IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 287 OF 2015

JOSEPH RAPHAEL MARUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Munuo, J.)

Dated the 17th day of September, 1999
In
Criminal Appeal No. 34 of 1999

.....

JUDGMENT OF THE COURT

19th & 21st July, 2016.

RUTAKANGWA, J. A.:

The appellant was charged with and found guilty of the offence of armed robbery by the District Court of Moshi District ("the trial court"). Together with one Thadei Joseph, he was sentenced to serve a term of imprisonment of thirty (30) years. He unsuccessfully appealed against the "conviction" and sentence to the High Court sitting at Moshi. We have deliberately put the word conviction in inverted commas for reasons which will become obvious subsequently. Aggrieved by the High

Court's ("first appellate court") decision, he has preferred this appeal ("the appeal").

The appellant's memorandum of appeal to this Court cites four distinct grounds of appeal. Apart from challenging the merits of the prosecution case, he is also challenging the legality of his trial. Ground three stands out clearly on the latter complaint thus:-

> *"3. The learned trial magistrate and the learned first appellate judge erred in law and fact by not considering that when the charge was substituted, PW1 and PW2 had already given evidence, and the witness evidence focused on the previous charge, so there was a need of recalling the witness (sic) so as their evidence could be applied on the amended charge."*

Though inelegantly framed, the message is clear.

For one to appreciate the gravity of this complaint, we have found it apposite to give the following background.

Going by the evidence on record, the undisputed armed robbery was committed on the night of 26th November, 1997 at Khambaita

garage within the municipality of Moshi, and a variety of properties belonging one J.S. Khambaita were stolen therefrom.

On 1st December, 1997, three suspects, not including the appellant, were formally arraigned before the trial court in connection with the said robbery. These pleaded not guilty and the case was adjourned for mention on 15/12/1997. However, on 3/12/1997, one Inspector Semu, as public prosecutor, appeared before one Mr. K.T.J. Rusema, P.R.M. and prayed for a removal order to issue for the three accused persons to appear in court on the following day. The assigned reason for the change of schedule was that there was a "*vital witness who*" was "*going on safari*" and the "*exhibits*" were "*supposed to be disposed of.*" Removal orders were issued accordingly and the three accused persons appeared in the trial court on 4/12/1997.

On 4th December, 1997, the public prosecutor substituted a fresh charge to which the three accused persons pleaded not guilty. Immediately thereafter, the prosecution proffered two witnesses, namely, PW1 WP. 117 D/Sgt. Nyoni and PW2 Renalda Kisima.

PW1 D/Sgt. Nyoni testified to have searched the room of the first accused on 27th November, 1997, following a tip to the effect that the

stolen goods were in her possession. According to this witness, they managed to seize therefrom:-

(i) One Telex Machine,

(ii) One Telex Printer,

(iii) One Computer,

(iv) One Electrical typewriter,

(v) One Radio call,

(vi) One Converter Unit,

(vii) One Fax Machine,

(viii) One Battery charge,

(ix) One Fan, and

(x) One Curtain.

These properties were collectively tendered in evidence as exhibit P3.

On her part, PW3 Renalda identified herself as a Secretary at the Khambaita Company. She further briefly testified that when she reported for duty on 26/11/1997, she found their "*watchmen badly injured*" and:-

> *"all typing machines such as electrical typewriter, telex, fax machine, radio call, computer, fan and fridge missing."*

To this list she added "*battery charge, printers, electric cooker and motor Reg. No. TAS 53 Land Rover 110.*" Although the trial court's record of proceedings shows that the:-

"Witness recognizes the stolen things exhibit P3",

it is silent on how she managed to identify the goods comprising exhibit P3 to be the robbed property of J. S. Khambaita.

After the short testimony of PW2 Renalda, the exhibits were ordered to be handed over to her "*on behalf of Kahambaita Company*". The matter was then adjourned for further hearing on 15th December, 1997.

As no witnesses turned up on 15th December, 1997, the matter was adjourned. On 23rd December, 1997, the Prosecution filed a fresh charge, citing nine (9) accused persons, including the appellant. The appellant was the 4th accused.

The substituted charge was read over and explained to all the accused persons, who denied committing the offence. Although the hearing was scheduled for 6th January, 1998, it never took off until 3rd June, 1998.

Although a new charge had added six more accused persons, who were not present when PW1 and PW2 testified, when the trial resumed on 3rd June, 1998, the two witnesses were not re-called to testify afresh. Instead the prosecution produced its third witness, one No. C2265 D/Sgt. Richard (PW3). Six (6) more witnesses testified, before the prosecution closed its case on 27th November, 1998. Curiously enough, none of these seven (7) witnesses were shown exhibit P3 so as to identify them as belonging to J. S. Khambaita, thereby connecting them with the robbery.

All accused persons gave sworn evidence unequivocally denying any complicity in the armed robbery. However, the learned trial Principal District Magistrate, relying on the doctrine of recent possession, found the appellant and one Thadei Joseph (3rd accused) guilty. Without entering a conviction as is mandatorily required by section 235 (1) read together with section 312 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 ("the CPA"), he proceeded to sentence them accordingly.

When the appeal was called on for hearing, the appellant appeared in person fending for himself. He had nothing of substance to tell us in elaboration of his grounds of complaint apart from continuing to protest his innocence.

For the respondent Republic, Ms. Sabina Silayo, learned Senior State Attorney, appeared, being assisted by Ms. Mary Lucas, learned State Attorney. The learned State Attorneys supported the appeal on the basis of ground of appeal number (3) because the appellant was "convicted" on the basis of the prosecution evidence given in his absence. The appellant, they contended, was not given a fair trial. We agree.

Our firm position in agreeing with both parties in the appeal is predicated on the concept of due process. Due process is not only well encapsulated in section 196 of the CPA, but more importantly in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1997 ("the Constitution") which safeguards the right to a full hearing ("fair trial").

Section 196 of the CPA provides as follows:-

> *"Except ass otherwise expressly provided,* ***all evidence taken in any trial under this Act, shall be taken in the presence of the accused,*** *save where has personal attendance has been dispended with."*
>
> *[Emphasis provided].*

There is no gainsaying here that the trial of the appellant and his co-accused was conducted under the provisions of the CPA. It is equally undisputed that when both PW1 WP 117 D/Sgt. Nyoni and PW2 Renalda, were testifying, the appellant was not an accused person. His personal attendance, therefore, could not have been legally dispensed with.

As we have already sufficiently demonstrated, the finding of guilty by the trial court which had the undisguised blessings of the first appellate court was premised almost wholly on the evidence of the two witnesses who testified prior to the arraignment of the appellant. It goes without saying, therefore, that even if the trial court had entered a conviction following a finding of guilty, that conviction would have been unsustainable, as part of the evidence had been taken in his absence, in contravention of the clear and mandatory provisions of the CPA. The appellant, therefore, was not given a full hearing or a fair trial as correctly contended by Ms. Silayo.

In view of the conceded fact that there was a failure of justice in the trial of the appellant, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 to nullify the proceedings in the trial court and first appellate court, and proceed to

quash and set them aside. The judgments of the two courts below are also quashed and set aside as well as the prison sentence.

As conceded by Ms. Silayo, the paucity of the evidence on record as well as the fact that the appellant has almost served two thirds of his illegal sentence, do not justify an order for a re-trial. The appellant, therefore, must be released forthwith from prison unless he is otherwise lawfully held.

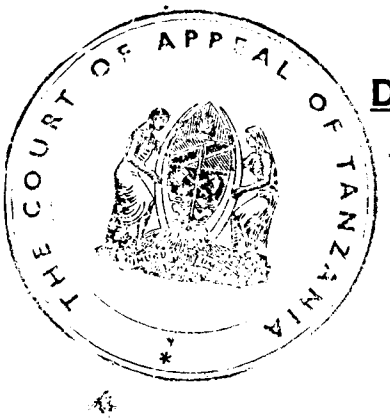
DATED at **ARUSHA** this 20th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL