IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KAIJAGE,J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 78 OF 2012

THOMAS ERNEST MSUNGU@ NYOKA MKENYA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mzuna, J.)

dated the 30th day of September, 2011
in
Criminal Appeal No. 5 of 2010

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JUDGMENT OF THE COURT

14 & 18 June, 2013

MSOFFE, J.A:

On 21/07/2006 at about 20.45 hours a group of armed bandits broke into the shop of PW1 Richard Samwel Mushi situated at Lyamungo Kati, Hai, Kilimanjaro Region, and stole a number of items. The incident was reported to the police and investigations were carried out. In the process, the appellant and others were named as having been responsible for the offence in question. They were accordingly arrested and charged with

armed robbery contrary to section 287A of the Penal Code before the District Court of Moshi. After a full trial the other accused persons were acquitted. The appellant was convicted as charged and sentenced to the statutory thirty years term of imprisonment. His first appeal to the High Court of Tanzania at Moshi was dismissed hence this second appeal. Before us he appeared in person while the respondent Republic had the services of Mr. Haruni B. Matagane, learned State Attorney, who argued in support of the appeal. With respect, Mr. Matagane was justified in not supporting the conviction and sentence for reasons which we will demonstrate hereunder.

Admittedly the appellant was not identified at the scene. His conviction was based mainly on two aspects of the evidence to wit (a) his cautioned and extra-judicial statements and (b) the ballistic expert's report to the effect that the three spent cartridges of a shotgun calibre 12 found at the scene of crime matched with the shotgun that was retrieved at a baobab tree in Bomang'ombe, Hai, after the appellant had directed the police to the place where the shotgun was hidden.

We propose to begin with the cautioned and extra-judicial statements. We have carefully read these statements. After doing so, we

are in agreement with Mr. Matagane that there is nothing in them to show that the appellant ever confessed to have been responsible for the breaking in question in the house of PW1 on the fateful night and time in issue. In effect, this means that these statements were worthless in the prosecution case against the appellant in that they had no probative value. To this end, the courts below erred in relying on them in affirming the prosecution case against the appellant.

This brings us to the ballistic expert's report. The proceedings of the trial District Court show that the report was produced and admitted in evidence on 17/07/2007 without objection by the appellant and his fellow accused persons. Apparently it was produced by the public prosecutor. As correctly submitted by Mr. Matagane, we too fail to understand why it was not produced by the maker of the report who was one C.6190 D/Sgt. Raphael Maira, a firearms examiner. We say so for reasons which will become apparent hereunder.

Under the general scheme of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act), particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute . A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In

tendering the report the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of section 198(1) of the Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report.

Ideally, it is good practice that a document should be produced in evidence by its maker or author except where it is impossible to secure his attendance due to unforeseen circumstances such as those mentioned under section 34B (2) (a) of the Evidence Act (CAP 6 R.E. 2002), that is, if he is dead or unfit by reason of bodily or mental condition, etc. We say so because the maker or author will always be better placed to explain what the document is all about, the intricacies, if any, relating to the said document, etc. In the process, the said witness could always be examined and cross-examined on the said document.

Very unfortunately the Act has no provision equivalent or similar to section 240(3) in relation to other reports. This subsection is similar to subsection (3) of section 291 of the same Act in relation to trials before the High Court. Subsection (3) of section 240 reads:-

(3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report, ***and the court shall inform the accused of his right*** *to require the person who made the report to be summoned in accordance with the provisions of this subsection.*

(Emphasis supplied.)

The above subsection applies to medical reports. We wish the Act had provided for a similar provision in relation to other reports such as the one under discussion in this case. If there had been a similar provision in the Act the court could have easily summoned the firearms examiner, if it was minded to deem it fit to do so, or mandatorily summon him if requested by the accused persons after being informed of their right under the subsection of cross-examining him.

In saying so, we are aware that the Act makes provision for other reports by a Government analyst, a fingerprint expert and a handwriting expert under sections 203, 204 and 205, respectively, in which there is

room for summoning the particular expert for cross-examination. But section 240 (3) of the Act is still unique in that it places a duty on the court of **informing** the accused person of his right to require the person who made the medical report to be summoned for purposes of cross-examination.

In conclusion on the above point, we are of the considered opinion that in the light of the circumstances under which the ballistic expert's report was produced and admitted in evidence it was not safe to rely on it in convicting the appellant.

Once the ballistic expert's report is disregarded it follows that the only other evidence against the appellant worth addressing is that he confessed to the police officers and eventually showed them the place under the baobab tree where the shotgun was hidden and then retrieved. Indeed, the courts below held the view that this was the sort of confession leading to discovery envisaged under section 31 of the Evidence Act (CAP 6 R.E. 2002). With respect, this aspect of the evidence has its own shortcoming. Once the ballistic expert's report is disregarded it follows that there is no nexus between the shotgun and the spent cartridges seen at

the scene of crime. This is so because it is not easy to say with certainty that the said cartridges were fired from the shotgun in question.

At any rate, even if the firearms examiner had testified in court his evidence would still be that of an expert witness only. An expert witness merely gives an opinion and the value of that evidence depends upon the experience and ability of the witness and the extent to which his opinion is supported by the opinion and experience of other recognized experts in the particular field – See **Rajabu Vs. Republic**(1970) EA 395 at page 397. In other words, if the firearms examiner in the instant case had testified his evidence would not have been believed and acted upon wholesale. That evidence would have still been subjected to the test enunciated in **Rajabu** (*supra*).

The judge on first appeal made the following finding in connection with the ballistic expert's report:-

> *It is true that the Ballistic Expert did no testify in court. This however did not cast doubt on the prosecution case because it was a public document based on expert evidence. Such omission to my view did not occasion a*

failure of justice and is curable under section 388 of the Criminal Procedure Act CAP 20 R.E. 2002. The appellant never objected it(i.e. report) when it was tendered in court.

With respect, it is true the appellant did not object to the production in evidence of the report. But in our view the learned judge misdirected himself in making the above finding in view of our findings and conclusions above on the manner in which the report was produced and admitted in evidence. As already stated, the report ought not to have been produced by the prosecutor. Furthermore, although the report "was a public document based on expert evidence" in view of what we have stated above ideally it still ought to have been tested as per **Rajabu's** case (*supra*). As it is, there was no way in which the appellant could have cross-examined anyone in the case on the report. We do not therefore, think that this was an omission curable under section 388 (1) of the Act.

For these reasons we allow the appeal of the appellant, quash his conviction for armed robbery and set aside the sentence of 30 years imprisonment imposed on him. He is to be released from prison unless he is lawfully held herein.

DATED at ARUSHA this 17th day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL