IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 4 OF 2014

(From Original Criminal Case No. 147 of 2004 in the District Court of Mpanda)

HAMISI MALINGIRA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

20th February & 12th March, 2014

JUDGMENT

MWAMBEGELE, J.:

On 03.11.2004; about 9¼ years ago, the appellant Hamisi Malingira was convicted by the District Court of Mpanda of the offence of armed robbery c/s 285 and 286 of the Penal Code, Cap. 16 of the Revised Edition, 2002 and sentenced to a thirty year jail term. It was alleged that, while armed with a bush knife, he robbed cash Tshs. 5,000/= and bicycle the property Leonard Julius. Way back in 2006, he filed an appeal in this court but was out of time and his appeal was struck out for that reason. He successfully

applied for leave to file the appeal out of time and on 16.01.2014 he filed the present appeal.

The appeal was argued before me on 20.02.2014 during which the appellant appeared in person under surveillance of the prison officers and not represented. The respondent Republic had the services of Mr. Mwashubila, learned State Attorney.

At the hearing of this appeal, the appellant had nothing to add to the grounds of appeal earlier filed. He only prayed to adopt and rely on them. On the other hand, the learned State Attorney was of the view that the evidence adduced by the prosecution at the trial was abundant enough to ground a conviction of the appellant. However, the learned State Attorney was quick to point out that there was a procedural irregularity apparent on the record of this case which need to be addressed by this court. This is the fact that the appellant was aged fifteen at the time but was sentenced to a custodial sentence. The learned State Attorney submitted that the course taken was against the dictates of the provisions of section 18 (1) of the Children and Young Persons Act, Cap. 13 of the Revised Edition, 2002 (henceforth "Children and Young persons Act"). The learned State Attorney submitted further that the issue arose during mitigation and the appellant's mother was called to testify as to the age of the appellant and expert evidence was sought as well. While the appellant's mother stated that the appellant was aged fifteen, expert evidence had it that he was not less than nineteen years. The trial court opted to rely on the evidence of the doctor. Relying on the decision of this court in ***Emmanuel Kibona &***

Others Vs Republic [1995] TLR 241, the learned State Attorney contended that with regard to the apparent age of the appellant the evidence of a parent was better than that of the Doctor and that in case of any doubt respecting the age of accused, the same should be resolved in favour of the accused person.

I have read the entire record of this case, in particular the proceedings and judgment of the trial court. I entirely agree with the learned State Attorney on the contention in respect of the age of the appellant at the trial. Indeed, the trial court realised in mitigation that the appellant was claiming that he was of the age of fifteen years which would mean that, in terms of the now repealed Children and Young persons Act, he was a young person, for this law, in terms of section 3 thereof, interpreted a young person to mean a person who is twelve years of age or more but under the age of sixteen years. The trial court was told of this fact during mitigation and, quite rightly, called his mother Kashindye @ Maria Maganga to testify on the age of the appellant. She testified that the appellant was aged fifteen. As the trial magistrate felt the appellant looked above that age, he sought for medical evidence from the District Hospital. The District Medical Officer, in a PF3 which was tendered and admitted in evidence, was of the view that the appellant was above nineteen years of age. The trial court was convinced by the expert evidence than the appellant mother's.

As rightly pointed out by the learned State Attorney, it is the law in this jurisdiction that with regard to the apparent age of an accused person, the

evidence of a parent is better than that of the Doctor. In ***Emmanuel Kibona*** supra, the court was faced with an identical situation. In that case appellants were jointly charged with two counts of conspiracy to commit an offence contrary to section 384 of the Penal Code and robbery with violence contrary to sections 285 and 286 of the Penal Code. They were all found guilty on both counts and sentenced to 15 years imprisonment terms on each count. On appeal to this court, they challenged both convictions and sentences claiming, *inter alia*, that they were children and young persons and therefore were wrongly sentenced on the second count under the Minimum Sentence Act, 1972. The trial court had sought evidence of their parents and medical evidence as well but at the end of the day, like in the instant case, was convinced by the medical report as against the evidence of parents. This court relied on the case ***Yusufu Kabonga v R*** [1968] HCD n. 188, in which Biron, J. held:

> "However high the medical officer's qualifications and the extent of his experience, I am very far from persuaded that a doctor ... could give a definite assessment in respect of age ... with that degree of certainty required in a criminal law. Accused to be treated as a minor."

The court also referred to the decision of the East African Court of Appeal of ***Sangu Saba & Anor Vs R*** [1971] HCD n. 385, [1971] 1 EA 539 where even x-rays were used to examine the accused as to his age and held:

> "It is so well known as to be within the judicial knowledge of the court that even with the aid of X-rays, age cannot be assessed exactly."

In the case at hand the trial court did not only believe medical evidence against that of parents but also injected its assessment. The trial magistrate, in concurring with the medical evidence, had this to say:

> "(1) first accused does not look that he is a juvenile. He looks an adult above the juvenile age of below 16 years.
> (2) no birth certificate nor babtismal (sic) chit [has been produced].
> (3) ... According to PF3 dated 3/11/2004 the District Medical Officer following the hospital's seal and doctor's signature there has written 'Hamisi Malingila ana umri usiopungua miaka 19 (kumi na tisa)'. This finding of a medical officer agrees with mine according to first accused's appearance ..."

From the foregoing quote, it can be deciphered that the trial magistrate, having observed the accused person, he was also of the view that, from appearance, the appellant was above the age of sixteen. First, by saying that the finding of the trial magistrate tallied with that of a medical doctor,

the trial magistrate assumed the role of a witness rather than an adjudicator. In so doing he abrogated his role of an umpire - he turned himself into a witness for the prosecution to the detriment of the appellant.

On the authorities of ***Yusufu Kabonga***, ***Sangu Saba*** and ***Emmanuel Kibona*** above, I can as well confidently say that in the case at hand the trial court erred in not giving the appellant a benefit of doubt. This is because there were two contradicting sets of evidence respecting the age of the appellant; medical evidence and that of the mother. Admittedly, unlike in the ***Emmanuel Kibona*** case, the appellant and his parent did tender neither a birth certificate nor a baptism certificate. However, I am satisfied that their testimonies were enough to throw a doubt on the prosecution case as regards his age. This doubt, so our criminal jurisprudence has it, ought to have been resolved in favour of the appellant.

And to crown it all, the medical practitioner who examined the appellant on his age and filled the PF3 was not called to testify to verify how he came about the age of the appellant. This was against the import of the provisions of section 240 (3) of the CPA. This provision reads:

> "When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who

made the report; **and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.**"

[Bold supplied for emphasis]

The proceedings of the present case does not show the court telling he appellant of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection. In view of the fact that this requirement is mandatory, our criminal law in thid jurisdiction founded upon prudence has it that such a report must not be acted upon. Relying on its earlier decisions of ***Kashana Buyoka Vs R,*** Criminal Appeal No. 176 of 2004, ***Sultan s/o Mohamed v R***, Criminal Appeal No. 176 of 2003 and ***Rahim Mohamed Vs R***, Criminal Appeal No. 234 of 2004, (all unreported), the Court of Appeal, in ***Alfeo Valentino Vs The Republic,*** Criminal Appeal No. 92 of 2006 (unreported) had this to say:

"This Court held in these cases that if such a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon."

In the light of the foregoing and in view of the fact that the appellant was not informed by the trial court of the provisions of section 240 (3) of the

CPA of his right to have the doctor who prepared PF 3 summoned, the PF3 deserves the wrath of being expunged. The same is hereby expunged.

Having expunged the PF3 this court remains with the evidence of the appellant and her mother. I hereby find and hold that the appellant was able to establish, or at least cast a doubt, that he was below the age of sixteen and therefore a young person as provided for by the Children and Young Persons Act. Therefore, the trial court ought to have given the appellant a benefit of doubt and should have dealt with the matter under the relevant legislation. At the material time, the law applicable was the Children and Young Persons Act. Under the provisions of section 18 (1) of that Act, it is provided:

> "Where a child or young person is convicted of any offence other than homicide, the court may make an order discharging the offender conditionally on his entering into recognisance, with or without sureties, to be of good behaviour and to appear for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order. A recognisance entered into under this section shall, if the court so orders, contain a condition that the offender be under the supervision of such person as may be named in the order during the period specified in the

order, if that person is willing to undertake the supervision, and such other conditions for securing the supervision as may be specified in the order."

Admittedly, the foregoing provision is couched in optional terms. However, subsection (2) of section 22 of the same Act provided in mandatory terms that a custodial sentence should be meted out to a young person only in circumstances where the court feels no other methods under the Act are available. It states as follows:

"No young person shall be sentenced to imprisonment unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this Act or any other law is suitable."

On the strength of this provision, the court ought to have dealt with the matter as provided for by section 18 (1) above. Unfortunately, the offence with which the appellant was charged and convicted of does not have clear provisions under the Penal Code on how to deal with young persons in situations they commit such offence. I have in mind, for instance, a situation in rape cases where the provisions of section 131 (2) of the Penal Code provide in no uncertain terms how an accused person who is or under the age of eighteen, convicted of an offence should be dealt with. But, as good luck would have it, the Children and Young Persons Act has

since been repealed by the law of the Child Act, 2009 (also Cap. 13) which has clearer terms on how to deal with children in instance like the present one.

The appellant has already served a substantial part of his prison term. He was sentenced to imprisonment for fifteen years on 03.11.2004. He has therefore served 9¼ years out of the twelve years he is supposed to serve given the commutation policy. Under such circumstances, I find and hold that in the interests of justice, the appellant should set free.

In the end result, the sentence meted out to the appellant is set aside. I order that the appellant Hamisi Malingira be released from prison forthwith unless otherwise held for some other lawfully cause. Order accordingly.

DATED at SUMBAWANGA this 12th day of March, 2014.

J. C. M. MWAMBEGELE
JUDGE