IN THE HIGH COURT OF TANZANIA

AT MOSHI

HIGH COURT CRIMINAL APPEAL NO. 47 OF 2001

(C/F DC MOSHI CRIMINAL CASE NO. 1582/1998)

MELKIORI MBANDO @

NICKSON PRISI MBANDO) ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON. JUNDU, J.

The Appellant, in the trial court was charged with Robbery with Violence c/s 285 and 286 of the Penal Code, Cap. 16, Vol. 1 of the laws. The particulars of the offence were that on 14th January, 1998 at about 00.01 at Marangu Kiraracha Village the Appellant stole cash 170,000/=, 580 Kgs of coffee valued at shs. 820,000/= and wrist watch valued at shs. 30,000/= all property valued at shs. 1,052,000/= the property of one Theresia w/o Mark (PW.2).

In order to prove its case against the Appellant, the prosecution in the trial court called four witnesses. In short, the evidence of the complainant, that is PW.2 Theresia w/o Mark adduced at the trial court was that her house on 14/1/1998 was broken during a rainy night by the Appellant and one John. She peeped through the window and saw the Appellant and the said John outside the house in standing position. She yelled "John unakuja kufanya nini nyumbani kwangu usiku" and the Appellant replied "Nyamaza, funga mdomo upesi". She put on the lights but the Appellant broke the door and the Appellant and the said John got into her room and the Appellant struck her on her head with an iron bar and told her "Toa hela, onyesha hela zipo wapi?" The Appellant struck her again with an iron bar and told her "Sisi ni mayahudi wale waliompiga Bwana Yesu". She then dragged herself beneath her bed bleeding heavily in face and lost consciousness. When she gained consciousness she heard some people talking at the corridor and one man touched her to check if she was still alive and that by then all the lights had gone off.

PW.2 stated further in her evidence at the trial court that she called Yasinta who got hold of her legs and pulled her out of bed and then the said Yasinta shouted "shangazi amekufa shangazi amekufa". PW.2 dragged herself to a neighbour one Salvestiri Maksi who got surprised to see her

in terrible shape. She washed her face to get rid of the lot of blood. PW.2 told Salvetiri "kabla sijafa nenda kwa Mwenyekiti wa Kitongoji Donani Edward ukamwite aje haraka"
When the said Donani Edward came PW.2 told him "Nimeingiliwa na majambazi nimewafahamu ni Melkiori Mbando and John Shayo". PW.2 stated in her evidence at the trial court that many people came to her house that night despite heavy rain and told them her calamity. The whole house was ransked, coffee, cash shs. 1,000/=, clothes, Radio, watch, spry pump and many other articles including paint hurricane lamps and sunflower were stolen from the house. On cross – examination she stated that she knew the Appellant since birth and that he works at Arusha and that it was her (PW2) son that caused the arrest of the Appellant. She denied that on 23/11/98 the Appellant was in prison.

PW.1 had testified in the trial court that he had a report that the Appellant and John had committed robbery at PW.2 on 13/11/98 and that on 23/11/98 he saw the Appellant at Arusha Bus Stand at about 5.00 p.m so he reported to Police Station who arrested the Appellant. PW.3, the Chairman of Kitongoji of Kiraracha on 14/1/98 having been awakened by Silvestiri and went to PW.2 house, found it broken with big stone and PW.2 was heavily bleeding, she had two big wound in the head. PW2 told PW.3 "nikifa watu walioniua ni Melkiori Sprisias and John William Shayo". PW.3 stated in his evidence in the trial court that the whole house of PW.2 had been ransacked and was in terrible mess. In the morning PW.3 went into the house of one William Shayo and arrested John and went into the house of the father of the Appellant and found a hurricane lamp and sunflower seeds in gunny bag with label of Olman Company and "kopo la rangi". He seized the said stolen property and he also went into the house of one Laurent where he met a small boy Godlisten Laurent who told him it was Melkiori who had brought the bag of coffee into the house the boy had said "Huyu Melkiori alikuwa hapa sasa hivi sijui amekimbilia wapi?" PW.3 seized the bag of coffee. PW.4 August Mchallo, the village Chairman of Kiraracha gave more or less evidence as PW.3.

On the other hand, the Appellant in his defence evidence contended that on the material day of the incident he was at Nairobi Kenya in "Chuo cha Malaba Technical School" and that he had been suspended on 28/1/98 because he had lost some tools of the said School. He came back to Tanzania on 8/2/98 to his parents with a letter requiring him to pay money equivalent to the tool, that is hydraulic jack toll box with spanner. His parents had no money hence they told him to wait till they get some monies to pay for the said loss. He had been given only one month to raise

money and his parents failed to raise the required money. He then went to Soweto area in Moshi and rented a house from 4/3/98 to 6/10/98. Police went to his house and arrested him in connection with another case of being in possession of stolen vehicle. He was taken to remand prison till 29/1098. He was sent to the trial court on 8/12/99. He contended that PW.1 had lied when he stated that he had found him at Arusha on 23/11/98. He contended that there were two people at Marangu with the name of Meljori, one is son of Prince and the other is son of Speransi and that he is the Appellant is Meljori son of Prince. He contended that it was not true that PW.2 had seen him because at the material time he was in Kenya. He contended that PW.1 and PW.2 had conspired to lie against him.

Having heard the evidence of the prosecution witnesses and that of the defence side, the trial magistrate evaluated the evidence adduced by the said witnesses and concluded that the Appellant was guilty as charged. He stated as follows –

> "That the house of complainant Theresia was broken into in night of 14th January, 1998 is confirmed by Theresia herself, PW.3 Roman Edward and PW.4 August Mchallo who happened to visit the house on the same night. These witnesses confirmed that they found the house broken and complainant Theresia in terrible condition. They further stated some of stolen coffee was found in house of one Laurent soaked with water and small boy aged 5 years told them that it was the accused who brought the coffee into the house for hiding. The woman Theresia said in her evidence that she knows the 1st accused since his birth and she saw him outside the house while the electric bulb was shining brightly. Accused could not deny this evidence apart from mere denial that he was the one seen. Theresia is fairly old woman, she impressed me most favourably that she was telling the court the whole truth. I rule out any mistaken identify. I believe that she saw and identified accused well. The alibi raised by the accused has not raised any doubt to prosecution case it is clear that accused was lying. The offence was committed on 14/1/98 and his story

that he was in prison from 6/10 – 29/10/98 doesn't hold water in view of the evidence given. I find as fact that the accused was among the robbers who invaded the house of complainant. I find him guilty and I convict him as charged."

Having been aggrieved by conviction and sentence, the Appellant has appealed to this court listing eight (8) grounds of appeal in his Petition of Appeal namely

(1) That the learned trial magistrate erred in law and fact in making a finding that the evidence adduced in court was sufficient to found the Appellant guilty as charged.

(2) That the learned trial magistrate gravely erred in law in entering a conviction against the Appellant without first assessing the credibility of the complainant's evidence.

(3) That the trial magistrate erred in law by not giving the Appellant's right to tender his supporting document of which it was deneyal of justice and against the laws.

(4) That because there was no eye witness to bear a direct testimony, the procedure adopted in law could have carried so as to led the presence prosecution witnesses to pin point the Appellant among others.

(5) That the learned trial magistrate erred in law and fact in not considering that the complainant (PW.2) said she was injured by the Appellant's, but she never tendered any medical report, PF 3 or any other hospital document to prove that the alleged offence took place or she was injured.

(6) That there was doubt in prosecution evidence as to whether the whole trial was conducted fairly as there was no investigating officer who came to testify at the court that he had visited the scene of the crime.

(7) That the learned trial magistrate erred in law by accepting the hearsay evidence from the prosecution side of which it was not credible to the effect that it could amount to the conviction of the Appellant.

(8) That the trial is indeed fatally irregular and defective as the trial magistrate totally ignored to abide with the provision of Section 192 Act 9/85 of CPA as amended by written laws (M.A) Act No. 3 of 1992.

Based on the aforesaid grounds of appeal, the Appellant in his Petition of Appeal has prayed to this court to allow his appeal, quash and set aside the conviction and sentence and to order his release from the prison forthwith.

On the day (20/9/2006) of hearing of the appeal, the Appellant was in person and he simply stated that what he had stated in his eight grounds of appeal in his Petition of Appeal sufficed to be his arguments in support of his appeal before this court. He prayed to adopt the said grounds of appeal as his arguments and further prayed to this court to allow the appeal, quash and set aside the conviction and sentence imposed on him by the trial magistrate and to order his release from the prison forthwith. Mr. Rwegerera, learned State Attorney who acted for the Respondent/Republic in his submission did not support conviction and sentence.

I will start to consider and determine ground eight (8) of the appeal as listed in the Petition of Appeal filed by the Appellant in this court. In this ground of appeal, the Appellant contends that the trial in the lower court was fatally irregular and defective as the trial magistrate totally ignored to abide with the provision of Section 192 of the Criminal Procedure Act, 1985 as amended by Act No. 3 of 1992. Mr. Rwegerera, learned State Attorney in his submission quickly conceded that the trial magistrate did not comply with the mandatory provisions of Section 192 (1) – (5) of the Criminal Procedure Act, 1985 thereby rendering the proceedings and the judgment of the trial court a nullity. I have carefully checked the record of the lower court on the said point. The record shows that the trial magistrate did not invoke the provisions of Section 192 of the CPA, 1985 in that he did not conduct preliminary hearing before the commencement of the trial to determine matters not in dispute in the manner stated in the said provision of the law. This court has on several occasions reminded trial magistrates that the provisions of Section 192 and its five (5) subsections are mandatory and that non-compliance thereof vitiates the proceedings and the judgment of the trial court rendering them a nullity. In the present case under appeal, the position is the same.

In ground six (6) of the appeal, the Appellant contends that there is doubt as to whether the whole trial was conducted fairly as there was no investigating officer who testified in the trial court. PW.1 in his evidence in the trial court contended that he saw the Appellant at the Arusha Bus Stand on 23/11/98 at about 5.00 p.m and went to report to the Central Police Station and one Police Officer went and arrested the Appellant, but the Appellant on his part in his defence evidence contended that on the said date of 23/11/98 he was in prison. PW.1 did not name the police officer who arrested the Appellant at the said Arusha Bus Stand nor did any Police Officer testify in the trial court that the Appellant was arrested at the Arusha Bus Stand on the said date of 23/11/98. Indeed, the evidence of PW.2, in the trial court was that she had reported the incident to

the police at Kilema Police Post and that her house having been broken it was completely ransacked with various items stolen including coffee, clothes, radio, watch, cash money etc. In such circumstances, it is expected that the police officer who investigated the case and went to the scene of crime would have been called to testify in the trial court. No such police investigation officer testified in the trial court.

In ground one of the appeal, the Appellant contends that the trial magistrate erred in law and fact in making a finding that the evidence adduced in the trial court was sufficient to found the Appellant guilty as charged. PW.3 and PW.4 in their evidence stated that some of the stolen coffee was found in a house of one Laurent soaked with water and a small boy aged 5 years told them that it was the accused who brought the coffee for hiding. The trial magistrate in his judgment acted on the said evidence in reading conviction of the Appellant. However, the said small boy aged 5 years old was not called to testify in the trial court on such piece of evidence. In such situation, the evidence of PW.3 and PW.4 on that part was merely hearsay evidence which is a further contention of the Appellant in his ground seven (7) of his appeal.

Further, the trial magistrate in his judgment believed the evidence of PW.2 in reaching conviction of the Appellant, but the latter in ground 5 of the Appeal states that though PW.2 contended that she was fatally injured by the robbers on the material day and was admitted for six days at Kilema Hospital for treatment, but no PF3 or any other hospital document was tendered in the trial court by the prosecution witnesses to prove that PW.1 was so injured on the material day and was treated in the alleged hospital for the injuries. No medical doctor who treated PW.2 was called to testify as a witness by the prosecution side.

Lastly, Mr. Rwegerera in his submission contended that the Appellant was not properly identified by PW.1 on the material day at the scene of the crime. He contended that PW.2 in her evidence testified that she had identified the Appellant because she knew him before and were residents of the same village and there was electric bulb light. However, Mr. Rwegerera in his submission contended and I quite agree with him that this was very insufficient identification because PW.2 did not describe in detail how she had identified the Appellant during the said night given her own evidence that it was raining heavily in the said night and that when the Appellant and his fellow robber one John as soon as they entered inside the house the electric bulb light was put off or was not on. This situation means that the conditions were such that one could not rule out possibility of mistaken identity unless PW.1 in her evidence of identification had given

detailed description of her identification of the Appellant such as his attire he had put on the said material night.

In the upshot, given the procedural irregularity that I have described above, that is non-compliance of the mandatory provision of Section 192 (1) – (5) of the Criminal Procedure Act, 1985 and the shortfalls in the evidence of the prosecution witnesses as above mentioned, I find and hold that this appeal has merit. I hereby allow it. I hereby quash and set aside the conviction and sentence that was imposed on the Appellant. The Appellant is hereby set free unless lawfully held under the law. It is so ordered.

F.A.R.JUNDU

JUDGE

20/10/2006

Right of Appeal Explained.

F.A.R. JUNDU;

JUDGE

20/10/2006

20.10.2006

Coram: F.A.R. Jundu, J.

For the 1st Appellant: present

For the 2nd Appellant: present

For the Respondent: Miss Rugaihuruza, State Attorney.

C/C: Muyungi

Court: Judgment delivered in the presence of the Appellants and in the presence of Miss Rugaihuruza, learned State Attorney for the Respondent/Republic.

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JUDGE

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