IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 43 of 2010

(Originating from the Morogoro District Court, Criminal Case No. 278/2008 E.N. Kyaruzi-RM)

FRED STEPHEN.....1St APPELLANT

MSAFIRI KIMARIO.....2ND APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 04-05-2012

Date of Judgment: 15-05-2012

JUMA, J.:

This is an appeal by Fred Stephen and Msafiri Kimario against the decision of the District Court of Morogoro in the original Criminal Case Number 278 of 2008. The learned trial Resident Magistrate E.N. Kyaruzi-RM had found the two appellants guilty of the offence of armed robbery contrary to

sections 287A of the **Penal Code** and sentenced both of them to serve thirty years in prison.

The particulars of the charge as they were specified in the judgment of the trial court stated that on 15th day of May, 2008 at around 06:00 hours at Mji Mkuu area in Morogoro the two appellants stole one bicycle valued at TZS 90,000/= the property of Paul Herman and immediately before such stealing the two appellants cut Mr. Herman on his head using a bush knife (panga) in order to obtain the bicycle. The appellants filed five grounds of appeal. At the hearing of the appeal on 24th February 2012, Msafiri Kimario (2nd Appellant) presented three additional grounds making a total of eight.

The two appellants appeared in person. Mr. Innocent Mhina, the learned State Attorney appeared for the respondent Republic. Appellants basically reiterated their grounds of appeal and asked this court to allow their appeal and set them at liberty. On his part, Mr. Innocent Mhina the learned State Attorney supported the conviction of the two appellants and their thirty year prison sentence.

I propose first to address myself to the fifth ground of appeal wherein the two appellants had alleged that the trial

court erred in law in failing to take any plea of the Appellants at the commencement of their trial. Responding to this contention, Mr. Mhina the learned State Attorney referred me to page 2 of the typed proceedings during the Preliminary Hearing showing that the two appellants were reminded of their charge and were required to plead thereto. Further, the learned State Attorney submitted that the record of typed proceedings shows that the appellants took their chances and they cross examined the witnesses. Mr. Mhina believes that this ground of appeal which revolves around the failure to take their plea lacks merit and should be dismissed.

Typed and hand-written records of proceedings of the trial court show that on 19 May 2008 when the two appellants appeared before the trial court for the first time the charge was actually read over and explained to the two appellants to which both pleaded "IT IS NOT TRUE." The records further show that during the Preliminary Hearing on 17 June 2008 the trial court reminded the appellants of the charge facing them; to which they pleaded the words "IT IS NOT TRUE." Once again, the court used the acronym "EPNG"- indicating an entry of PLEA OF NOT GUILTY. It is also clear that on 26

June 2008 when the hearing of the trial formally commenced, the two appellants were not asked to plead before the first witness for the prosecution testified.

An important question arising from the fifth ground of appeal is whether the failure by the trial court to take the pleas of the appellants on 26 June 2008 when the hearing of the trial formally commenced; was fatal to the subsequent proceedings, judgment and sentence based thereon.

The law on taking of pleas at the commencement of criminal trials is provided for by sections 228 and 229 of the **Criminal Procedure Act, Cap. 20 (CPA)**:

> *228.-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
> *(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.*

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

229.-(1) If the accused person does not admit the truth of the charge, the prosecutor shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge

Sections 228 and 229 of **CPA** employ mandatory language requiring subordinate courts to state to the accused person about the substance of the charge, and the accused persons are supposed to get a chance to either admit the truth of the charge or deny it. It is only when the accused does not admit the truth of the charge when the court shall proceed to hear the case. The mandatory words that are employed by sections 228 and 229 of **CPA** are not employed in vain. The requirement to state the substance of the charge of the offence of offence of armed robbery contrary to

sections 287A of the Penal Code gives the accused person an opportunity to appreciate the ingredients constituting the offence of armed robbery for which he is charged with.

Mr. Mhina has suggested that it sufficed that pleas of the Appellants were taken during the Preliminary Hearing. With due respect, the taking of plea of accused persons during Preliminary Hearing is not sufficient for purposes of section 228 and 229 of the **CPA** regulating the commencement of trials before subordinate courts. The legal obligation requiring the subordinate courts to take plea from accused persons during the Preliminary Hearing under Part VI (c) of the **CPA** on accelerated trial and disposal of cases is distinct and separate from the similar duty of subordinate courts to take plea at the commencement of trial under sections 228 and 229 which fall under PART VII of the **CPA**.

Section 228 of the **CPA** provides the accused persons with a second distinct opportunity to hear the substance of the charge facing them and to plead the substance of the charge. In my opinion, the failure of the trial magistrate to take the plea of the two appellants before the commencement of their trial on 26th June 2008, denied them an opportunity to

appreciate the main elements of stealing, being armed with dangerous or offensive weapon at, during or after stealing or being in the company of one or more persons during stealing, and threatening or using force or violence constituting offence of armed robbery under Section 287A of the **Penal Code**.

My understanding of the mandatory language of section 228 of **CPA** is similar to the position which Shaidi, J. took in an earlier appeal to this court in the case of **Mohamed S. Soud Vs. R., Criminal Appeal No. 198 of 2007 HC DSM**. One of the grounds of appeal filed by the appellant in the **Mohamed S. Soud Vs. R (supra)** was to the effect that the trial Magistrate erred in law and fact when he failed to take the appellant's plea before the start of the trial. Shaidi, J. checked the proceedings as recorded by the trial magistrate and found nowhere the trial had taken the appellant's plea before commencement of the trial before him. Citing section 228 of the **CPA**, this Court (Shaidi, J.) stated:

> *"...This was not only a serious misdirection or non direction on the part of the trial magistrate but failure to take the accused's plea rendered*

the whole proceedings null and void. Her failure was fatal to the whole case whatever she did thereafter was in vain."

Similar interpretation of section 228 of **CPA** has also been taken by the Court of Appeal of Tanzania. In the case of **Thuway Akonaay Vs. Republic 1987 TLR 92 (CA)** the Court of Appeal of Tanzania stated that the wording of section 228 (1) of the **CPA** are couched in mandatory terms with respect of taking of pleas. The Court of Appeal stated:

.....It is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity. We would refer to an old case which had dealt with this matter and which is still good law. The case is ***Cr. Appeal 220/56 Akbarali Damji v R. reported in 2 T.L.R. 137****. The head note reads:*

The arraignment of an accused is not complete until he has pleaded. Where no plea is taken the trial is a nullity. The omission is not an irregularity which can be cured by section 346 of the ***Criminal Procedure Code****.*

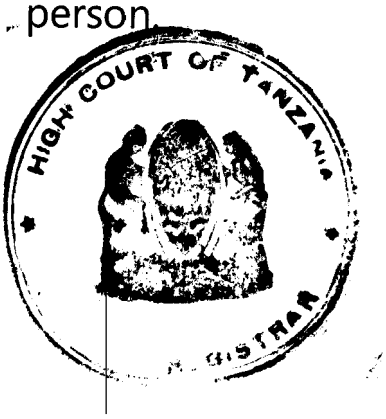
In view of my finding that the learned trial magistrate failed to take the appellants' plea at the commencement of

the trial rendering the whole subsequent proceedings, conviction and sentence against the Appellants null and void, it is not necessary for me to go into the other remaining grounds of appeal. Four years have since passed from the date when the appellants were arrested, charged, convicted and sentenced in proceedings which this court of first appeal has found to be a nullity. For the above reasons, this appeal shall be allowed; the convictions of the appellants are hereby quashed and their respective sentences set aside. Appellants are set at liberty.

DATED at DAR ES SALAAM this 15th May, 2012

I.H. Juma,
JUDGE

Judgement is delivered this 15th day of May, 2012 before Ms Tumaini Stephen (State Attorney) for the Respondent and the Appellants FRED STEPHEN and MSAFIRI KIMARIO present in person



I.H. Juma,
JUDGE