**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)**

**CRIMINAL APPEAL NO. 56 OF 2009**

**MOSES MAYANJA @ MSOKE .....APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Mackanja, J.)**

**dated the 11th day of November, 2008**
**in**
**Criminal Appeal No. 115 of 2006**

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**JUDGMENT OF THE COURT**

**14 & 17 May , 2012**

**RUTAKANGWA, J.A.:**

This appeal seeks to assail the judgment of the High Court sitting at Mwanza which dismissed the appellant's appeal against a conviction for armed robbery and a sentence of thirty years jail. The trial court was the District Court of Mwanza District.

Before the trial court, the appellant, together with two others, were being charged with robbing a motor vehicle make, a Toyota Land Cruiser with registration No. TZN 4079, the property of Plan

PW6 Yahya Rushaka, the father of PW2 Aisha. The houses's entire compound was fenced and had one gate. It was the evidence of PW1 Musa that on the material day he woke up **very early in the morning,** and found the vehicle, which was the subject of armed robbery charge, "parked in the fenced area." Later on, while he was leaving for his work place, he met Nurdin Anas (third accused in the trial court), a tenant in the house, who told him that the vehicle had been sent to him from Kigoma by his relative. He then left for work only to learn later that the said vehicle had been robbed. To us, the unresolved nagging and pertinent question is: how could motor vehicle with Registration No. TZN 4079 have been robbed from its driver, PW3 Masunga at 07.30 hrs, when by that hour it was already safely enclosed at the home of PW1 Musa and Nurdin Anas who, incidentally, was acquitted by the trial court? If it will be absolutely necessary, we shall return to this crucial question later.

We have already shown above that it was only PW3 Masunga and PW4 Stella who testified to have witnessed the alleged armed robbery live. The evidence of these witnesses is loudly clear on the

In his judgment, the learned trial Resident Magistrate found it as:-

> "undisputed that the incidence (sic) occured at 7.10 a.m., by then it's already day bright so there was enough light to enable eye witnesses (sic), to see properly ... Between these witnesses, it's only the PW3 who alleged to have properly identified the 1st accused person ..."

On the basis of the evidence of PW3 Masunga alone, the learned Resident Magistrate concluded that:-

> "it's only the first accused, who was properly identified at, 'scene A' i.e. at Kiloleni and at 'scene B' i.e. at Kona ya Bwiru by the PW3."

After reproducing, **in extenso**, a passage from the judgment of the trial court which contained the above quoted extracts, the learned first appellate judge, without any evaluation of the evidence, thus concluded:-

the prosecution and/or the defence case. This omission, be it deliberate or a result of laxity, would ordinarily have clothed us with jurisdiction to interfere with the concurrent findings of fact of the two courts below. See for instance:

(a) **Amiratlar Damodar Maltaser and Another v. A. H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31,

(b) **Salum Mhando v. Republic** [1993] TLR 170,

(c) **Abdalla Musa Mollel @ Banjoo v. The D.P.P.,** Criminal Appeal No. 31 of 2008 (unreported), etc.

After all, it is now trite law that failure to consider the defence case is fatal and usually vitiates the conviction. See for instance:-

(a) **Lockhart – Smith v. R** [1965] Ea211 (TZ),

(b) **Okoth Okale v. Uganda** [1965] EA.555,

(c) **Hussein Idd & Another v. R** [1986] TLR 283,

(d) **Malonda Badi & Others v. R,** Criminal Appeal No. 69 of 1993, (unreported), among others.

As already alluded to above, the appellant was aggrieved by the decision of the High Court and decided to lodge this appeal. The appellant's memorandum of appeal lists five grounds of complaint

stand on, he pressed us to allow the appeal in its entirety on the basis of this ground of appeal only.

There is no gainsaying here that the right to a full or fair hearing/trial, is guaranteed by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, which deals with equality before the law. As this Court unequivocally stated in the case of **Alex John v.R.,** Criminal Appeal No. 129 of 2006 (unreported), the State has enacted many laws containing provisions giving effect to this clear dictate of the Constitution. One such law is the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Act).

The Act contains many provisions guaranteeing a full hearing or a fair trial to an accused person. One of the basic and uncompromisable tenets of due process or a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the latter for any reason, decides to absent himself. See for instance, s. 196 of the Act. In our considered opinion, this requirement is not fulfilled by the mere physical presence of the accused in the court room. This presence must be accompanied by his/her actual full participation in the

before the trial started in May, 2001. Interpreters had always been provided at the instance of the public prosecutors. However, when it was the turn of the two key prosecution witnesses to testify, for undisclosed reasons and in utter disregard of the mandatory provisions of the Act, the services of an interpreter were withdrawn. This was highly irregular and fundamentally flawed the trial of the appellant. So, as rightly contended by the appellant and supported by Mr. Kidando, the only incriminating evidence of PW3 Musa against the appellant was given against his back.

It follows from the above that it cannot, therefore, be predicated that he was given a full or fair hearing. We, accordingly, fully associate ourselves with the position taken by the appellant and the respondent Republic to the effect that this was a fundamental incurable irregularity. We find ourselves constrained to accept the invitation of Mr. Kidando to expunge the evidence of PW3 Musa, suspect as it was, from the record, which we hereby do.

Having expunged the evidence of PW3 Musa, the prosecution case against the appellant is bereft of no cogent evidence upon which his conviction for the alleged armed robbery can be credibly

being remote, the prosecution is equally to blame for the error which led to the conviction being overturned.

All said, having allowed the appeal, we order that the appellant be released forthwith from prison unless he is otherwise lawfully held.

DATED at MWANZA this 16th day of May, 2012.

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

E.A. KILEO
**JUSTICE OF APPEAL**

K.K. ORIYO
**JUSTICE OF APPEAL**

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


E.Y. MKWIZU
**DEPUTY REGISTRAR**