IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 351 OF 2008

(CORAM: MBAROUK,J.A., MJASIRI, J.A. And MASSATI, J.A.)

BONIFACE KUNDAKIRA TARIMO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Mchome, J.)

dated the 7th day of August, 2008
in
(DC) Criminal Appeal No. 6 of 2008

JUDGMENT OF THE COURT

12th & 17th October, 2011
MASSATI, J.A.:

The appellant was charged with and convicted of the offence of armed robbery contrary to Section 287A of the Penal Code (Cap 16 R.E. 2002) by the District Court of Hai. He was sentenced to 30 years imprisonment, six strokes of the cane as corporal punishment, and ordered to compensate Tshs. 250,000/= to the complainant. He unsuccessfully appealed to the High Court at Moshi (Mchome, J.). He has now come to this Court on a second appeal.

It was alleged before the trial court that on the 21st day of January, 2007 at about 20.00 hours, at Nkwensira Village in Hai District, Kilimanjaro Region, the appellant robbed one **JUDICA S.O ANAUFOO** (PW1) of cash Tshs. 250,000/= after stabbing him with a knife. In the course of the trial, it was established that on that evening the complainant, was at the shop of one **WILLIS WILFRED** (PW3). The appellant appeared there and found PW1 drinking a soft drink, **DAVID ANDREW SWAI** (PW2) was also around. The appellant then beckoned to PW1 to follow him so that he could deliver a massage to him. PW1 did so. It was a few paces from PW3's shop. A few minutes later, PW1 raised an alarm which drew PW2 and other neighbours to the site. The appellant ran away, but the complainant told the audience that the appellant had stabbed him on several parts of his body. The incident was reported to Bomang'ombe Police Station, where PW1 obtained a PF3 with which he went to KCMC Hospital where he was admitted for three days. The following night, the appellant was arrested. On 24/1/2007, the appellant was charged. It is not insignificant at this stage, to note that on that day the appellant appeared in court on a charge of Grievous Harm contrary to Section 225 of

the Penal Code. On 20/6/2007 this charge was substituted with one of Armed Robbery, with which he was in the end, convicted.

In this Court, the appellant appeared in person, and fended for himself. The respondent/Republic was represented by Ms. Javelin Rugaihuruza, learned State Attorney.

The appellant filed a memorandum of appeal containing five grounds, which may be summarised into three major ones. **Firstly,** that it was irregular for a D/Cpl Elisha to prosecute the case without the court's permission. **Two,** that the witnesses for the prosecution were not listed in the preliminary hearing and this included the investigator who did not testify. **Lastly,** taken as a whole, the prosecution case was not proved beyond reasonable doubt.

In his written arguments, the appellant submitted that the prosecution of the case by D/Cpl Elisha who was below the rank of a sub inspector, was contrary to Section 99(1) of the Criminal Procedure Act ("the CPA") Secondly, that, the prosecution case was so hopelessly investigated that no witnesses were listed in the preliminary hearing, and

the investigator could not come forth to testify. These, together with the contradictory evidence between PW1 and PW2, showed that the prosecution case was so improbable and more of a fabrication. He thus prayed that his appeal be allowed.

On the other hand, Ms. Rugaihuruza, resisted the appeal vigorously. On the first ground, she conceded that it was irregular for D/Cpl Elisha to prosecute the case, as it was contrary to Section 99(1) of the CPA, but the irregularity was curable under Section 388 of the CPA. On the second and third grounds of appeal she was of the view that the contradictions in the evidence of PW1 and PW2, did not go to the root of the prosecution case and so not material. On the fourth ground, the learned counsel relied on Section 143 of the Evidence Act (Cap 6 R.E. 2002) "(the TEA)" and submitted that the prosecution was not obliged to call each and every witness or a specific number of witnesses. Lastly, the learned State Attorney submitted that under Section 192 of the CPA, the prosecution was not obliged to list witnesses in a preliminary hearing. It was her view that the prosecution case was proved to the tilt, and urged the Court to dismiss the appeal.

We agree with Ms. Rugaihuruza, and the appellant, that, the prosecution of the case by D/Cpl. Elisha, who was below the rank of a sub inspector, ran contrary to Section 99(1) of the CPA and The Public Prosecutors (Appointment) Notice made under Section 95 of the CPA. But this Court has already taken the view that such irregularity was curable under Section 388 of the CPA (See: **LIBERATI MTENDA V.R** (1980) TLR.301, **JOHN GODFREY BABU V.R** Criminal Appeal No. 114 of 2008 **OTTO KALIST SHIRIMA V.R.** Criminal appeal No. 234 of 2008 (both unreported). In view of this position of the law, we agree with Ms. Rugaihuruza, that the first ground of appeal lacks substance and we accordingly dismiss it.

We shall leave the second and third grounds of appeal, until the end of our judgment. In this part, we shall next consider the fourth ground in which the appellant complains about the non calling of the investigator as a witness. The learned State Attorney relied on Section 143 of the TEA for an answer.

We find the respondent's answer to this ground too simplistic. It is true that under Section 143 of the TEA no specific number of witnesses is

required for a party to prove a fact. But the wording of that Section does not invite such a simplistic approach. On a wholistic reading of that provision, one must note that it is not safe to read it in isolation, because its application is made:-

> *"Subject to the provisions of any other written law."*

One such written law is Section 122 of the TEA which allows courts to draw certain inferences. That Section provides:-

> *"122. A court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

So, before invoking Section 143 of the TEA, regard must be had to the facts of the particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on the Section. It is thus now settled law that, where a witness who is in a better position to explain

some missing links in a party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one (See: **AZIZ ABDALLAH V.R** (1991) TLR. 71, **KIKUYU MONDI V.R** Criminal Appeal No. 99 of 1991 (Unreported), **MT 7479 SGT BEN HOLELA V.R** (1995)TLR. 121. In **R v UBERLE** (1938) 5 EACA 58, the Court of Appeal for Eastern Africa held that:-

> *"The Court is entitled to presume that evidence which could be but is not produced would if produced be unfavorable to the person who withholds it."*

In the present case, the appellant has complained about the non calling of the investigator. We think that the appellant's complaint is justified. This is because, no witness was able to explain what was the nature of the report first laid by the complainant to the police. No one but the investigator could explain why, if the complainant had reported a robbery, the appellant was first charged with grievous harm only, only to be charged with armed robbery, some six months later? Why the delay? Why didn't the narration of the facts by the prosecution in the preliminary hearing, contain anything about the robbery or the amount stolen? Such

evidence is certainly relevant and important in cases of this nature, because, as the Court of Appeal for Eastern Africa observed in **TEKORALI S/O KOROGONZI V.R** (1952) 19 EACA 259.

> *"Evidence of the first complaint to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or a made up case."*

And that:

> *"It is desirable in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness that evidence of the details of such report ... should always be given in a trial."*

(See: **R.V SHABANI BIN DONALDI** (1946) 3 EACA 122)

So, we think that it is wholly wrong, on the facts of the present case, to downplay or ignore the evidence of the investigator. The prosecution

evidence in this case, has left a lot of gaps which only the investigator, could possibly have filled. His not being called, is in our view fatal to the prosecution case, as we shall demonstrate below. In our judgment this ground of appeal must succeed.

The fifth ground of appeal is that the prosecution case was a frame up, as even in the preliminary hearing the witnesses were not listed. As hinted, Ms. Rugaihuruza dismissed this, by submitting that Section 192 of the CPA did not compel the prosecution to list down its potential witnesses.

We agree that Section 192(3) of the CPA read together with The Accellerated Trial and Disposal of Cases Rules (GN 192 of 1988) do not require that names of witnesses should be given during the preliminary hearing (See: **YUSUPH NCHIRA V. DPP** Criminal Appeal No 174 of 2007 (unreported). But we understand that this has been the practice in the trial courts and we strongly recommend its continued use. However, on reflection, we think that this was not the message that the appellant intended to convey in this ground. If we understood him well, all that he wanted to say was that this omission, was only further proof that the case was a frame up. And if that is so, we think that this, ground is not

different from the preceeding one, and we shall consider their effects below.

We now come to the 2nd and 3rd grounds of appeal which generally boil down to the attack on the credence of the prosecution case. We are aware that in a second appeal such as the present one, our primary concern is on points of law, and we would normaly be very cautious and slow in disturbing concurrent findings of facts made by the courts below. We may, however, be forced to intervene with those findings if there are misdirections, non directions, or misapprehensions on the quality and nature of the evidence (See: **FRANCIS MAJALIWA AND TWO OTHERS V.R,** Criminal Appeal No. 139 of 2005 (unreported).

In the present case, apart from the evidence of PW1, PW2 and PW3 the courts below also relied on the PF3 of the victim (Exh. PI) as well as some *"agreed"* facts reduced in "the memorandum of matters agreed" extracted from the preliminary hearing.

Of the three witnesses, only PW1 (the victim) could competently have testified on the actual commission of the offence. PW2 came to the

scene when the attacker was just finishing attacking the victim and soon thereafter, the attacker ran away. PW3 never left his shop to quell the attack on PW1. So, the only evidence of robbery came from PW1. The others could only have corroborated what PW1 had testified upon. The question, is, were the two courts below right in assessing the credibility of PW1? We think not. **Firstly,** apart from his bare assertions, there was no other evidence that PW1 had in his possession, Tshs. 250,000/=, which the appellant allegedly took. **Secondly,** in the absence of the evidence of an investigator it is difficult to tell whether PW1 reported the robbery to the police. And if he reported it why: (1) was the appellant charged with grievous harm? (2) why was the allegation of the robbery not brought up in the preliminary hearing and (3) why was the charge of armed robbery brought in nearly six months later? Would not that be an embellishment or a made up case? If not, why not? If the courts below had considered the questions posed above, we do not think that they would have come to the same conclusion. They could have drawn an adverse inference against the prosecution for not calling the investigator, and that if he had testified, his evidence would have been unfavourate to the prosecution. It is due to the existence of the above gaps that we find that PW1 was not a credible witness, and the possibility that this was a made up case, is a real

one. It follows therefore, that, if PW1 was not a credible witness, no amount of evidence from PW2 and PW3 could corroborate his evidence.(See: **AZIZ ABDALLAH V.R** (supra)

The next piece of evidence relied on by the two courts below is the PF3 (Exh. PI). This exhibit was admitted on 20/6/2007, where the appellant had been asked and responded by saying that he had no objection. There the trial court did not inform the appellant of his rights under Section 240(3) of the CPA. Two months later, on 2/8/2007, the trial court must have realized the omission and tried to redress it by informing the appellant of his such rights and the appellant is alleged to have replied that he did not need the doctor. In our view, this was irregular because as far as Exh. PI was concerned, the trial magistrate was ***functus officio*** on whether or not to admit it. If he did so out of realising that he had made a mistake, it was wrong because he could not correct his own such mistakes. This was a fatal mistake and could only be revised by a higher court. On the premises, we hold that the position remains that the PF3 was irregularly tendered.

The consequences of such omission are now well known and documented (see **ALFRED VALENTINO V R** Criminal Appeal No. 92 of 1996 **WILBALD KIMANGANO V R** Criminal appeal No. 235 of 2007 (both unreported). So, Exh. P1 must be and is hereby expunged from the record.

The remaining evidence relied on by the trial court, and accepted by the first appellate court is the "admitted facts" extracted from the preliminary hearing. It is no doubt the law (section 192 (4) of the CPA) that where any fact or document has been admitted in a preliminary hearing, that fact or document is deemed to have been proved. But that presumes that the preliminary hearing has been conducted according to law, otherwise it may result into the expulsion of such evidence (see **JUMA SALUM SINGANO V R,** Criminal Appeal No. 172 of 2008 (unreported).

In this case, the trial court held a preliminary hearing on 31/5/2007 where the recorded memorandum of agreed facts shows that the appellant admitted that:-

1. *Name of address*

2. *That I was arrested at night time by villagers on allegations that I attacked the complainant by stabbing him with a knife.*
3. *That on 21/1/2007 at about 6.30 pm I met the complainant at the shop of WILLIS WILFRED*
4. *That the complainant is my friend and we know each other*

And in its judgment (pg 1-2) the trial court used the evidence that the appellant and PW1 knew each other and that on 21/1/2007, at the material time he met PW1 at PW3's shop. The court went on to acknowledge that:-

> *"Those two issues which are crucial to the case at hand were admitted by the accused person at the preliminary hearing of this case."*

However, the only preliminary hearing referred to by the trial court was held when the appellant was still facing the charge of Grievous Harm and nearly three weeks before the charge was substituted on 20/6/2007 for the one of Armed Robbery, which was a more serious offence. Since under section 234(3) of the CPA if a charge is substituted, a fresh plea must be taken from the accused; we think that, with equal force section 192 (1) of the CPA must also be applied afresh and a new preliminary hearing be

compensation are set aside. We order his immediate release from custody, unless he is lawfully held for other reasons.

DATED at ARUSHA this 14th day of October, 2011.

S.M. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL