IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO. 103 OF 2006

1. PETER KASMIRI MASSAWE
2. KIONDO STEPHEN } **.....APPELLANT**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of District Court of Arusha)

(R.N. MUGISSA, RM)

Dated the 8th day of May, 2006

In

DC Criminal Case No. 584 of 2005

J U D G M E N T

N.P.Z. CHOCHA, J.

This judgment is a consolidation of Criminal Appeal No. 103/2006 and Criminal Appeal No. 108 of 2006. The latter was consolidated with the former. The former prevailed. Upon consolidation, the appellants one Peter Kasmiri Massawe and Kiondo Stephen became the 1st and 2nd appellants respectively. They shall be referred to as such hereinafter.

The two appellants were jointly charged, and subsequently convicted with armed robbery c/s 287 of the Penal Code. They were each sentenced to 30 years imprisonment.

The prosecution's case was not very difficult to comprehend, although sometimes it was slightly complicated by poor grammar on the part of the trial magistrate. It can fairly be reorganized to the following extent.

That on the 31st May, 2005 at 22.00 hours the complainant was on the way to his home. He was suddenly invaded by the appellants from behind. They ordered him to surrender the cell phone he was possessing. He resisted. Some force was applied. He was hit by a heavy object and was forcibly disposed the cell phone. The appellants snatched it. They fled. The complainant sustained injuries on some parties of his body.

The complainant did not easily give up. He raised an alarm. Lucky was not on the appellants' side. As they attempted to escape with the proceeds of the loot, they all fell in the nearby pit latrine. They were still armed.

People quickly responded to the alarm which the complainant had raised. They found the appellants all trapped in the pit latrine. The appellants pleaded for mercy. They promised to return to the appellant the robed cell phone if they were left alive.

They were hooked from the pit latrine. The phone was however not traced except only a battery and its cover. According to PW 2, together with the cell phone's components, a panga, cap and voter's identity were found at the scene, on the following day. The appellant and the found exhibits were handed to the police who were on patrol on the very night. It did not come out to whom exactly was the accused person handed.

On the 2nd June, 2005, the appellants made very incriminating caution statements, actually confessing that it was themselves who attacked and robbed the complainant. They further admitted having fallen into the pit latrine wherefrom they were hooked.

During the trial however, the appellants changed their minds. They resisted the prosecution's prayer to have the statements admitted because they said the statements were not freely made. They were according to them, procured by coercion. The court admitted both statements, and without conducting a trial within trial. The trial court happens to have relied on the caution statements to base the appellant's conviction.

The appellants raised a number of grounds challenging their conviction and sentence.

They said the offence of armed robbery was not proved. No evidence that the victim was assaulted by a weapon was adduced. The appellants said the falling into the latrine was not a conclusive proof that they had committed an offence. They further insisted that there ought to have been conducted a trial within trial to ascertain the voluntariness of the repudiated statements.

In fact the respondent Mr. Ngole – State Attorney, almost conceded to most of the grounds. He conceded for example, that the PF 3 was irregularly admitted in clear violation of the provisions of section 240(3) of the Criminal Procedure Act. Underneath, the court has the duty to inform the accused of his right to have the person who made the report (PF 3 for this matter) to be

summoned. The accused shall then exercise his discretion whether he wishes such a person be called as witness. The appellants were not availed the opportunity.

I find, just like the appellants and the respondent, that the PF 3 was erroneously admitted. The prosecution's failure to inform the appellants of their rights denied them opportunity to exercise their legal discretion to have the maker called. That PF 3 was not proved by the maker, it makes sense for the appellant to complain that the offence of armed robbery had one constituent, namely, use of lethal weapon, not proved.

The respondent rightly conceded that the trial magistrate erred in his failure to conduct a trial within trial to ascertain the voluntariness of the retracted statement. It has been held in the case of HILKU MEHI VR. R.CR. APP. No.77/2006 (CA) unreported, which the learned respondent was kind to supply this court a copy, that it is essential to conduct a trial within a trial in order to satisfy itself with the voluntary nature of the caution statement. In the absence thereof, it is doubtful whether the statement was freely made. In the light of the above, the trial court's failure to ascertain the appellants' statements' voluntariness is prejudicial to the prosecution's case.

The learned respondent further hitherto, noted contradictions in the prosecution witnesses' evidence regarding the actual party of the body which the complainant sustained a fracture. Some say it was a leg. Some say it was an

arm. The contradiction is basic. It has the implication, and in the absence of clarification to the contrary, that there were two different victims.

The respondent proposed to this court to order a retrial. He did not tell this court why he thought this was the best remedial course to take.

I was prepared to accept a proposition to order a retrial, especially after considering the contents of the disputed caution statements, which were otherwise very incriminating on the appellants had the admissibility procedures been properly observed.

I have discovered however that the would be caution statement were recorded in contravention of the provision of section 50 of the Criminal Procedure Act as further interpreted in the case of **SALIM PETRO NGALAWA VRS. R. CR. APP No. 85/2004** (C.A) – Arusha Registry unreported. It is statutorily provided that the statement of the suspect shall be taken within 12 hours after his arrest.

The appellants were arrested and handed to police on the night of 31st May, 2005. They were not interviewed until on the 2nd June, 2005 after 15 hours. That was after the lapse of 12 hours. No reason was assigned behind the police's failure to record the appellant's statements within the prescribed time.

In my view, a retrial is a better option where it does not prejudice the rights of parties. It is a cardinal principle that the prosecution has the duty to prove the case beyond reasonable doubts. Where there are serious irregularities on the prosecution's case, I think a retrial is not a good option, for, it would

amount to guiding or assisting the prosecution to fill in the gaps on areas which it had in the first place failed to establish.

All these irregularities considered, I feel it is not just to order a retrial. I fear a retrial will favour the prosecution. It is in the best interest of justice to declare that the prosecution had failed to prove the case beyond reasonable doubts. Conviction is quashed. Sentences are set aside against all appellants. They are hereby declared free unless for some other lawful cause, they be incarcerated.

Sgd. N.P.Z. CHOCHA

JUDGE

14/07/2008

Date: 14/07/2008

Coram: N.P.Z. Chocha, J.

Appellants: All present

Respondent: Ms. Ndomba – State Attorney

Court: Judgment delivered in presence of parties as indicated in the coram.

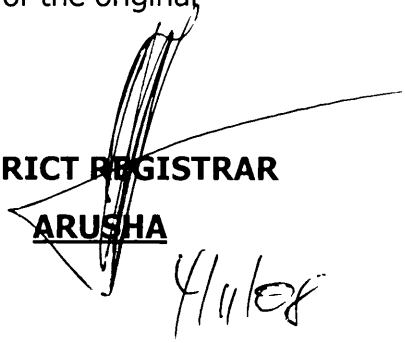
Order: Right of Appeal Explained.

Sgd. N.P.Z. CHOCHA

JUDGE

14/07/2008

I hereby certify to be a true copy of the original



DISTRICT REGISTRAR

ARUSHA

NPZC/vm