IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO.23 CF 24/2007

ORIGINAL CRIMINAL CASE NO.8 OF 1999

OF THE DISTRICT COURT OF MEATU DISTRICT

AT MWANHUZI

Before: RUHASHA Esq., DISTRICT MAGISTRATE

1. MASESHA S/O SHODO]

2. SITTA S/O BUHIMILA].....APPELLANTS

(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

J U D G M E N T

14th May, 07 & 15th May, 07

MUJULIZI, J.

The Appellants were convicted of Armed Robbery c/ss 285 and 286 of the Penal Code, Cap. 16. They were sentenced to serve 30 years in prison, plus corporal punishment and compensation of Tshs.1,700,000/= to the complainant.

The Appellants were charged together with one Ngassa Shodo, the 3rd accused who did not appeal, to have jointly, on the 16th day of January, 1999, at about 00.30 hrs at Bomani Street in Mwanhuzi Township, Meatu District, Shinyanga Region, stolen the sum of Tshs.1,700,000/= one Radio 3 band National (Tshs.32,000/=), 25 pairs of vitenge valued at Tshs.120,000/=, 20 pairs of kanga (shs.20,000/=), one pair of male shoes (20,000/=) and one suitcase "SUMA" (10,000/=) Total value shs.2,122,000/= the property of one Yohana s/o Nyadu and that immediately before Stealing had used a firearm, shooting the complainant in the right arm in order to obtain or retain the said property.

At the trial the prosecution [redacted] marshaled a total of 5 witnesses. However, the conviction was mainly based on the Cautioned statement made by the three accused persons; Exhibit P.8 made by the Appellant, Sitta Buhumila before No.B 8535 D/CPL Richard on 24.01.1999; Exhibit: P.9 made by the 1st Appellant, Masesa s/o Shodo before the same police officer on the same date and Exhibit P.10 made by the 3rd Accused Ngassa Shodo before No.C 9641 D/CPL Simon on 24/01/1999.

Both Appellants attack their conviction based on the said statements; that they were obtained through beatings, torture and threats.

The record shows that all three statements we tendered in evidence by, P.W.4, E 6662 D/C Fidelis who investigated the case. According to the record, he said that D/CPL Richard who took the two statements subject of this appeal had passed away at the time of the trial. He did not explain as to why D/CPL Simon did not appear.

The record also shows that of the three accused, only the 2nd Appellant made any allegations of torture in cross examining P.W.4. None of the three objected to the admission of the statements in evidence when they were produced.

At the hearing of this appeal, Mr. Manyanda, learned State Attorney, raised an issue relating to the failure by the trial Magistrate to Rule on a case to answer and guide the accused persons accordingly. He submitted that this was contrary to sections 230 and 231 of the CPA – (Cap 20 R.E 2002). But then, he said in this case the error was inconsequential as it did not occasion any injustice to the accused person as they proceeded to defend themselves in the case notwithstanding the anormally.

Section 231 provides;

"231(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 charged or in relation to any other offence of which, under the provisions of section 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;

b) to call witnesses 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."

The rights granted to an accused person under section 231 as quoted above are in absolute terms. I find no proviso saying that in case a Magistrate skips to proceed as required above then the trial is saved simply because the accused were not widely prejudiced.

In my judgment the procedure prescribed under section 231 is meant to guarantee a fair trial. In the absence of such rights being explained thoroughly to the accused it can not be said that the accused under went a fair trial.

Unfortunately the Learned State Attorney did not cite case law to support his position.

To the contrary, the courts have construed such provisions strictly: ZUBERI MUSSA V. SHINYANGA TOWN COUNCIL (CAT MZA) CIVIL APPEAL NO.100/2004 (Unreported).

In TABU NYANDA @ KATWIGA V.R. (CAT MZA) Criminal Appeal No.220 of 2004 (Unreported), the court was construing failure to comply with the provisions of section 192(3) of the CPA and Rules 4 and 6 of the Rules made under that section.

Section 192 (3) provides:

> ***"192(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then failed."***

After analysing Rules 4 and 6 prescribing the procedure to be followed in preparing the memorandum made under Section 192(3) which rules are couched in mandatory terms, the Court of Appeal of Tanzania held that;

"Failure to comply with the mandatory provision of the law as set out above, fatally affected the preliminary hearing proceedings. The proceedings should be discounted."

An order for retrial would be the appropriate remedy where an accused did not have a fair trial: R.V. DOSSANI (1946) 13.EA.CA 150.

However, whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it, and where it is not likely to cause an injustice to the accused person: AHMED ALI DHAMSI SUMAR V. REPUBLIC (1964) E.A.481.

In R.V. BALUTUNIKA V. MNOZI V. R 1968) HCD No. 392, the court (Seaton, J) hesitated to order a retrial in view of the fact that the accused had already spent sometime in prison.

In the case before me, the Appellants have been under custody since 25/01/1999 and serving sentence since 19/02/2000. In my judgment it would not be fair to order a retrial.

Moreover, the Republic in any event does not support the conviction, because the confessions upon which the appellants were convicted were repudiated but the court admitted them without investigating the issue as to whether they were made voluntarily. Further, that, although there was no corroborative evidence the trial court simply agreed with the prosecutions' assertion that they were freely made.

Secondly none of the two prosecution witnesses present at the incident, P.W.2 and P.W.3; positively identified their assailants.

On thoses grounds the Learned State Attorney submits that the conviction was not founded on a proven case of guilt.

That being the case I find that, although there was no fair trial, there is no need to order a retrial in respect to the Appellants.

They should be released forthwith, unless they are held under other lawful custodial orders. The order to compensate the complainant is also set aside.

Given this finding, which affects the legality of the trial and in view of the position taken by the Republic, I believe it would only be fair that what has been held in here applies to the 3rd Convict, Ngassa Shodo.
For, although he did not appeal, he was convicted on the same evidence and out of the same trial. The right to a fair trial ennures to a person not only if he recognises it and acts on it, but ,because the Law has guaranteed a fair trial to all persons, without discrimination. Even the mute would be protected, under this principle.

In the premises pursuant to Revisional Powers of this court, since this matter has come to my attention in the course of this Appeal, I can not leave the said convict to serve sentence arising out of proceedings, which I have declared to have amounted to a mistrial. In the premises he too must be released forthwith.

The conviction and sentence of Ngassa Shodo on the offence of Armed Robbery Contrary to Sections 285 and 286 of the Penal Code, Cap. 16. R.E. 2002, on 08/02/2000 is hereby quashed and the sentence to serve 30 years term in jail set aside. The order for compensation is also set aside.

It is therefore ordered that the Appellants: MASESHA S/O SHODO and SITTA S/O BUHIMILA together with the convict NGASSA SHODO be released from jail forthwith unless they are held for other lawful sentences.

A.K. MUJULIZI

JUDGE

15/05/2007

The judgment is read in the presence of the two Appellants, and Mr. Zacharia Learned State Attorney for the Republic.

A.K. MUJULIZI

JUDGE

15/05/2007

Right of Appeal in respect of the 3rd accused is explained to the Republic.

A.K. MUJULIZI

JUDGE

15/05/2007