IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., ORIYO, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEALS NO. 349"B" & 352"B" OF 2009

1. KASHINDYE BUNDALA
2. JUMA PETER } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the RM's Court [Extended Jurisdiction] of Tabora at Tabora)

(Hon. L.J. Mbuya – PRM, Ext. J)

Dated the 6th day of October, 2009

In

Criminal Appeal No. 62 cf 63 of 2008

JUDGEMENT OF THE COURT

17th & 22nd April, 2015

LUANDA, J.A.:

The appellants **KASHINDYE s/o BUNDALA** and **JUMA s/o PETER** (hereinafter referred to as the 1st and 2nd appellant respectively) along with two others, were jointly charged in the District Court of Igunga at Igunga of robbery. The appellants were convicted as charged and each was sentenced to 30 years imprisonment. As to the other two, one died before

the trial was finalized. The other one was acquitted at the close of the prosecution case as he had no case to answer.

The appellants were dissatisfied with the decision of the trial District Court, they separately lodged their appeals in the High Court of Tanzania (Tabora Registry). The High Court transferred the appeals to the Tabora Resident Magistrate's Court and directed Mr. L.J. Mbuya Principal Resident Magistrate (Extended Jurisdiction) to hear the appeals. The appeals were consolidated and the same were dismissed for lack of merits. Undaunted they have come to this Court on appeal. As they separately filed their appeals, the same were consolidated.

Having read their memoranda of appeals, we found out that the two have one common ground. Basically they are saying that the prosecution case is not strong to ground conviction. The 2nd appellant is also complaining that the trial District Court did not give him opportunity to present his defence.

In this appeal the appellants were unrepresented so they fended for themselves; whereas Mr. Juma Masanja learned State Attorneys appeared for the respondent. Mr. Masanja did not resist the appeal and rightly so.

It was the case for the prosecution that while on the fateful day Leticia d/o Sanga (PW4) a Primary School teacher at Nkinga, went to Nzega to mourn the death of her beloved husband leaving behind Benezeth Michael Swetu (PW1) to look after her house at night time, robbers struck and took a number of items. PW1 raised an alarm whereby people responded. But on arrival the robbers had already left. Efforts were made to pursue them. They divided into small groups. One group saw the appellants coming from the opposite direction. When they came closer the appellants ran away. Naturally they suspected them. They chased them and managed to arrest them. The 2nd appellant when queried about the stolen items he said they were in the house of one Mwanankuli and that he intended to buy. When Mwanankuli was confronted, he admitted to have received the stolen properties and mentioned two youths other than the appellants who brought the properties to him.

Indeed the properties were found in the house of Mwanankuli. The said properties namely one sewing machine, suit case, television, two radio cassettes and four pieces of vitenge were taken from the house of Mwanankuli and later tendered in court by PW4 as exhibits.

Mr. Masanja submitted generally that the evidence in the record is not strong to ground conviction. First, it is not shown who seized the items and kept them before they were tendered in court. What he is saying in respect of the keeping of exhibits is that there was no chain of custody. He referred us to **Makoye Samwel @ Kashinje And Four Others v R**, Criminal Appeal No. 32 of 2014. Second, PW4 when testifying and later when she tendered the exhibits she did not give any special marks. Third, the act of running of the appellants per se is not enough to connect the appellants with the offence they were charged with.

Turning to the complaint of the 2nd appellant that he was not given opportunity to present his case, Mr. Masanja said the record of appeal shows very clearly that the 2nd appellant was not accorded that opportunity. That irregularity is fatal. He however said that since the evidence is weak, there is no need of ordering for a retrial. He urged us to allow the appeal.

The evidence in the record clearly shows that the items which allegedly belonged to PW4 was found in the house of Mwanankuli. We did not understand as to why this Mwanankuli did not feature in this case either as a witness, if at all he came to possess the properties without any

criminal mind or an accused person. To implicate the appellants simply because they ran away is not enough. At most it may raise suspicion. But suspicion however, strong should not be taken as the basis of conviction. The prosecution side must prove its case beyond any shadow of doubt. In any case the properties which allegedly belonged to PW4 were seized from the house of Mwanankuli without following the laid down procedure as is provided for under section 38 of the CPA (Criminal Procedure Act, Cap 20 R.E. 2002) which reads:

> *(1) If a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle or place -*
>
> *(a) anything with respect to which an offence has been committed;*
>
> *(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence,

and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) When an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds in which it was issued and the result of any search made under it to a magistrate.

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near

relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

A police officer who went to the house of Mwanankuli and seized the properties did not testify at all. So, we are not told whether he had a search order and, if he had, whether on completion he caused the same to have been signed by Mwanankuli and those who witnessed the search. It is clear therefore that the procedure of search was not followed. Since the procedure of search as laid down under S.38 of CPA was not followed, any evidence arising from such unlawful search should not be accorded any weight and the same should be discarded.

Further, assuming that the search was properly conducted it is not shown how the exhibits were handled from the day of seizure to the date they were tendered in court as exhibits by PW4 often referred to as chain of custody. In **Makoye Samwel** case cited supra the Court reiterated the need to adhere to the principle of chain of custody by citing **Paulo Maduka and Four Others V.R,** Criminal Appeal No. 110 of 2007(unreported).

In **Maduka** case the Court, said, inter alia:-

> *"By **"chain of custody"** we have in mind the chronological documentation and or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish the alleged evidence is in fact related to the alleged crime- rather than, for instance, having been planted fraudulently to make someone appear guilty."*

Apart from the above observation, the record also shows that after the close of prosecution case, the trial District Court did not address the 2nd appellant his right of giving his defence as is provided under S. 231 (1) – (4) of the CPA. That omission as correctly submitted by Mr. Masanja is a fundamental irregularity which goes to the root of administration of justice. The 2nd appellant was not accorded a fair hearing which is also against Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 RE. 2002. Ordinarily if it is shown that a party to a case was not accorded opportunity of being heard or fair hearing the remedy is to quash

the proceedings and order a retrial. However, in this case as the evidence is weak as correctly submitted by Mr. Masanja, ordering retrial will serve no useful purpose.

In fine we allow the appeal, quash the conviction and set aside the sentences. The appellants are to be released from prison forthwith unless they are held in connection with another matter.

Order accordingly.

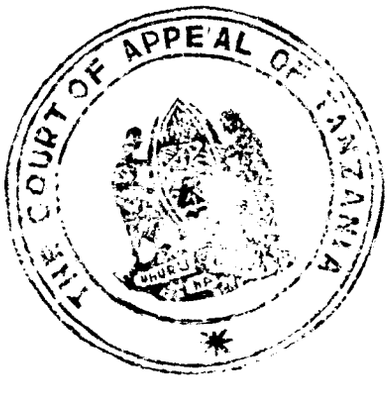
DATED at TABORA this 20th day of April, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL