbery.

Aggrieved by both the conviction and sentence, they filed Criminal Appeals No73, 74, 75, 76 and 77 in the High Court, which were consolidated and heard as one. The High Court allowed the appeal by all the appellants on the offence of conspiracy. For the offence of armed robbery the High Court allowed the appeal by the others, but for the appellant it was dismissed.

Still protesting his innocence, the appellant has filed this appeal. He has three grounds of appeal. In the first ground of appeal the appellant is faulting the first appellate court for misdirection on the evidence of his identification. On the second ground his complaint is that the confession that he made was inadmissibility in law. In his third and fourth grounds of appeal the appellant is complaining about noncompliance of procedure by the trial court, in that the provisions of sections 214 and 231 of the Criminal Procedure Act, [CAP 20, R.E.2002] were not complied with.

At the hearing of the appeal, the appellant defended himself while the respondent Republic was represented by Mr. Steven Makwega, learned State Attorney. When the appellant rose to argue the appeal, he informed the Court that he was waiting to hear the views of the learned State Attorney first, before expounding on his own grounds. The learned State Attorney supported the appellant's appeal and prayed that the same be allowed and the appellant be acquitted.

On our part we prefer to start with ground four of appeal in which the appellant is complaining that he was not informed of his right of defence as required by the provisions of section 231 of the Criminal Procedure Act, [CAP 20. R.E. 2002]. This ground, in our view, if found to have merit suffices to dispose of the appeal. In support of this ground of appeal the learned State Attorney said that section 231 of the Criminal Procedure Act, CAP 20,requires the trial court, after the prosecution has closed its case, to inform the accused person(s) of the options made available to him/her by the law, for making his/her defence. He said the record of appeal at page 26 shows that the prosecution closed its case on 31st March, 2003. On that day, the appellant was not informed of the

procedure he could use for making his defence. The case was adjourned several times until on 23rd of October, 2003 when the defence of the appellant was recorded. But the record does not show that there was compliance with the provisions of section 231 of the Criminal Procedure Act. Citing the case of **Ndamashule Ndoshi Vs R** Criminal Appeal No. 120 of 2005 (unreported) the learned State Attorney said the failure by the trial court to inform the appellant of the available options in making his defence prejudiced the appellant. He prayed that this ground of appeal be allowed.

The appellant in reply had nothing to say after the learned State Attorney argued the ground of appeal, supporting him.

The views expressed by the learned State Attorney are correct. Going by the record of appeal, the prosecution case was closed on 31st of March, 2003. On that day the trial court did not inform the appellant of the available options for making his defence. The case was adjourned several times for defence hearing, but it was not until 23rd October, 2003 that the defence of the appellant was recorded. The record does not show that there was any time the appellant was addressed in terms of

sections 231, CPA before he took the witness box to give his defence. This was obviously a contravention of the law. The provision of section 231 provides as follows:-

Section 231(1) "At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the ***court shall*** *again explain the substance of the charge to the accused and inform him of his right-*

(a) to give evidence whether or not on oath

or affirmation, on his own behalf ;and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate *if it is intended to exercise any of the above rights* ***and shall record the answer ;*** *and the* ***court shall then call on the accused person*** *to enter on his defence save where the accused person does not wish to exercise any of those rights.*

(2) Notwithstanding that the accused person elects to give evidence not on oath or affirmation, he shall be subject to cross –examination by the prosecution.

(3) If the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and

the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

(4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses."

*(**Emphasis added**).*

It is clear that the provisions of section 231 are couched in mandatory terms. The Interpretation of Laws Act, [CAP 1 R.E.2002] provides in section 53(2) that:

"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted

to mean that the function so conferred must be performed."

From the provisions of section 231 of the CPA quoted above, it is a mandatory requirement for the trial court to inform an accused person of the available options under the said provision, for making his defence and also the consequences which follows for using any of the options. An accused person is also entitled to be informed of his right to call his material witnesses as well as being assisted in procuring their attendance.

What is the effect of non compliance of the said provision? In the case of **Ndamashule Ndoshi** (supra), the Court held that:

"Section 231 of the Act contains a fundamental right of an accused person: the right to be heard before they are judged. It directs that a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or any other

alternative offence for which the court could under the law convict. Not only is an accused entitled to give evidence in defence but to call witnesses to testify in their behalf. So, the section is an elaboration of the all important maxim –audi alteram partem and that no one should be condemned unheard. "

From the provisions of section 231 CPA and the case of **Ndamashule** (supra), it is the right of an accused person to be informed of what the law provides for him in making his defence and the consequences thereto. Failure to do so amounts to a violation of the principle of the law.

In the case of **Alex John Vs R** Criminal Appeal No. 129 of 2006(Unreported) the Court in discussing the right to a fair trial said:-

"We are aware that one of the laws enacted by our Parliament to ensure "equality before the law" when the "rights and duties of any person

are being determined by the court" is the Act as far as criminal trials are concerned. The Act contains many provisions guaranteeing a fair trial or hearing in conformity with the provisions of Article 13(6)(a) of the Constitution. For the purpose of this appeal, however, section 231(1) is the most relevant. It reads as follows:-

...This section not only guarantees to an accused person a right to be heard on his own behalf, but also imposes a duty on the trial court to inform him fully of this right.

To avoid a miscarriage of justice in conducting trials , it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings in conformity with article 13(6)(a) of the Constitution of the United Republic of Tanzania. **It is the duty of the trial court to do what the law says must be done, and the same to be reflected in the proceedings that it was done**. As we have seen, the trial court failed in its obligation to inform the appellant of the available options for

making his defence. His right on this aspect was violated. This ground of appeal has merit and it suffices to dispose of the appeal.

The learned State Attorney did not ask for a retrial. In his view, there was no sufficient evidence to support the conviction of the appellant. We have carefully read the record and we agree with his views that apart from the illegality in the procedure, the evidence that was led by the prosecution did not prove the offence against the appellant. We thus allow the appeal, quash the conviction, and set aside the sentence. We also order an immediate release of the appellant from prison, unless he is held there for any other lawful purpose. It is accordingly ordered.

DATED at MWANZA this 4th day of October, 2010

N. P. KIMARO

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

W. P. Bampikya
SENIOR DEPUTY REGISTRAR

known to the complainant from before. Two, when the complainant testified, the appellants did not contradict him by way of cross-examination that the appellants used to visit and buy merchandise from his shop. Three, that the prosecution testimony was corroborated by the appellants's cautioned statements. Four, that some of the stolen properties were retrieved from the home of the first appellant.

In view of the foregoing and with respect, the conviction in **Juma Ntandu's** case was not solely based on the evidence of identification with aid of light from two torches at the scene but was corroborated by a number of other piece of evidence. In the event, the decision cannot be followed to uphold the conviction in the instant case.

Having closely examined the evidence and account taken of the submissions, we are of the settled view that PW1's identification of the appellant at the scene by the light from the three torches cannot

be said to be watertight. It was night time, past midnight; and PWs were all asleep.

With these unfavourable conditions, the requirement for reliance on visual identification set out in **Waziri Amani vs R** (supra); **R vs Eria Sebwato** (1960) EA 174 and **Abdalla Bin Wendo and Another vs R** (1953) 20 EA 166, can hardly be said to have been met. Serious doubt is raised on prosecution witnesses's alleged identification of the appellant.

In the circumstances and in view of the foregoing we allow the appeal by the appellant, quash the appellant's conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless he is otherwise lawfully held therein.