IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 244 OF 2007

ELIDADI EMANUEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Munuo, J.)

dated the 18th day of April, 2001
in
Criminal Appeal No. 63 of 2000

JUDGMENT OF THE COURT

31st Aug. & 3rd September, 2010

ORIYO, J.A.:

In the District Court of Moshi, the appellant, Elidadi Emanuel was charged with the offence of Armed Robbery contrary to Sections 285 and 286 of the Penal Code. He was convicted and sentenced to thirty (30) years imprisonment. His appeal to the High Court at Moshi was unsuccessful, hence this second appeal.

The brief facts are that the appellant is alleged to have stolen one motor vehicle with registration number KAJ 825U make Mitsubishi Canter

valued at Tshs 15,000,000/= the property of one Mtiani Musiyimi. It is further alleged that immediately before or after stealing, the appellant used actual violence on Mtiani Musiyimi by shooting into the air in order to obtain or retain the stolen vehicle. The offence is alleged to have taken place on 15/9/1999 at about 08.30 hours at Rombo village, Kajiado District in the Rift Valley Region, Kenya.

The Petition of Appeal before us has 7 grounds of appeal. For our purposes, the appellant has put up 4 basic complaints as follows:

(i) He was convicted on insufficient evidence;

(ii) The trial court failed to comply with the provisions of Section 192 (3) of the Criminal Procedure Act;

(iii) Identification parade held on 23/9/99 after he had made a court appearance on 20/9/99;

(iv) He challenges the jurisdiction of Tanzania's courts when the incident took place in Kenya.

At the hearing the respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney. For the appellant, he appeared in person. Being a layman the appellant did not make any serious arguments on the ground of appeal about the failure by the trial court to hold a Preliminary Hearing. He only stated that absence of a preliminary hearing denied him the opportunity to know the names and number of the prosecution witnesses in advance.

Mr. Elisaria conceded that indeed the trial court did not conduct a preliminary hearing. He submitted that failure to conduct a preliminary hearing did not vitiate the trial court proceedings. He stated that the main purpose of a preliminary hearing in a criminal case is to expedite the trial. In the case under appeal the trial court heard all the evidence that was relevant and necessary before deciding the case. The decision in the case was based on such evidence and the law and the appellant was not thereby prejudiced by the omission. He referred us to the case of **Kalisti Clemence @ Kanyaga v Republic,** Criminal Appeal No. 19 of 2003 (unreported) in support of the submission and urged us to dismiss that ground of appeal.

It is undisputed that a preliminary hearing was not conducted at the trial as required under section 192 of the Criminal Procedure Act. The omission was not alluded to by the first appellate court most probably because it was not brought up.

The issue here is whether the proceedings at the trial were vitiated.

Section 192 of the Criminal Procedure Act, Cap 20, RE 2002 falls under Part (c) and is headed:

"Accelerated Trial and Disposal of Cases;"

The procedure under Section 192 is intended to achieve the speeding up of criminal trials. And one of the means to achieve that is by holding a **preliminary hearing** to identify matters disputed and undisputed. In the event a substantial number of facts are found to be **undisputed** then much fewer witnesses will be required to testify. In that way the trial will take a shorter time.

But at times, the accused person, and this happens quite often, may dispute all the material facts relating to the case against him. When that happens, the purpose of the preliminary hearing is defeated and all

witnesses have to be summoned to testify. In such an eventuality the trial time is not spared, and it is as if a preliminary hearing had not taken place. That is what was stated by this Court in the cases of **MT 7479Sgt Benjamin v R** (1992) TLR 121; **Kalisti Clemence @ Kanyaga v R** (*supra*) and **Joseph Munene vs Republic,** Criminal Appeal No. 109 of 2002 (unreported).

In **Joseph Munene and Another** (*supra*) this Court said unambiguously about the failure to conduct a preliminary hearing:

> *"...we are satisfied that the proceedings which were conducted without invoking the procedure laid down under section 192 of the Act, were not vitiated."*

The irregularity does not have the effect of nullifying the trial proceedings.

We find the ground lacking in merit.

The appellant's challenge to the jurisdiction of Tanzanian courts over an incident that occurred outside its borders; that is in Kenya, the issue

was actually considered and determined at the trial. In response to that, the trial court said as follows:

> *"Perhaps the first issue should be whether it has been proper and competent for this court to try this case in view of the fact that the robbery was perpetrated in Kenya. Sections 6(b) and 7 of the Penal Code give this court competence to try this case."*

Section 6 of the Penal Code, Cap 16, R.E. 2002, provides:

> *"6. The jurisdiction of the Courts of mainland Tanzania for the purposes of this Code extends to –*
>
> *(a) ...N/A*
>
> *(b) Any offence committed by a citizen of mainland Tanzania at any place outside mainland Tanzania; ... and*
>
> *(c) ...N/A"*

Further, Section 7 states: -

> *"When in any act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within jurisdiction does any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction."*

As correctly held by the trial court, the courts in Tanzania have jurisdiction over this case.

This ground also lacks merit.

In another ground of appeal, the appellant faults the identification parade organized on 23/9/1999 because the appellant had made a court appearance on 20/9/99 and there was a possibility that the prosecution witnesses had seen him and was easy for them to pick him up from the parade as they did.

Mr. Elisaria readily conceded that, that was the order of events in that the appellant appeared in court on 20/9/99 and identification parade was held on 23/9/99. But he stated that in this case the two key prosecution witnesses, PW1 and PW2 were Kenyans and only arrived in Moshi on the date of the parade. In the circumstances the possibility of PW1 and PW2 to see the appellant in court before the date of the parade was not there.

With respect, we agree with Mr. Elisaria on this as the record bears him out. PW1, the driver of the motor vehicle, the subject matter of the trial, is recorded to have testified as follows on 27/9/99: -

> *"I went to the boader and got a bicycle from a Maasai. I was ridden to Laitotoki road where I got a vehicle to Loitoto Police Station. I reported the incident. The police drove with me to Rombo Tanzania. Before arriving at Police Station we met Tanzanian Policeman who told us that the vehicle we were tracing had been found and impounded at Himo.*

The car was at Himo Police Station. I saw and checked it. It had Tanzanian Registration numbers in front and back of it. The Registration number was TZJ 3284. On the rear plate number the Kenya plate number was beneath the Tanzanian number. The Kenya plate number was KAJ 825U the one I used to drive. There are numbers KAJ 825U on the numbers and the name of the owner of the car NGEWA written.

Two tyres – one spare tyre and another which had been fixed on the car were missing. The jack was also missing. The canvas was missing. The road licence, insurance TLB were missing.

The Police told me that somebody had been arrested. They did not show me the person.

We drove back to Kenya to inform the owner of the car. I stayed there.

On 23/9/99 I came to Tanzania upon being instructed by police. I came to Moshi and found people in a line. I was told to pick out the one who had hijacked my car. I picked this accused who was the 5th from left."

As correctly stated by Mr. Elisaria the fear expressed by the appellant is unfounded in view of the testimony above.

In the absence of such a possibility of prejudice, this ground of appeal also fails for lack of merit.

The last ground of the appeal is insufficiency of the evidence upon which the appellant was convicted. His complaints are mainly on the sufficiency of the evidence on his identification and in proof of the charge of armed robbery.

Admittedly, as it was underscored in the case of **Waziri Amani v R** [1980] TLR 250 great caution has to be exercised by courts before relying on the evidence of visual identification at the scene to convict. This Court stated as follows:-

> *"No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

The issue is whether the appellant was sufficiently identified without leaving any doubt. The incident took place on a main road at 8.15 am during broad daylight. As PW1 drove the motor vehicle from Rombo Village towards Nairobi, Kenya, suddenly 8 people holding guns, bush knives and sticks emerged from the forest and stood in the middle of the road, thus blocking it. Among them was the appellant. PW1 was forced to stop the car which was immediately surrounded by the 8 people. The appellant ordered PW1 off the driver's seat and instead to sit in the back of the car among

crates of tomatoes. PW1 obliged and the appellant drove the car towards Tanzania.

Upon crossing the border onto Tanzanian side, the appellant ordered PW1 to offload the crates of tomatoes with the assistance of some passersby who did it at gunpoint. Thereafter the appellant drove the car for about 2 kilometers into Tanzania and PW1 was then allowed to go his way.

In **Waziri Amani** the relevant factors underscored in examining the circumstances in which the identification of a witness was made include the following:-

(i) the **time** the witness had the accused under observation;

(ii) the **distance** at which he observed him;

(iii) the **conditions** in which the observation occurred;

(iv) whether the witness **knew or had seen the accused before or not.**

Applying these factors to the case at hand, the length of **time** PW1 spent with appellant was quite sufficient. PW1 had plenty of time to

observe the appellant from the point of encounter in Kenya to the time he was released 2 kilometres within Tanzania. Similarly the **distance** between PW1 and the appellant was very close as they drove in the same car for a considerable period of time. The observation was made in broad daylight.

The evidence of identification of the appellant by PW1 was corroborated by that of PW3, the arresting Police Officer. He traced the said car somewhere in Moshi, the same day of the incident and when the occupants were stopped by PW3 and his 2 colleagues, they abandoned the car and fled. The police gave chase and managed to apprehend the appellant only. Subsequently PW1 was able to point out the appellant in the identification parade as the assaillant who robbed him of the motor vehicle in Kenya.

With all the above factors in place, we entirely agree with Mr. Elisaria that the evidence tendered by the prosecution left no doubts whatsoever as to the correct identification of the appellant as the one who robbed PW1 of the car at gunpoint on 15/9/99.

We are unable to fault the two lower courts in the circumstances of the case. The appeal lacks merit. Accordingly, we dismiss it.

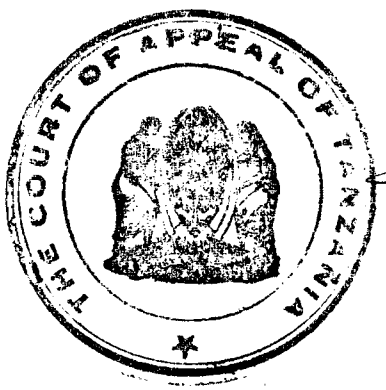
DATED at **ARUSHA** this 3rd day of September, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL