LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT MWANZA. CRIMINAL APPEAL NO. 13 OF 2008. RAMADHAN C.J,KIMARO, J.A AND MANDIA J.A	**PETER JOHNSON, IRENGE** **JOSEPH MTIBA,** **SIKI MRIMI VS THE REPUBLIC.** (Appeal from the Judgment of the High Court of Tanzania at Mwanza Mackanja, J)	1. Where it is shown that failure to have a preliminary hearing did not result in a miscarriage of justice or caused delay in the trial or extra costs to the appellant the proceedings are not vitiated. 2. The ability of the witness to name a suspect at the earliest opportunity is all important assurance of his reliability in the same way as an explained delay or complete failure to do so should put a prudent court to inquiry. 3. If the witness did not close his professional qualification before he gave evidence, then he is unqualified.

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RAMADHANI, C.J., KIMARO, J.A., And MANDIA,J.A.)

CRIMINAL APPEAL NO.13 OF 2008

1. PETER JOHNSON IRENGE.....1ST APPELLANT
2. JOSEPH MTIBA.....2ND APPELLANT
3. SIKI MRIMI.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania At Mwanza)
(Makanja, J.)
dated 22nd December, 2007
in
Criminal Appeal No. 8 of 2007

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JUDGMENT OF THE COURT

11th October & 18th October, 2010

KIMARO, J.A.:

The District Court of Tarime at Tarime convicted the appellants with three counts of armed robbery contrary to sections 285 and 286 of the Penal Code. Each of the appellants was sentenced to thirty years imprisonment and twelve strokes of the cane. Aggrieved by the conviction and the sentence, they lodged an appeal in the High Court of Tanzania

which was dismissed. Still aggrieved, they have come with this second appeal. The appellants are advocated by Mr. Bernard Kabonde and Mr. Stephen Magoiga , learned advocates. The respondent Republic is represented by Mr. Stephen Makwega, learned State Attorney.

This is a second appeal. In **Ludovide Sebastian V R** Criminal Appeal No318 of 2009 (Unreported) the Court held that:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehend the substance, nature, and quality of evidence, resulting in an unfair conviction, this Court must , in the interest of Justice interfere."*

See also the cases of **Peters Vs Sunday Post Ltd**(1958) EA 424 the Court of Appeal for East Africa and See also the cases of **Daniel**

Nduru and Four Others V Republic Criminal Appeal No.178 of 2004(Unreported). It is this established principle which will guide us in the determination of the appeal.

In the appellants' grounds of appeal they are complaining against :- One, irregularities in the procedure; namely (i) failure to comply with the provision of section 192 in drawing up a memorandum of matters not in dispute and (ii) admission of prosecution exhibits at the preliminary hearing despite protest from the prosecution. Two, the trial court illegally assumed revisional powers which it was not conferred with. Three, a misdirection on the learned judge on first appeal to quash a revision order by the trial court without nullifying the whole proceedings of the trial court. Four, failure by the learned judge on first appeal to evaluate the prosecution evidence which they contend was marred by contradictions from the prosecution witnesses as well as the exhibits admitted in court. Five, the learned judge on first appeal failed to give weight to the defence exhibits. Six, the first appeal court is blamed for declaring PW6 a qualified forensic expert while there was no evidence to prove his credentials.

In the trial court evidence was led that on the 1st of April, 2005 Bosta Mwikwabe Gesase @ Mchael Nicholaus Gesase@ Riziki(PW1) returned to

his residence at Bomani area in Tarime town about 11.15 p.m. Prior to arriving home, he phoned his wife Christina Michael (PW7) to alert her that he was on the way, so that she would be ready to open the gate for him. On arrival home, Hussein Athumani (PW2) his watch man, opened the gate. PW7 was also ready standing at the front of the house. As PW4 entered into his compound, PW7 saw several people surrounding the motor vehicle and they entered the compound with him. This appeared to be unusual. His wife Christina (PW7) asked her husband why he was entering the compound with those people.

As PW4 looked around he saw a man he knew pointing a gun at him. The wind screen to the driver's door was lowered but the other one was locked. PW4 said the man carried an SMG. As he gave his testimony, he identified the man as Peter. He is the first appellant. He said he knew him because he had a shop in the same building where PW's shop was also located. Peter required PW4 to surrender his pistol but PW4 pretended not to have one. As he bent to pick the pistol he was shot in the abdomen. He then saw about four people passing him and going to the house. Another person identified by PW4 as Joseph Mtibwa, the second appellant, searched the motor vehicle, and seized the pistol, a

Browning with serial No. C 7823, eight rounds of ammunition which were loaded in a magazine, a Nokia 1100 mobile phone and a sum of Shs. 5,000/=. The items stolen in PW's motor vehicle formed the subject matter of the first count.

His wife (PW7), after seeing what had befallen her husband, ran into the house and hid in a toilet. According to PW4, he saw about four people passing him and going into his house where they stayed for about half an hour. It was the testimony of PW7 that as she was in the toilet she heard one of the bandits saying "shoot the woman". The bandits searched the house and found her. They required her to surrender to them Shs 21, 000, 000/= which PW7 said they did not have that amount. The bandits then ransacked the bedroom and took Shs, 1, 000,000/= from a wardrobe, and a shot gun with serial No.19379. These items formed the subject matter of the second count. The bandits also left with three rounds of ammunition they took from the bedroom, the subject matter of the third count. Out of the bandits who went into the house, PW7 said she identified only one person and that is Siki, the third appellant. It was the testimony of PW7 that Siki was known to her since 2000. Although PW7 was ordered to take the bandits to their shop, she managed to slip away and hid under a table.

The watchman Hussein Athuman PW2 made a dock identification of the first appellant describing him as person he used to see in town.

After the bandits left, PW7 raised an alarm. One Joseph Petro Kwayu (PW1) was the first neighbour to respond. He found PW4 in a critical condition and took him to Tarime Government Hospital. The severe injuries he suffered ended in his being admitted at Bugando Hospital for a month.

From the evidence of ASP Waliko (PW5) all the appellants were arrested on 21st April 2005. Upon interrogating the second appellant, he agreed to show a shot gun he had at his home village at Nkende. Prior to the arrest of the appellants, on 11th April 2005 there was an exchange of fire between the police and suspected robbers where the police recovered a submachine gun and two magazines and a pistol left behind by the suspected robbers. One magazine had eighteen rounds of ammunition and the other one thirty rounds of ammunition. No one was arrested on that day. The first and third appellants were arrested after the second appellant said they gave him the gun. The gun recovered from the second appellant was a shot gun with a barrel that was cut to make it shorter. The witness said PW4 managed to identify the short gun and the pistol as

being the ones that were stolen from his residence on 1st April, 2005 although the serial numbers of the shot gun had been erased. According to PW5, PW4 said his shot gun had its trigger broken and its firing pin replaced with a locally made pin. The witness said a shell and a bullet was also picked at the residence of PW4 on the date the robbery was committed at his home. The SMG gun with serial number 14216826 was admitted in evidence as exhibit P6, two magazines with 46 rounds of ammunition exhibit P7 and the SMG shell exhibit P8.

The prosecution also brought A/Insp. Godfrey Luhanga, (PW6) of the Forensic Bureau, to testify from which weapon the bullet was fired. Taken to him was the shot gun which had its barrel cut to make it short, and a small pistol with calibre 6.35. The witness was required to make a comparison of the two weapons to ascertain from which one the shell that was recovered from the residence of PW4 was fired. It was the testimony of PW6 that his team fired three bullets from the SMG. Then , a microscopic testing was done to compare the shell and the bullet head that was sent to them. They noted that the shell and the bullet head had been fired from the SMG that was sent to them for investigation. A forensic

report dated 31st July, 2006 with photographs was admitted in evidence as exhibit P9. Substantially that was the prosecution evidence.

All the appellants denied the commission of the offence. The first appellant relied on the defence of alibi that he was in Mwanza from 27th March 2005 to mourn the death of his mother in law. He returned to Tarime on 3rd April 2005. The first appellant also relied on the statement PW2 made to the Police in which he said he did not identify anyone, to impeach his credibility. The second appellant on the other hand said he was taken blind folded and taken to his farm under threat of death, where a gun was unearthed and he was instructed to say that the gun belonged to him. The second appellant said the charges were framed against him after he refused to yield to demands of corruption from the OC-CID. As for the third appellant he denied involvement in the commission of the offence. He challenged the identification made by PW7 claiming that her testimony in court differed from the statement he made to the police. The third appellant said he was arrested because the second appellant mentioned him.

On the evidence as given above, the trial court was satisfied that the offences of armed robbery were committed and the appellants were

sufficiently identified as the persons who attacked PW4 and stole the properties forming the subject matter of the offences.

In their first appeal to the High Court, the learned judge agreed with the appellants that there were irregularities in procedure for not complying with the provisions of section 192 of CAP 20 for admitting in evidence exhibits disputed by the defence and for invoking powers of revision to correct the error the trial court made in the admission of the exhibits. He was satisfied that the error did not vitiate the proceedings. The appellant's appeal ended up in being dismissed in it entirety.

Coming to the first ground of appeal, it has two limbs. Arguing the appeal in support of the first limb, Mr. Kabonde learned advocate said that there was no memorandum of matters not in dispute drawn up from the preliminary hearing that was conducted on 10th August 2005. This, contended the learned advocate, contravened section 192 of CAP 20. He lamented over the trial magistrate admitting as evidence, exhibits which the defence side disputed.

Mr. Makwega, learned State Attorney, for the Respondent Republic supported the appeal and the arguments advanced by his learned colleague on all grounds of appeal.

This ground need not detain us. The record of appeal at pages 12 to 15 show that a preliminary hearing was conducted. At page 14 a memorandum of matters agreed upon was drawn up, but it was neither read out to the appellants, nor signed by any of the parties to the proceedings. This omission contravened section 192(3) of CAP 20. In the case of **MT. 7479 Sgt Benjamin Holela V R** [1992] T.L.R. 121 the Court held that:

> *"Section 192(3) of the Criminal Procedure Act, 1985 imposes a mandatory duty that the contents of the memorandum must be read and explained to the accused."*

The provisions of section 192(3) require the accused person and his advocate (if any) and the public prosecutor to sign the memorandum of the matters which the parties agree not to be in dispute.

In furtherance to the first ground of appeal, the trial magistrate was faulted to have admitted in evidence exhibits P.1, 2, 3, 4, 5, 6, 7, 9 and 10 which the defence side disputed. These exhibits included firearms, ammunition, a spent cartridges, a PF3 form, a sketch plan of the scene of crime and a report of the Forensic Bureau. On this ground the learned judge on first appeal held that the exhibits were wrongly admitted. We agree with the learned judge on first appeal that the trial magistrate erred in admitting the exhibits which the defence side disputed. That was done after the preliminary hearing was completed and the trial magistrate did not even show the provisions under which he was admitting the exhibits. Under sub section 4 of section 192 of CAP 20:

> *" any fact or document admitted or agreed*
>
> *(whether such fact is mentioned in the*
>
> *summary of evidence or not) in a memorandum*
>
> *filed under this section shall be deemed to have*
>
> *been proved."*

Such documents could only be admitted in evidence at the preliminary hearing if both the prosecution and the defence side had agreed to them. Otherwise there was no basis for the trial magistrate to admit the same. In terms of the case of **MT 7479 Stg. Benjamin Holela**, supra, non compliance with section 192(3) makes section 192(4) inapplicable.

As for the second limb of the preliminary hearing, the learned judge on first appeal held that the trial magistrate erred in correcting the mistake he made in admitting the exhibits which the defence side disputed, because he was not vested with that jurisdiction. Such jurisdiction is conferred to the High Court by the provisions of section 372 of CAP 20. According to the learned advocate for the appellants, what the learned judge on first appeal had to do, was to nullify the proceedings and return the file to the district court for continuation of the proceedings in compliance with the relevant provisions. The learned judge on first appeal did not quash the proceedings because he said the irregularity did not occasion any miscarriage of justice. We are of a considered view that the learned judge on first appeal was right. Still in the case of **MT. 7479 Sgt Benjamin Holela**, (supra) the Court held that:

"Since the requirements under section 192(3)

were not complied with, the provisions of

section 192 (4) of the Criminal Procedure Act

cannot apply."

What this meant was that, as there was no compliance with section 192 of CAP 20 in conducting the preliminary hearing, the trial court had to proceed with the hearing in the usual manner for conducting trials.

In **Kulwa s/o Mwakajape and two others Vs R** Criminal appeal No. 35 of 2005 (Unreported) the Court held that:

"where it is shown that failure to hold

a preliminary hearing did not result in

a miscarriage of justice or caused delay

in the trial or extra costs to the appellant,

the proceedings are not vitiated."

On ground three of the appeal, Mr. Magoiga vehemently attacked the identification evidence which he claimed was not reliable and was

marred by contradictions. Starting with the evidence of PW4, the complainant in this appeal, the learned advocate said although he said he identified all the appellants, yet PW4's evidence showed that he failed to mention the names of the persons he identified to his wife PW7, or to the first person to be at the scene of crime, PW1. In this respect, the first judge on appeal was faulted for not properly evaluating the evidence of PW4. Furthermore, the learned advocate argued, the intensity of the light was not even disclosed. The Court was referred to the cases of **Nyigoso Masolwa V R** [1984] T.L.R.186 and **Marwa Wangii Mwita V R** Criminal Appeal No.6 of 1995 which insisted on the importance of the identifying witness mentioning the name of the attacker at the earliest opportunity. In the latter case the Court held:-

> *"The ability of a witness to name a suspect at the earliest opportunity is all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry."*

Explaining further the unreliability of the identification made by PW4, Mr.Magoiga said, since the witness said he was thrown out of the motor vehicle, and he had been shot, hence suffering pains from the injuries, it was doubtful that he could make a proper identification of the appellant .

On the identification by PW7, the learned advocate said that the conditions of her identification of the third appellant were not different from that of PW4. She too, failed to mention the name of the third appellant whom she claimed to have identified at the scene of crime, to the first person to be at the scene of crime. He said PW1 was the first person to be at the scene of crime, but he did not say that PW7 mentioned to him the name of the third appellant as being among the bandits who invaded their house. The learned advocate also wondered how PW7 could have identified the third appellant while she said she hid herself under a table in the dining room.

Regarding the dock identification made by PW2, Mr. Magoiga said no weight should be put to it because the witness admitted in cross examination that in the statement he made to the police, he did not say that he identified any person and that was the correct version of his evidence.

Pointing out contradictions in the prosecution evidence, the learned advocate said that PW5, who was among the investigations officers who visited the scene of crime, did not corroborate the evidence of PW7. She did not mention to him the name of the third appellant as being among the bandits. He said that the fact that there was a lapse of 21 days before the appellants were arrested also watered down the identification evidence that was made by the witnesses. Referring to the judgment of the trial court, the learned advocate said it was categorically stated in the judgment that neither PW4 nor PW7 disclosed the name of the attacker.

Another remarkable deficiency in the identification of the appellants, the learned advocate contended, came from PW 5. The learned advocate said the witness said in cross examination that blood was found at the place where the police recovered arms after exchange of fire between the police and the suspected bandits. But no appellant was found with fresh wound. Yet the learned judge on first appeal failed to evaluate this evidence in favour of the appellants.

Lastly the learned advocate pointed out contradictions in the prosecution witnesses in the evidence of PW2, PW3, PW4, PW5, PW7 and PW 8 in respect of their testimonies in court and their statements to the

police claiming that the statements of the identifying witnesses made to the police did not mention the name of any suspect and they were not even recorded immediately. The statement of PW4 was recorded on 31st May 2005, and that of PW7 on 20th April, 2005.

On our part we agree that, given the contradictions and the inconsistencies in the identifying witnesses we can hardly say that the appellants were correctly identified. In the celebrated case of **Waziri Amani V R** [1980] T.L.R.250 the Court reiterated the importance of eliminating all possibilities of making a mistaken identity of the appellant before his conviction. In this appeal we are satisfied that the prosecution evidence on the identification of the appellants was not water tight. This ground has merit.

The other ground of complaint was the failure by the learned judge on first appeal to consider defence exhibits. These were the statements that were made to the police by PW2, PW4 and PW7 which the defence claimed were in variance with the testimonies of the witnesses. The defence was supplied with photocopies which were not certified, and the first appellate court said the exhibits were in admissible in evidence. The learned advocate said they were lawfully admissible in evidence under

section 67(1)(a)(i) of Cap 6. On this ground, and with respect to the learned judge on first appeal, we are sure he was wrong. The statements were supplied to the defence by the prosecution and they were being proved against the prosecution who were in possession of the original copies. In terms of section 65(b) they were secondary evidence which was admissible in evidence under section 67(1)(a)(i) of the CAP 6. They had to be considered to test the credibility of the prosecution witnesses, which as we have said was not reliable. This ground has merit.

Lastly was the admission of the forensic report of Godfrey Luhanga, PW6. It was admitted in evidence as exhibit P9. The learned advocate contended that his expertise was not proved. The defence objected to the receipt of his evidence because he was not precise in his evidence. What the witness said was that the shell that was picked at the scene of crime and the one that was test –fired showed "**sufficient marks**" and not "**same marks.**" The evidence of this witness is at page 26 of the record of appeal. This witness, apart from telling the trial court that he had seventeen years of work experience and that he studied in South Africa and USA, he did not inform the court his qualifications. The learned advocate contended that since the witness did not prove his expertise by a

gazetting of his professional qualification in a Government gazette, then he was unqualified. The Court was referred to the case of **R V Samwel Marwa @ Matiko** Criminal Appeal NO. 25 of 2006 where PW6 testified as PW2 in that case, and before the same judge. According to the learned advocate, the case was decided before the appellants' appeal in the High Court and the witness was declared unqualified. Given the fact that the witness did not disclose his professional qualification before he gave evidence, we are agree with the learned advocate that PW6 was an unqualified witness.

Given the totality of what we have said, we agree with both the learned advocate for the appellants and the learned State Attorney for the respondent Republic that the appeal has merit. We allow it, quash the convictions and sentence, and order their immediate release from prison unless they are held for any other lawful reason. It is ordered accordingly.

DATED at MWANZA this 18th day of October, 2010.

A.S.L. RAMADHANI

CHIEF JUSTICE

N. P. KIMARO

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

P. W. Bampikya

SENIOR DEPUTY REGISTRAR