IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LUANDA, J.A., JUMA, J.A.And MUGASHA, and J.A.)

CRIMINAL APPEAL NO 108 OF 2015

BENARD EMMANUEL.....1ST APPELLANT

SAMWEL EMMANUEL.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

At Tanga)

(Msuya, J.)

Dated the 4th day of March 2014

In

Criminal Appeal No. 44 of 2013

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JUDGMENT OF THE COURT

17th & 19th August, 2015

MUGASHA, J.A.:

In the District Court of Lushoto, the appellants, Bernard Emmanuel and Samwel Emmanuel, were charged with armed robbery contrary to section 287A of the Penal Code [CAP 16 RE: 2002]. They were convicted and sentenced to imprisonment to a term of thirty years with an order to pay

Tshs. 500,000/= to the victim Ramadhani Ngereza who testified as PW1 during trial.

The facts of the case are briefly that: On 17th February, 2013 at 16.30 hours within Lushoto District, the 1st appellant hired a motorcycle rode by PW1 for a trip from Kwemakame village to Masange Secondary School. On their way back from Masange Secondary School, when they reached Mazumbani within the forest, the 1st appellant strangled PW1 by the neck and he fell down. Thereafter, the 2nd appellant who appeared from the forest, using iron bar hit PW1 on knee and the head. PW1 was unconscious and he was thrown in the bush as the appellants took away the motorbike with Registration No. T.337 BWR, make SUNLAG red in colour. After PW1 felt better, he informed his colleague a motor cycle rider on what befell him. PW1 was taken to Kwai mission hospital and on 18th February, 2013, reported the incident to the Police. On 19th February, 2013, PW1 got information that, the motorcycle was found in Handeni District in possession of the appellants suspected to have been stolen in Lushoto. PW1 was over a phone call asked to identify the motorcycle and he availed the Registration number of the motor cycle after which the

appellants were taken to Lushoto where PW1 managed to identify the appellants.

The appellants denied the charge. The 1st appellant claimed to have peacefully hired the motorcycle from PW1 and went with the same to Handeni. The 2nd appellant confirmed that, they went to Handeni with the motorcycle in question to commence agricultural activities. However, on the way they were arrested by Handeni Police Officers.

The conviction of the appellants was mainly based on the doctrine of recent possession. The appellants unsuccessfully appealed to the High Court hence this appeal. Each filed separate Memorandum of Appeal. Several grounds were listed in the memoranda; however appellants' main complaint against the decisions of courts below is on sufficiency of evidence of armed robbery while the motor cycle was not robbed rather, peacefully hired and arrested by the police alleged to have robbed the motorcycle. According to the appellants the charge of armed robbery is unwarranted. Besides, during trial the alleged stolen motorbike was tendered by PW1 instead of the arresting police. In addition it was the

complaint of the appellants that, the investigator was not paraded as a prosecution witness during trial.

The appellants who were unrepresented by counsel opted to initially hear the submission of Ms. Maria Clara Mtengule, learned State Attorney who represented the respondent/Republic. Initially, the learned State Attorney did not support the appeal. She argued that the entire prosecution evidence did prove a charge of armed robbery against the appellants who robbed the motorcycle from PW1, assaulted him and were arrested at Handeni with the stolen motorbike which was tendered and admitted in evidence without being objected by the appellants. She argued that, it was not fatal for the police officer to tender the motorbike in the light of the case of **Birahi Nyankongo and Kijiji Isiaga vs. Republic, Criminal Appeal No. 182 of 2010 (CAT) (Unreported) at Mwanza**. When asked if at all the 1st appellate did re-evaluate trial evidence, she urged this Court to step into the shoes of the 1st appellate court, re-evaluate the evidence and confirm the decisions of courts below. She relied on **Shabani Amiri vs. Republic, Criminal Appeal No 18 of 2007(Unreported) (CAT) at Arusha.**

Furthermore, parties were invited to address the Court on a procedural irregularity occasioned during trial whereby, **One,** after PW1 had testified on 11th March,2013, the trial magistrate ordered a retrial and PW1 testified again on 10th April,2013, due to what the trial magistrate considered as availing opportunity to appellants to cross examine PW1. **Two,** the effect of the trial magistrate relying on subsequent evidence of PW1 to convict the appellants.

Ms. Maria Clara Mtengule, learned State Attorney conceding to the procedural irregularity argued that, the trial magistrate ought to have subjected PW1 to cross examination instead of ordering PW1 to repeat adducing evidence. However, the learned State Attorney was of the view that the same is not fatal because it addressed the 1st appellant's own request. Moreover, she argued that, the trial was not vitiated because it is not clear if the trial magistrate relied on such evidence to convict the appellants. As to what would be the fate of the prosecution case in the event evidence of PW1 is expunged from record and a retrial ordered, she preferred to leave it to the Court to decide. As for the appellants, they had

nothing useful to add apart from submitting that, they leave the matter to be determined by the Court.

It is evident from the record of trial proceedings that, on 11/03/2013, PW1 testified narrating how he was attacked, assaulted and robbed a Motorbike by the appellants after the 1st appellant hired him for a trip from Kwemakame to Masange Secondary School and then back to Kwemakame. Also PW1 testified that he was hit on the head and knee and lost consciousness. In addition, PW1 tendered a motor cycle Registration No. T.337 BWR make SUNLAG which was admitted in evidence as exhibit P'1'. Thereafter, appellants cross-examined PW1 and the prosecutor re-examined PW1. After the 1st appellant complained about a headache, the trial was adjourned to 26/3/2013. On 26/3/2013, the 1st appellant requested that PW1 be paraded or summoned and ordered to repeat testimony adduced on 11/3/2013 because he was not able to cross examine him for he could not hear testimony of PW1. The Public Prosecutor was not comfortable and he is on record to complain about the move to be a torture to the respective witness. However, the trial magistrate proceeded to make an order that, PW1 be summoned or

paraded for retrial on 10/04/2013 to adduce evidence to avail the appellants opportunity to cross examine PW1.

On 10/4/2013 PW1 adduced evidence with much more details compared to initial testimony such as, that he had to wait the 1st appellant for one hour before a trip back to Kwemakame and while approaching Mazumbai forest he was attacked by a bush knife and threatened to be killed. In addition, that he called his co-motorcycle driver and informed him about the incident. This evidence not initially paraded by PW1 was relied on by the trial magistrate to convict the appellants. The 1st appellate court did not address itself on this anomaly whereby the magistrate ordered a retrial of proceedings before him which is quite irregular.

As earlier stated, the trial magistrate embarked on a strange procedure occasioning a procedural irregularity which in our view vitiated the trial. In the first place, it is not true as found by the trial magistrate that, PW1's repeated testimony was geared at availing appellants opportunity to cross examine PW1. From the record, it is clear that, on 11/3/2013 PW1 did testify and was cross-examined by the appellants and

re-examined by the prosecutor before the trial was adjourned to 10/4/2013. This shows that, the trial magistrate did not peruse previous record or else he would not have acceded to 1st appellant's prayer that PW1 be summoned to repeat adducing evidence.

The procedure regulating conduct of criminal trial including examination of witnesses, recording of evidence or recalling of witnesses is governed by Part VI of the Criminal Procedure Act [CAP 20 RE: 2002]. Section 196 of the Criminal Procedure Act (supra) provides:

> *"Except as otherwise expressly provided, all evidence taken in any trial under this Act shall be taken in the presence of the accused, save where his personal attendance has been dispensed with".*

In the case at hand, during trial PW1 adduced evidence in presence of all appellants who exercised their right to cross examine PW1. As such, there was no ground of making PW1 to repeat adducing evidence. Under the law, circumstances warranting recalling witnesses are limited to the following:

1. Under section 195(1) and (2) the Criminal Procedure Act (supra), any court may, at any stage of a trial recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. The prosecutor or the defendant or his advocate, shall have the right to cross-examine any such person, and the court shall adjourn the case for that purpose if it considers it necessary.

2. Where a trial is presided over by more than one Magistrate, section 214(1)of the Criminal Procedure Act (supra) provides:

> *" 214 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the*

magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings".

3. After substituting a charge under at any stage of trial under section 234(2) (b) of the Criminal Procedure Act(supra), the court is among other things, required to call upon the accused person to plead to the altered charge and the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused and the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination. In the case of **Sumari Hau and 4 others vs. The Republic, Criminal Appeal No. 305 of 2007 (Unreported) at Arusha,** the Court observed that, the non compliance is irregular but curable under section 388 of the Criminal Procedure Act (supra).

None of the stated circumstances arose during a trial which is a subject of this appeal to warrant recall of PW1 because, neither was his initial

evidence recorded by one magistrate nor charge substituted after PW1 had testified. As such, having concluded hearing and examination of PW1, the trial magistrate should not have ordered a retrial or rather a repeated hearing of evidence of PW1. In the premises, this was a procedural irregularity which is remedied by expunging the entire evidence of PW1 from the record. This renders the remaining prosecution evidence which now lacks complainant's evidence not sufficient to prove a charge of armed robbery against the appellants.

Pertaining to the propriety of the trial magistrate's order of retrial of a matter before him after hearing evidence of PW1, we have perused the entire Criminal Procedure Act and did not come across any provision allowing such procedure which is strange in our considered view. This is basically so because a retrial is a domain of the Higher Court sitting in its appellate or revisional jurisdiction on matters originating from lower courts. However, the High Court also relied on irregular proceedings to entertain the appeal. As such, as the irregularity occasioned a miscarriage of justice, it was incumbent on the High Court as 1st appellate court, to invoke section 388 of the Criminal Procedure Act (supra) and order a retrial or

make any order deemed fit to remedy the irregularity. However, we have in mind circumstances which may warrant a retrial as articulated in the case of **Fatehali Manji vs. the Republic [1966] EA 343** where the Court among other things, held:

> " *In general a retrial will be ordered only when 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 the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where interests of justice require it;*

In the matter under scrutiny, from the record there are a number of serious evidential gaps to mention few, during trial not parading the police officer who arrested the appellants at Handeni and transferred them to Lushoto considering that, the appellants denied to have robbed the motorcycle and claim to have peacefully hired it from PW1. In that regard, to order a retrial is not in the interest of justice because it will avail the

prosecution opportunity to fill in evidence gaps which is not in the interests of justice. In view of the aforesaid, exercising our revisional powers under section 4(3) of the Appellate Jurisdiction Act [CAP 141 RE: 2002], we quash the entire proceedings and judgments of lower courts below, set aside conviction and sentence and order the appellants to be released forthwith .

DATED at **TANGA** this 18th day of August, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL