IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO.3 OF 2012

JAFARI MWALE @MAPROSOO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kalombola, J.)

dated the 07th day of November , 2011
in
DC Criminal Appeal No. 16 of 2011

JUDGMENT OF THE COURT

10th & 11th December, 2012

KILEO, J. A.

This is a second appeal in a case which has its origin in the District Court of Namtumbo where the appellant was convicted of armed robbery contrary to section 287A of the Penal Code, Cap 16 and was sentences to thirty years imprisonment.

The key witness for the prosecution was PW2 Mahamoud Said@ Kifunga. It was his evidence that on 21/11/2010 as he dropped from a bus at Mtwara Pachani area he met several people among them was the

appellant who asked him for money. When he declined to accede to the request the appellant is said to have obtained a pair of scissors from a mechanic (PW4) who was nearby and threatened the complainant that he would kill him before 2015. Thereafter the appellant took the complainant's mobile phone. The witness further stated that he sought the assistance of the appellant's friend to persuade the appellant, at least to return his sim card. When that failed, PW2 asked for help from people who were around. The appellant was arrested and it is said that when he was searched he was found with the complainant's sim card.

Before the hearing of the case the appellant had asked the trial magistrate to withdraw from the case. The basis for the application was his fear that he would not be accorded a fair trial as the magistrate had in another case convicted him but subsequently he was released on appeal. The magistrate declined to recuse himself. This was followed by the appellant keeping mum throughout the proceedings that followed after the magistrate had refused to withdraw from the case.

The learned first appellate judge dealt mainly on the identification of the appellant at the scene of crime and the non-tendering of the mobile

phone which was alleged to have been stolen from PW2. She did not address herself to the complaint that the trial magistrate's failure to withdraw from the case led to a miscarriage of justice nor did she consider whether the charge of armed robbery was established.

The appellant's memorandum of appeal comprised of six grounds. In essence the appeal is premised on three major complaints:

> *That the High Court erred in not appreciating the fact that the failure by the trial magistrate to withdraw from the case was a denial of the appellant's right to a fair hearing.*
>
> *That armed robbery was not established*
>
> *That the sim card, the subject of the armed robbery was not identified.*

The appellant appeared before us unrepresented. He did not have much to say apart from asking us to adopt his grounds of appeal.

The respondent Republic was represented by Mr. Maurice Mwamwenda, learned Senior State Attorney who did not see it fit to support the conviction. He submitted that without identification of the sim card that the appellant was allegedly found with the conviction could not be sustained. He also opined that the surrounding circumstances of the

case, if anything, looked like a fabrication of the charge against the appellant. The learned Senior State Counsel also conceded that the refusal by the trial magistrate to recuse himself after he had been asked to do so prejudiced the appellant's right to a fair hearing in the particular circumstances of this case.

There are two main issues for our consideration. The first one is whether, from the circumstances of the case it can safely be said that armed robbery was established. The second issue is whether the trial magistrate's refusal to recuse himself after he was asked to do so resulted in a miscarriage of justice.

The evidence that was available to prove the charge of armed robbery was that of PW2 who said that the appellant had obtained a pair of scissors and threatened to kill him before 2015 after PW1 had declined to give in to his demand that he give him some money. The appellant is also said to have taken the complainant's Nokia mobile phone but he was only found with a sim card presumably belonging to the complainant.

The question that we have asked ourselves is whether the above scenario amounted to armed robbery?

With due respect to both courts below, the circumstances of this case as they were did not show that armed robbery had taken place. We have asked ourselves: If it had been armed robbery why did the complainant request the appellant's friend to ask the appellant to return his sim card? It appears that it was only after the appellant had allegedly refused to return the sim card that he was apprehended. To us this doesn't sound like armed robbery at all. It is not normal for people against whom such an atrocious crime has been committed go about looking for the bandit's friends and asking them to persuade the bandit to return the stolen property. The charge might as well have been a fabrication as suggested by the learned Senior State Attorney. Another aspect of the case which discredits the case for the prosecution is the fact that the stolen Nokia phone was not found with the appellant nor was the sim card allegedly found in his possession identified by the complainant. The complainant did not inform the court what his mobile number was, nor was the sim card verified in court as being the same one as that which belonged to the complaint. Even if the appellant kept silent still the prosecution had a duty to prove its case against the appellant beyond reasonable doubt. Adverse inference due to appellant's silence could not be drawn because there was no evidence in

the first place which would have warranted the drawing of an adverse inference. Where an accused person keeps quiet in the course of his trial and even after the prosecution has closed its case an adverse inference may only be drawn where the case presented by the prosecution leaves no doubt as to the accused person's guilt.

We are settled in our minds, in the circumstances of this case, that armed robbery was not established.

On the question of bias, as we indicated before, the appellant is on record as having asked the learned trial magistrate to withdraw from the case as he had earlier convicted him in another case which ended in his release on appeal. In rejecting the appellant's prayer to withdraw himself the trial magistrate made reference to **Republic v. Sefu Hamad Rashid** (1992) TLR. 227 where Mmilla, PRM Extended Jurisdiction (as he then) was held:

> *(i) Whether or not the presiding Magistrate should disqualify himself from hearing a case on the ground of bias requires an objective appraisal of the materials before the court, and to say that a party has a subjective (albeit firm) apprehension of bias is not of itself*

sufficient to warrant, or require, the disqualification of the magistrate.

(ii) the duty of the magistrate to disqualify himself for proper reasons is matched by an equal duty not to disqualify himself save

for proper reasons, and parties not to be encouraged to believe that, by an application for the disqualification of a magistrate, they can have their case heard by a magistrate thought to be more likely to decide a case in their favour.

We noted earlier in the course of this judgment that the first appellate judge did not address herself to the complaint about bias. As this was a serious complaint it ought to have been addressed. In the circumstances of this case we are compelled to do what the High Court did not do.

The appellant was afraid that he may not get justice from the magistrate since the magistrate had convicted him in another case which however resulted in his acquittal on appeal. Even going by the case cited by the magistrate it cannot be said that the appellant had no proper reasons for asking the magistrate to withdraw from the case.

The circumstances pertaining to **Zabro Pangamaleza v Joackim Kiwaraka & Another** (1987) TLR 140 (CA) are on all fours with the present case. In that case the plaintiff in the trial magistrates' court wanted the case to be heard before another magistrate. The magistrate refused

the application on the grounds that there were no sufficient reasons as to why he should not hear the case. The plaintiff refused to give testimony. The magistrate dismissed the case under Order XVII rule 3 of the Civil Procedure Code.

The case finally came to the Court of Appeal. The Court held:

(i) *"Justice must not merely be done, but must be seen to have been done. The safest thing to do for a judicial officer who finds his integrity questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is quite clear from the surrounding circumstances and the history of the case that the accused is employing delaying tactics."*

(ii) .....

(iii) .....

(iv) *"By insisting to hear the case against such strong opposition and proceeding to dismiss it, the magistrate not only confirmed the appellant's worst fears of his having a personal interest in the matter, but also amounted to an error material to the merits of the case involving injustice to the appellant."*

We fully subscribe to the principle laid down in the above case. We find, bearing in mind the circumstances of this case, that the magistrate's

refusal to withdraw from the case resulted in a miscarriage of justice as the appellant was denied his right to a fair hearing.

For the foregoing reasons we find that there is sufficient ground for allowing this appeal as we hereby do. We quash the conviction entered and set aside the sentence imposed. The appellant is to be released from custody forthwith unless he is held for some other lawful cause.

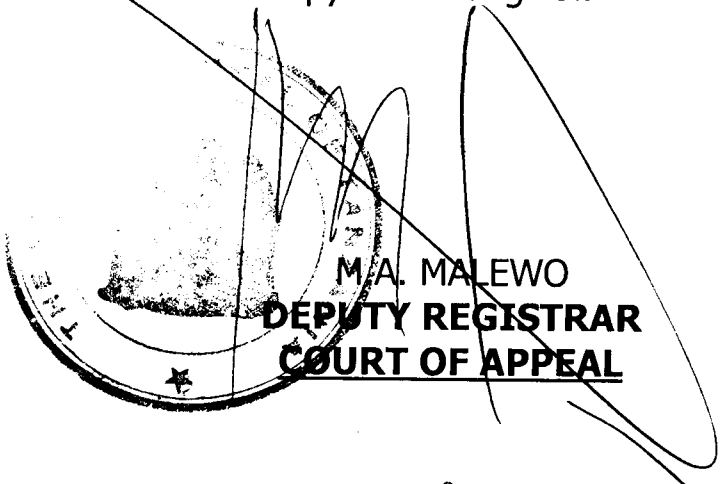
DATED at **IRINGA** this 11th Day of December 2012.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL