

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 56 OF 2020

(Original Criminal Case No. 312 of 2019 in the District Court of Bukombe at Bukombe)

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

versus

- 1. ELIZA BERTH S/O PAUL @ ZANZIBAR.....1ST RESPONDENT**
- 2. LUKANYA S/O LUBINZA @ MPUYA2ND RESPONDENT**
- 3. FIKIRI S/O MATHIAS @ BUNDALA3RD RESPONDENT**

EXPARTE JUDGMENT

16th & 30th August, 2021

RUMANYIKA, J.:

With respect to the charges of armed robbery, assault causing grievous bodily harm and, but alternatively, with respect to the 3rd accused the charges of receiving stolen property levelled against Elizabeth Paulo @ Zanzibar, Lukanya Lubinza @ Mpuya and Fikiri Mathias @ Bundala (the 1st, 2nd and 3rd accused) the present respondents respectively, the appeal arises from a ruling and orders of no case to answer case issued and dated 25/2/2020 by Bukombe district court (the trial court).

When the appeal was, by way of audio teleconferencing called on 16/8/2021 for hearing, Ms. L. Meli learned state attorney appeared for the

appellant Republic irrespective of several and repeated orders for service, respondents were not traced until on 3/8/2021 when they were, by way of publication served through Mwananchi local newspaper hence the exparte judgment. I heard the appellant through mobile number 0717418929.

However, yet still on that one I had a point to make. In fact contrary to provisions of Section 381 (2) of the Criminal Procedure Act Cap 20 RE. 2021, instead of the three require times the respondents were, as said through the local newspaper served but only once. I think according to records the appeal having had been instituted say 1 ^{4/12} years and it was now called say 20 times, there was no proof service yes, but reasonably the respondents had reasons to have been aware by all standards of the backlog appeal. It is for these reasons that I reserved on 11/8/2021 and dispensed with the requirement of serving them 2 more times.

There were four (4) grounds of appeal, but when it was, by way of audio teleconference on 16/8/2021 called for hearing the learned state attorney dropped two of them. With respect to the remaining 1st and 4th grounds therefore, she argued; **(i)** that Contrary to Provisions of Section 210 (1) (a) of the CPA the learned trial magistrate did not sign at each end of the witness's testimonies **(ii)** that with totality of the evidence on record

actually each respondent had a case to answer. That there was no evidence of visual identification yes, but the 2nd respondent had recently been found in possession of a mobile phone and too he counter signed the respective certificate of seizure much as he did not claim title.

Questioned by the court for more clarity, Ms. L. Meli, learned state attorney submitted that the evidence on record was sufficiently considered and, had point number one of the appeal been allowed the appellant would now pray for an order of retrial. That is all.

In a nutshell the evidence on record ran as follows: -

Pw1 John Samwel of Ilalwe area Bukombe stated that he readily recognized the 1st respondent (now 1st accused) at the scene of crime. That as he was together with his parent's, little sisters and brothers watching television, a group of people whom, by aid of solar lamp identified they just stormed in with a gun. That among other items the bandits stole three cellular phones inclusive of his. That Pw1 and other raised alarms for assistance then say a week later the 2nd respondent arrived with a cellular phone which resembled one stolen in the incident

and he reported it to police immediately then the latter was apprehended in possession of the Pw1's cellular phone.

Pw2 Samwel John Mabula a peasant of Ilalwe area Bukombe also Pw1's father he stated that he knew the respondents before (the 1st respondent resident of a neighbouring village and the rest of them were, following the incident arrested and charged) that as together with family members were at home watching Tv on 3/5/2019 at about 11:00 pm, four culprits armed with a gun and machete stormed in only that he identified no one of them because he was in terror. That the culprits stole his shs. 560,000/= cash, 3 mobile phones make TECNO one his, one belonged to Pw1 and the other one belonged to his wife plus assortment of items (as per charge sheet).

Pw3 E. 5173 Cpl Ladislaus a police officer / Ocs of Bukombe Mnadani police post he stated that following the incident, Pw1 and Pw2 having had reported it to him on 6/5/2019, together with CPL Goziberth, Pw1 and Pw2 they arrested the 2nd respondent in possession of a mobile phone make ITEL over which also the former claimed title (copy of the respective certificate of seizure – exhibit PEX 1)

Pw4 G 5580 DC Evalius, a police man from CID Bukombe Kantete post he stated that following the incident, but having had been duly assigned he accordingly recorded cautioned statement of the 2nd respondent who admitted being in possession of a cellular phone make Itel (exhibit P2). That is all.

Point number 1 of the appeal needs not to take much of time. A.R. Kahimba, RM therefore the case having had changed hands of the magistrates on 28/1/2020, I had ample time and read the records between the lines but for the reasons of official transfer with respect to the learned trial magistrate and four public witnesses, both the hand written and typed scripts the records were signed by the respective trial magistrate. On this one therefore with greatest respect the learned senior state attorney couldn't be more incorrect. The point of appeal is dismissed.

However, even just for the sake of it the records were not signed, sufficed at the end of the last prosecution witness in this case Pw4, at the end of the prosecution case the learned trial magistrate duly signed it (see the case of **Masumbuko Makeleze @ Kasovo v. R**, Criminal Appeal No. 433 of 2017 (CA) unreported. Additionally, I would hold that unless a party to case had complained against the magistrate(s) falsifying the records

which is not the case here anyway, as opposed to omission of procedural requirement, only substance of the evidence counted.

With regard to the 2nd and last point of appeal, as admitted by the learned state attorney not only no respondent was visually identified but also with regard to Pw1's ownership and identification of the cellular phone Pw3 cut the long story short that during interview also the 2nd respondent claimed title. Much as, by aid of a solar lamp the latter may have recognized the 2nd respondent yes but contrary to trite law he did not, at the earliest possible opportune name the latter **Two**, according to Pw1 the respondent was, if at all arrested say seven days later. Not only naming the 2nd respondent was, but after thought, the witness's failure to name the accused a bit earlier it lowered credence of the prosecution case (case of **Khatib Hamis & Another v. R**, Criminal Appeal No. 90 of 2016 (CA) unreported leave alone lapse of the time with respect to the 2nd respondent / or others. Expiry of seven days made the principle of recent possession inapplicable under the obtaining circumstances. If anything, now that neither Pw1 nor Pw2 had given prescription of the cellular phone until at such a later stage it wasn't but sort of dock identification hence not

credible and reliable evidence (case of **Wambura Mniko Bunyige v. R**, Criminal Appeal No. 256 of 2010 (CA) unreported

When all is said, I shall have nothing upon which to fault the learned trial resident magistrate. The devoid of merits appeal is dismissed. It is ordered as such.

Right of appeal explained.



S. M. RUMANYIKA
JUDGE
29/08/2021

The judgment delivered under my hand and seal of the court in chambers this 30/08/2021 in the absence of the parties.



S. M. RUMANYIKA
JUDGE
30/08/2021