IN THE HIGH COURT OF TANZANIA

AT MOSHI

DC CRIMINAL APPEAL NO. 26 OF 2003

C/F ROMBO DC CR. CASE NO. 463/2001

SELESTIN KAMILI)

GALOUS FAUSTIN STANSLAUS @ WASIWASI) APPELLANTS

SEVERINE FRANCIS @ MASAWE)

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

HON. JUNDU, J.

In the cause of preparation of this Judgment some matters emerged that need to be put in proper perspective in the interest of justice. First, though the 1st Appellant is listed as an appellant, the record does not show that he did give notice of intention to appeal. It can even be said that there was confusion as to his Petition of Appeal. The Petition of Appeal that was allegedly filed by Mr. Njau, learned counsel listing the names of Selestin Kamilii, Philipo Rogath, Galous Faustin and Severine Francis @ Wasiwasi as the Appellants was with leave of this court amended to remain with the names of Galous Faustin and Severine Francis @ Wasiwasi as the only Appellants. The names of Selestin Kamili (1st Appellant) and that of Philipo Rogath were deleted from the Petition of Appeal on the ground that Mr. Njau who had filed the Petition of Appeal had no instructions from them to appeal to this court against the conviction and sentence entered by the trial court.

However, the record shows that in the order for amendment of the Petition of Appeal, this court (Mmilla, J.) had also ordered that Selestin Kamili (1st Appellant) and Philipo Rogath (then formanly listed as the 2nd Appellant) should also be informed that it was by mistake that they were considered that they had appealed on the basis of the Petition of Appeal filed by Mr. Njau but in actual fact Mr. Njau had not been instructed to appeal for them. The record shows further that on 2nd March, 2004, the District

Registrar had purportedly written to the said Selestin Kamili (1st Appellant) and Philipo Rogath (formerly listed as the 2nd Appellant) vide the Officer In charge of Karanga Prison that their counsel, Mr. Njau, had withdrawn from the conduct of the appeal before this court and that they should engage another advocate to represent them in the appeal.

In my considered view, the District Registrar's letter to Selestin Kamili (1st Appellant) and Philipo Rogath was quite misleading. The fact was not that Mr. Njau had withdrawn from the conduct of the appeal and that they should engage another advocate to represent them in the appeal but the order of this court was that Mr. Njau had no instruction to appeal for them as purportedly shown in the earlier Petition of Appeal which Mr. Njau had filed in this court. As far as the record of this court is concerned, it remains to date that no proper position was communicated to the 1st Appellant and the said Philipo Rogath (formerly listed as the 2nd Appellant) to enable either of them to act properly following the amendment of the Petition of Appeal filed by Mr. Njau.

Secondly, my proper reading of the record of the trial court shows that Philipo Rogath should not have been listed as an appellant in this appeal. Though he was listed in the charge sheet, in the trial court as one of the accused persons but was not brought in the said court for trial nor was he tried and convicted in absentia by the said court. On the day, the said court conducted preliminary hearing, the Public Prosecutor told the trial Magistrate as follows:-

> "The accused of this case are three in number and the 1st accused is called Selestin Kamili a farmer of Mashati. The 2nd accused is called Galous Faustin Stanslaus @ Wasiwasi a farmer of Mrere Mashati. The 3rd Accused is called Severine Francis Massawe a farmer of Mrere Mashati. All these accused reside at one village of Mrere Village."

From the above record, it is certainly clear that Philipo Rogath at the trial court was not named as one of the accused persons in the trial. He was not tried, convicted and sentenced by the trial court. It follows that he should not have been listed as an appellant in this appeal as no appeal existed on his part judging from the record of the lower court. His name has to be disregarded and deleted as I hereby do in this appeal. Hence forth, in the following paragraphs of this Judgment, Mr. Selestin Kamili will be referred to as the

1st Appellant, Mr. Galous Faustin Stanslaus @ Wasiwasi the 2nd Appellant and Mr. Severin Francis @ Masawe the 3rd Appellant.

Thirdly, this court on 17/8/2005 had ordered the appeal to be argued by way of written submissions. The 1st Appellant that is Selestin Kamili did file his written submission. However, as I have earlier stated that following the amendment of the Petition of Appeal that was filed by Mr. Njau on the ground that he had no instructions from the 1st Appellant and Philipo Rogath to appeal for them, it could be concluded that no petition of appeal existed for the 1st Appellant. As I have further earlier stated that no proper communication was made to the said Appellant by the District Registrar in respect of the order which this court had made. In my considered view, the 1st Appellant must have filed his submission in support of the appeal on his genuine belief that his appeal was still existing in this court. This is the position because in the communication sent to him by the District Registrar on 21/3/2004 it was that Mr. Njau had merely withdrawn from the conducted of the appeal and that they should engage another advocate to represent them. He was not informed that his appeal was no longer in existence in this court on the ground that Mr. Njau had no instruction to appeal for him.

It would appear to me that the 1st Appellant all along thought and laboured under a genuine belief that his appeal was still in place despite being informed that Mr. Njau had withdrawn from the conduct of the appeal before this court. Even when it came to arguing the appeal by way of written submission there was no objection from the Republic that the appeal for the 1st Appellant did not exist or it was incompetent before this court. However, I will not labour under the illusion that the appeal for the 1st Appellant exists in this court given the anomalies mentioned above. This court has still to render justice to the 1st Appellant which can be done by other alternatives existing in the court as I will later state in this judgment.

In the trial court, the three Appellants were jointly and together charged with Armed Robbery c/s 285 and 286 of the Penal Code, Cap. 16, Volume 1 of the laws. The particulars of the offence were that the Appellants jointly and together on the 21st day of July, 2001 at about 01.00 hours at Mrere Village within Rombo District in Kilimanjaro Region did steal cash money Tshs 200,000/= one radio cassette 5 band valued at Tshs 75,000/=, one sweater valued at Tshs 25,000/= all total valued at shs.300,000/= the

properties of Donath Kamili and immediately at or before such time of stealing did use a panga and a club to the said Donath Kamili in order to obtain and retain the said property.

The record shows that the prosecution side, in the trial court had called 4 witnesses to prove its case while the Appellants who were the accused persons decided to remain mute in their defence. In his judgment the trial magistrate stated as follows:-

> "-------- In this case the prosecution evidence was not challenged and was not rebutted. All these accused are of sound mind and they knew the out come of refusing to give evidence. The prosecution side had four witnesses and PW.1 to PW.3 identified the 1st accused. PW.1 is the brother of 1st accused and PW.II is the sister in law of the 1st accused. PW.1 and PW.II also identified the 2nd accused and third accused at the scene and later when the third accused was arrested was found with a bush knife which PW.1 identified it as his property. All these facts were not at all challenged nor rebutted and thus all these accuseds are convicted as charged under Section 235 of Act 9/1985."

Having convicted the Appellants, the trial magistrate sentenced them to 30 years imprisonment each and to pay the complainant the stolen properties. Having been aggrieved with the said conviction, sentence and order the Appellants have appealed to this court listing three grounds of appeal in their Petition of Appeal namely:-

1. That the learned trial magistrate grossly erred in law and fact in convicting the Appellants with the offence of Armed Robbery in the absence of sufficient evidence in support of the said charge.
2. That the learned trial magistrate erred in law and fact in making a finding that the Appellants were properly identified in the absence of any credible evidence to that effect.
3. That the learned trial magistrate passed on the Appellants a sentence which is grossly excessive unwarranted and thus illegal in the circumstances.

Based on the above grounds of appeal, the Appellants, in their Petition of Appeal prayed to this court to quash and set aside the conviction, sentenced and order of the trial magistrate imposed on them. The Appellants are advocated by Mr. Njau, learned counsel while the Republic/Respondent is represented by Miss Mlay, learned State Attorney.

By consent, this court, on 17th August, 2005 ordered the parties to argue the appeal by way of written submissions. Both, Mr. Njau, the learned counsel for the 2nd and 3rd Appellants and Miss Mlay, the learned State Attorney for the Republic/Respondent have fully complied with the said order and I hereby commend them for their diligence in the matter. In her submission, Miss Mlay did not support conviction, sentence and the order passed by the trial magistrate against the 2nd and 3rd Appellants.

Though the said Appellants had listed three grounds of appeal in their Petition of Appeal as above shown, they chose to pursue grounds 1 and 2 collectively only in their submissions. The main thrust in these grounds of appeal is that the said Appellants contend that they were not properly identified as the persons who committed the offence and that the prosecution evidence did not establish their guilty beyond reasonable doubt. So the issue to be addressed and determined in this appeal is whether the said Appellants were properly identified and whether the prosecution side did prove its case against the said Appellants in the trial court beyond reasonable doubt as required by the law.

The record shows that the armed robbery incident which the Appellants were charged with in the trial court was alleged to have occurred at night at 01.00 hours. PW.1 and PW.2 in their evidence adduced at the trial court had alleged to have been at the scene of the incident and to have identified the Appellants. However, both Mr. Njau and Miss Mlay in their submission contend and rightly so in my considered view that there was no favourable condition for proper identification of the Appellants at the scene of the crime. PW.1 in his evidence at the trial court had alleged that after the Appellants had entered into the house he hide himself in a corner along the corridor and that there was a lamp which reserved electricity meaning a recharge torch. On the other hand, PW.2 had alleged in her evidence at the said court that she had identified the Appellants inside the said house as there was electricity house. It is clear to me that there existed a contradiction in the evidence of the said two witnesses, PW.1 alleged that the

identification of the Appellants was facilitated by a recharge torch while PW.2 alleged that it was by electricity light. Therefore, I quite agree with the submission of Mr. Njau that the status of light in the house or room was not clear. PW.1 in his evidence did not state how he was able to identify the Appellants from the corner he was hiding or the direction he had observed them and the distance from the corner to where the Appellants were there. I further agree with the submission of Miss Mlay that PW.1 and PW.2 in their evidence at the trial court had contradicted themselves as regards the type of device which had brought light inside the house which in itself caused doubts on their credibility hence their evidence could not remain unshaken. **In Michael Haishi V. Republic** (1992) TLR 92 this court had allowed an appeal based on the contradiction of witnesses on the question of identification of appellants while in the case of **Nyigoso Masolwa V. Republic** [1994] T.L.R. 186, the Court of Appeal had allowed the appeal on the ground that at the time of attack circumstances prevailing in the room of the incident were not favourable for proper identification.

It is further clear to me as stated by Mr. Njau in his submission that the trial Magistrate rested his decision on the basis that PW.1, PW.2 and PW.3 had identified the Appellants at the scene of the incident. However, as I have demonstrated above the evidence of PW.1 and PW.2 in the trial court did not prove favourable conditions for proper identification of the Appellants by the said witnesses at the scene of the alleged crime. Even the evidence of PW.3 was not relevant to the identification of the Appellants as he was not at the house of the complainant at the material time. It can be said as submitted by Mr. Njau that the identification of PW.1 and PW.2 was merely visual identification. As stated in **Waziri Amani V. Republic [1980] TLR** and in **Rashidi Ally V. Republic [1987] TLR 97** the evidence of visual identification is of the weakest kind and most unreliable and that the same should not be acted upon unless the court has cautioned itself of this weakness and unreliability and unless it is absolutely tight.

To add to what I have stated above, I quite agree with Mr. Njau and Miss Mlay that the prosecution witnesses at the trial court, that is PW.1 and PW.2 did not give particulars or descriptions of the Appellants whom they had alleged to have identified at the scene of crime. Their evidence on record shows that apart from the 1st Appellant; the

2nd Appellant and the 3rd Appellant were seen by the said witnesses for the first time hence as stated by Miss Mlay, in her submission, the law requires that the identifying witness to describe in detail the identity of theAppelants when they saw them at the time of the incident. This principle was started by the Court of Appeal of Tanzania in the case of **Raymond Francis V. Republic** [1994] TLR 100. PW.1 and PW.2 did not do so. I quite agree with the submission of Miss Mlay that with regard to the 1st Appellant who is the brother of the complainant, though known to him even to PW.2 before, one is convinced to believe that the identification against him was done in the honest mistake because just to mention him without providing special description could not be said he had identified him properly.

It is further my firm considered view that as submitted by Mr. Njau the trial Magistrate in his judgment did not show how he had reached his conclusion that the Appellants were guilty on the strength of the evidence available. He made no evaluation and or analysis of the evidence adduced by the prosecution witnesses to show how his decision of guilty was reached. He was merely contented with the fact that the prosecution evidence was not challenged and was not rebutted by the Appellants to arrival at his decision. This approach is completely wrong. The trial Magistrate was required to evaluate and analyse the evidence adduced by the witnesses who had testified before him in order to reach a decision that the prosecution side had established its case beyond reasonable doubt, despite the fact that the Appellants at the trial had opted to remain mute The record does not even show that the trial Magistrate had addressed the Appellants at the close of the prosecutions case on the implications of sections 293 (1) (2) of the Criminal Procedure Act, 1985 and the implications of remaining mute or silent as stated under Sections 293 (3) of the same Act that the trial court could draw adverse inference against them.

Having stated in the aforegoing paragraphs, I find and hold that this appeal has merit and I accordingly allow it. However, this will be in respect of the 2nd and 3rd Appellants. As regards the 1st Appellant, given the shortfalls that I had earlier stated, I hereby act under the revision powers contained under Section 372 and 373 (a) of the Criminal Procedure Act, 1985 to revise the proceedings, conviction , sentence and order imposed on him by the trial Magistrate based on the same reasons obtaining in this

appeal. The final result for all the Appellants is that, I hereby quash and set aside the conviction, sentence and order made by the trial Magistrate on the Appellants. I hereby set them free unless lawfully held under the law. It is so ordered.

F.A.R. JUNDU,
JUDGE,
3/1/2006

Right of Appeal explained.

F.A.R. JUNDU,
JUDGE,
3/1/2006

Date:- 3/1/2006
Coram:- F.A.R. Jundu, J.
For the 1st Appellant - present
For the 2nd Appellant -) Mr. Njau, Advocate.
For the 3rd Appellant -)
For the Republic – Miss Mlay, State Attorney.
C/C:- Matiku

Court:- Judgement delivered in the presence of the 1st Appellant, in the presence of Mr. Njau, learned Counsel for the 2nd and 3rd Appellants and themselves in person and in the presence of Miss Mlay, learned State Attorney/Respondent.

F.A.R. JUNDU,
JUDGE,
3/1/2006

AT MOSHI.