IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 562 OF 2016

1. **MABULA JULIUS**
2. **SAGUDA JOHN** ..... **APPELLANTS**

VERSUS

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

(Appeal from the Judgment of the High Court of Tanzania, at Shinyanga)

(Makani, J.)

dated the 11th day of November, 2016
in
DC. Consolidated Criminal Appeal Nos. 10 & 117 of 2015

.....

JUDGMENT OF THE COURT

14th & 20th August, 2020

MWAMBEGELE, J.A.:

The appellants, Mabula Julius and Saguda John, were convicted by the District Court of Kahama in Shinyanga Region of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged in the particulars of the offence that on 24.08.2018 at about 21:30 hours at Shunu Street, Kahama town, they stole cash Tshs. 500,000/=, three mobile phones make Nokia

valued at Tshs. 150,000/=, mobile phone vouchers valued at Tshs. 500,000/= and various telephone vouchers valued at Tshs. 1,150,000/= the property of Mbaruku Rashid and that immediately before and after such stealing, they used a homemade gun in order to get and retain the said properties.

The appellants pleaded not guilty to the charge after which a trial ensued at the end of which they were convicted and each sentenced to a statutory minimum sentence of thirty years in prison. Their appeals to the High Court were unsuccessful, for Makani, J. dismissed them in their entirety on 11.11.2016. Undeterred, they have come to this Court on second appeal.

Briefly stated, the material background facts to this appeal, as they can be gleaned from the record are as follows: on 24.08.2008, at around 21:30 hours at Shunu street in Kahama town, four people, armed with a homemade gun and a *panga* (bush knife) and wielding a torch, stormed into a shop of Mbaruku Rashid (PW1), fired a gun in the air and ordered the people around to lie down. In that process, the invaders smashed the kerosene lamp that was illuminating the shop and made away with cash

and the items mentioned above. In the course of the robbery the invaders injured one Dickson Daudi (PW4) who was a customer. The appellants were allegedly identified by PW1, PW4, Zuwena Kotekwema (PW2) and Bahati Daudi (PW3) who were also at the scene of crime. The appellants were arrested, arraigned and after a full trial, they were convicted and sentenced in the manner referred to hereinabove.

The appeal was argued before us on 14.08.2020 through the virtual court service of the Judiciary of Tanzania. The appellants appeared remotely at Shinyanga District Prison and Mr. Nassoro Katuga and Ms. Salome Mbughuni, learned Senior State Attorneys and Ms. Immaculata Mapunda, learned State Attorney, joined forces to represent the respondent Republic.

When we called on the appellants to argue their appeal, they simply adopted their respective memorandum of appeal and preferred to hear the response of the respondent Republic. They, however, reserved their right of rejoinder if need to do so would arise.

In response, Ms. Mapunda had a preliminary matter to address the Court which she thought the Court needed to resolve before hearing the

appeal in earnest. We granted the prayer to address us on the point. The learned State Attorney submitted that having perused the record of appeal, they realised that the provisions of section 231 (b) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA) were flouted. She contended that the appellants were not told of their right to call witnesses as dictated by the provisions of section 231 (1) (b) of the CPA. That, she submitted was a fatal infraction as the appellant might have wished to call witnesses to support their case. That is even more so because in defence, Ms Mapunda charged, for instance, the second appellant mentioned one WP Upendo who allegedly subpoenaed him to go to the Police Station with a view to mediating a dispute between him and one Shukuru where he was arrested in connection with the present charge.

The learned State Attorney argued further that had they been told of their right to call witnesses, they would perhaps have called the said WP Upendo or any other witness to testify in defence. That, she submitted, was a fatal ailment which did not accord the appellants a fair trial. The learned State Attorney thus invited us to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (the AJA) to revise the proceedings of the trial court.

With regard to the way forward, Ms. Mapunda prayed for a retrial from the moment the appellant were denied of that fair trial. That is, she prayed for remission of the matter to the trial court so that the appellants are fully addressed in terms section 231 (1) (b) of the CPA. However upon being probed by the Court as to the propriety of that prayer while the appellants have been incarcerated since 2008 when they supposedly committed the offence, the learned State Attorney, chose to leave the matter in the wisdom of the Court to decide on the way forward.

Given that this was but a point of law, the appellants, who are laypersons, had very little to contribute. However, in contrast, they both had a strenuous objection to the prayer by the respondent Republic for remission of the matter to the trial court so that they could be addressed properly in terms of section 231 (1) (b) of the CPA. They lamented that the mistake is not theirs and, in addition, they had been under custody for about twelve years then and, therefore, remission of the matter to the trial court would prejudice them.

