JOSEPH MUNENE AND ALLY HASSANI v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Lubuva, Nsekela and Kaji, JJ.A.)

CRIMINAL APPEAL No. 109 OF 2002

(Appeal from the conviction of the High Court of Tanzania at Moshi, Munuo, J., dated 15 February 2000, in Criminal Appeal No. 33 of 1997)

Criminal Practice and Procedure - Preliminary hearing – Whether failure to hold a preliminary hearing vitiates proceedings in a case – Section 192 of the Criminal Procedure Act 1985 and rule 3 of the Accelerated Trial and Disposal of Cases Rules 1988.

The accused were charged with and convicted of armed robbery in the District Court. Their appeal to the High Court was dismissed and they appealed to the Court of Appeal. One of their grounds of appeal was that at the commencement of the trial the trial magistrate did not hold a preliminary hearing as required by section 192 of the Criminal Procedure Act 1985.

Held: (i) Holding a preliminary hearing is a mandatory requirement under section 192(1) of the Criminal Procedure Act and rule 3 of the Accelerated Trial and Disposal of Cases Rules 1988.

(ii) In the instant case the non holding of a preliminary hearing did not delay or cause extra costs or prejudice the appellants in any way.

Appeal dismissed

Cases referred to:

(1) *Mkombozi Rashidi Nassoro v. Republic* Court of Appeal Criminal Appeal Number 59 of 2003 (unreported)

(2) *MT 7479 Sgt Benjamin Holela v. Republic* [1992] T.L.R. 121.

(3) *John Kasanza and another v. Republic* Court of Appeal Criminal Appeal Number 27 of 2001 (unreported)

A (4) *Efraim Lutambi v. Republic* Court of Appeal Criminal Appeal Number 30 of 1996 (unreported)

Statutory provisions referred to:

B (1) Criminal Procedure Act 1985 and Rule 3 of the Accelerated Trial and Disposal of Cases Rules 1988, section 192

(2) Penal Code Chapter 16, sections 285 and 286

Mr Mulokozi, for the Republic

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JUDGMENT OF THE COURT

(Dated 05 October 2004)

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Kaji, J.A.: This is a second appeal. In the District Court of Rombo at Rombo, Joseph Munene and Ally Hassani who are hereinafter referred to as the first and second appellants, respectively were charged with E and convicted of armed robbery contrary to sections 285 and 286 of the Penal Code Chapter 16. They were each sentenced to 32 years imprisonment and 12 strokes of the cane. They were also ordered to pay the complainant, Peter Ndeliva (PW2), TZS. 8 600 which F they were alleged to have robbed him. On appeal to the High Court their appeal was dismissed, hence this appeal.

At the trial the prosecution adduced evidence to the effect that, on first August 1996, at about 6:30am, Peter Ndeliva (PW2) left G his home at Kitowo Olele Mashati for Kwamakorosha Village to draw water. He had a bicycle, a 60 litre container and TZS. 8 600 with which he had intended to purchase maize. He left riding on the bicycle along Njaa road. The well at Kwamakorosha Village where H he was going to draw water was about 5 kilometres from his home.

A short distance from his home he met the appellants and a third person who later escaped. The first appellant was armed with something resembling a firearm which later turned out to be a toy pistol. The I second appellant had a matchet (*panga*). The third person who later

escaped had a gun. The 3 bandits stopped him by aiming the gun and the toy pistol at him and ordered him to give them all the money he had. They searched him and took the TZS. 8 600 he had in the pocket of his pair of long trousers. The second appellant cut the ropes which had tied tightly the 60 litre container onto the carrier of the bicycle. They left while one of them cycling carrying the other two, one of them carrying the container. PW1 ran after them while raising an alarm. His alarm was respondend to by villagers who included Jacob Moningo (PW3). They all ran after the appellants and the third bandit. When the bandits arrived at a stream they bumped into it and fell down thereby damaging the bicycle. They abandoned it together with the container and the matchet and took to their heels towards Tanzania/ Kenya border. PW2, PW3 and other villagers pursued them. On the way the third bandit who had a gun fired in the air to scare the pursuers. It would appear it was through this threat that he managed to escape. But PW2, PW3 and other villagers continued running after the appellants who crossed the Tanzania/Kenya border into Kenya and took refuge in a Masai boma. The owner of the boma, Likimbiraiwai Ngatoya (PW4) apprehended the appellants assisted by some Morani. They were handed over to PW2, PW3 and other villagers who took them to the stream where the bicycle, container and matchet were. The appellants were later taken to Mkuu Police Station and later the court.

In this appeal the appellants who were not represented raised a total of 20 grounds of appeal which basically revolve on non compliance with section 192 of the Criminal Procedure Act 1985, identification, burden of proof, credibility of the prosecution evidence, age of the second appellant and severity of sentence.

At the commencement of the trial the learned trial magistrate did not hold preliminary hearing as required by section 192 of the Criminal Procedure Act 1985 on a mistaken belief that since the appellants were not represented by an advocate, that provision of the law was inapplicable. He was labouring under the old section 192 before its amendment which was effected by Act Number 19 of 1992. It is the

appellants' submission that failure to hold a preliminary hearing which was mandatory, vitiated the proceedings in the case.

In reply Mr Mulokozi, learned Senior State Attorney who appeared for the respondent Republic, conceded the error. However he was of the view that non-compliance with that provision of the law did not vitiate the proceedings because the appellants were neither prejudiced nor did it cause failure of justice or delayed the disposal of the case.

At this juncture we think it is convenient to set out the provisions of section 192(1) as amended. It provides:

> "192(1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall, as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate if he is represented by an advocate and the public prosecution to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.

It is apparent, in our view that the provisions of section 192(1) are mandatory. Similarly rule 3 of the Accelerated Trial and Disposal of Cases Rules 1988 is couched in mandatory terms with regard to preliminary hearing. It provides:

> 1. In every case where a person pleads not guilty to the charge the presiding magistrate or judge shall hold a preliminary hearing on the day when the person charged or arraigned in the presence of his advocate either at his first or subsequent appearance in court, or if this is not possible, then as soon as it is practical.

In *Mkombozi Rashidi Nassoro v. Republic* (1) this court had an opportunity to give a brief historical background to the enactment of section 192 in the Criminal Procedure Act 1985 (hereinafter the Act) in the following terms:

> ...It is common knowledge that prior to the enactment of the Act, the then Criminal Procedure Code, 1966 (Chapter 20) did not contain a provision similar to section 192. It is apparent however, that as a result of complaints

of dissatisfaction with the slow pace of the disposal of cases, Parliament in its wisdom enacted the Act which introduced section 192. The objective of the legislation was, as stated, to accelerate trials and the disposal of criminal cases ... From the wording of the legislation as seen from the section 192 of the Act and rule 3 it seems clear to us that the legislature intended to introduce a Wholistic scheme that would apply in criminal trials. This is in order to accelerate speedy disposal of criminal cases. That is, at the commencement of a trial where an accused person pleads not guilty, once the procedure laid down under section 192 of the Act is brought into play, it is mandatory for the trial court to strictly comply with the procedure set out in each of the subsections of section 192. This is the procedure which relates to the preliminary hearing. Failure to follow the procedure laid down under say, sub-section (3) and the rest of the subsections is fatal to the proceedings.

The court then cited the case of *Mt. 7479 Sgt. Benjamin Holela v. Republic* (2) where it was held:

Section 192(3) of the Criminal Procedure Act 1985 imposes a mandatory duty that the contents of the memorandum must be read and explained to the accused.

The court cited also in this respect the case of *John Kasanza and Paulo s/o Dominick v. Republic* (3). That, in our view, is the position where the procedure laid under section 192 of the Act is brought into play.

But in the instant case the learned trial magistrate did not hold a preliminary hearing at all as required by the law. The crucial issue, therefore, is whether the proceedings in this case were vitiated.

We have already observed in this judgment that the intention of the legislature in enacting section 192 of the Act was to accelerate and speed up trials in criminal cases. This was emphasized also by the court in *Efraim Lutambi v. Republic* (4) where it said:

.... the provisions of section 192 of the Act are very useful in the administration of criminal justice. They were intended by the legislature not only to reduce

A the costs of criminal trials in the country, but also to ensure that those trials are, without prejudice to the parties, conducted expeditiously.

In the instant case, we think the issue is whether the proceedings were vitiated by the omission of the trial court to hold preliminary B hearing. From our perusal of the record we have found nothing suggesting that the appellants' trial which proceeded without holding a preliminary hearing either delayed or caused extra costs or prejudiced the appellants. In fact through the appellants' defence as recorded in the proceedings, C the appellants denied all essential matters of the case necessitating the prosecution to call witnesses to prove them. Also the trial took only one month and ten days, that is from 12 September1996 till 22 October 1996.

D Under the circumstances we are satisfied that the proceedings which were conducted without invoking the procedure laid down under section 192 of the Act, were not vitiated. With due respect, through an oversight, it seems the learned judge on first appeal did not address E this issue. Had the judge addressed her mind to this aspect, we think she would have come to this conclusion.

Coming to the merit of the appeal, the crucial issue is the identification of the appellants PW2 testified at length how on the material day at F 6.30am he left his home for drawing water, how he was invaded by the appellants who robbed him of his bicycle, TZS. 8 600 and a 60 litre container. His evidence was supported by PW3 who responded to the alarm raised and both of them together with other villagers G pursued the appellants up to the *boma* of PW4. It was a continuous pursuit from when they robbed PW2 up to when they were apprehended in PW4's *boma*. It was during daytime. There was therefore no question of mistaking the appellants for somebody else. Even PW4 confirmed H that it was the appellants who took refuge in his *boma* while being pursued by PW2, PW3 and others, until the appellants were apprehended thereat.

The appellants complained that the prosecution evidence was not I credible in view of the contradiction in the evidence of PW1 on

one hand and PW2 and PW3 on the other or whether it was PW1 who picked up the live ammunition as stated by PW1, or a woman as stated by PW2 and PW3. In our view, this contradiction is minor and did not go to the root of the case. The appellants also complained that they were not found in possession of any of the stolen properties. Again this complaint is lame in view of the abundant evidence by PW2 and PW3.

The second appellant complained that at the material time he was 16 years old. We have noted the charge sheet shows his age to be 21 years, and his own statement when giving his evidence where he said he was 21 years old. This complaint therefore has no merits. In fact he had never raised it before the courts below. It is nothing but an afterthought which has no merits.

The first appellant who claimed to be a Kenyan citizen, complained why he was tried in Tanzania, and also why he was not assigned legal aid on government expenses. We have carefully considered this. It is common knowledge that the first appellant was tried in Tanzania because the offence was committed in Tanzania. He was not assigned legal aid on Government expenses because the government of Tanzania does not provide legal aid in cases of this nature, regardless of the nationality of the accused.

As far as sentence is concerned the minimum sentence for the offence of armed robbery as provided under Act Number 10 of 1989 as amended by Act Number 6 of 1994 is 30 years imprisonment. According to the circumstances of this case there were no aggravating factors calling for a sentence higher than the minimum. We think the learned trial magistrate had intended to impose the minimum sentence which is 30 years imprisonment. Likewise the learned judge on first appeal (Munuo, J. as she then was) was labouring under the same impression when she remarked in the judgment that the appellants were each sentenced to 30 years imprisonment plus 12 strokes of the cane. Since the sentence of 32 years imprisonment appears to have been inadvertently imposed, it is hereby set aside and substituted with a sentence of 30 years imprisonment.

A In the event, save for the substitution of the sentence the appeal is otherwise dismissed in its entirety.

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