IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO, J.A., MANDIA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 299 OF 2013

1. **SABAS BAZIL MARANDU@ MYAHUDI**
2. **IGNAS ELIAS MUSHI** ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Jundu, J.)

Dated 8th day of May, 2007
In
Criminal Appeal No. 9 of 2005

JUDGMENT OF THE COURT

Date 16th & 3rd July, 2014
MANDIA, J.A.:

The appellants SABAS BAZIL MARANDU @ MYAHUDI and IGNAS ELIAS MUSHI appeared in the District Court of Rombo District at Mkuu on a charge of Robbery c/s 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. The appellants were arraigned with four other persons to make six accused persons in all. When the prosecution closed its case in the trial court four of the accused persons were found to have no case to answer and the charges against them were dismissed. This left the appellants to defend themselves which they did. At the end of the trial

they were convicted and each sentenced to thirty years imprisonment. Aggrieved, they preferred an appeal to the High Court of Tanzania at Moshi where their appeal was dismissed. Further aggrieved, they have lodged this appeal. Their separate memoranda of appeal raise the following grounds of complaint, namely;-

1. wrong reliance on a confessional statement made by the first appellant.
2. convictions based on evidence of uncredible witnesses.
3. convictions based on unreliable evidence of visual identification.
4. a conviction based upon an identification parade conducted against procedure.
5. an unconstitutional sentence.
6. a medical report admitted into evidence contrary to s. 240 (3) of the Criminal Procedure Act.
7. failure of the trial court to take into account the defence.

The appellants appeared in person, unrepresented, to argue their appeal while the respondent Republic was represented by Ms. Elizabeth Swai, learned State Attorney. Apart from their memoranda of appeal, the appellants have each filed a written statement of arguments in support of

their appeal under Rule 74(1) of the Court of Appeal Rules, 2009. On her part Ms. Elizabeth Swai supported the conviction and sentence, and argued the appeal generally. We will also discuss the appeal generally.

The background evidence in this appeal as presented in the trial court and affirmed in the first appellate court shows that on 28/9/2003 at 10.30 p.m. PW3 Theresia Michael Shirima, a teacher at Mhaka Primary School who lives at Urauri village in Rombo District was in her house with other members of her family which included her mother. At the time mentioned, she heard a loud bang on her front door and she opened the window to see what was happening. The witness testified that she could see five persons outside because electric lights outside the house and inside the house were on. Through the window she saw three of the five whose faces were not covered, and two who had covered their faces. She realized that she had been invaded by robbers and she closed the window and she and her mother cried out for help. Three of the five robbers entered the house after PW3 and her mother raised the alarm. Two had their face uncovered, and PW3 recognized the appellants SABAS BAZIL MARANDU @ MYAHUDI and IGNAS ELIAS MUSHI because she used to see them at Tarakea. The third robber was *"brown"* in colour and carried a gun but he had covered his face so PW3 did not recognize him. The gun

wielder told PW3's mother to show where money was kept and ordered PW3 to open the cupboard door which she did. The gun wielder took shs 85,000/= from the cupboard. The first appellant SABAS BAZIL MARANDU @ MYAHUDI told PW3 there was more money than the amount retrieved since somebody regularly sent them (i.e. PW3) money. The first appellant then ordered PW3 and her mother to take off their underpants which they did. The first appellant then made a physical inspection of the private parts of PW3 and her mother and got satisfied that no money was concealed in there. The unidentified gun wielder then took off gold earrings from the ears of both PW3 and her mother. After this PW3 was taken to another room while her mother escaped. In the other room the first appellant and the gun wielder took a wax kitenge and a panga. They then took her to the sitting room where the first appellant and the second appellant took three wrist watches. The robbers then ordered PW3 to go to bed. PW3 testified that as she prepared to go to bed the gun wielder hit her on the forehead with an iron bar on the forehead, and the first appellant pushed her into a lying position on her bed while at the same time the gun wielder was ordering her to open her legs. She refused to obey the order. The gun wielder then told the other robbers i.e. the first and second appellants to leave PW3 alone as she might be infected with AIDS. The robbers then

left. PW3 then called out for her mother and she came out of the shamba where she was hiding. The ten cell leader PW2 Cosmas Kamando also had responded to the alarm raised by PW3 Theresia Maiko Shirima. They all decided to wait until the next morning to report the incident. On the morning of 29/9/2008 at 8 a.m PW3 Theresia Michael Shirima reported the robbery and assault on her to PW1 C 9709 Detective Sergeant Benjamin of Tarakea Police Station who testified on seeing the physical injuries on her in the form of cut wounds on the face, hand and legs for which he issued a PF3, Exhibit P1, to PW3 Theresia Michael Shirima so that she gets treated. Detective Sergeant Michael testified that Theresia Michael Shirima described her assailants as one being tall and black with a scar on his lips, and the other one tall and black. He arrested the first appellant on 18/1/2004 and recorded a statement from him. When he put the statement in evidence the first appellant objected to the production of the statement. The trial court, however, took the statement into evidence without conducting an inquiry. In his ruling the trial magistrate observed thus:-

> *"So, I rule that the statement alleged to have been made by the 4th accused be read in Court and admitted as Evidence in this case, and the 4th Accused will have the right to deny it in his defence and Also had right to appeal against this Ruling".*

On 23/1/2004 PW3 attended an identification parade conducted by PW4 Assistant Inspector Zeno of Tarakea Police Station where she picked the first appellant who had a scar on the lip and was the one who ordered her to lie on her bed on 28/9/2004, as well as the second appellant who PW3 said she used to see frequently at Tarakea on many occasions before the incident.

On the conduct of the identification parade, PW1 Assistant Inspector Zeno testified that he took ten people from town of similar build and appearance to the suspects. He kept the suspect at the backyard of the Police Station where they could not be seen by anybody and kept those to identify the suspects and the ten people apart at the Police Canteen which was one hundred metres away. He made sure that the ten people, the identifying witnesses and the suspects did not meet by putting each group under police guard. He then arranged the parade line and told the suspects the purpose of the parade. He told the suspects they were free to change the clothes they wore and also were free to choose where to stand. The witness testified that the first appellant chose to stand between the sixth and the seventh person, and the second appellant chose to stand between the third and fourth person in the line. The identifying witness was then called and she identified the first and second appellants. One of

the ten persons picked from Tarakea town to form the parade line testified as PW5 Yasint Innocent and he corroborated the evidence of PW4 Assistant Inspector Zeno on the conduct of the parade when he testified that PW4 offered the suspects an opportunity to exchange clothes and choose where to stand, and that the appellants said there was no need for the exchange of clothes and chose themselves where to stand in the parade.

In his defence in the trial court the first appellant only testified on his arrest on 21/1/2004 and joinder in a case he did not know anything about. On his part, the second appellant alleged that he was also arrested on 21/1/2004, at Useri market, was taken to Makuku area where he met PW3 Theresia Maiko Shirima and on 23/1/2004 was put on line for identification in a parade where Theresia Maiko Shirima picked him up.

We will now address the grounds of complaint as raised by the appellants. The first ground of complaint is the confessional statement made by the first appellant. The trial court clearly based its conviction on the confessional statement of the first appellant when it marked, at P 39 of the record:-

> *"The 4th accused among others said was arrested for other offences and joined in the case which he said do*

not know. He also said did not name the other culprits but was just forced to sign a document. On this I say the statement produced in court as Exh. P1 shows all particulars of the accused persons, and it is clear that the writer could not have just decide (sic) to write such document if at all was not told so by the 4th accused."

But how did the confessional statement find its way into the trial court? The record shows, at P. 12, the first appellant denying to have made the statement but the trial court accepted it in evidence with a remark that if he wanted the first appellant could deny the statement in his defence. The appellate High Court, at p. 60 and 61 of the record supported the finding of the trial court when it held that:-

"the record of the trial court clearly shows that upon the 1st appellant objecting to the confession statement that he had made before PW1, the trial magistrate conducted a trial within a trial and ruled that the same was made voluntarily by the 1st Appellant hence he admitted the same as Exhibit P1. In other words, I hold that the trial magistrate had fully complied with the mandatory requirements of section 27 of the evidence Act, 1967. Therefore, the second ground of appeal has no merit".

With due respect to the first appellate judge, there is no record in the proceedings of the trial court where the trial court held a trial within a trial. In the excerpt quoted above the trial court just brushed aside the first appellant's objection and told the appellant to appeal if he felt aggrieved.

This Court has previously stressed that where the voluntariness of a confessional statement is called into question the trial court must satisfy itself of the voluntariness of the statement by conducting proceedings where the voluntariness of the confessional will be determined. The rationale for such proceedings is provided in section 27(2) and (3) of the Evidence Act, Chapter 6 R.E 2002 of the laws reads thus:-

> *"27 (1).....*
>
> *(2) The onus of proving that any confession was made by any accused person was voluntarily made by him shall lie on the prosecution."*
>
> *(3) A confession shall be held to be involuntary if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police force or by any other person in authority."*

To our mind section 27(2) of the Evidence Act lays down the law on the burden of proof where the voluntariness of a confession is called into question, **and places the burden on the prosecution**. Since the side putting up the querry on the voluntariness of a statement through an objection is the defence, this means the proceedings to determine the voluntariness of the statement objected to are necessarily adversarial. The prosecution should therefore adduce evidence that the statement was

voluntary, whereas the defence will counter this assertion with evidence that it was not. Thereafter the court will make its ruling on the single issue of whether the statement was voluntary or not. The standard of proof is that set in section 27(3) of the Act – that the statement shall be declared to be involuntary **if the court believes that it was induced by any threat, promise or other prejudice held out by the police officer to whom it was made or by any member of the police force or by any other person in authority.**

The emphasis laid down in Section 27(3) is that to be acceptable a confessional statement must be freely given, and not procured by any third degree methods.

Be it as it may, section 27 (2) and Section 27(3) do not set down the procedure to be followed in securing a free confessional statement from a suspect. It was left to case law to set down the procedure. The history of the procedure to be followed where a confessional statement has been objected to has been documented by this Court in **SHUKURU RAMADHANI MAKUMBI & 4 OTHERS VERSUS THE REPUBLIC,** Criminal Appeal No. 1999 of 2010, and it shows that as far back as **M' MARUIRA KAREGWA v. R.** (1954) 21 EACA at pg 264, **MWAGI s/o NYANGE v. REGINA M** (1954) 21 EACA 377, **ISRAEL KAMUKOLSE &**

FIVE OTHERS v. R, (1956) 23 EACA 521, **KINYORI s/o KARUDITI v RGINAM** (1956) EACA 480 **LAKHANI v R**, (1962) E.A 644, **BAKRAN v REPUBLIC** (1972) E.A 92, **ROBINSON MWANJISI & 3 OTHERS v REPUBLIC**, Criminal Appeal No. 154 of 1994 (unreported), **MICHAEL JOHN MTEI v R,** Criminal Appeal No. 202 of 2002 (unreported) the principle of law as developed by case law was that where the voluntariness of a confessional statement is called into question, **a trial within a trial** must be conducted in order to determine the voluntariness of the statement sought to be tendered in evidence. In mid-2004 there was a change of tack, when in **EMMANUEL JOSEPH @ GIGI MARWA MWITA versus THE REPUBLIC**, Criminal Appeal No. 57 of 2002 this court made the following observation:-

> *".....it is to be observed at the outset that unlike the practice applicable in the High Court, where a trial within a trial is held in order to establish the voluntariness of a disputed statement,* ***in subordinate courts, no such practice is applicable****. In that case, where a situation arises say in the District Court as happened in this case, an enquiry on the voluntariness or otherwise of the statement can be ascertained from the evidence on the record and what the trial magistrate did at the trial."* (emphasis added).

The Emmanuel Joseph @ Gigi Marwa Mwita Case (Supra) is vague on who should do the ascertaining of the voluntariness of the confessional statement, but in **SELEMANI ABDALLAH AND TWO OTHERS v THE REPUBLIC**, Criminal Appeal No. 384 of 2008 (unreported) this Court went to great length to set down an elaborate list of what should be done where a subordinate court conducts an inquiry and where a High Court conducts a trial within a trial, and the regime set in the **SELEMANI ABDALLAH** case (supra) was adopted in **SAMUEL s/o BATROMEO vs THE REPUBLIC**, Criminal Appeal No. 72 of 2013 (unreported). Even in **TWAHA s/o ALI & 5 OTHERS vs THE REPUBLIC**, Criminal Appeal No 78 of 2004 (unreported) this Court seems to have acknowledged the difference between an inquiry and a trial within a trial when it remarked thus:-

> *"If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

We have gone to great length to give a historical perspective in order to try and clear the air on the procedure as set down by case law. We have shown how trial within a trial was in vogue in the subordinate courts

up to the **Emmanuel Joseph @ Giji Marwa Mwita** case **(supra)** when the above procedure was declared not applicable, and the idea of an enquiry substituted. Thereafter subordinate courts followed the procedure of enquiry until **SHUKURU RAMADHANI MAKUMBI** case (supra) chipped in with the idea that the correct procedure was that followed prior to the **Emmanuel Joseph @ Giji Marwa Mwita** case **(supra),** that is, conducting a trial within a trial, and not an enquiry. The Oxford Advanced Learner's Dictionary defines **to enquire** as *"to ask for some information,"* and **enquiry** as *"an official process to find out the cause of something or to find out information about something".* We are of the opinion that this definition suggests a one-sided process, to wit, an effort by a single person or body acting unilaterally to find out something. This single-handed effort, however fair, goes against the grain of section 27 of the Evidence Act which insists on **an adversarial process** where one party puts up an objection to the introduction of a confessional statement because it is not voluntary, and the other party argues that the statement is voluntary, and thereafter a decision is made by the court on the voluntariness of the statement.

Since case law holds that in trying the issue of voluntariness of a confessional statement of the trial court, if is the High Court, has to

exclude assessors, this means when sitting in this capacity the High is in the same position as any subordinate court, which does not sit with assessors. Since the procedural laws involved in both the High Court and the subordinate courts are the same, that is, the Evidence Act, Chapter 6 R.E. 2002 and the Criminal Procedure Act, Chapter 20 R.E. 2002, there is no reason to distinguish the procedure held under section 27 (2) and (3) between that applicable to the High Court and that applicable to a subordinate court. We would therefore argue that the interpretation put forward by **SHUKURU RAMADHANI MAKUMBI & 4 OTHERS Versus THE REPUBLIC,** that there is no law prohibiting the conducting of a trial within a trial in a subordinate court is a correct statement of the law, and we follow it.

Coming back to the appeal at hand it is clear that failure to conduct a trial within a trial makes the confessional statement inadmissible. We therefore find Exhibit P1 inadmissible and should not have been admitted in evidence. We according expunge it from the record.

There was an issue raised as to the scene of the crime. The charge sheet mentions the scene as Useri Village while the evidence on record alleges the scene was Urauri Village. There is therefore a variation between the charge sheet and the evidence on record on where the crime

was committed. We are however convinced that the variance is not material and does not go to the root of the case in view of the evidence on record which establishes the scene of crime. The appellants all through the trial knew what the proceedings against them were all about, they were not prejudiced or embarrassed by the variance and no miscarriage of justice was occasioned to them.

The second, third and fourth grounds of complaint question the credibility of the evidence of the victim and the ten cell leader PW2 Cosmas Kamando. We have noted that the issue of credibility is raised for the first time in this second appeal and was not raised in the High Court. We also note both the trial court and the first appellate court made concurrent findings that the witnesses were credible, and properly identified the appellants at the scene of crime. We have previously held in **JUMA MANJANO versus THE D.P.P,** Criminal Appeal No. 211 of 2011, (unreported) following **SAMWELI SAWE vs REPUBLIC**, Criminal Appeal No. 135 of 2004 (unreported), that a second appellate court cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. We therefore dismiss the ground of complaint on credibility. On identification, we observe that both the trial court and the first appellate court made concurrent findings of fact that the appellants

were identified at the scene and also in the identification parade in circumstances that left no doubt as to their identity, and that the victim described the appellants to the police in detail when she was giving a first report of the robbery, in line with **MARWA WANGITI MWITA & ANOTHER v REPUBLIC**, Criminal Appeal No 6 of 1995 (unreported, which was quoted with approval in **SWALE KALONGA @ SWALE & ANOTHER v R,** Criminal Appeal No. 46 of 2001 (unreported).

There was also a ground of complaint about both the trial court and the appellate High Court taking into consideration the medical report PF3 which was issued to the complainant and tendered in evidence in proof of injuries received by the complainant. We agree that the PF3 was admitted into evidence against the dictates of section 240 (3) of the Criminal Procedure Act, chapter 20 R.E. 2002 of the laws. We accordingly discount it.

The second appellant raised an issue about him seen by the complainant before the identification parade conducted where the complainant picked him up. In the first appeal, the appellants lodged a joint Memorandum of Appeal in the High Court, and this ground of complaint did not feature in their Memorandum of Appeal. In line with the

Juma Manjano case (supra) cited above, we dismiss this ground of complaint.

Lastly, both appellants have complained about the sentence meted out against them, terming it unconstitutional. The charge in was laid against the appellants under Section 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. The date of commission of the offence is 28/9/2003 by when Act No. 10 of 1989 was in force and had been amended by Act No. 6 of 1994. In **STUART ERASTO YAKOBO v THE REPUBLIC,** Criminal Appeal No. 202 of 2004 (unreported), this Court made the following observation:-

> *"Now we come to the question of sentence. The appellant was convicted of robbery with violence and sentenced to fifteen (15) years imprisonment. The offence was committed on 15th October, 2000 after the Written Laws (Miscellaneous Amendments) Act No. 6 of 1994 had come into force on 18/3/1994"*

After citing section 5(b) of the Minimum Sentences Act, as amended by Act No. 10 of 1989 and Act No. 6 of 1994 the Court went on to observe:-

> *"Section 5(b) (ii) applies to all robberies in which the offender is armed with a dangerous weapon or instrument, or is in the company with one or more person, or where in the course of committing the robbery he wounds, beats, strikes or uses any other personal violence to any person (Also see **Mwita Sibora v Republic** (C.A.T.) Criminal Appeal No 49 of*

1996 (unreported). In this case, as already stated, the offence was committed on 15/10/2000 when Act No. 6 of 1994 was operational. The evidence clearly shows that there was personal violence to PW1. The appellant was in the company of the other accused persons. They were armed with machetes. Under these circumstances, the appropriate sentence was thirty (30) years imprisonment."

In the present appeal, there was personal violence to PW3 Theresia Maiko Shirima Shirima. The appellants were in the company of each other and of a gun wielder who escaped prosecution. The appellants were also armed with an iron rod which they used to inflict the injuries occasioned on PW3 Theresia Maiko Shirima. They were therefore correctly sentenced to thirty years imprisonment. The ground about the sentence being unconstitutional has no basis and is accordingly dismissed.

We find that the appeal filed has no merit and we dismiss it.

DATED at ARUSHA this 2nd day of July, 2014.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL