

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A, And JUMA, J.A.)

CRIMINAL APPEAL NO. 267 OF 2015

AMOS SELEMANAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the judgment of the High of Tanzania
at Dodoma)**

(A. Mohamed, J.)

Dated the 13th day of May, 2015

in

Criminal Appeal No. 66 of 2012

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JUDGMENT OF THE COURT

22nd & 27th April, 2016

KILEO, J.A.:

Amos Seleman (hereinafter referred to as the appellant) was charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 in the District Court of Singida at Singida. He was sentenced to thirty (30) years imprisonment. Aggrieved, he unsuccessfully appealed at the High Court of Tanzania at Dodoma and has come before us on a second appeal.

Before us, the appellant appeared in person and fended for himself, while on the other hand the Respondent Republic was represented Ms. Judith Mwakyusa, learned State Attorney.

The brief facts leading to this matter were that on 4th day of December, 2011 at about 00.10 hours at Makhonda/Igongwe within the District and Region of Singida, PW1 and PW3 who are husband and wife respectively, were, together with their children, sleeping when they suddenly heard the door of their house being broken. Instantly, PW1 and PW3 woke up and saw two people with two torches worn on their foreheads. It was alleged that those culprits were also carrying a machete which they used in threatening them while demanding some money from them. Consequently, PW1 pointed to a certain bag where he kept some money. One of the culprits flashed a torch towards the direction of that bag. That act enabled PW1 and PW3 to identify the appellant. It is the evidence of PW1 that he managed to identify him because the torch light was "too bright". The appellant and his colleague managed to steal cash Tshs. 830,000/=, one cell phone worth Tshs.150, 000/= and a radio worth Tshs.18, 000/= making it a total of Tshs. 998,000/= in value of the stolen items.

When the matter was called on for hearing the appellant prayed for the court to adopt his twelve (12) grounds of appeal and preferred for the learned State Attorney to submit first. His major complaint was on sufficiency of identification.

Ms Judith Mwakyusa, learned State Attorney supported the appeal on one legal ground. She argued that in so far as the two key witnesses were neither affirmed nor sworn before they gave their testimonies, then what was recorded in court was no evidence at all. In support of her argument she referred us to **Mwami Ngura V. Republic**, Criminal Appeal No.63 of 2014, (unreported).

Without having to linger on this matter we can safely say right away that we entirely agree with the learned State Attorney on the point that she raised. Evidence given without oath in a criminal trial is no evidence at all as it is contrary to the mandatory provisions of section 198 (1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (CPA). The section reads:-

198 (1) – Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath

or affirmation in accordance with the provisions of the Oaths and statutory Declaration Act.

In **Mwami Ngura V. Republic** supra, the Court had an occasion to deal with a similar scenario regarding non-compliance with section 198 (1) of the CPA. There it stated:

*"...this means that, as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless, she falls under the exceptions provided in a written law. As demonstrated above one such exception is section 127(2) of the Evidence Act. But once a trial court, upon an inquiry under section 127(2), of the Evidence Act, finds that the witness understands the nature of an oath, the witness must take an oath or affirmation. If this is not done, such evidence must be visited by the consequences of non-compliance with section 198(1) of the CPA. **And, in several cases, this Court has held that if in a criminal case, evidence is given without oath or affirmation, in violation of section 198(1) of the CPA, such testimony amounts***

to no evidence in law (see eg. MWITA SIGORE @OGOREA vs. R. Criminal Appeal No. 54 of 2004 (unreported). The question of such evidence being relegated to "unsworn" evidence does not therefore arise."

(Emphasis provided).

PW1 and PW3 were husband and wife, who happened to be pagans. The Oaths and Statutory Declarations Act, Cap 34 R.E.2002 provides for the Rules governing oaths. Section 4 of the Act and the rules thereunder require that in judicial proceedings courts administer oaths to witnesses professing Christianity and affirmations to those who are not Christians. Paragraph 4 of the First Schedule to the Oaths and Affirmation Rules made under section 8 of the Oaths and Statutory Declarations Act, provides for the form of affirmation by a pagan. It states:

"4. Affirmation by pagans, persons objecting to making an oath, or persons professing any faith other than the Christian, Moslem or Hindu faith:

'I solemnly affirm that what I shall state shall be the truth, the whole truth and nothing but the truth'.

As correctly submitted by Ms. Mkwakya, the evidence of PW1 and PW3 should be discounted from the record for failure to comply with section 198 (1) of the Criminal Procedure Act. Once that evidence is discounted, the prosecution case remains with no legs to stand on. That said and done the appeal by Amos has to be allowed as we hereby allow it.

The conviction by the trial court which was upheld by the first appellate court is quashed. The sentence of thirty years imprisonment imposed is set aside. We order that the appellant be released from custody forthwith unless he is held therein for some lawful cause.

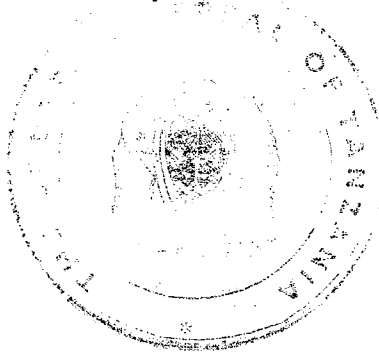
DATED at DODOMA this 24th day of April, 2016.

E.A. KILEO
JUSTICE OF APPEAL

K.K ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL