

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

CRIMINAL APPEAL NO. 5 OF 2016

(CORAM: MMILLA, J.A., MZIRAY, J.A. And KWARIKO, J.A.)

1. SAMWEL GITAU SAITOTI @ SAIMOO }
2. MICHAEL KIMANI PETER @ MIKE @KIM }..... **APPELLANTS**
VERSUS

THE REPUBLIC **RESPONDENT**
**(Appeal from the decision of the High Court of Tanzania
at Moshi)**

(Mwingwa, J.)

dated the 28th day of December, 2013
in
DC Criminal Appeal No. 34 of 2013

.....

RULING OF THE COURT

25thSeptember & 1st October, 2018

MZIRAY, J.A.:

The two appellants, namely Samwel Gitau Saitoti @ Saimoo @ Josee (first appellant) and Michael Kimani Peter @ Kim @ Mike (second appellant), are Kenyan Nationals. They were charged together with other 11 accused in RM Criminal Case No. 34 of 2007 before the Resident Magistrate's Court of Moshi, in Kilimanjaro Region, with three counts; the first count was for conspiracy contrary to section 384 of the Penal Code and in the second and third count, for armed robbery contrary to section 287 A of the Penal Code.

At the end of the trial, only three accused including the two appellants were found guilty of the charged offences. They were convicted and sentenced to serve seven years imprisonment for the first count and thirty years imprisonment each for the second and third count respectively. The sentences were ordered to run concurrently. The appellants being discontented, preferred an appeal to the High Court which upheld the decision of the trial court after acquitting them in the first count of conspiracy. Still dissatisfied, the appellants are now before this Court appealing against the conviction and sentence imposed.

On 4/12/2017 when the appeal came for hearing, the appellants complained to the Court that the record of appeal was incomplete for missing some vital documents. They mentioned these documents to be: the amended charge before the trial court dated 24/10/2008, the memorandum of appeal before the High Court in Criminal Appeal No. 34 of 2013 (with nine grounds of appeal), their joint submissions and a missing page (page 380) in the first appellant's defence before the trial court. They contended that they made some efforts by writing twice to the Deputy Registrar, Moshi, for the missing documents to be traced and incorporated in the record of appeal but their efforts were unsuccessful. They lamented that these missing documents were of great importance in the determination of the appeal. On

considering these complaints, the Court had no other option but to adjourn the hearing of the appeal to enable the appellants be furnished with the aforementioned missing documents.

It would appear that after the last Court session the Registry made some efforts to trace the missing documents and reconstruct the record of appeal. This is evidenced by several correspondences appearing in the record of appeal and an affidavit deponed by the Deputy Registrar of the High Court of Tanzania at Moshi to that effect. In this attempt it has been categorically stated in the deponed affidavit that the memorandum of appeal dated 24/10/2008 in respect of Criminal Appeal No. 34 of 2013 before the High Court could not be traced.

When the appeal came before us for hearing on 25/9/2018 the two appellants appeared in person, unrepresented, while on the part of the respondent Republic had the services of Ms Elizabeth Swai, learned Senior State Attorney, assisted by Ms Tarsila Gervas, learned State Attorney. Before the commencement of the hearing of the appeal the Court wanted to hear from the appellants whether the last Court Order made on 4/12/2017 has been complied. The Court informed them that it was aware that the amended charge sheet which was one among the missing documents could not be traced but it assured the appellants that the matter will be given due

consideration when the right time comes during the start of the hearing of the appeal.

The first appellant was the first to respond. He informed the Court that the Order made on 4/12/2017 has not been fully complied with for failure to furnish them with the memorandum of appeal in Criminal Appeal No. 34 of 2013, Ruling made by the trial court as to whether the accuseds had a case to answer or not after the close of the prosecution case and some defence exhibits comprising of admission and discharge documents from hospital (exhibit D1). He argued with force that these documents are very much relevant in the determination of this appeal. To illustrate the importance of these documents he mentioned for example that the memorandum of appeal lodged had nine grounds but to his dismay grounds 4, 5, 6, 7 and 8 had been deliberately omitted for unexplained reasons. To support his assertion he referred us to page 1022 of the record of appeal on which the first appellate judge stated that the memorandum of appeal lodged by the appellants raised nine grounds which can be summarized into four grounds. With that assertion he invited us to believe that they presented to the High Court Registry a memorandum of appeal with nine grounds and the Registry was responsible for the missing five grounds.

On the missing Ruling on whether the accuseds had a case to answer, the first appellant explained to us that the said ruling had raised some important issues which were worth to be adjudicated by the Court during the course of the hearing of the appeal. As regards the missing admission and discharge documents from hospital, he maintained that such documents were crucial in assisting the Court to arrive at a fair and just decision in this appeal.

As to the way forward, the first appellant suggested us to give a short adjournment of the appeal to enable the Registry trace the missing documents. Similar views have been expressed by the second appellant who supported fully the arguments advanced by the first appellant.

On the part of Ms. Swai, learned Senior State Attorney who appeared for the respondent, she appreciated the concern raised by the appellants and added that the respondent has not also been supplied with the missing Ruling which in their opinion is an essential document in the determination of the appeal. In principle the respondent was not objecting to the adjournment sought.

In this matter the appellants are seeking for an adjournment of the appeal to give more time to the Registry to reconstruct the record of appeal

to include some documents which have not been traced in compliance with the Court order made on 4/12/2017. These documents according to the appellants includes the memorandum of appeal consisting of nine grounds of appeal in Criminal Appeal No. 34 of 2013, a purported Ruling of the trial court which determined that the two appellants had a case to answer and lastly some medical evidence (exhibit D1) of the first appellant produced in the course of the trial. Principally, the respondent is not resisting to the adjournment sought. We could not adjourn the matter instantly because we wanted to satisfy ourselves whether these documents were actually missing from the record and what relevance they had in the final determination of this appeal.

We thoroughly went through the reconstructed record of appeal and the original record, our particular attention was to the affidavit of Franck H. Mahimbali, Deputy Registrar, High Court of Tanzania at Moshi deponed on 11/9/2018. In that affidavit, among the documents he attached in reconstructing the record of appeal was a Saving Telegram from Karanga Prison addressed to the District Registrar High Court of Tanzania received on 1/8/2013. In that telegram there was a memorandum of appeal annexed thereto. For ease of reference we think it is prudent to reproduce the Saving Telegram and its annexture.

SAVING – TELEGRAM

TO. District Registrar H/C of (T) at Moshi

FROM: Karanga Prison Moshi

SAV No: 112/KIL/I/LII/ 82 Date 2013

.....
**OFFICER INCHARGE
KARANGA PRISON MOSHI**

REF: MEMORUNDUM OF APPEAL.

**IN THE HIGH COURT OF (TZ) AT MOSHI
CRIMINAL APPEAL NO. 34 OF 2013
C/F/ ORIGINAL RM CRIMINAL CASE NO. 12 O 2007
IN THE RESIDENT MAGISTRATES COURT OF MOSHI
AT MOSHI**

**(1) SAMWEL GITAU SAITOTI OR SAIMOO ORJOSEE
(2) MICHAEL KIMAN PETTER OR KIM OR MIKE
APPELLANTS:**

Forwarded here with please find the memorandum of appeal of the above mentioned prisoners.

Let this office know the outcome of the appeal so as to inform the appellants accordingly.

////// PRISON//////

FOR SERVICE UPON:

The Principal State Attorney
Attorney Generals Chamber
P.O. BOX.....

MOSHI

IN THE HIGH COURT OF TANZANIA

AT MOSHI

CRIMINAL APPEAL NO. OF 2013

SAMWELI GITAU SAITOTI @ SAIMOO @ JOSEE

MICHAEL KIMANI PETER KIM MIKI

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the judgment of the Resident Magistrates Court of Moshi at Moshi; Before Hon Magistrate P.M. KENTE PRM A.E. TEMU-SRM A and J.F. NKWABI RM, Vide RM Criminal Case No. 12 of 2007, Dated this 13th day of June, 2013]

The appellants were charged with others with three counts each. First count is conspiracy to commit an offence under section 384 of the Penal Code and 2nd and 3rd count being an offence of Armed Robbery c/s 287A of the Penal Code Cap 16 Vol 1 R.E. 2002

Both appellants were found guilty in all the counts and convicted to a sentence totaling 67 years jail imprisonment each in the 1st count they were convicted to seven (7) years second count thirty (30) years and 3rd count thirty (30) years all to run concurrently. The remaining nine (9) others were acquitted pm different stages during the trial.

The appellants being dissatisfied by the decision and the judgment of the lower Court, so here by lodge this appeal against the conviction and sentence as follows:-

ELEMENTARY GROUNDS:

1. That the learned trial magistrates erred in law and fact when they continued to accept the prosecution evidence despite them having violated our constitution rights, rights form the beginning. Mainly section 32 sub section (1)(2)(4) and section 33 of C.P.A CAP 20 R.E. 2002
2. That the trial Magistrate grossly erred in law and fact by convicting the appellants with the charge that was not proved against them, as to the standard required by the law.
3. That the trial Magistrates grossly misdirected themselves and consequently erred in law when they used weak, tenuous, incredible, incoherent, uncorroborated and un unreliable evidence which lacked collaboration and un unreliable evidence which lacked collaboration an above all the evidence that was not in record as a basis of convicting the appellants.

9. That the learned trial Magistrate erred in law and fact when they failed to realize that the prosecution applied a double jeopardy principle when charging and prosecuting the accused person which finally violated their constitutional rights including the appellants.

That the Appellants wish to be present during the hearing of their appeal so as they may expound their either orally or in a written form.

WHEREFORE: That the Appellants humbly pray to this Honourable court of Justice to allow their appeal, quash both conviction and sentence and set them at liberty.

1st APPELLANT – SAMWEL s/o CITAU SAITOTI – SAIMOO-JOSSE

2nd APPELLANT – MICHAEL s/o KIMANI PETER – KIM-MIKE

VERIFICATION: I do verify that the above grounds of appeal are for the Appellants, and have been prepared before me without change of anything.

Date and time of receipt of memorandum of appeal 31/7/20123

Date of receiving copy of judgment 22/7/2013

Date of forwarding memorandum of appeal to the

Registrar on this 1st day of August, 2013

To the High Court of Moshi.

.....
**OFFICER IN CHARGE.
ARANGA CENTRAL PRISON MOSHI**

To the Honourable High Court of Tanzania at Moshi registry at Moshi on this 1st day of August 2013.

.....
REGISTRY OFFICER

COPY TO BE SERVED UPON

**The Principal State Attorney
Attorney General Chamber
P.O. BOX 6433
Moshi, Kilimanjaro**

With greatest care, we went through the Saving Telegram and its annexure. It is plainly clear that the Saving Telegram has a heading "**REF: MEMORANDUM OF APPEAL**". Thereafter, there is the number of the appeal; the court the appeal originated and the names of the two herein appellants. In the annexure to the Saving Telegram, among other particulars, there are grounds of appeal headed, "**ELEMENTARY GROUNDS**". Then what follows therefrom are grounds No. 1, 2 and 3. These three grounds are in the first page numbered 1. The second page which is numbered 2 has only one ground which is ground 9. In this page, the two appellants signed by inserting their thumb prints besides their names.

With this information, by all necessary implications, it is clear in our mind that the document which was presented in the Registry is seemingly complete. If there were any omissions therefore, the appellants were the one to blame. There was no room to temper with the document because it was sequentially numbered. The chronological sequence explained above suggests that, as it appears at page 1022 of the record of appeal, the trial judge did not properly examine the document before him that is why he rushed to say that in the memorandum of appeal the two appellants raised nine grounds which could be summarized into four grounds. On our part,

having observed the document closely, we are wholly satisfied that the appellants presented a memorandum of appeal containing grounds No. 1, 2, 3 and 9 only.

Coming to the alleged missing Ruling it is a fact that it was not one among the documents complained of on 4/12/2017, that is why it was not listed at page 2 of the Order of the Court made on that day. All the same, we took the trouble of going through the original record. What we gathered from the said record is that on 30/7/2010, after the close of the case for the prosecution, the trial court ordered the parties through their respective learned counsel to file written submissions to determine whether the accuseds had a case to answer. The case was then adjourned several times on various excuses. Subsequently, on 11/4/2011, the accuseds through their respective learned counsel indicated that they were going to give sworn testimonies. The matter was then fixed for defence hearing on 12/4/2011. Up to that stage, it is clear in our mind that the Ruling complained of was not composed or delivered. The allegation therefore by the appellants that the Ruling existed and is now missing, is unfounded.

On the remaining complaint in respect of medical chits of the first appellant allegedly missing, is something we take cognizance that they were

there and we see no point not to proceed with the hearing of the appeal after we had taken cognizance that they existed.

Overall, we are of the considered view that the complaints made by the appellants lack substance and we think that this cannot deter the Court from proceedings with the hearing of this appeal without those documents.

We appreciate the concern of the appellants on a quick disposal of this appeal and on this regard we recommend that it should be counselled for hearing in the earliest convenient session.

DATED at ARUSHA this 27th day of September, 2018.

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

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


B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL