IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.107 OF 2004

(Original Criminal Case No.15 of 2002 RM's Court of D'Salaam at Kisutu)

DIRECTOR OF PUBLIC PROSECUTIONS

VERSUS

JUSTINE KAKURU KASUSURA @ JOHN LAIZER

JUDGMENT

MANENTO, JK:

This is an appeal by the Republic appealing against the decision of the Principal Resident Magistrate (Mr. Mtotela) at Kisutu Resident Magistrates Court, whereby the respondent, together with others, were charged with, among others, an offence of armed robbery. The accused persons were released on bail. The respondent was not released on bail for reasons I shall explain later on. The respondent together with other accused persons were charged before the subordinate court with three counts, namely conspiracy to commit an offence c/s 384 of the Penal Code, Armed robbery c/s 285 and 286 of the Penal Code and thirdly, in the alternative to the 2nd count, for all the accused persons, stealing c/s 265 of the Penal Code.

When the other accused persons were released on bail, the respondent was not. The reason for non grant of bail was for respondents own safety or protection. However, on 18th August 2004 the respondent applied to the subordinate count for grant of bail. The prosecution objected the grant on the ground that by operation of Act No.4/2004 which amended the Penal Code by adding section 287A (but mistakenly named 278A) which added a section defining the offence of armed robbery, then the respondent was not entitled to the grant of bail by law. The subordinate court ruled that the said Act No.4/2004 could not operate retrospectively and the fact that other accused persons were already out on bail, then the respondent's application was granted. He was released on bail. The Republic was aggrieved by that ruling, hence this appeal.

In their memorandum of appeal, the Republic filed three grounds namely that:-

1. The Principal Resident Magistrate erred in law in granting bail contrary to clear provision of the law.
2. The Principal Resident Magistrate misjudged the operation and effect of Act No. 4 of 2004.

3. The Principal Resident magistrate misdirected himself when he granted bail basing on extraneous considerations.

In his submissions before this court, Mr. Mulokozi, learned state attorney submitted that Act No.12/1988 which amended section 148 (5) of the Criminal Procedure Act, 1985 barred the courts from granting bail to accused persons charged of treason, murder and armed robbery. Therefore, he submitted, the subordinate court erred in not refusing to grant the respondent bail, instead, it released him on bail. In his second ground of appeal, the learned state attorney submitted that the subordinate court erred in contravening Act No.4/2004 by misunderstanding it. He understood it to mean that it barred the grant of bail whereas the provision of the law specifically created the offence called armed robbery. That section, he submitted removed the misunderstanding by some courts that, there was no any offence known as armed robbery in our legislations. He went on to submit that even before the enactment of Act No.4/2004 which amended the Penal Code, Cap.16 by adding section 287A. The new section defined the term armed robbery. He further rightly submitted that even before Act No.4/2004, the Court of Appeal had recognized

the existence of the offence termed armed robbery. He cited the decision in the case of Michael Joseph VR. (1995) TLR 278.

Pegging his submissions more in Act No.4/2004, the learned state attorney submitted that the application for bail by the respondent was on 18/8/2004, four months after the coming into operation of Act No.4/2004. The Act came into operation on 14/4/2004. The learned state attorney concluded his submissions – that taking into consideration the amendment of the Criminal Procedure Act, 1985, specifically section 14.8 which deals with the grant and non grant of bail to accused persons, and the clear wording of the amendment of the Penal Code by Act No.4/2004, then this court should allow the appeal, canceling the release on bail of the respondent.

Mr. Magafu, learned advocate for the respondent did not stomach those submissions. He strongly and forcefully submitted that the appeal by the Republic is aimed at two things. To delay the proceedings and secondly to torcher the respondent. The learned counsel rightly submitted that the respondent is charged with six others who were all granted bail when they requested for it. The respondent was refused bail at that time not because the law did not allow for the grant of bail, but it was because of his safety at that time.

The Republic appealed against that grant of bail in Criminal Appeal No.129/2003. The appeal was dismissed on the ground that there was no offence in the Penal Code known as armed robbery. That appeal was heard and determined by Luanda, J. The Republic, being further aggrieved, filed a notice of appeal to the Court of Appeal. That notice was later on withdrawn.

After a lapse of time, when the respondent's life was not threatened, then he applied for the grant of bail to the respondent. The Republic thereafter raised the application of Act No.4/2004, without amending the charge. It is true that to date, the respondent stands charged of armed robbery c/s 285 and 286 of the Penal Code, which hon. Luanda, J. ruled that They never created the offence termed armed robbery. This Act No.4/2004 which added section 287A of the Penal Code, is not applicable in this case. The Act has no retrospective effect. That is because the offence was alleged to have been committed on 2/8/2001 over two years before the coming into operation of Act No.4/2004.

Arguing outside the memorandum of appeal, the learned advocate submitted that as per Article 13 of the Constitution of the United Republic of Tanzania, there should be equal treatment in

criminal law to all the people before the court. That whereas six other accused persons are out on bail, the respondent is denied the grant of bail, though charged in the same case and under the same law with the six other accused persons.

Having concluded that there is no law in the Penal Code known as armed robbery, then there is no mandatory provision to preclude the court from exercising its discretion in granting bail to the respondent. He cited several cases, to show that the grant or non grant of bail is a right of the accused person and it is only refused when the courts are excising their discretions. Among the cited cases are those of Tito Lyimo V. Republic 91979) LRT 55; DPP v. Daudi Pete (1993) TLR 22 and Saidi Shabel and 3 others V. Republic (1976) LRT 4 where it was said that in exercising its discretion, the court should strike a balance between the interest of an individual and the society in which an accused lives. There are no threats on the part of the accused nor is there any interference in the prosecution case by the respondent. On the strength of that decided case. the respondent was and is to be granted bail. The learned counsel ended his submissions. But is that all a bout this case?

It is true that the respondent's personal security is not threatened, nor is he a threat to the societies interests, by either interfering with the prosecution investigation or witnesses. Besides that all, the question remains whether bail is allowed if a person is charged of armed robbery. Hon. Luanda J. in an appeal by the Republic. Challenging the grant of bail by the other six accused persons charged together with the respondent, decided in Criminal appeal 21/2002 that there was no offence in the Penal Code known as armed robbery, so it followed that the restrictions imposed by the Criminal Procedure Act, 1985 in relation to armed robbery is of no legal effect. He then went on to grant bail to the other accused persons who are charged with the respondent. That is where Mr. Magafu, learned counsel submitted of equality treatment in criminal justice.

The relevant Acts cited in support of the non grant of bail or the grant of it were Acts No.12/1988, Act No.6/1994 which amended section 148(5) (b) of the Criminal Procedure Act, and the Minimum Sentence Act, 1972. Act No.12/98 amending the section 148(1)(5)(a) of the Criminal Procedure Act, 1985 which prohibited both the police and the court before whom a person is brought or appears to admit

that person to bail if that person is charged of murder, treason, armed robbery or defilement. Act No.6/94 was and is mainly in regard to the sentence to be imposed on a person charged of armed robbery, dangerous or offensive weapon or instrument or by more than one person.

Luanda J. whose judgment was relied upon by the subordinate court in granting the respondent bail, and which was also relied upon by the learned defence counsel, conceded that armed robbery is a specie of robbery with violence, yet it never created an offence under which bail could not be granted mandatorily.

Before I proceed with the case laws which had been the centre of the arguments by the learned state attorney and the defence counsel, I would like to go back in the year 1991. Under Act No.27/1991 the Criminal Procedure Act 1985 was first amended in section 148(5)(a) where bail for offences of persons charged with murder, treason, armed robbery contrary to sections 285 and 286 of the Penal Code was barred. Here section 285 and 286 of the Penal Code were specifically mentioned. These sections are hereby reproduced for ease of reference:

S.285.Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses **or threatens to use actual violence to** any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed "robbery" (underline supplied).

To my understanding of the phrase 'uses' or threatens to use actual violence are to be read together with the words in Act NO.27/1991 "aimed" in which some weapons of any kind are used in the commission of the offence. That understanding of mine has been the understanding of the Court of Appeal in its various decisions. When dealing with the question of sentence for an accused charged of armed robbery c/s 285 and 286 of the Penal Code, the Court of Appeal in the case of Raymond Francis V. Republic (1994) TLR 100, where the issue was whether the provisions of Act No.10/1989 which provided for 30 years imprisonment as minimum sentence for an accused persons charged under section 285 and 286 of the Penal Code was proper. The Court of Appeal had this to say:

" With respect, this court has held in a number of cases that after the enactment of Act No.10 of 1989 the offence of armed

robbery is distinct though cognate to robbery with violence. It should be clearly spelled out in the charge."

By those words of the Court of Appeal, the offence of armed robbery, though not specifically named in the Penal Code, came into existence and it found its roots in section 285 of the Penal Code, where and when actual violence or threat is used. However, the Court of Appeal stated that for the offence of armed robbery to subsist, it must be clearly stated in the particulars of the offence. If it is so clearly particularized, to give the accused person the chance to know both the relevant law and the particulars of the charge, then an accused person could be properly charge and convicted of the offence termed armed robbery.

Likewise in another criminal appeal Michael Joseph v. Republic (1995) TLR 276 the Court of Appeal ruled that under Act No.10/89 read together with section 286 of the Penal Code, once it is proved that a dangerous or offensive weapon or instrument was used in the commission of the robbery, then such act would be termed armed robbery. The Court went on to hold that under the circumstances of that case, a knife was a dangerous or offensive weapon or instrument. The accused was then properly sentenced to thirty years imprisonment for an offence of armed robbery c/s 285 and 286 of the Penal Code.

Basing on those Court of Appeal judgments, the question is whether the particulars of the offence in this case spells out clearly the use of dangerous weapons or instruments for the offence to be termed armed robbery. The answer to that is yes. Second count of the charge which the respondent is charged together with others is termed Armed robbery c/s 285 and 286 of the Penal Code. The particulars of the offence shows in the "stealing immediately before such stealing did threaten by pointing a pistol to one Said Musa Hamisi in order to obtain the stolen money". There is no doubt therefore that the offence alleged to have been committed is nothing but armed robbery. For that reason then, I cannot hesitate to say that the Ruling by this court, Luanda J, was made in ignorance of the Court of Appeals decisions which are not only authoritative, but binding upon this court.

On the issue of Act No.4/2004, I agree with the decision of the subordinate court that it has no retrospective effect, so that, if I had ruled otherwise, then it could not have any effect in this appeal as it did not have in the ruling of the trial court. In his further submissions, Mr. Magafu, learned advocate strongly argued that the refusal to grant bail to the respondent would amount to unequality before the law because other accused persons are already out on bail on the same offences. I would just

briefly say that one wrong can not be blessed by another wrong. That was the decision of the court which is not binding on me and this is my decision, which I consider to be the correct interpretation of the law.

Lastly, I would say that the enactment of Act No.4/2004 to add s.287A in the Penal Code, was just to bring into the bright lights of those whose eyes could not see it that the offence of armed robbery was covered in section 285 of the Penal Code. By doing so, then these mischieves would not appear in future.

Finally, and for the reasons already stated, no grant of bail on charges of armed robbery c/s 285 and 286 of the Penal. The bail granted to the respondent is therefore cancelled and he should be in remand custody till the finalization of the proceedings and judgment at the subordinate court. It is so ordered.

A.R. Manento

JAJI KIONGOZI.

11/10/2004

Coram: A.R. Manento, JK

For the appellant: Tango State Attorney

Respondent: Present in person

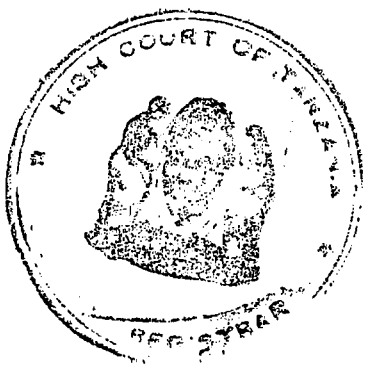
For the Respondent: Absent

Cc: Claudias

Respondent: Mr. Magafu told me that he is coming, but he has not yet turned up, it is 9.35a.m

Order: Judgment shall be read in the presence of the accused, though in the absence of his advocate.

Court: Mr. Magafu, learned counsel came while I was reading the judgment.



A.R. Manento

JAJI KIONGOZI.

11/10/2004