CRIMINAL APPEAL NO. 213 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.	**1. BENARD MASUMBUKO SHIO, 2. CHARLES WIDMAN Vs. REPUBLIC (Appeal from the Decision of the High Court of Tanzania at Moshi)-** **Criminal Appeal No. 72 of 1999-** **Munuo, J.**	**Offence of** armed robbery contrary to sections 285 and 286 of the Penal Code.- statutory minimum sentence of thirty years imprisonment. **Non compliance with section 192 of the Criminal Procedure Act-** Failure by the Court to hold a preliminary hearing does not vitiated the trial if the accused person was not prejudiced- *….. conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated under s. 192 are mandatory. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases. <u>However, in the most unlikely</u>*

		event that a preliminary hearing is not conducted in a criminal case that trial that proceeds without it will not automatically be vitiated ….. the proceedings could be vitiated depending on the nature of a particular case …..": **see Mkombozi Rashid Nassor** v **R, Criminal Appeal No. 59/2003 (unreported), Joseph Munene and Another v R, Criminal Appeal No. 109/2002 (unreported), and Christopher Ryoba v R, Criminal Appeal No. 26 of 2002.** **Confession made to Police Officer-** Confessions made to police officers all things being equal were admissible under section 27 (1)

		and (2) of the Evidence Act. **Proof of voluntariness of Confession**-The allegation by the appellants of being forced to sign the caution statements must be disputed by the prosecution to negate the allegation of involuntariness of the confession alleged. **Section 39 Criminal Procedure Act, 1985-Non production in evidence of anything with respect to which an offence is alleged to have been committed-** Section 39 falls under Part II (A) of the Act which deals with ***"Arrest, Escape and Recapture and Search Warrants and Seizure".*** Part II as a whole provides for "***Procedure Relating to Criminal***

		Investigations", a function falling squarely within the province of the Police and not trial courts. **Section 39 Criminal Procedure Act, 1985-**A plain and/or purposive reading of section 39 leaves no doubt that it was meant to aid investigators of criminal cases. **Section 39 Criminal Procedure Act, 1985-** does not compel the prosecution to tender any such thing in evidence in the event a prosecution is instituted. After all if the prosecution fails to tender material evidence in its possession, that will be to its detriment and an advantage to the defence. At any rate a torch was not one of the items robbed at PW7's house.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 213 OF 2007

1. BENARD MASUMBUKO SHIO
2. CHARLES WIDMAN } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 28th day of February, 2000
in
Criminal Appeal No. 72 of 1999

JUDGMENT OF THE COURT

2 & 23 October, 2007

RUTAKANGWA, J.A.:

The two appellants, Benard and Charles, the 1st and 2nd appellants respectively, were charged in the District Court of Moshi along with three others on one count of armed robbery contrary to sections 285 and 286 of the Penal Code. The robbery took place at about 23.45 hours on 6th December, 1995 at Sambarai area of Moshi District at the home of one Valerian Massawe, who testified as PW7. The properties robbed included cash money Tshs. 2,500,000/=, clothes, a phoenix bicycle, one bag and one sewing machine. During the course of the robbery a gun was used and two people who were in the house at the time, were physically assaulted and one of them wounded. These were PW1 Flora Valerian Massawe and PW2 Peter V. Massawe.

Although the appellants and their colleagues denied the charge, they, alone, were convicted as charged. They were sentenced to the statutory minimum sentence of thirty years imprisonment. They were aggrieved and appealed to the High Court. The High Court,

sitting at Moshi upheld their conviction and sentence and dismissed their appeal. Still aggrieved they lodged this appeal.

Each appellant filed his own memorandum of appeal containing six grounds of complaint each. Briefly, the appellants' complaints zero in on these issues. **One,** that the prosecution did not prove its case beyond reasonable doubt. **Two,** that their trial was irregularly conducted and therefore null on account of failure to conduct a preliminary hearing. **Three,** that the trial was irregular because the evidence of PW2 was taken without a *voire dire* being conducted. **Four,** that the trial District Court erred in law in admitting in evidence their retracted confessions contained in their alleged caution statements. **Five,** the two courts below erred in law in failing to note that a torch which the 2nd appellant Charles was allegedly arrested with was not tendered in evidence contrary to the mandatory requirements of section 39 of the Criminal Procedure Act, Cap. 20 (or the Act hereinafter). **Six,** that the two courts below erred in law in rejecting their defence evidence and proceeded to ground the conviction for robbery on contradictory, inconsistent and unreliable evidence. **Seven,** that the two courts below erred in law

in acting on the identification evidence of PW1 who did not give the physical description of the 1st appellant.

In this appeal the appellants advocated for themselves. The Republic which vigorously resisted the appeal was represented by Mr. Boniface, learned Senior State Attorney.

Before discussing the grounds of appeal and the respondent's response to them, we have found it necessary to give a brief summary of the evidence which led to the conviction of the appellants. It was as follows:

On the evening of 6th December, 1995 PW7 was on his way back home from Dar es Salaam, where he had gone on business. At home he had left behind his wife (PW1) and their son (PW2). At about 11.45 p.m. when both PW1 and PW2 were watching television in the living room PW7 called to tell PW1 that he was at Mwanga. As the two were talking over the phone, PW1 and PW2 heard sounds of footsteps outside their house. PW1 went to peep through a window. The area was well lit by electric light. She then saw some people outside, some were already at the door. She was ordered to open

the door by those people who claimed to be soldiers from Moshi. As PW2 was about to open the door, the same was smashed open with a big stone commonly known as *"fatuma"*. A gun was fired outside at the same time. Two people burst into the house.

Once in the house the two invaders began to attack both PW1 and PW2. PW1 was at first hit with a long double-edged knife or *"sime"* on the forehead. She was then continuously beaten by the intruders, who had doubled to four, while being asked to surrender money to them. She ultimately told them to take anything they wanted. At that, the bandits switched off the lights in the living room. They ransacked the house and collected all they wanted. They then hit PW1 unconscious and left. PW1 was subsequently sent to the K.C.M.C. hospital where she was admitted. However, before PW1 was hit unconscious she had managed to recognize the appellant Charles and one Amedeus Assenga whom she knew well, among the robbers. Furthermore, while the bandits were ransacking the house, PW2 sneaked out of the house and went to inform their neighbour, PW3 John Massawe, what was happening.

PW3 rushed to the home of PW7 with his younger brother and PW2. As they approached the house they saw one person with a bicycle and a torch on his forehead making his escape through a barbed-wire fence. An alarm was raised. People gathered and gave chase to the escaping person who sought refuge in a banana farm. When that person finally emerged from the farm without the bicycle but still with a torch affixed on his forehead, he was arrested and taken to PW7's house. That person was the 2nd appellant Charles. The bicycle which Charles had left in the farm was recovered. It was the bicycle which had earlier been robbed. It was subsequently admitted in evidence as exhibit P3.

Charles was handed over to PW4 No. C.760 D/Cpl Peterson who rushed to the scene of the crime on receiving a report of the robbery. Charles allegedly confessed to PW4 to have participated in the robbery, and named his accomplices who included the 1st appellant Benard. He then led them to Benard's residence.

The house of Benard was searched in the presence of his *Kitongoji* Chairman, PW3 Michael Arcado. Inside the house two bags

were found. One of the bags contained clothes. The clothes included four pairs of trousers and 4 shirts and a vehicle inspection report belonging to PW7. Benard claimed that the bag and clothes were given to him by one Amadeus. The appellants were then taken to the Moshi Central Police Station and subsequently charged.

In his sworn evidence Benard told the trial court that he was awakened at 2.00 a.m. on 6/12/1995 by some "*Sambarai"* people who were accompanied by two armed "soldiers". These people seized some of his properties. They took him out of the house, had his hands and legs tied with ropes. Then the bags containing PW7's properties were put in his house so as to fake evidence before PW6 arrived. When the chairman arrived he told him what had happened. He was taken to the police station where on 8/12/1995 he was given some papers and asked to sign. He was beaten and decided to sign them. He denied committing the robbery. He called his wife, Grace Charles (DW1) to confirm his story.

On his part the 2nd appellant Charles in denying the charge had a very interesting story to tell. On 6/12/1995 at 6.30 p.m. he was

requested by his neighbour to escort her/him to hospital to take a sick child. After getting treatment they left for home at about 8.00 p.m. By that time there were no buses. They had to make it on foot. After covering a distance of over 4 kilometers they came across a group of people who told them that a theft had occurred and they were suspects. However, those people decided to let his companion (a woman) go and he was detained. At that juncture policemen arrived. He was handed over to the policemen on the allegation that he was a thief. He was then taken to the police station where he was tortured and forced to confess to having committed the robbery. Because of the torture, he sustained injuries and had to be admitted in hospital for nine days.

He also attacked the credibility of PW1, PW2, PW3, PW4, PW5 and PW7 on the basis that they contradicted each other.

In convicting the two appellants, the learned trial Resident Magistrate was satisfied that the two appellants had committed the offence because of their voluntary confessions, being found in

possession of some of the stolen properties and Charles was positively identified at the scene of the crime.

The learned first appellate judge dismissed their appeal for almost similar reasons. She was of the firm view that even without relying on the retracted confessions, the visual identification evidence, the fact that Charles was *"caught red-handed within the farm of the complainant running from the scene of crime",* and the doctrine of recent possession, conclusively proved that the appellants were among the robbers.

At the hearing of the appeal the two appellants opted to say nothing in elaboration of their grounds of appeal. It was the appellant Charles, who reiterated that PW1 was a liar because she never tendered in evidence her PF3 to prove that she was indeed admitted at the K.C.M.C. hospital.

On his part, Mr. Boniface urged us to dismiss the appeal. He assigned these reasons for his stance. **Firstly,** the 2nd appellant was arrested in the vicinity of the scene of the crime after he had abandoned the robbed properties. Thereafter he led the search

party to the home of the 1st Appellant where some of the robbed properties were recovered. **Secondly,** the 1st appellant was found in possession of PW7's robbed clothes and he never gave any reasonable explanation to account for his possession of the same. **Thirdly,** the 2nd appellant was positively identified by PW1 at the scene of the crime to have been among the four robbers who invaded their house.

Regarding the issues of law raised by the two appellants, Mr. Boniface candidly conceded to the mentioned irregularities. On the failure to conduct a preliminary hearing as required under section 192 of the Criminal Procedure Act, Mr. Boniface submitted that the omission in the circumstances of this case did not occasion any injustice to the appellants. Regarding the failure to conduct a *voire dire* before the trial court received the evidence of PW2 the learned Senior State Attorney urged us to hold the omission to have been innocuous as neither the trial court nor the first appellate court relied on PW2's evidence to ground the appellants' conviction. Furthermore, he argued that on the basis of established law, such evidence should be taken as unsworn evidence. However, Mr.

Boniface was of the firm view that the cautioned statement of Benard (exhibit P6) was irregularly received in evidence as no inquiry was made to determine the voluntariness or otherwise of the alleged confession. He accordingly urged us to discount the alleged confession.

Responding to Mr. Boniface's submission, Benard urged us to hold that the bag containing the clothes of PW7 was planted by the police in his house before the arrival of PW6. The appellant Charles pressed us to find PW1 an untruthful witness as she neither mentioned his name to PW2 nor did she tender in evidence her PF3 to support her claim that she was actually admitted at the K.C.M.C. hospital.

In disposing of this appeal we have found it convenient to start with the issue of non compliance with section 192 of the Act. We are satisfied that the trial District Court erred in law in failing to hold a preliminary hearing as provided for in section 192 of the Criminal Procedure Act and the rules made thereunder, as argued by the appellants. That being the case, we have asked ourselves this

question: Did this omission vitiate the trial of the appellants? Mr. Boniface is of the view that it did not. We entirely agree with him. We find support for this view in a number of decisions delivered by this Court on the issue. These decisions include: **Mkombozi Rashid Nassor** v **R,** Criminal Appeal No. 59/2003 (unreported), **Joseph Munene and Another** v **R,** Criminal Appeal No. 109/2002 (unreported), and **Christopher Ryoba** v **R,** Criminal Appeal No. 26 of 2002.

In **Ryoba's** case there was non compliance by the trial High Court with the provisions of section 192 (3) of the Act in that no memorandum of agreed matters was drawn up along the requirements spelt out in the said sub-section. The appellant came to this Court seeking the nullification of his trial on this ground only. The Court held that only the proceedings dealing with the preliminary hearing were vitiated and dismissed the appeal. Before dismissing the appeal, however, the Court observed thus:-

> *"….. conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated*

> *under s. 192 are mandatory. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases. However, in the most unlikely event that a preliminary hearing is not conducted in a criminal case that trial that proceeds without it will not automatically be vitiated ….. the proceedings could be vitiated depending on the nature of a particular case …..”*
> [Emphasis is ours].

In **Joseph Munene's** case (supra), the trial District Court did not hold a preliminary hearing at all. The appellants were convicted as charged of armed robbery. Their appeal to the High Court was dismissed. One of their grounds of appeal to this Court was on non compliance with section 192 of the Act. They asked the Court to nullify the trial which led to their conviction on this ground.

In rejecting this ground of appeal, the Court said:-

> *"….. From our perusal of the record we have found nothing suggesting that the appellants' trial which proceeded without holding a*

> *preliminary hearing either delayed or caused extra costs or prejudiced the appellants …..*
>
> *Under the circumstances we are satisfied that the proceedings which were conducted without invoking the procedure laid down under section 192 of the Act, were not vitiated".*

Likewise, from our dispassionate study of the record in this appeal we have gleaned nothing therefrom indicating that the appellants were prejudiced in any way by this non-compliance. The appellants did not tell us that they were prejudiced by this omission. We subscribe to what the Court held in the above cited cases. The trial was not vitiated. We accordingly dismiss this ground of appeal.

Equally admitted is the fact that the evidence of PW2 who was 14 years old at the time he testified, was taken on oath by the trial court without conducting a *voire dire*. We share the observation by Mr. Boniface that it is now established law that such evidence ought to be reduced to the level of unsworn evidence and all things being equal it can be acted upon. See, for instance, the decisions of this Court in the cases of:-

(i) **Dahiri Ali** v **R** (1987) T.L.R. 218

(ii) **Deemay Daati** v **R**, Criminal Appeal No. 80 of 1994

(iii) **Herman Henjewele** v **R,** Criminal Appeal No. 164 of 2005 (unreported).

All the same, as was correctly observed by Mr. Boniface, the appellants were not prejudiced at all by this irregularity. This was so as neither the trial District Court nor the first appellate court relied on the evidence of PW2 in convicting the appellants and/or sustaining their conviction on appeal. We accordingly find this ground of complaint to lack merit.

Another ground of complaint, which is purely a point of law, is that the trial District Court erred in law in admitting in evidence the retracted confessions of the appellants, exhibits P6 and P8 without conducting a trial within a trial.

It is true that when PW5 No. 9616 D/Staff Sgt. Adrum and PW8 No. C.8360 D/Cpl. Thomas were about to tender in evidence those caution statements which they had recorded, the appellants raised objections. The basis of the objections were that they were forced to

sign the statements. All the same these were admitted without any further assurances from the prosecution that they were voluntarily made and signed. The prosecution had a duty to prove this under section 27 (2) of the Evidence Act, Cap. 6 R.E. 2002.

In response to this ground of complaint Mr. Boniface agreed with the appellants. It was his submission that no inquiry was made by the trial District Court to determine the voluntariness or otherwise of exhibit P6. He accordingly invited us to discount it.

There is no doubt that exhibits P6 and P8 amount to confessions. The said confessions were made to police officers. All things being equal they were admissible under section 27 (1) and (2) of the Evidence Act. These provisions read as follows:

> *"27 – (1) A confession voluntarily made to a police officer by a person accused of an offence may be proved against that person.*
>
> *(2) The onus of proving that any confession made by an accused person was voluntarily made shall lie on the prosecution".*

The allegation by the appellants of being forced to sign the caution statements was not disputed by the prosecution. So the involuntariness of the alleged confessions was not negated at all. The two courts below, unfortunately, did not address their minds on this aspect of the case. As the voluntariness of exhibits P6 and P8 was not proved by the prosecution, we hold that the trial court erred in law in relying on them in its judgement. We shall accordingly discount exhibits P6 and P8 in our judgement as pressed by Mr. Boniface.

The 2nd appellant has raised another interesting point of law. This relates to non production in evidence of the torch he was arrested with. He is claiming that this was contrary to the mandatory requirements of section 39 of the Act. In order to answer this complaint satisfactorily we shall first reproduce this section in full. It reads thus:-

"39. For the purposes of this Part –

(a) anything with respect to which an offence has been or is purported on reasonable grounds to have been committed;

(b) anything as to which there are reasonable grounds for believing that it will afford evidence of the commission of any offence; and

(c) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any offence

shall be deemed to be a thing connected with the offence".

Section 39 falls under Part II (A) of the Act which deals with ***"Arrest, Escape and Recapture and Search Warrants and Seizure".*** Part II as a whole provides for "***Procedure Relating to Criminal Investigations",*** a function falling squarely within the province of the Police and not trial courts. Only Parts VI – VIII of the Act provide provisions for the conduct of trials in the subordinate courts and the High Court, which include provisions on the taking and recording of evidence.

A plain and/or purposive reading of section 39 leaves no doubt that it was meant to aid investigators of criminal cases. It empowers

them to seize anything mentioned in clauses (a), (b) and (c) in the course of their investigations. It does not compel the prosecution to tender any such thing in evidence in the event a prosecution is instituted. After all if the prosecution fails to tender material evidence in its possession, that will be to its detriment and an advantage to the defence. At any rate a torch was not one of the items robbed at PW7's house. We accordingly find no merit in this ground of appeal and it is dismissed.

The appellants are also complaining that the courts below erred in law and fact in failing to note the *"enormous contradictions and false testimony from the prosecution witnesses".* Our understanding of the word ***"enormous"*** as used here is that the contradictions were overwhelming and fundamental. As such it was wrong to found a conviction on such evidence.

We have carefully analysed the evidence of the prosecution witnesses, leaving that of PW2 aside. We have failed to locate the evidence of any witness which was flawed by such fundamental contradictions. Having discarded the evidence of PW2 as urged to do

by the appellants, we have found the evidence of both PW1 and PW3 to be totally undiscredited. Benard specifically stated that these contradictions are found on pages 25 (lines 10-12), 29 (lines 15 and 19) and 31 (lines 14 and 23) of the record of appeal. We have read these pages thoroughly. We did not come across any piece of evidence which would suggest that the witnesses patently contradicted themselves or each other. The inconsistency traced is in the evidence of PW7 who at first said that only *"two soldiers"* and himself entered Benard's house but while being re-examined he said that *"Two soldiers, Chairman, me and other people entered into Benard's house".* To us, this was a minor inconsistency on a matter of detail. It did not go to the root of the matter, that is, the robbery and the recovery of part of the robbed properties from the house of the 1st appellant. The appellant admitted this fact although he attempted to explain how they got into his house.

Appellant Charles invited us not to believe the evidence of PW1. She lied that she was hospitalized and she did not back up this claim with a PF3, he contended. It is true that the PF3 of PW1 was not tendered as evidence. But this omission alone cannot be the

criterion for rejecting her evidence. In spite of this omission the two courts below found her to be a credible witness on all the relevant issues in the case. She was believed on her assertions that they were attacked and robbed by armed bandits. She was also believed on her unequivocal assertion that she had identified Charles and Amedeus Assenga among the robbers. PW1 was very categorical in her evidence that she unmistakably recognized Charles because he was known to her prior to the robbery incident. That PW1 and Charles were known to each other was never disputed at all by Charles. The conditions conducive for an unmistaken identification were not disputed. All the same, the fact that PW1 was admitted at the K.C.M.C. hospital was fully confirmed by PW7 and PW4, the police officer who personally took her to the said hospital. We accordingly reject the call for disbelieving the evidence of PW1 on this ground.

We are now left with the first common ground of appeal. This is that there was no sufficient evidence to prove the charge. The trial District Court and the first appellate court were satisfied after believing PW1, PW3, PW4, PW6 and PW7 as truthful witnesses, that

their evidence not only proved beyond reasonable doubt the preferred offence of armed robbery but further that the two appellants participated in the robbery.

Issues of credibility of witnesses are issues of fact. As already indicated in this judgement, the fact that an armed robbery was committed at the home of PW1 and PW7 was never contested. The issue was on the identity of the robbers. The two courts below found it as an established fact on the basis of the credible evidence of PW1, PW3, PW4, PW6 and PW7 that the two appellants were among the robbers.

It is now trite law that where there are concurrent findings of facts by two courts below this Court should not disturb such findings unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. Nothing of the sort has been shown in this appeal. On the contrary, on our re-appraisal of the whole evidence on record we are of the settled mind that the two courts below came to the correct decisions. Their concurrent finding that the two

appellants were principal participants in the robbery was right and cannot be disturbed.

The 2nd appellant Charles as correctly found by the courts below was arrested near the scene of the crime and a robbed bicycle was recovered in the vicinity. He then led the police to Benard's house where some of the robbed properties of PW7 were recovered. In his attempt to explain his possession of the said properties Benard said that they had been taken there by one Amedeus. The mention of Amedeus was not a figment of his imagination. It was an attempt to shift the criminal liability wholly to Amedeus Assenga, his accomplice, whom PW1 had unmistakably recognized at the scene of the crime together with Benard during the commission of the robbery. The doctrine of recent possession was, therefore, properly invoked in the circumstances by the two courts below. Taken together with the visual identification evidence of PW1 and PW3 who participated in the arrest of the 2nd appellant it cannot be seriously argued that the appellants' guilt was not proved beyond a reasonable doubt.

For the foregoing reasons we find that the appellants were rightly convicted. As the appeal lacks merits it is hereby dismissed in its entirety.

DATED at ARUSHA this 23rd day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

I. P. Kitusi
DEPUTY REGISTRAR