IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 231 OF 2007

1. **GALLUS FAUSTINE STANSLAUS @ WASIWASI..... APPELLANT**
2. **SEVERINE FRANCIS MASSAWE..... .....APPELLANT**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Moshi)

(Jundu, J.)

dated the 5th day of May, 2006
in
Criminal Appeal No. 38 of 2003

JUDGMENT OF THE COURT

17th & 26th February,2010

NSEKELA, J.A.

The appellants, (i) Gallus s/o Faustine Stanslaus @ Wasiwasi and (ii) Severine s/o Francis Massawe were jointly charged before the District Court of Rombo at Mkuu with the offence of armed robbery c/ss 285 and 286 of the Penal Code, Cap 20, RE 2002 and sentenced to a custodial term of thirty (30) years imprisonment each. They unsuccessfully appealed to the High Court, (Jundu,J.) as he then was, and hence this second appeal.

The appellants filed a joint seven point memorandum of appeal which is understandably, not elegantly drafted. Essentially, the grounds of appeal can be reduced to:-

(i) That the case was not proved against them beyond all reasonable doubt.

(ii) That there was non-compliance with the conduct of preliminary hearing under section 192 (3) of the Criminal Procedure Act.

(iii) That the evidence of identification by PW1 and PW2 was highly unsatisfactory to support their conviction.

In addition to their joint memorandum of appeal, the appellants filed a joint written submission. At the hearing of the appeal, the appellants had nothing to add by way of elaboration.

The respondent Republic was ably represented by Mrs. Neema Ringo, learned Senior State Attorney. On the question of non-compliance with section 192 (3) of the Criminal Procedure Act, the learned Senior State Attorney submitted that the record of appeal indicated that at the end, the signature of the prosecutor and the

appellants were duly appended. She however conceded that the record does not show whether or not the memorandum of matters not in dispute was explained to the appellants in a language they understood. She was of the view however that their signature was an indication that they understood its contents. And in any case, the omission, if any, did not occasion a miscarriage of justice. As regards the appellant's identification, she submitted with deep conviction that the evidence of PW1 Donath Kamili, and PW2, Olyompia w/o Donath fully justified the appellants' conviction. These witnesses knew the appellants; there was enough light in the room to facilitate the identification; the appellants spent some time asking PW2 where they kept the money. She referred the Court to the guidelines enumerated in **Waziri Amani v Republic** [1980] TLR 250 at page 252.

We propose to start with the non-compliance with section 192(3) of the Criminal Procedure Act, Cap 20 RE 2002. The learned Senior State Attorney submitted that the preliminary hearing was conducted and at the end, there were signatures of all concerned. She admitted however, that it was not indicated on the record that the contents of the memorandum of undisputed facts were explained

to the appellants in the language that they understood before signing the same. The learned State Attorney, however, was of the opinion that non-compliance of section 192 (3) vitiates the preliminary hearing and not the trial proceedings. She referred the court to Criminal Appel No. 26 of 2002, **Christopher Ryoba v Republic** (unreported); Criminal Appeal No. 59 of 2003, **Mkombozi Rashid Nasoro v Republic** (unreported). She added that though the memorandum of undisputed facts was not prepared, the judgment of the trial court was not based on the preliminary hearing.

Fortunately, this type of complaint, that is, non-compliance with section 192 (3) of the Criminal Procedure Act and its legal consequences, is not virgin territory, it has been traversed before. In the case of **Kalisti Clemence @ Kanyaga v The Republic**, Criminal Appeal No. 19 of 2003 (unreported) the Court had occasion to generally consider the underlying philosophy of section 192 of the Criminal Procedure Act, and had this to say:-

> *"In* ***Christopher Ryoba v The Republic*** *Criminal Appeal No. 26 of 2002, the appeal to this court was* ***"based solely on non-compliance with section 192(3) of the***

> ***Criminal Procedure Act, 1985."*** *The advocate for the appellant in that appeal had contended that failure by the trial court to conform to the requirements in sub-section (3) of section 192 of the Act rendered the whole proceedings during the trial a nullity. The Court, referring to the* ***MT 7479 Sgt Benjamin Holela*** *case held that the non-compliance only vitiated the preliminary hearing proceedings, not the trial proceedings. We can reiterate, therefore, without any risk of contradiction that failure to conduct a preliminary hearing under section 192 of the Criminal Procedure Act, 1985 is an irregularity but it does not have the effect of rendering the trial proceedings a nullity."*

Since it is not shown on record that the contents of the memorandum, (if any) were read over and explained to the appellants, its contents will be discounted. This takes us to the

second major ground of complaint, namely, the identification of the appellants.

The issue of the appellants' identification has caused us considerable anxiety. A question we ask ourselves is, did the courts below adequately probe the matter in order to be satisfied that there was justification to convict the appellants' on the strength of that evidence. This is a second appeal and with respect, we are alive to what was stated in the case of ***Amratlal D.M t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel*** [1980] TLR 31. The rule is that an appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice.

PW1 testified that he knew the appellants well since they were villagemates. He stated thus –

> " *I know both accused persons as they are living at the village. On 9/6/2000, at midnight I was sleeping with my wife. I heard people*

walking outside surrounding our shop. They called Tarimo. I did not respond. They knocked the door. I replied, they said were police...."

It is clear, that PW1 heard the voices of the appellants' twice before they forced their way into the house. Since PW1 knew them very well, it is not far-fetched that he knew their voices as well. There is no scintilla of evidence of voice identification since they were not strangers to him. In their evidence, DW1 and DW2 (the appellants denied that PW1 knew them). On the morning of 9/6/2000, PW3 D5803 D.C. Omari arrived at the scene of crime. The appellants did not inform this policeman the names of the appellants. Again, PW1 testified that about ten minutes after the appellants had left the scene of crime, **neighbours** arrived and enquired what had happened. PW1 said nothing on the identity of the appellants to their **neighbours.** PW2 had specifically mentioned the name of the second appellant, Severina as one of the culprits identified at the scene. Additionally, these **neighbours** must have had names. There was no disclosure of their names. Not surprisingly therefore, that the prosecution did not call any "**neighbour**" to come forward

and give evidence on the incident. The non-calling, as witnesses of **neighbours** who came to the scene of crime gives rise to doubts as to whether or not the appellants were the culprits. No explanation was given by the prosecution why even a single **neighbour** was not called as a witness. In the absence of such an explanation, it is fair and reasonable to infer that if any such **neighbour** was called would not have given evidence similar to that of PW1 and PW2 (See: **Joina Siwakwi** v **The Republic**, Criminal Appeal no. 5 of 1998 (unreported). There is another aspect we have to take into account. The first appellant was arrested on the 21/8/2001 and the second appellant was arrested on the 23/8/2001. The incident happened on the 9.6.2000! If the appellants were indeed that known why did it take that long to arrest them?

For the reasons we have given, we are of the settled opinion that the prosecution did not prove the appellants guilt beyond reasonable doubt. We allow the appeal, quash their convictions and set aside the sentences imposed on each appellant. Unless the appellants are otherwise lawfully detained, they should be released forthwith from custody.

DATED at ARUSHA this 24th day of February, 2010..

H.R. NSEKELA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL