

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MASSATI, J.A. And MUSSA, J.A)

CRIMINAL APPEAL NO. 183 OF 2010

**1. RICHARD MALIMA
2. KILLO OKELO
3. MASULE DAUD
4. MATHIAS TANA
5. THOMAS KASHINJE**

VERSUS

THE REPUBLIC.....RESPONDENT

..... APPELLANTS

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

(Masanche J.)

dated 8th day of September 2004

in

Criminal Case No. 147,148,149,150&151 of 2003

.....

JUDGEMENT OF THE COURT

27th February, & 4th March & 2013

MBAROUK, J.A:

In the District Court of Magu at Magu, the appellants and another not subject to this appeal were charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. All the five appellants were convicted and sentenced to serve thirty (30) years

imprisonment. Aggrieved by both the conviction and sentence they unsuccessfully appealed to the High Court (Masanche, J.) (as he then was). Undaunted the appellants have lodged this second appeal.

In this appeal, each appellant filed his memorandum of appeal separately. However, looking at the contents of each memorandum of appeal, we have found that they are mainly based on the following grounds of complaints:-

- That, the identification was not watertight.
- That, the appellants were not named at the earliest possible time as claimed by some prosecution witnesses that they knew them before.
- That, there was non – compliance with the mandatory provision of section 231 (1)(a) and (b) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA).

At the hearing, the appellants appeared in person, unrepresented. Whereas the respondent/Republic was represented by Ms. Revina Tivilengwa, learned State Attorney.

When given their right to argue their appeal, each appellant opted to wait for the learned State Attorney to submit first before they were to expound on their grounds of appeal. Having examined the grounds of appeal, we have opted to start with the third ground, of appeal concerning the non compliance with section 231 (1)(a) and (b) of the CPA as it might dispose of the appeal.

Initially, the learned State Attorney supported the appeal of the third appellant only. However in the course of her submission for not supporting the appeal for other appellants, the learned State Attorney changed her mind upon realizing that the mandatory provisions of section 231 (1) (a) and (b) were indeed not complied with by the trial court. The learned State Attorney further urged us not to order a re-trial for the interests of justice, because the appellants have already served about ten years of their sentences in jail. Thereafter, she urged us to order the immediate release of the appellants. In support of her argument, she cited to us the decision of this Court in the case of ***Juma Limbu @ Tembo V. The***

Republic, Criminal Appeal No. 188 of 2006, where the case of **Ndamashule Ndoshi V.R**, Criminal Appeal No. 120 of 2005 (both unreported) was cited.

Basically, Section 231 of the CPA requires a trial court to inform an accused person of his rights before making his defence. The said provision states as follows:-

Section 231 (1) "At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance

of the charge to the accused and inform him of his right-

- (a) To give evidence whether or not on oath or affirmation, on his own behalf; and
- (b) to call witnesses in his defence, ***and shall then ask the accused person or his advocate if it is intended exercise any of the above rights and shall record the answer;*** and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.”
(Emphasis added).

According to the decision of this Court in the case of ***Ndamashule Ndoshi*** (supra) emphasis was put on the compliance of section 231 of the CPA, where it has been stated as follows:-

“ **Section 231 of the Act contains a fundamental right of an accused person;** the right to be heard before they are judged. It directs that a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged” (Emphasis added).

The relevancy of section 231 of the CPA has been put more clearly in the case of **Juma Limbu @ Tembo** (Supra), where it was stated as follows:-

“To avoid a miscarriage of justice in conducting trials, it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings”

In the instant case, the record shows that the trial magistrate failed to comply with the mandatory provisions of section 231 of the CPA as a whole, where the accused rights were stipulated. The Appellants were not represented by an advocate at the trial court, hence the paramount factor to be examined in this case is whether the non-compliance with section 231 by the trial court has occasioned miscarriage of justice.

As pointed out earlier, the appellants who are laypersons and unrepresented were not made aware of their rights pursuant to section 231 of the CPA. In the circumstances of this case, we think, the omission stated herein above occasioned a miscarriage of justice, since the appellants were not represented by an advocate and were not made aware of their rights. We think so because the appellants could have opted for any option among those stated therein if they were made aware of their rights. The problem is, they had no legal representation and worst enough the trial court failed to comply with the requirements under section 231 of the CPA.

The situation in this case is different from the situation to in the case of ***Bahati Makeja V. The Republic***, Criminal Appeal No. 118 of 2010 (unreported) where the accused/appellant was represented by an advocate. In the case of ***Bahati Makeja*** (Supra), the full bench of this Court reached to a conclusion that the word "shall" in section 293 of the CPA which governs trials in the High Court but whose wording is identical to section 231 of the CPA. is not imperative as the accused person had an advocate who is presumed to know the rights of an accused person and the accused person is expected to be advised accordingly.

For that irregularity of non-compliance with section 231, we are of the view that all the proceedings appearing after the closure of the prosecution's case were null and void and vitiates all those proceedings, thereafter. Considering the fact that each case has to be decided according to its own facts, we have preferred not to order a retrial. This is for the reason that, having examined the record more closely, we fully agree with the learned State Attorney to the effect that there was no

sufficient evidence to support conviction of the appellants as stipulated in their grounds of complaint. Furthermore, the record shows that, the appellants have already served almost ten years out of their thirty years imprisonment sentence.

For the reasons stated herein above, we allow the appeal, quash the convictions and set aside the sentences imposed on the appellants. In the event, we order an immediate release of the appellants from prison, unless otherwise lawfully held. It is so ordered.

DATED at **MWANZA** this 28th day of February, 2013.



M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL