

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO.55 OF 2020

(Appeal from the decision of the District Court of Bagamoyo at Bagamoyo dated 8th May, 2019, Hon. T. Geofrey, RM in Criminal Case No. 323 of 2018)

RAJABU SHABANI RAJABU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2/05/2023 & 31/05/2023

POMO, J

The Appellant together with other two accused persons who are not party to the appeal herein were arraigned before Bagamoyo District Court (the trial court) charged with the offence of Armed Robbery contrary to section 287A of the Penal Code CAP 16 (Written Laws Miscellaneous Amendment Act. No. 3/2011) (the Penal Code). It was the charge that on 1st day of September, 2018 at 03:00 hours at Magereza area along Bagamoyo – Mlandizi road within Bagamoyo District in Coastal Region did steal one motorcycle Registration No.MC 972 BPV make SUNLG valued at Tshs 2,200,000/- the property of Abdul Seleman and immediately before and after

such stealing did use a Bush Knife to threaten Abdul Seleman in order to obtain the said property.

In proving the offence charged, the respondent republic paraded four prosecution witnesses and on defence side the accused persons testified themselves without calling any witness.

Upon full trial, the trial court found the charge to have been proved against the Appellant only and therefore acquitted the rest. It then proceeded to convict the appellant and sentenced him to serve thirty years jail sentence. He is aggrieved with that conviction and sentence hence this appeal which contains fourteen (14) grounds of appeal.

The background albeit briefly of the facts of the case can be stated as follows. That, on 1st September, 2018 PW1 Abdul Selemani, a motorcycle driver, was given by Rajabu Juma a motorcycle Registration MC 972 BPV make SUNLG to use it for part time driving. Around 22:00hrs the appellant herein hired him for a trip to attend a festival at Chasimba/Yombo village.

While on the ride the appellant asked PW1 to pick with him his two friends who were drinking local brew commonly known as "Gongo" at a place known as "Kwa siwatu" area, who are non but the 2nd and 3rd accused



persons. The agreed fare for the trip to Chasimba village was Ten Thousand of which the 2nd accused paid. They started the journey at 23:00hrs and reached the destination at 00:00hrs.

The journey back started at 02:00hrs and while on the way, having reached at Magereza area, the appellant asked PW1 the motorcycle rider to stop so that he can attend short call and upon stopping all the accused persons also attended the short call. Followed the short call, the 3rd accused took off the motorcycle key from the motorcycle and demanded PW1 to go away the order which was enhanced by the 2nd accused who took a sword and asked him to get out of that place the order he complied with for his safety. The accused persons then escaped with the said motorcycle. PW1 reported the incident to the motorcycle owner and informed him of the appellant's as one of the culprits whom they were familiar with because they were leaving with him in the same place. In the morning, having gone to the appellant's home without finding him there, PW1 together with the owner of the stolen motorcycle reported the matter to the police station which culminated into investigation hence arrest and arraignment before the court of the accused persons, the appellant herein inclusive.

As hinted above, having paraded four witnesses the trial court was satisfied the respondent republic to have proved the charge of armed robbery against the appellant hence convicted and sentenced him in the manner above stated.

When the appeal was called on for hearing on 27/3/2023 the Appellant was present unrepresented while the Respondent republic enjoyed legal service of Clement Masua, learned State Attorney. I ordered the appeal be argued by way of written submission. It is only the Appellant who complied the order. I take the view that the Respondent republic failure to file her respective reply submission entails had nothing to reply.

In determining the appeal, I will start with the 10th ground of appeal.

The ground reads thus:

"11 - That, the learned trial magistrate erred in law and fact by convicting the appellant in unprocedural conducted trial as the trial witnesses' evidence were recorded in non-compliance with a mandatory provision of section 210(3) of the Criminal Procedure Act, Cap.20 R.E.2002]".

In support of the ground, the appellant argued that the trial court record clearly shows that when the prosecution witnesses were adducing

evidence, their evidence in chief so is during defence testimonies, section 2010(1)(a) of the CPA was not complied with as witnesses were not accorded their right to be informed if they wanted their evidence to be read and record their comment (if any). In support, he cited the case of **MUSSA ABDALLAH MWIBA AND 2 OTHERS VS R, CRIMINAL APPEAL No.200 CAT AT DAR ES SALAAM (Unreported)** at page 10 – 13. That, the requirement under the section is to have witnesses' authenticated testimonies. Also referred to the case of **YOHANA MUSSA MAKUBI VS R, CRIMINAL APPEAL No.55 OF 2015 CAT at (Unreported)**. In the end he argued that section 210(3) of the CPA is intended to ensure authenticity and transparency in criminal trials therefore his appeal be allowed

Having keenly followed the above submission together with trial court proceedings, I have observed that all the prosecution witnesses' testimonies so is the defence testimonies were recorded by the trial magistrate without appending his signature at the end of each recording of examination - in - chief; cross - examination and re – examination. (See: PW1 Abdul Selemani pp.8 – 12; PW2 Jane Joseph Msimba pp.12 – 14 ; PW3 Rajabu Juma Rajabu pp.15 – 17; PW4 E.3325 DCP Amani pp.22 – 25; DW1 Rajabu Shabani Rajabu



pp.31 – 32 ; DW2 Amiri Mohamed Deboa pp.33 – 34; DW3 Abdallah Said pp. 34 – 35 both of the typed trial court proceedings).

What is the position of the law on recording of witnesses' evidence without authenticating the same by appending signature? I will let the cited **section 210(1)(a) of the CPA** speak by itself: -

"210(1) – in trials other than trial under section 213

"S.210(1) – in trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner –

*(a) **the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record.**"*

In **Chacha S/O Ghati @ Magige V.R, Criminal Appeal No.406 of 2017 CAT (Unreported)** the Court of Appeal stated thus: -

*"...we entertain no doubt that **since the proceedings of the trial court were not signed by the trial judge after recording evidence of witnesses for both sides, they are not authentic.** As a result, they are not material proceedings in determination of the current appeal".*

[Also see: **Unilever Tea Tanzania Limited Vs David John, Civil Appeal No.413 of 2020 CAT at Iringa; Yohana Mussa Makubi & Another v.R, Criminal Appeal No.556 of 2015 CAT;** (both unreported)]

For instance, in **Yohana Mussa Makubi** case (*supra*) the Court of Appeal stated thus: -

*"In the **absence of the signature of the trial judge at the end of each testimony of every witness; firstly, it is impossible to authenticate who took down such evidence; secondly, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel, thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus, fourthly, such evidence does not constitute party of record of trial and record before us".***

[Again see: **Iringa International School Versus Elizabeth Post, Civil Appeal No.155 of 2019 CAT at IRINGA;**

With that infraction of failure by the trial magistrate to append signature at the end of every testimonies of the witnesses who testified vitiated the evidence as such evidence lacked authentic hence not worthy to be acted upon by the trial court. It follows therefore that the offence was

not proved against the appellant as such recorded evidence is a nullity proceedings

Guided by the decision of the Court of Appeal in **Fatehali Manji Vs R [1996] EA 343** where it was held:

*"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and **an order for retrial should only be made where the interests of justice require it** ".*

Taking the nature of the case and guided by **Fatehali** case (**supra**), in my considered view, the interest of justice does not demand for retrial. This is because by so ordering will allow the respondent republic to fill the gaps in their evidence. Having so analyzed, I find merit in the 10th ground of appeal

Since the above ground of appeal alone suffice to dispose the appeal I find no need to labour on the rest of the grounds as doing so shall remain to be an academic exercise



Consequently, the appeal is hereby allowed. The conviction is quashed and the sentence is set aside. I order the appellant be released from prison forthwith unless is held therein for other lawful cause.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 31 day of May, 2023



MUSA K. POMO

JUDGE

31.05.2023

Judgment delivered in chamber on this 31th May, 2023 in presence of the Appellant but in absence of the Respondent republic



MUSA K. POMO

JUDGE

31.05.2023

