IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUNUO, J.A., KILEO, J.A. And MANDIA, J.A.)

CIVIL APPEAL NO. 78 OF 2010

JOSHUA LAZARO.. ..... APPELLANT
VERSUS
TRUSTEES OF TANZANIA NATIONAL PARK
t/a TANZANIA NATIONAL PARKS..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Mmilla, J.)

dated the 19th day of March, 2010
in
Civil Appeal No. 3 of 2009

RULING OF THE COURT

01st & 2nd March 2012

MANDIA, J.A.:

The appellant filed an appeal in this Court against the decision of the High Court of Tanzania at Arusha in **Civil Appeal No. 3 of 2003**. The appeal in the High Court was against the decision of the District Court of Arusha at Arusha in **Employment Cause No. 1 of 2005.** The appellant is self-represented, and the respondent is represented by Mr. Ezra Mwaluko, learned advocate.

The respondent filed a notice of preliminary objection under Rule 107 (1) of the Court of Appeal Rules, 2009. There are two points of objection, namely, failure to seek and obtain leave to appeal, and failure by the appellant to serve the respondent with a copy of the Notice of Appeal.

It was undisputed that this was a third appeal for which leave to appeal was mandatory under Section 5(1) (c) of the Appellate Jurisdiction Act, Chapter 141 R.E.2002 of the laws. The appellant conceded in court that he did not seek leave as he was a layman and nobody told him anything about leave. Mr. Ezra Mwaluko, learned advocate, drew our attention to authorities which laid down the law that an appeal from the High Court exercising appellate jurisdiction requires leave to appeal otherwise the appeal becomes incompetent.

These are:

(1) **Mechanical Installation and Engineering Co. Ltd versus Abubakar Ndeza Maporo (1987) TLR 44.**

(2) **Enock M. Chacha versus Manager, NBC Tarime (1995) TLR 270.**

(3) **Linus F. Shao versus The National Bank of Commerce Civil Appeal No. 36 of 2000**, (C.A.T. Mwanza Registry, unreported)

We therefore find the appeal before us incompetent. We therefore do not need to go into the second ground relating to service, as the first ground of objection is enough to dispose of the matter. We therefore uphold the preliminary objection. The application before us is clearly incompetent and we strike it out with costs.

DATED at ARUSHA this 1st day of March, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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THE COURT OF APPEAL OF TANZANIA

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 220 OF 2009

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

NYERERE BURA ..... APPELLANT
VERSUS
RASHID MOHAMED .... RESPONDENT

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

(Sambo, J.)

dated the 11th day of March, 2009

in

PC Criminal Appeal No.25 of 2007

JUDGMENT OF THE COURT

24th February & 2nd March, 2012

MANDIA, J.A:

The appellant Nyerere Bura appeared as an accused person in Criminal Case Number 215/2000 in the Primary Court of Endasak, Hanang District. He was found guilty, convicted and sentenced to thirty years imprisonment. He preferred an appeal to the District Court of Babati District at Babati where Criminal Case No. 215 of 2000 was consolidated with Criminal Case No. 214 of 2000 to form one Criminal Appeal Number

31 of 2007. Criminal Appeal Number 31 of 2007 was dismissed. The appellant preferred a second appeal to the High Court of Tanzania at Arusha. This second appeal was also dismissed. Undeterred, the appellant sought leave of the High Court and filed this third appeal. When the appeal came up for hearing the appellant appeared in person, unrepresented. The respondent/Republic was represented by Mr. Juma Ramadhani, learned Principal State Attorney. Mr. Juma Ramadhani argued that this being a third appeal, it could only lend itself to adjudication by this court on a point of law, and that the point of law evident in this appeal is whether identification by voice is strong enough to ground a conviction.

The facts of the case are very simple. They show that on 7/8/2000 at about 9 p.m. PW1 Rashid Mohamed of Matengarimo Village, Babati District, was walking along the road between Atta Village and Soera Village. In front of PW1 Rashid Mohamed was one Ally Martin who did not testify in the trial court. Rashid Mohamed PW2 testified that along the road they heard the appellant asking "*who are you*?" The exact word are:-

> "*...muda wa saa tatu usiku tulipokaribia kwetu tulikutana na watu 2 kwenye kitongoji cha ATTA*

kilichopakana na chetu cha SOERA. Wakati huo Ally Martin alikuwa mble yetu akawaita usiku x 2 ndipo tukasikia sauti mshtakiwa akasema "nyinyi ni nani usiku huu?"

Further on PW1 Rashid Mohamed went on to testify thus:-

"Abdallah aliuliza tukio mimi tukaeleza tulikuwa na nani na Nyerere na mwenzake tusiyemtambua wakakimbia..."

The above evidence is the only implicating evidence which led to the appellant's conviction in the Primary Court, a conviction which was affirmed in the District Court and in the High Court.

As we said earlier, the only point for consideration is whether the appellant was correctly identified at the scene of crime. The trial court and the two successive appellate courts held that the appellant was correctly identified. The record of trial shows the only means of identification is a voice which asked loudly in darkness "*nyinyi ni nani usiku huu?*" and that PW1 Rashid Mohamed immediately recognized the voice to be that of the

appellant. Curiously, through the witness admitted that the only means of identification is the voice of the appellant, he went on to say "*Mshtakiwa ndiye aliyechukua fedha yetu wote Ally alitoa fedha yake wenyewe kabla ya kutoka fahamu".* What is implied here is that the witness could not see the appellant because of the darkness but could see his colleague handing over money in the darkness.

The learned Principal State Attorney representing the respondent/ Republic declined to support the conviction based on voice. He argued that this appeal did not meet the threshold set by **WAZIRI AMANI versus Republic** (1980) TLR 250. We are in agreement with him.

First and foremost, the evidence of PW1 Rashid Mohamed shows clearly that it was the appellant who first started to talk when he asked "*Nyinyi ni nani usiku huu?* The inquiry by the appellant that night shows what happened was a chance meeting. It was at this chance meeting that the appellant supposedly wounded two persons in total darkness and robbed them. According to PW1 Rashid Mohamed he saw Ally Martin handing over money before blacking out! There is no evidence to show the time the robbers took. There is also no evidence to indicate any

exchange of words in that dark night apart from the words *nyinyi ni nani usiku huu?"* alleged uttered by the appellant. In **NUHU SELEMANI versus REPUBLIC** (1984) TLR 93 at P. 94 this Court, when dealing with voice identification in a lighted shop, remarked thus:

> *"Also it is notorious that voice identification by itself is not very reliable."*

The present circumstance involve voice identification in a chance meeting along a bush road and in total darkness, which makes the identification even more unreliable. In **STUART ERASTO YAKOBO versus REPUBLIC,** Criminal Appeal No. 202 of 2004 (unreported) this Court observed:

> *"For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime-see* ***Baldwin Komba @ Ballo versus Republic*** *(CAT) Criminal Appeal No. 56 of 2003 (unreported). (Also see* ***Kanganja***

Ally and Juma Ally versus Republic *(1980) TLR 270)"*

The record of trial does not show PW1 Rashid Mohamed as testifying that he is very familiar with the voice of the appellant, and that the voice he heard at that dark spot in the bush road is none but that of the appellant.

In the circumstances of this case we are of the considered view that the appellant was not properly identified on the material day. In the result, we allow the appeal, quash the conviction, set aside the sentence of imprisonment imposed on the appellant, and order that he be released from custody forthwith unless he is held on some other lawful cause.

DATED at ARUSHA this 01st day of March, 2012

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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THE COURT OF APPEAL OF TANZANIA

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 308 OF 2009

AMOS PAULO AND ANOTHER..... APPELLANT
VERSUS
THE D.P.P..... RESPONDENT

(Appeal from the Judgment of the High Courtof Tanzania at Arusha)

(K.M.M.SAMBO, J.)

dated the 2Ist day of August, 2009
in
Criminal Appeal No. 121 of 2007

JUDGMENT OF THE COURT

28th February & 02nd March, 2012

KILEO, J.A.:

The appellants, Amos s/o Paulo and Odian s/o Elias were, along with two others, charged with the offence of Armed Robbery contrary to section 285 and 286 of the Penal Code Cap 16 as amended by Act No.10 of 1989 in the District Court of Hanang at Katesh. The appellants appeared as the first and second accused persons respectively, at the trial. The trial magistrate found, after the prosecution case had been closed, that there was no case to answer for the third and fourth accused persons. The appellants were convicted and sentenced to serve

We are mindful of section 143 of the Evidence Act which provides that *no particular number of witnesses shall in any case be required for the proof of any fact*. However in the circumstances of the present case one would have expected that the prosecution would have at least tendered evidence to show when the witnesses reported the matter to the police and how the appellants were arrested. We have made this observation bearing in mind the fact that there is nothing on record to show that the victims made an immediate mention of the appellants as the ones who robbed them. This means that the witnesses made dock identification. Moreover, there was no evidence that the appellants were ever searched to find out if they possessed the stolen property which would have easily linked them to the crime. This is a criminal case; normally where a complainant claims that some properties were stolen from her the first thing to be expected is for the suspects to be searched.

In view of the above considerations we are settled in our minds that the identification of the appellants at the scene of crime was not sufficient to sustain a conviction.

We have also noted, and Ms. Mlay conceded that much, that the trial magistrate did not address himself to the defence that was raised

by the appellants. The first appellant gave evidence which suggested that he could not have been at the scene of crime at the time the crime was committed. He called a witness (DW3) who testified to have been with him the whole night on the day of the incident. Another witness, a fellow teacher at the school where the complainant taught (DW4) gave evidence that the first appellant accompanied them as they went to the complainant's house after they had heard what befell her. When they got there, PW2 who was present never mentioned the appellant as having been one of the robbers. Even later when he met the complainant she never mentioned to him that the first appellant who was the complainant's neighbor and one time pupil was among those who robbed her. The second appellant claimed that he was joined in the case due to grudges that existed between her and the complainant over some payment for work done. **In Alfeo Valentino vs. The Republic** – Cr. Appeal No.92 of 2006 (unreported) the Court had this to say in regard to a trial court's failure to fully consider the defence of *alibi*:

> *'As this Court succinctly stated in* ***Charles Samson v. R****, Criminal Appeal No. 29 of 1990, as in many other cases, failure by a trial court to fully consider the defence of alibi, and we may add without fear of being contradicted, the defence case as a whole, is a serious error. We*

are of the settled mind, therefore, that the trial court fatally erred in not considering the entire defence evidence before finding the appellant guilty. Unfortunately, even the first appellate court did not address itself on this omission.'

In **Hussein Idd and Another vs. Republic** (1986) TLR 166 the first appellant together with another person were convicted of murder. The trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. The Court held:

'It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence'

In the case at hand if the courts below had properly addressed themselves to the whole case they would probably have found that the defence raised by the appellants was highly probable. The first appellant in his address before us said that it would be most unlikely that he, a long time neighbor of the complainant would have been so foolish as to

go to the complainant's house without even masking his face. His argument is sound. In **Salum Petro Ngalawa vs. The Republic** – Criminal appeal No. 85 of 2004 (unreported) this Court made the following observation after a witness had claimed to have identified the culprits through a vehicle's head lights:

> *'We start with the identification of the appellant by PWs 2 and 3. It was their evidence that they were able to identify the appellant because of the head lamps of the vehicle. But we ask ourselves how the bandits could have been so foolish as to come out in front of such a glare of the head lights of the vehicle. According to PWs 2 and 3 those people had taken cover and only emerged after the vehicle stopped and tried to reverse. It is highly improbable that they would have done so.'*

The first appellant's contention that it would be most unlikely, being very well known to the complainant, to have gone to rob her without concealing his identity makes sense.

In the light of the above considerations we find the appeal by Amos Paulo and Odian Elias to have been filed with sufficient cause for

complaint. We accordingly allow it. Convictions entered against them are quashed and sentences imposed are set aside. The appellants are to be released from custody forthwith unless held for some other lawful cause.

DATED at **ARUSHA** this 29th Day of February, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 208 OF 2009

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

HAMIS HASSAN ..... APPELLANT
VERSUS

THE D. P. P. .... RESPONDENT

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

(Sambo, J.)

dated the 11th day of June, 2009

in

Criminal Appeal No.155 of 2006

JUDGMENT OF THE COURT

20th February & 2nd March, 2012

MANDIA, J.A:

The appellant appeared before the District Court of Monduli at Monduli on a charge of Committing an Unnatural Offence C/S 154 (1) of the Penal Code where he was found guilty, convicted and sentenced to imprisonment for thirty years. He preferred an appeal to the High Court of Tanzania at Arusha where his appeal was dismissed summarily. This is his

second appeal. The appellant, who is unrepresented, filed a memorandum of appeal containing three grounds of appeal.

The respondent/Republic was represented by Ms. Veritas Mlay, learned Principal State Attorney. The grounds of appeal as filed by the appellant go thus:-

"1. *That, the learned trial Magistrate and the appellate Judge erred both in law and fact when satisfied themselves that the evidence of PW was sufficient enough to convict the appellant even without corroboration without asking themselves one crucial question that why the PW2 did not respond to the screams made by the PW1 after the incident taking into consideration that the PW2 was the close neighbor to PW1.*

2. *That, the learned trial Magistrate and the appellate Judge erred in Law and fact when failed to assess carefully the credibility of the prosecution witnesses. Since we don't see why the PW2 did not*

take quick actions to pursue and arrest the appellant soon after the incident taking into consideration she (PW2) was the first person to get the news about the incident?

3. *That, the learned trial Magistrate and the appellate Judge erred in Law and fact when failed to detect that the prosecution did not prove its case beyond reasonable doubts since the evidence laid before the Court by the prosecution differs with the charge-sheet."*

The case is a short one. The prosecution fielded four witnesses and the defence fielded one witness who is the appellant himself.

PW3 Alfred Ismail of Migombani Juu area of Mto wa Mbu testified in court that on 18/8/2001 he left his home for the farm in the morning, leaving his son PW1 Joseph Alfred asleep. When he returned home at 10 p.m. Mama Martha, who testified as PW2 Cecilia Benedict, told him his son Joseph had been sodomised by the appellant Hamisi Hassan, known also as Hamisi Chongo. He examined his son and found bruises and semen in

the buttocks. He reported the matter to Mto wa Mbu Police Station where he was given a PF3 and took his son to hospital where one Dr. Ngoka treated the boy. The PF3 issued to Alfred Ismail was never tendered in court, and Dr. Ngoka was not called as a witness.

On her part PW2 Cecilia Benedict @ Mama Martha testified that on 18/7/2001 at about 8 a.m he called children, including PW1 Joseph Alfred, so that she would give them porridge. On arrival, Joseph Alfred told her (PW2) that the appellant had sodomised him. She passed on the information to Joseph's father when the latter returned home.

The victim of the alleged offence PW1 Joseph Alfred told the trial court that he awoke from sleep on the morning of 18/7/2001 only to find his neighbor, the appellant, putting his male organ into his buttocks. PW1, claimed he was hurt and that the appellant promised to give him buns and biscuits'. When the appellant left he (PW1) dressed up and went to tell his neighbor Mama Martha (PW2) what had happened.

The record of trial, however, shows that the trial court described PW1 as a young boy without indication of his age. Despite this, the trial court

conducted a *voire dire* examination of PW1 which consisted of knowledge of the nature of an oath and the duty to speak the truth. The court omitted to conduct an intelligence test as is required of Section 127 (2) of the Evidence Act, Chapter 6 R.E. 2002 of the laws. In **Khamis Samwel Versus Republic Criminal Appeal No. 320 of 2010** this Court held thus:-

> *".... the trial court must first find and form an opinion and record in the proceedings;* ***first,*** *that the child is of sufficient intelligence, and* ***secondly*** *that the child understands the duty of speaking the truth. In practice, this is preceded by a process called voire dire examination. The purpose of a voire dire examination is for the record to show how and why the court came to those opinions. These are statutory requirements, and the trial court has no option but to do such an examination and record its opinion. If this stage is omitted or if the child does not satisfy those tests a trial court cannot receive the evidence of such child, because then the*

child still remains an incompetent witness by reason of tenders age as per section 127 (1) of the Evidence Act."

By omitting to conduct an intelligence test on PW1 Joseph Alfred the trial court has made the witness an incompetent witness. The appellate High Court made an observation, at page 45 of the record which goes thus:

"At page 3 of the typed judgment of the trial court, the honourable trial magistrate gave a detailed account as to why he believed that PW1 spoke the truth and nothing but the truth. In short, his demeanor was too high for any trial magistrate to believe what he testified. The evidence of PW1 Joseph Alfred, a young boy aged seven (7) years, was correctly admitted and positively acted upon."

PW 1 Joseph Alfred did not state his age in court, and the parent PW3 Alfred Ismail did not give the age of his son while testifying. The

court record describes PW1 Joseph Alfred as a young boy of an indeterminate age. Where the first appellate court got the age of seven years is a riddle, and in any event a finding on age is supposed to be made by the trial court and not an appellate court. We are therefore satisfied that the finding of the first appellate court that **"the evidence of PW1 Joseph Alfred a young boy aged seven years"** is not supported by the evidence adduced in the trial court. The default in conducting the intelligence test and the failure to determine the age of PW1 Joseph Alfred makes the witness and incompetent witness whose evidence should not have been put on record. We discount the evidence of PW1.

After discounting the evidence of PW1, is there independent evidence which the court could rely on? It is clear that the evidence of PW2 Cecilia Benedict @ Mama Martha is hearsay. So is the evidence of the father of the victim, PW3 Alfred Ismail. Only the PF3 and the evidence of Dr. Ngoka who attended the victim would have been probative, but the PF3 was never tendered in evidence, and Dr. Ngoka was not called to testify.

The alleged incident happened on the morning of 18/7/2001 round about 8 a.m. It was not until 8 p.m., twelve hours later, that a report

reached Mto wa Mbu Police Station, and was received by PW4 E 24 PC Emmanuel. Even here, PC Emmanuel testified that the appellant was sent to the Police station by unknown wananchi, none of whom testified in court.

The conviction of the appellant was based on the testimony of an incompetent witness PW1 and that of PW2 Alfred Ismail which was hearsay, as well as the testimony of a Police Officer PW4 who based his evidence of unknown wananchi. Of particular interest is the reliance of the two lower courts on the evidence of PW3 Alfred Ismail in proof of the offence. As we said above, PW3 Alfred Ismail testified on what was verbally passed on to him by PW2 Cecilia Benedict, making his evidence hearsay. None of these two witnesses gave any evidence placing the appellant at the scene of the crime. The defence of the appellant that he was nowhere near the scene of crime was not considered at all. We held in **Charles Samson versus Republic**, Criminal Appeal No. 29 of 1990 that failure to consider the defence case is a serious error. In a case like the present one where none of the evidence on record places the appellant anywhere near the scene of crime, the error is fatal.

the admissibility of the evidence of a child of tender years, as well as on acting on hearsay evidence and failure to consider the case of the defence, defects which resulted in miscarriage of justice. We would accordingly not uphold the conviction and sentence. The conviction entered against the appellant is accordingly quashed and the sentence set aside. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at ARUSHA this 1st day of March, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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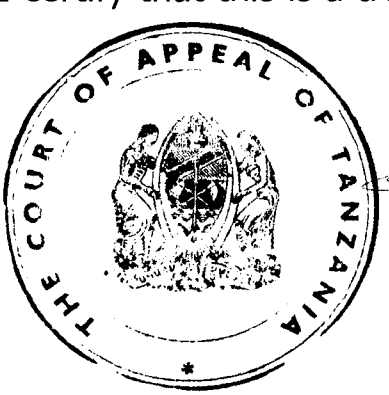

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL