IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 216 OF 2012

HAJI MASANJA @MAKINGA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

dated the 12th day of May, 2003
in
Criminal Appeal No. 299 of 1987

JUDGMENT OF THE COURT

24th & 27th July 2013

KIMARO, J.A.:

This appeal arises out of a conviction and sentence of fifteen years imprisonment imposed on the appellant by the District Court of Mwanza in a charge of robbery with violence contrary to sections 285 and 286 of the Penal Code, [CAP 16 R.E. 2002]. The conviction and the sentences were sustained by the High Court on first appeal. Being dissatisfied, the appellant has filed this appeal. Through legal representation by Mr. Salum Amani Magongo of Magongo and Company advocates, the appellant filed four grounds of appeal faulting the decision of the first appellate court.

1. That the evidence of identification was not water tight.

2. That identification parade had no evidential value

3. That as a whole the evidence on record did not support the conviction.

4. That without prejudice to the above grounds the appellant was denied the right to be heard.

Briefly what transpired in the trial court was that the appellant was jointly charged with three others for the same offence. The trial started on 6th March, 1998 under section 226 of the Criminal Procedure Act, [CAP 20 R.E. 2002] in the absence of the appellant. The continued absence of the appellant is recorded up to 26th July 1999. In all that period, the trial proceeded in his absence and by the date he appeared in court five witnesses had testified in his absence. When the appellant appeared, the case proceeded to conclusion, and the appellant was convicted and sentenced as aforesaid.

His main ground of appeal in the High Court was his identification. He claimed that he was not properly identified. He also challenged the

Identification Parade. The learned Judge on first appeal however, sustained the conviction and the sentence.

Before us the appellant was represented by Mr. Salum Amani Magongo, learned advocate. The respondent Republic was represented by Mr. Castus Ndamugoba learned State Attorney.

In support of the appeal the learned advocate chose to focus on ground number four of the appeal that the appellant was denied the right to be heard. He said it was not proper for the learned Judge on first appeal to sustain the conviction of the appellant because in the trial court the case proceeded against him under section 226 of the Criminal Procedure Act [CAP 20 R.E.2002] without first ascertaining the reasons for his default to enter appearance on the date the case was called for hearing. The learned advocate contended that since the appellant was out on bail the trial court was duty bound under section 159 (b) of CAP 20 to make efforts to compel his attendance before proceeding hearing witnesses in his absence. He said the omission by the trial court to trace the appellant and compel his attendance in court infringed the appellant's right of hearing. The learned advocate said the record does not show that the appellant absconded. He said since the appellant was

not present when some of the prosecution witnesses testified against him, and the trial court did not bother to make efforts to trace him or even find out at the time he appeared in court again on 26th July 1999, why he did not attend court sessions, it was wrong for the first appellate court to sustain the conviction of the appellant. He said the right to a fair hearing is fundamental. He prayed that the appeal be allowed.

The learned State Attorney for the Republic supported the appeal. He agreed with the learned advocate for the appellant that it was wrong for the first appellate court to sustain the conviction of the appellant without being satisfied that the appellant was afforded the right to fair hearing. He faulted the learned Judge on first appeal for not realizing that the trial court improperly applied section 226 of CAP 20. The learned State Attorney said the trial court was supposed to make inquiry on the absence of the appellant in court before resorting to using section 226 of CAP 20. He also agreed that since the appellant was on bail, before the trial court proceeded with the hearing of the case in his absence, the trial court had to make efforts to trace him and compel him to attend court. Because of the irregularity, the learned State Attorney prayed that the appeal be allowed.

Indeed the record of appeal at page 1 of the record of the appeal shows that the appellant was granted bail. At page 8, the proceedings of 6th March 1998 the appellant was absent and a warrant of arrest was issued in respect of the appellant. Summons to show cause to the sureties for the appellant who guaranteed that he would appear in court when so required were also issued. Thereafter, the record is silent on how the trial court followed up the matter. On 31st March, 1998 the trial then started, and in the absence of the appellant under section 226 of the Criminal Procedure Act, CAP 20. The 26th July, 1999 is when the appellant appeared in court again. However, no action was taken by the trial magistrate to find out why the appellant was absent for all that period. Instead, the trial proceeded as if he was present in court all the time.

Section 159 of CAP 20 says:

> *"Where a person absconds while he is on bail or, being on bail fails to appear in court on the date fixed and conceals himself so that a warrant of arrest may not be executed,--*
>
> *(a) Such of his property, movable or immovable, as is*

commensurate to the monetary value of any property involved in the case may be confiscated by attachment:

and

(b) The trial in respect of that person shall continue irrespective of the stage of the trial when the accused absconds ***after sufficient efforts have been made to trace him and compel his attendance."***

Section 159 (a) is not applicable in our case. There is no record to show that the appellant absconded or that he concealed himself so that the arrest warrant would not be executed. Section 159 (b) is what is relevant in this case. The appellant was out on bail and an arrest warrant was issued. As already observed, the record of appeal does not tell us what followed after the court issued the arrest warrant. When the appellant appeared in court again after a recorded absence of one year and three months the trial court took no action to find out why he was absent for all that period. The trial continued to completion and he was convicted. He was convicted on evidence of identification and an identification parade. But when the evidence on identification was given

he was absent. Under such circumstances how did the trial court ascertain the identity of the person who the witness said he identified?

Common sense and good reasoning would suggest that it was not possible for the trial court to ascertain that it was the appellant who was identified by the witness for an obvious reason. The witness did not point to the court that person he was referring to was the appellant. At that time he was not present in court. The prosecution should also have seen the danger of proceeding with the case in the absence of the appellant under the circumstances. For this reason we entirely agree with both the learned advocate and the learned State Attorney that the right of the appellant to full and fair hearing was infringed. The appellant had the right to see the person who said he identified him and cross examine him. That is what the law says.

For this reason we allow the appeal and order his release from prison forthwith unless he is held there for other lawful purpose.

Using our powers of revision under section 4(3) of the Appellate Jurisdiction Act, [CAP 141 R.E.2002] we nullify the entire proceedings of the High Court and that of the trial court from 6th March, 1998 when the

trial court decided to proceed with the case under section 226 of CAP 20 in the absence of the appellant. The appellant was convicted on 10th July, 2002. A period of eleven years has lapsed since then. We accordingly order that, in the event the prosecution chooses to proceed with the prosecution of the appellant that should be carried out as expeditiously as possible.

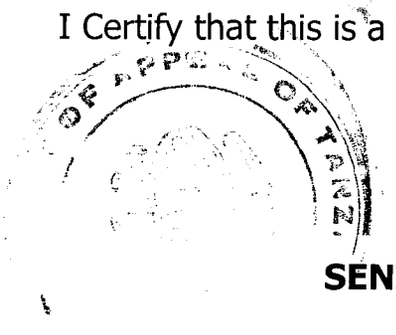
DATED at MWANZA this 27th day of July 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL