IN THE HIGH COURT OF TANZANIA

AT TANGA

PC CRIMINAL APPEAL NO.11 OF 2009

(Originating from District Court Tanga, Criminal Appeal No.6/2007, Primary Court of Pongwe, Criminal Case No.58/2007)

SIRIRI SEIF @ KIFOSHO.....APPELLANT

VERSUS

ABUBAKARI NASIRI.....RESPONDENT

Date of last order: 14/12/2009
Date of Judgment: 8/02/2010

JUDGMENT

Mussa, J;

This is a second appeal, having its backdrop from criminal case No.68 of 2007; instituted in the primary court of Pongwe. The appellant was arraigned there for robbery, contrary to section 285 of the penal code, chapter 16 of the laws. The allegation was that on the 15th April, 2007 at Kisimatui area, within Tanga City, the appellant stole a bicycle, make phoenix, property of a certain Abubakari Nasiri. It was further claimed, upon the indictment, that immediately before such stealing and; to facilitate the taking; the appellant severally assaulted the said Abubakari; that is, on his back, shoulders and legs; by the flat of a machete. The appellant denied the accusation but; at the close of the enquiry, he was sentenced to fifteen years imprisonment. He now appeals upon a lengthy petition comprised of ten points of grievance. In a rare occurrence, the DPP felt he should resist the appeal and; before me was Miss Massawe, learned state attorney, who fully supported the conviction and sentence.

To express at once, going by the allegation as comprised on the particulars, this was, on the face of it, rather, an accusation to do with armed robbery, of which, the trial court did not have the mandate to try. Faced with such a situation, it is always desirable that a trial court takes the initiative, at first opportunity, to advise a complainant as to which court of first instance he/she ought to have approached. Nonetheless, much as simple robbery of which the trial court was competent to try is as well comprised in the particulars; it is just as worthwhile to consider whether or not the appellant was properly brought to book. The prosecution case was comprised of two persons inclusive the complainant who, then, was a child aged 14. As to the manner in which the trial court approached the testimony of the complainant, there is simply this:-

> *Abubakari Nasir, Mchaga, 14, Mlalamikaji nimemhoji ni nini maana ya kiapo na kusema uongo kuna madhara gani, baada ya yeye mlalamikaji kutoa majibu yake ambayo nimeridhika nayo nilimchukua maelezo yake kama ifuatavyo:-*

That said, the witness went straight into testifying, that is, without taking an oath or affirmation. That being the conduct of affairs during the trial; I ask myself: What was this enquiry as to understanding the nature of an oath all about if; even upon the positive finding; the witness was, after all, not affirmed? But, perhaps, on a more serious note: did the trial court adopt a proper approach really? To this, I am alive of the fact that the trial was held in a Primary Court; of which is known to obtain its own procedure. All I could cull in relation to the subject of reception of tender age testimony was Rule 35(2) of the Primary Court Criminal Procedure Code that goes thus:-

> **The evidence of the complainant, the accused person and all other witnesses shall be given on affirmation save in**

case of a child of tender years who, in the opinion of the court, does not understand the nature of the affirmation; and an affirmation shall be in the prescribed form.

As to what is and where to find the prescribed form tagged to this particular affirmation; quite frankly, I am completely at a loss but; needless to have to digress any further, much as, in the situation at hand, it was specifically found that the witness understood the nature of an affirmation; hence, there was no need going into such affirmation by prescribed form. Still, I am anxious and; additionally, kind of, uneasy, in the manner in which the trial court reached that finding. It seems to me that the expression; **in the opinion of the court;** as comprised in the Rule, imports a duty upon a trial court to enquire as to whether or not a prospective child witness understands the nature of an affirmation. It is a duty closely resembling the one imposed upon superior courts in terms of section 127(2) of the Evidence Act. The only way an appellate court would adjudge whether or not a trial court properly reached its finding is by looking at the details of the enquiry. To this end, I take the position that it is just as imperative in trials obtaining in Primary Courts that whatever transpires during the *voire dire* enquiry must be manifest upon record. Where, as here, details of the enquiry are not reflected upon it can hardly be said that the evidence of a child witness was properly gone to. That said, I am left with no other option than to discount the entire testimony of that child, Abubakari.

That done and; looking at the accusation as it stood against the appellant; the one outstanding feature is that it was almost wholly derived of the disgraced testimony of the complainant. The other witness, namely, Petro Pius (SM.1); watched the incident from afar whilst he was running an animal trapping errand. The culprit, according to Petro, had a piece of

cloth tied across his face and; yet, the witness positively advanced claims of visual identification. It would have, perhaps, made a whole difference if the appellant was previously well known to the witness but; unfortunately, it was not said so. To say the least, it was unsafe to attach reliance on such weak evidence of visual identification. To this end, the conviction was against the weight of the evidence; on account of which, the same is, accordingly quashed. The sentence is just as well set aside with an order for the immediate release of the appellant unless he be held in custody for some other lawful reason. It is so ordered.

K.M. MUSSA, J.
5/2/2009

8/02/2010

CORAM: Mussa, J;

Appellant: Present

Respondent: Mr. Samwel, state attorney

Judgment delivered in the presence of the parties.

K.M. MUSSA, J.
8/02/2010