IN THE HIGH COURT OF TANZANIA

AT MBEYA.

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 168 OF 1978

(ORIGINAL CRIMINAL CASE NO. 383 OF 1978
OF THE DISTRICT COURT OF IRINGA DISTRICT
AT IRINGA)

BEFORE: H.I. MUUBIRI ESQ., DISTRICT MAGISTRATE

ROMADI MKINI .... APPELLANT

versus

THE REPUBLIC . ..... RESPONDENT

J U D G M E N T

SAMATTA, J., - About two and half centuries ago, that is to say, before anyone who is learned in law in this country was born, FORTESCUE, J., in a celebrated passage, emphasized the importance of giving a man charged with anything the opportunity of making his defence before his fate is determined. He said:

> " The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

(Rv University of Cambridge, (1723), 1 Stra.557, cited with approval by MEGARRY, J., in John v Rees and Others, [1969] 2 All E.R. 274).

Today I am required to decide whether a district court (in Tanzania) can, in law, convict an accused person of an offence without giving him the opportunity of putting forward his defence, if any.

The appellant was convicted by the district court of Iringa district of cattle theft, contrary to s. 265 and 268 of the Penal Code, and was sentenced, in accordance with s. 5(c) of the Minimum Sentences Act, 1972, to a term of five years'

say that it was one of the most irregular steps a court of justice can take. Even if the evidence laid in the scale against an accused person appears unanswerable, the court is

imprisonment. He thinks that that decision is not a triumph for justice. The appellant's co-accused, who gave evidence on his own behalf, was acquitted of the charge. After he had been addressed in terms of s. 206 of the Criminal Procedure Code, the appellant said:

" I elect to give a sworn statement."

It was an election which he was not afforded the opportunity of exercising. The learned trial magistrate proceeded to write his judgment soon after the appellant's co-accused, who was the first accused in the case, closed his defence. He delivered the judgment on the same day.

No one will think of disputing the elementary proposition that every person charged before a court of law in this country has the right to defend himself, including giving evidence on his own behalf. As far as criminal proceedings conducted in subordinate courts are concerned, that right is specifically mentioned in s. 206(1) of the Criminal Procedure Code, which I proceed to read:

> " At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 181 to 189 (inclusive) of this code, he is liable to be convicted, the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on oath from the witness box and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence if any." (the emphasis is supplied).

It is more likely than not that the omission of hearing the appellant in his defence was just an oversight. If, however, it was a deliberate step, I cannot resist the temptation to say that it was one of the most irregular steps a court of justice can take. Even if the evidence laid in the scale against an accused person appears unanswerable, the court is still under the legal duty to hear the other side, if that

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side is prepared to talk. In this connection it is not inappropriate, I think, to recall the memorable words of MEGARRY, J, in John v Rees and Others [1969] 2 All E.R. 274, at p. 309:

> " As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained ... Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

The right to defend himself after a case to answer has been made out which the accused person enjoys under our law is not, as some people would be inclined to think, a procedural right. It is a fundamental, substantive right, the denial of which is a fatal irregularity. Nothing can cure that irregularity. I devoutly hope that the day will never come when that right is denied to any person who enjoys the protection of our laws. I would allow the appeal.

Before I part with the case I desire to say one word or two on a procedural point. One of the witnesses in this case was a twelve - year-old child. Even before last year, when the legislature defined the term " a child of tender years", it was well settled by caselaw, I think, that the term meant a child of any age or apparent age of under fourteen years: see Kibangeny Arap Kolil v R, [1959] E.A.92; and Sakila v Republic, [1967] E.A. 403, a case in which (as counsel) I had the privilege of representing the Republic. In the case now at the Bar the learned trial magistrate received the evidence of the child without first conducting a voire dire examination. This was an error, as a study of Sakila's case will readily show. Before the court permits a child of tender years to become a witness in a criminal case it must conduct a voire dire examination. The court has to make a decision, first, whether, in its opinion, the child understands the nature of an oath, and, then, if that question is answered in the negative, whether he is possessed of sufficient intelligence to warrant the reception of his evidence, and whether he understands the duty of speaking the truth.

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If the first question is decided in the affirmative, then the child's evidence should be received under oath or, as the case may be, under an affirmation. If, on the other hand, that question is decided in the negative, and the other two questions are decided in the affirmative, then the child's evidence should be received without any oath or affirmation being administered. As required by s. 127(2) of the Evidence Act, 1967, as amended by s.11 of the Evidence (Amendment) Act, 1980, the opinions of the court on these matters should be reflected on the record of the case.

For the reasons I have endeavoured to state, I hope not at an inordinate length, I allow the appeal, quash the conviction and set aside the sentence imposed thereon. The order for compensation is also set aside. Unless his personal liberty is otherwise lawfully assailed, the appellant be set at liberty forthwith.

B. A. SAMATTA

JUDGE.

Delivered at Mbeya this 16th day of April, 1981, in the presence of Mr Saffari, counsel for the republic.

B. A. SAMATTA

JUDGE.