IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 141, CF 142 CF 143 OF 2009

1. **ROJELI s/o KALEGEZI.....1ST APPELLANT**
2. **HABONIMANA s/o STANISALUS.....2ND APPELLANT**
3. **HAMED s/o PHILLIPO.....3RD APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the High Court of Tanzania at Tabora)

(Kaduri, J.)

Dated the 1st day of April, 2009

In

Criminal Appeal No. 162 cf 163 cf 164 of 2007

JUDGEMENT OF THE COURT

16th & 23rd April, 2013

KIMARO, J.A.:

The three appellants were charged and convicted of the offence of armed robbery by the District Court of Kibondo , at Kibondo. Their appeal to the High Court was not successful.

They filed this second appeal to this Court. With legal services of Mr. Kamaliza Kamoga Kayaga learned advocate, the appellants have filed three grounds of appeal, two in alternative to the first ground of appeal.

It is trite law that in a second appeal, the Court rarely interferes with concurrent findings of the fact by the lower Courts unless there are glaring errors on the face of record, misdirections or non-directions on the evidence which occasioned a miscarriage of justice. The principle is well set in the cases of **Ludovick Sebastian V R.,** Criminal Appeal No.318 of 2009 (unreported), **Edwin Mhando V R.** (1993) T.L.R. 170 and **D.P.P.V Jaffari Mfaume Kawawa** (1981) TLR 149 and **Moses Thobias Ikangara V R** Criminal Appeal No. 12 of 2010 (unreported).

At the hearing of the appeal, the appellants were represented by Mr. Kamaliza Kamoga Kayaga, learned advocate, and Mr.Jackson Bulashi learned Principal State Attorney represented the Respondent/Republic.

The first ground of appeal faults the learned judge on first appeal for failure to nullify the proceedings of the trial Court because the appellants

were not afforded a fair trial. Pleas were not taken in respect of any of the appellant for the charges preferred against them.

In support of this ground of appeal, the learned advocate referred to the record of appeal from 29th November 1999 when the appellants first appeared in court, to 22nd February, 2000 when their trial started. He said there was no single date in which the appellants pleaded to the charge which faced them. He said that omission contravened section 228(1) of the Criminal Procedure Act, [CAP 20 R.E. 2002]. He said the appellants were denied a fair trial. He referred the Court to its decision in **Musa Mwaikunda Vs R.** Criminal Appeal No. 174 of 2006(unreported) and prayed that this ground of appeal be allowed.

The learned Principal State Attorney supported the appeal. He conceded that the appellants' pleas were not taken.

The question before us is whether there is need for us to interfere with the findings of the lower Courts. As will be demonstrated below, we do not hesitate to say that the circumstances under which the proceedings were conducted by the Courts below call for the interference of the Court.

The record of appeal at page 4 shows that the appellants appeared in court for the first time on 29th November, 1999. On that day they appeared before F.N. Kazinduki, JP who had no jurisdiction to take their plea because he was a Primary Court Magistrate and the proceedings were instituted in the District Court. Section 6(1) (b) of the Magistrates Courts Act, [CAP 11 R.E.2002] stipulates that a District Magistrates Court shall be dully constituted when presided over by a District Magistrate. In the subsequent dates of their appearance in court, from 29th December, 1999 to 22nd February, 2000 when the proceedings were presided over by P.Y. Maumba, a District Magistrate conferred with jurisdiction to conduct the proceedings, no plea was taken.

Section 228 of the Criminal Procedure Act, gives a mandatory requirement of reading the charge to the accused person and require him to say whether he admits or denies the truth of the charge.

Section 228(1) reads:

> "*The substance of the charge shall be stated to the accused person by the Court, and he shall be*

asked whether he admits or denies the truth of the charge."

In the case of **Mussa Mwaikunda Vs R** (supra) the court held:

> *"Perhaps it is useful to digress a bit and state here that there are minimum standards which have to be complied with if any accused person is to undergo a fair trial. As stated in **Regina V Henley** (2005) NSWCCA 126 (a case from New South Wales Court of Criminal Appeal) quoting Smith J. in RV Prosper (1959) VR 45 at 48.*

The standards are:-

1. *To understand the nature of a charge;*
2. *To plead to the charge and to exercise the right of challenge;*
3. *To understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;*

4. *To follow the course of the proceedings;*

5. *To understand the substantial effect of any evidence that may be given in support of the prosecution ; and*

6. *To make a defence or to answer the charge."*

As we have indicated above, there was no plea taking in respect of the appellants. The learned Principal State Attorney, conceded to the omission. We agree with the learned advocate for the appellant that there was no fair trial. The omission in not taking the plea ought to have been dealt with by the first appellate Court.

Having resolved the crucial issue in favour of the appellants that they have not undergone any trial as their plea was not taken, we allow the appeal. Following the decision of this Court in **Safari Deemay V R.** Criminal Appeal No. 269 of 2011 (unreported), we order the file to be remitted to the trial Court for a de novo trial. Since the appellants have remained in custody for a long period, we direct that the trial should take place as expeditiously as possible. We order accordingly.

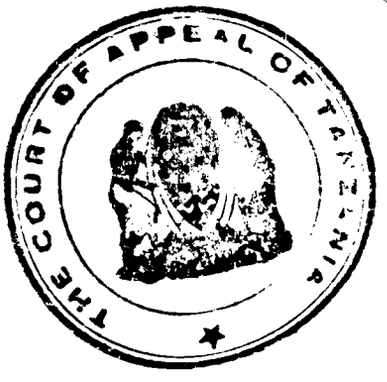
DATED at **TABORA** this 19th day of April, 2013

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL