IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 314 OF 2010

KIGUNDU FRANCIS
JACKSON MUSSA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of High Court of Tanzania, at Bukoba)

(Lyimo, J.)

dated the 29th day of September, 2010
in
Criminal Appeal No. 16 of 2009

JUDGMENT OF THE COURT

24th & 28th November, 2011

MASSATI, J. A.:

The appellants were convicted on their own pleas of guilty to a charge of armed robbery contrary to sections 285 and 286 of the Penal Code (Cap 16 R.E. 2002) by the District Court of Biharamulo, Kagera Region. They were sentenced to 30 years imprisonment. Their attempts at challenging the pleas were not met with success in the High Court, which dismissed their appeal after satisfying itself that their pleas were unequivocal. They are still challenging those pleas in this Court.

According to the charge sheet, the appellants and nine others were alleged to have invaded the residence of MICHAEL SYLVESTER on the night of 24th May, 2001, at Kitali Refugee Camp, in Biharamulo District and stole therefrom several properties worth Tshs 1,458,900/= and used a knife in order to obtain or retain them. When they first appeared in court on 1/8/2001 and asked to plead, the 1st appellant (who was the 7th accused) is recorded to have said:-

> *"I was with the 1st accused and the 4th accused we broke and stole things they have mentioned."*

The second appellant (who was the 1st accused said:-

> *"I do admit to have stolen the following.....I was with others but we (me) have no guns. We just broke into the building"*

As shown above, upon these responses, the trial court entered pleas of guilty for both appellants, and convicted them of the offence of armed robbery.

In this Court, the appellants have appeared in person and filed a three ground memorandum of appeal each, but essentially, there are two complaints. **First**, that their pleas of guilty were not unequivocal; they were therefore wrongly convicted thereon; **two**, that the charge and proceedings were conducted in a language they were not conversant with, and so, were not in a position to understand the proceedings, for them to make meaningful responses. They referred to us the decisions of **LAWRENCE MPINGA V R** (1983, TLR. 166 and **LUCAS MALIMI V R Criminal Appeal No. 134 of 2001** for inspiration.

Mr. Edgar Luoga, learned Senior State Attorney, who represented the respondent/Republic supported the appeal. He argued that on the facts, as narrated by the prosecution and admitted by the appellants it cannot be said that the appellants' pleas were unequivocal. The facts showed that a gun was used but the appellants said no gun was used. So the facts were qualified and were therefore equivocal. It was wrong to convict the appellants on the alleged pleas of guilty, argued the learned counsel. On the second ground, Mr. Luoga submitted that it is apparent that, both appellants being Hutus, (from the information in the charge sheet) may have needed an interpreter and the record reflects that one Francis Kalori

was shown to be an interpreter, but the record is silent on whether he was sworn or affirmed before undertaking his duty as an interpreter, nor is it clear whether he was a regular court interpreter, who in terms of section 30 of the Magistrates' Courts Act did not need to be sworn every time. In his view, in the circumstances, it was difficult to tell whether the appellants received a fair trial. He finished by saying that had it not been for the long period of incarceration that the appellants had already suffered, he would have prayed for a retrial.

We think that this appeal can be disposed of only on one ground:- Which is - whether the appellants had a fair trial? This is important because the right to a fair trial is now one of the fundamental rights guaranteed in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. A trial may be defined as a legal process where an impartial tribunal formally examines the evidence presented by the parties to a dispute, and makes the decision on the rights and or liabilities of the parties before it. In **MUSA MWAIKUNDA v R** (2006) TLR the Court of Appeal attempted to define the minimum standards for a fair criminal trial. They are; that the accused must:

(a) Understand the nature of the charge;

(b) Plead to the charge and exercise the right to challenge;

(c) Understand the nature of the proceedings namely, that it is an inquiry as to whether the accused committed the offence;

(d) Be able to follow the course of the proceedings;

(e) Understand the substantial effect of any evidence that may be given in support of the prosecution; and lastly;

(f) Be able to make a defence or to answer the charge.

In Tanzania, a trial in a criminal case in a subordinate court is governed by the Criminal Procedure Act, and the process begins with the taking of a plea under section 228. A plea of guilty may be recorded on the authority of section 228 (2) which provides:

> *(2) "If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible, in the words he uses, and the magistrate shall convict him and pass sentence upon or make an order against him unless there*

shall appear to be sufficient cause to the contrary"

In **ADAN v R** (1973) IEA.443 this wording was interpreted to entail that:

"the charge and all the ingredients of the offence should be explained in his language, or in a language he understands"

ADAN'S case was just underscoring the minimum standards for a fair trial that were outlined in **MWAIKUNDA's** case; but the difference is that in **MWAIKUNDA's** case the assumption is that the accused can follow the language of the court; but in **ADAN's** case it impliedly recognizes that an accused person may not be in an position to understand and follow the language of the court. And that takes us to the next point.

In Tanzania, by statute, the courts that are entrusted with the duty of administering justice and ensure fair trials, can only use two languages; Swahili and English. But that does not mean that people who do not know or understand the two languages cannot get fair trials. They can, because,

under section 211 of the Criminal Procedure Act the court may, in such situations, arrange for some interpreter to translate the proceedings or evidence for the accused person or from witnesses who do not understand the language of the court. However, under section 4 (b) of the Oaths and Statutory Declarations Act (Cap 34 RE2002) such interpreters must take judicial oaths prescribed under the Act before embarking on any interpretation.

But in the present case, the appellants have complained that they did not understand the language of the court when their pleas were being taken. In the High Court, the learned judge on first appeal, found that, although there was no record that the interpreter was sworn, the appellants were not prejudiced. With due respect, this was a serious misdirection. So long as there is no record that the interpreter was sworn it cannot be said that the proceedings were conducted in a language that the appellants understood. That goes to the root of the principles of a fair trial. The omission is therefore incurable and vitiates all the proceedings in the two courts below.

In the event, we allow the appeal. We quash all the proceedings and judgments of the lower Courts and set aside the sentences. After considering all the circumstances of this case we agree with Mr. Luoga, that it would not be in the interests of justice to order a retrial. We therefore order immediate release of the appellants from custody unless they are lawfully held for some other cause.

Order accordingly.

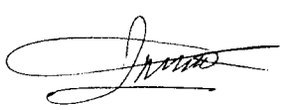
DATED at MWANZA this 25th day of November, 2011

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
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
COURT OF APPEAL