IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 7 OF 2010

DENIS S/O MAGABE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Uzia, J.)

dated the 16th day of November, 2009
in
(DC) Criminal Appeal No. 58 of 2008

JUDGMENT OF THE COURT

28 & 30 June 2011

MUNUO, J.A.:

The appellant, Denis Magabe, was convicted of robbery with violence c/s 285 and 286 of the Penal Code, Cap 16 R.E. 2002 in Criminal Case No. 429 of 2004 in the District Court at Iringa. It was alleged that on the night of the 16th October, 2004 at about 20.30 hours at Makorongoni area in Iringa Municipality, the appellant and two other suspects who are not parties to this appeal, stole cash

Tshs. 8,000/=, a cap valued at Tshs. 15,000/= and a mobile phone Nokia 1100 valued at Tshs. 145,000/=, total valued at Tshs. 168,000/=, the property of Moshi Lujuo and at the time of stealing cut the victim with a knife in order to obtain and retain the stolen property.

Narrating his ordeal with the appellant and his co-bandits on the fateful night, PW1 Moshi Lujuo deposed that he encountered the said bandits on his way home. They attacked and seized from him the property listed in the charge sheet namely cash Shs. 8,000/=, a cap and a Nokia 1100 mobile phone. He reported the robbery at the police station where he got a PF3 form, Exh. P1 for medical treatment. The PF3, Exh P1, shows that the complainant, Moshi Lujuo suffered cut wounds on the chest, abdomen and head, dangerous harm inflicted by a sharp instrument. PW1 stated that he had seen the appellant at the Iringa bus stand carrying loads and that sometimes he popped in the complainant's office. The complainant was admitted at the Iringa government hospital for 3 days. It was the evidence of the complainant that the scene of crime

was lit with electric tube light and there was moonlight. So he had no difficulty identifying the appellant whom he knew before. Subsequently, the appellant was among three bandits arrested in a taxi they had hired. PW2 C 8647 Sergeant Nicolas Kimela stated that he arrested the appellant at Ipogoro in a taxi. The bandits had a bag which had 4 mobile phones. PW1 identified the Nokia 1100 mobile phone as the one the bandits had seized from him on the material night. The appellant was thereafter arraigned for robbery with violence.

In his defence on oath, the appellant categorically denied the charge of robbery with violence. He stated that he was among three passengers in a taxi they had hired to take them to various destinations. The taxi stopped at Ipogoro to get a spare tyre. It was then that the police car stopped by and arrested the passengers in the taxi alleging that they were bandits. In the said taxi there was a bag which had 4 mobile phones including the Nokia, the subject of this case. The appellant disclaimed ownership of the said bag and the mobile phones therein.

Before us, the appellant was represented by Mr. Justinian Mushokorwa, learned advocate. The Respondent Republic was represented by Mr. Michael Luena, Senior State Attorney. He filed a preliminary objection seeking nullification of the proceedings and judgement of the learned judge on the ground that the appellant omitted to file a Notice of Appeal against the decision of the trial court when he lodged (DC) Criminal Appeal No. 58 of 2008 in the High Court of Tanzania in contravention of the mandatory provisions of section 361(1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2002. None compliance with the provisions of section 361 (1) (a) of the CPA, the learned Senior State Attorney contended, rendered the High Court Appeal No. 58 of 2008 before Uzia, J. incompetent for lack of a statutory notice to institute the appeal. Hence, the Court should quash the proceedings and judgement of (DC) Criminal Appeal No. 58 of 2008 from which the present appeal arises. In that regard, the present appeal would be rendered incompetent so it should be struck off.

The learned Senior State Attorney cited the cases of **Epson s/o Michael and Another versus Republic, Criminal Appeal No. 335 of 2007, (CA) (unreported)** and **Meck Donald versus Republic, Criminal Appeal No. 473 of 2007, (CA) (unreported)** wherein the Court struck appeal for lack of a Notice of Appeal.

Mr. Mushokorwa, learned advocate for the appellant urged us to invoke the doctrine of estoppel under the provisions of section 123 of the Evidence Act, Cap 6 R.E. 2002 to overrule the preliminary objection. He observed that if there was no Notice of Appeal in the High Court appeal, a preliminary objection to that effect would have been raised then or the learned judge would **suo motu** raise the lack of notice issue at the commencement of the hearing of the appeal. The fact that the learned judge proceeded and determined the appeal presupposes that a Notice of Appeal was duly filed. The Notice of Appeal was probably misplaced during the preparation of the record. Hence, counsel for the appellant argued, the doctrine of

estoppel should be invoked by the Court to bar the Respondent Republic to raise the preliminary objection at this late stage.

Section 123 of the Evidence Act, Cap 6 R.E. 2002 states *inter – alia:-*

> *"123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be done and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."*

Upon perusing the Court's decision in the case of **Epson and Another** cited *supra,* we realized that the 2nd Appellant was convicted in absentia and whereas the 1st Appellant had filed a Notice of Appeal against the decision of the trial court, the 2nd Appellant had not filed a Notice of Appeal because he was at large when the judgement was delivered. For lack of a Notice of Appeal, the appeal of the 2nd Appellant against the decision of the trial court was

nullified and the appeal to the Court of Appeal was accordingly struck out. The record of the present appeal is systematic, the appellant was not convicted in absentia. In the premises, we agree with the learned defence counsel that the learned judge would in all probabilities have struck out the appeal if there was no notice of appeal, or alternatively, the Republic would at that time have raised a preliminary objection on the lack of a Notice of Appeal. In that situation, in our view, the Respondent Republic is estopped, under the provisions of section 123 of the Evidence Act, from raising the preliminary objection at this late stage of a second appeal. The high possibility of the Notice of Appeal in question falling out or being misplaced during the preparation of the record cannot be safely ruled out given the unsatisfactory performance of some registries in preparing appeal records. Under the circumstances, the preliminary objection is overruled.

The learned counsel for the parties argued the appeal on merit in the alternative so we shall proceed to determine the appeal on merit.

Learned counsel for the appellant filed three grounds of appeal to challenge the conviction and sentence namely that:-

1. *The learned judge having ruled that the identification evidence was not watertight should have acquitted the appellant in the absence of a common intention that he was involved in the stealing of the complainant's mobile phone which was recovered in a bag of one of the passengers in the taxi.*

2. *That there was no reliable evidence to prove that the mobile phone belonged to PW1.*

3. *That the learned judge, like the trial court failed to consider the defence case.*

Submitting that the appellant was erroneously arraigned, counsel for the appellant contended that his client was coincidentally travelling in the taxi in which the stolen mobile phone was found in an unidentified bag which did not belong to the appellant. Mere

presence in the taxi, counsel contended, was not sufficient to incriminate an innocent passenger. Mr. Mushokorwa cited the case of **Jackson Mwakatoka versus Republic (1990) TLR 17** in which the Court held that mere presence is not sufficient to ground a conviction. Counsel for appellant doubted whether the complainant satisfactorily identified the stolen Nokia 110 mobile phone recovered in the unclaimed bag in the taxi in view of the fact that the said complainant failed to identify the mobile phone by serial number or other relevant description. Be it as it may, the appellant is not claiming the ownership of the mobile phone in dispute. On the need to identify disputed property properly to establish ownership, counsel for the appellant cited the case of **Ally Bakari versus Republic (1992) TLR 10.** Contending that there is no evidence to connect the appellant with the offence charged, Mr. Mushokorwa prayed that the appeal be allowed.

Mr. Michael Luena, learned Senior State Attorney, supported the appeal, thus he did not support the conviction and sentence. Conceding that the learned judge discarded the identification

evidence, the learned Senior State Attorney submitted that the recovery of the mobile phone in the taxi in which the appellant was a mere passenger amongst other passengers, was too scanty to warrant a conviction for robbery with violence. Besides, the learned Senior State Attorney observed, the purported receipt for the mobile phone in dispute does not bear any name or serial number. Furthermore, he stated that the evidence of PW1 and PW2 on the identification of the mobile phone was contradictory because PW1 stated that when the mobile phone is switched on, his name appears while PW2 said that the mobile phone is identified by the letter M in the battery compartment. For lack of cogent evidence to ground a conviction, the Republic prayed that the appeal be allowed.

Precisely, we are satisfied that there is no concrete evidence to connect the appellant with the charged offence. Under the circumstances we quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith if he is not detained for other lawful cause. We accordingly allow the appeal.

DATED at IRINGA this 29th day of June, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(J.S. MGETTA)
DEPUTY REGISTRAR