We have considered the concern of the respondent Republic on the effect of the non-adherence to the provisions of section 231 (1) (b) of the

CPA. We think that it will be prudent to reproduce section 231 (1) here. It reads:

> *"(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 charge 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 witness in his defence,***
>
> *and shall then ask the accused person or his advocate if it is intended to 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 supplied].

The court has had an opportunity to discuss the effect of non-compliance with these provisions in a number of its decisions. There is a considerable body of authority as to what should be the way forward in case the provisions of section 231 (1) of the CPA are defied. Such cases are **Frenk Benson Msongole v. Republic**, Criminal appeal No, 72A of 2016 – [2019] TZCA 317 at www.tnzlii.org, **Maneno Mussa v. Republic**, Criminal Appeal No. 543 of 2016 – [2018] TZCA at www.tanzlii.org, **Cleopa Mchiwa Sospeter v. Republic**, Criminal Appeal No. 51 of 2019 - [2020] TZCA 287 at www.tanzlii.org and **Maduhu Sayi @ Nigho v. Republic**, Criminal Appeal No. 560 of 2016 – [2020] TZCA 1723 at www.tanzlii.org.

In **Maduhu Sayi @ Nigho** (supra) whose decision we delivered in the ongoing sessions of the Court at Shinyanga, we reproduced an excerpt from **Cleopa Mchiwa Sospeter** (supra) which we think is worth recitation here:

> *"... this Court has oftentimes held that failure to comply with the mandatory provisions of s. 231 (1) of the CPA vitiates subsequent proceedings."*

The Court, in **Cleopa Mchiwa Sospeter** (supra) at p. 10 of the typed judgment, relied on **Maneno Mussa** (supra) to hold:

> *"... failure by the trial court to comply with the provisions of section 231 (1) of the CPA which safeguards accused persons' right to fair trial; is a fatal omission."*

In the case at hand, it is no gainsaying that the trial court did not comply with the provisions of section 231 (1) of the CPA. The appellants, at p. 14 of the record, are each recorded as saying:

> *"I will give evidence on oath"*

The record is silent in the manner how the appellants would exercise their right under section 231 (1) (b) of the CPA; the right to call witnesses. As we observed in **Maduhu Sayi @ Nigho** (supra), at p. 11 of the typed judgment:

> *"... the record does not show the manner in which the appellant elected to give evidence and whether or not he intended to call witnesses.* ***The trial magistrate was enjoined to record the appellant's answer on how they intended to exercise such rights*** *after having been informed*

of the same and after the substance of the charge has been explained to him."

[Emphasis supplied].

Flowing from the above, failure by the trial court to record whether the appellants would call witnesses in terms of section 231 (1) (b) prejudiced the appellants. The infraction, on the authority of the decisions cited above, is fatal. It vitiated all subsequent proceedings.

In the premises, we find difficulty in declining the invitation by Ms. Mapunda to invoke our revisional powers under section 4 (2) of the AJA to nullify, as we hereby do, the proceedings after the closure of the prosecution's case and the judgment thereon. The proceedings and judgment of the first appellate court are also quashed. The sentence meted out to each appellant by the trial court and upheld by the first appellate court is set aside.

With profound respect to Ms. Mapunda, we decline the invitation to give a retrial order. We have considered the fact that failure to comply with the provisions of section 231 (1) (b) of the CPA is tantamount to denying an accused person a fair trial. We have also considered that the appellants have served approximately eleven years now since they were

convicted and sentenced to serve a prison term of thirty years on 14.08.2009. With such considerations in mind, we do not think a retrial order will meet the justice of the case. All considered, we order that the appellants – Mabula Julius and Saguda John – be released from prison custody forthwith unless held there for some other lawful cause.

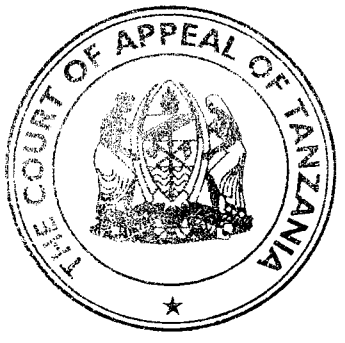
DATED at **SHINYANGA** this 20th day of August, 2020.

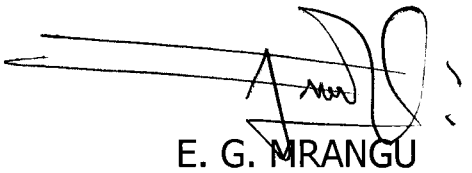
A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 20th day of August 2020, in the Presence of the Appellant in person via video link and Ms. Wampumblya Shani, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL