IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 367 OF 2015

1. ELIKO SIKUJUA
2. JANUARY JUMA .....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

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

(Sambo, J.)

dated the 22nd day of May, 2015
in
DC. Criminal Appeal No. 31 of 2014

JUDGMENT OF THE COURT

4th & 11th October, 2017

MUSSA, J.A.:

In the District Court of Sumbawanga, the appellants along with three others stood charged for armed robbery, contrary to section 287A of the Penal Code, Chapter 16 of the Revised Laws. In the charge sheet, the appellants were arraigned as, respectively, the first and fourth accused, whereas their co-accused persons were George Lwanji, Hussein

Seli and Frank Peter who stood as, again respectively, the second, third and fifth accused persons.

For a reason that will shortly become apparent, we will reproduce in full the particulars of the offence which were laid on the charge sheet:

> ***"PARTICULARS OF OFFENCE:***
>
> *JANUARY s/o JUMA, GEORGE s/o LWANJI, HUSSEIN s/o SELI, ELIKO s/o SIKUJUA, FRANK s/o PETER are charged on the 6th day of October, 2013 at Mkusi village, within Sumbawanga District and Rukwa Region, did steal a motorcycle make WUYANG, one mobile phone make ITEL valued Tsh. 35,000/= and cash Tsh. 45,000/= properties of AGREY MWESIMPYA and* ***immediately before and after such stealing, did use a machete in order to obtain and retain the said property.***"
>
> *[Emphasis Supplied.]*

When the charge was read over and explained to the accused persons, they all refuted the prosecution accusation, save for the second appellant who pleaded: -

"It is true."

Soon after the second appellant's plea, without procuring the statement of facts from the prosecution, the trial court promptly issued the following order: -

> ***"Court:*** *The 1st accused person one January s/o Juma is found guilty and convicted as charged for his own plea of guilty."*

Upon conviction, the second appellant was sentenced to a term of thirty years imprisonment with corporal punishment of twelve strokes of the cane. He was aggrieved and, consequently filed Criminal Appeal No. 32 of 2014 to the High Court to which we shall later have occasion to revert.

As for the remaining accused persons including the first appellant, the trial proceeded and, in an effort to prove its accusation, the prosecution featured four witnesses, a motor cycle, a motor vehicle licence and three cautioned statements (exhibits P2, P3 and P4). It is, however, noteworthy that none of the prosecution witnesses were sworn or, as the case may have been, affirmed ahead of the reception of their

evidence. What is more, two of the cautioned statements, that is, exhibits P2 and P3 were adduced into evidence against an unattended protest from the accused persons as to their admissibility. At a later stage of our judgment we hope to find space to interject a remark or two with respect to these disquieting factors of the trial proceedings. For the moment, an observation will suffice that at the close of the case for the prosecution, a *prima facie* case was found to have been established as against all accused persons who opted to defend themselves on oath.

Incidentally, as distinguished from the treatment accorded on the prosecution witnesses, all the accused persons including the first appellant were sworn ahead of the reception of their respective testimonies. As it were, they all disassociated themselves from the prosecution accusation but, at the height of the trial, it were only the second, third and fourth accused persons who were exonerated from involvement and thereby acquitted. Contrariwise, the first appellant was found guilty, convicted and sentenced to a term of thirty years imprisonment.

He was aggrieved and preferred Criminal Appeal No. 31 of 2014 in the High Court which was consolidated with Criminal Appeal No. 32 which was filed by the second appellant. Upon deliberations, the first appellate court (Sambo, J.), found the appeal by the second appellant to be wholly misconceived in the light of the provisions of section 360(1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (CPA). To be sure, that provision estops a person, who was convicted on his own plea, to prefer an appeal, except as to the extent or legality of the sentence. Thus, the second appellant's appeal was, thereby, dismissed in its entirely. As for the first appellant, the Judge found the prosecution "evidence", if at all it were, to have been overwhelmingly sufficient and, thus, his appeal was, similarly, dismissed in its entirety.

The appellants are, presently, aggrieved upon separate memoranda which raise a variety of points of grievance and, when the appeal was placed before us for hearing, they were fending for themselves, unrepresented, whereas the respondent Republic had the services of Ms. Catherine Paul, learned State Attorney. We need not, however, venture upon a consideration of each and every points raised in the respective memoranda of appeal. If we may express at once, it

seems to us that the presiding trial Magistrate (Mwanjokolo, RM) was in a haste to conclude the proceedings and, as a result, he or she strayed into a litany of mistakes.

The sequence of events involving the learned trial magistrate's mishandling, started with the entering of the conviction against the second appellant. As it turned out, subsequent to the second appellant's plea of guilty, the prosecution did not narrate the facts from which the trial court might have, appropriately, based the conviction. The procedure to be followed before and after a plea of guilty is entered was meticulously laid down in **Adan Vs. The Republic** [1973] EA, 445: -

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential elements, the magistrate should record what the accused has said as nearly as possible in his own*

words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement or additional facts which if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts and the accused reply be recorded."

The foregoing extracted procedure was echoed by the Court in the unreported Criminal Appeal No. 69 of 2007 – **Hemedy Mkondya v. The Republic** which was referred to us by Ms. Paul. To say the least, the second appellant's plea of guilty was obviously equivocal on account of

the omission by the prosecution to narrate the facts constituting the charged offence. As we pondered on the way forward, it came to our attention that such was not the only shortcoming which undermined the case for the prosecution.

In this regard, we purposely extracted the particulars of the offence as laid on the charge sheet to disclose the apparently material shortcoming which we, *suo motu,* put to the parties on either side for their comments. As is clearly discernible from the charge sheet, the particulars of the offence merely insinuated that the persons accused employed a machete to obtain and retain the stolen properties without specifically particularizing as to whom the violence or the threat thereof was, if at all, directed to.

In her comments, Ms. Paul forthrightly submitted that since the particulars of the offence alleged that a machete was employed to obtain and retain the stolen properties, it was just as vital for the particulars to additionally allege the name of the victim against whom the violence of threat of violence was directed to. The omission, she said, is fundamental and, for that matter, it cannot be rescued by section 388(1)

of the CPA. In sum, as a consequence of the shortcoming, the learned State Attorney invited us to exercise our revisional jurisdiction to quash and vacate conviction and sentence meted against both appellants.

Having heard the forceful submissions of the learned State Attorney which effectively sought to exonerate them from the conviction, both appellants felt safer to decline any comment and, indeed, they did not wish to make any rejoinder.

On our part and, consistent with our concern, we entirely subscribe to the submissions of the learned State Attorney. Upon numerous occasions, this Court has held that on a charge of robbery with violence as well as armed robbery, the particulars of the offence must, as of necessity, allege the name of the victim to whom the violence or threat thereof was directed against (see, for instance, the unreported decisions in Criminal Appeal No. 60 of 2013 - **Tayai Miseyeki Vs The Republic**; Criminal Appeal No. 287 of 2014 - **Matatizo Bosco Vs The Republic**; Criminal Appeal No. 250 of 2011 - **Zefania Siame Vs The Republic**; and Criminal Appeal No. 341 of 2015 - **Robert Mneney Vs The Republic**).

As correctly formulated by the learned State Attorney, the foregoing deficiency would alone suffice to dispose of the appeal in favour of both appellants. But, for the sake of completion of the record and future guidance, we wish to additionally comment on the other deficiencies which, just as well, fatally undermined the proprieties of the trial proceedings.

As we have already intimated, the testimonies of all the prosecution witnesses were recorded without oath or affirmation. Section 198(1) of the CPA clearly spells out that 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 Oaths and Statutory Declarations Act, Chapter 34 of the Revised Laws. This Court has, time without number, taken the stance that where the testimony of a witness is taken without oath or affirmation, the resultant account from the witness is not worth the name: "Evidence", and that the same can only be discarded (see, for instance, the unreported cases in Criminal Appeal No. 10 of 2008 - **Godi Kasenegela Vs The Republic**; Criminal Appeal No. 54 of 2008 – **Minja Sigore Vs The Republic**; Criminal Appeal No. 300 of 2008 – **Membi Steyani Vs The Republic**; Criminal

Appeal No. 284 of 2008 – **Athumani Bakari Vs The Republic**; and Criminal Appeal No. 264 of 2010 – **Anthony Mwita** and **Two others Vs The Republic**).

And, finally, as we have, again, hinted upon, two of the tendered cautioned statements, that is, exhibits P2 and P3 were adduced into evidence against an unattended protest from their alleged makers (see page 19 of the record). As to what was the appropriate approach expected of the trial court, we need only pay homage to the unreported Criminal Appeal No. 199 of 2010 - **Makumbi Ramadhani Makumbi** and **Four others Vs The Republic**, where the Court observed: -

> *"...we now hold without any demur that subordinate courts have a duty to hold a trial within trial whenever an accused confessional statement is either repudiated or retracted before it is admitted in evidence."*

To conclude from the foregoing, on account of the several deficiencies which we have endevoured to point out, the trial proceedings were, to say the least, a complete mess and a travesty of justice. Accordingly in the exercise of our revisional jurisdiction, we nullify the

entire proceedings and verdicts of the two courts below with an order that both appellants should be released from prison custody forthwith unless if they are held there for some other lawful cause.

DATED at **MBEYA** this 10th day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL