

Discretion of the prosecution to call witnesses should be exercised judicially

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 80 OF 2008

RIZIKI METHOD @ MYUMBO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Werema, J.)

**dated the 31st day of January, 2007
in**

DC. CR. Appeal No. 29 C/F 22, 25, 34 of 2007

JUDGMENT OF THE COURT

17th & 24th August, 2010

RUTAKANGWA, J.A:

The appellant and three others were convicted as charged by the trial District Court of Iringa of the offence of Robbery with violence c/ss 285 and 286 of the Penal Code. They were each sentenced to thirty (30) years imprisonment. Aggrieved by the conviction and sentence, they separately appealed to the High Court. Their appeals were consolidated and heard together.

The High Court, (Werema, J.) sitting at Iringa, allowed the appeals of the other three appellants but dismissed that of the appellant herein in its entirety. Convinced of his innocence he has lodged this appeal.

The prosecution evidence, upon which the courts below based the conviction of the appellant, is as follows: Edward s/o Mgimwa and Eva d/o Jacob, who testified as PW1 and PW3 respectively at the trial of the appellant, are husband and wife. In 2004 they were living together at Isoka "A" area within the Municipality of Iringa. While PW1 Edward is a driver by profession, PW3 Eva identified herself as a businesswoman. At the time the alleged robbery was committed she used to sell liquor at Amani club within the Iringa Municipality.

On 19th October, 2004, PW3 Eva had engaged herself in her liquor selling business. She left Amani Club at around 10:00 p.m. and proceeded home alone. As she approached her home, four people appeared in front of her. Without uttering any word, the quartet jointly grappled with her and beat her up causing her some bodily injuries. While the assault on PW3 Eva was going on, PW1 Edward arrived at the scene. He too was hit with a

club on the forehead. The couple raised an alarm and some people including one Ruvanda, rushed to their assistance. When Ruvanda arrived at the scene of the crime the bandits took to flight, taking PW3 Eva's Tshs. 20,000/=, a crate of beer, a radio and a mobile phone with them. The total value of the stolen properties was Tshs. 207,500/=. Both PW1 Edward and PW3 Eva were taken to Iringa Police station where they reported the incident .

At the police station, the two witnesses recorded their statements (exhibits DA and DB) implicating mainly the appellant and were then sent to Iringa Government Hospital for treatment. On the basis of the claims by PW1, Edward and PW3, Eva that their assailants were the appellant and his co- accused in the trial District Court, they were arrested and charged accordingly.

The appellant and his co-accused, who had been found with none of the stolen goods, denied committing the alleged robbery. But as already indicated above, the learned trial Honorary Magistrate was satisfied that on the basis of the credible visual identification evidence of PW1 Edward and

PW3 Eva, the prosecution had proved its case against the four accused persons to the hilt. The first learned appellate Judge was of the firm view that only the guilt of the current appellant had been proved to the required standard and hence this appeal.

The memorandum of appeal lodged by appellant contains chiefly three substantive grounds of complaint against the decision of the two courts below. These are:- **One**, the learned High Court Judge erred in law and fact in upholding his conviction which was based on very weak and unreliable visual identification evidence. **Two**, the learned High Court Judge erred in law in relying on the only uncorroborated evidence of PW1 and PW3 who are husband and wife. **Three**, that the first appellate Judge erred in law in not drawing an inference adverse to the prosecution by its failure to call as witnesses those people who responded to the raised alarms and further in using double standards in his assessment of the credibility of PW1 Edward and PW3 Eva .

Before us the appellant fended for himself. For the respondent Republic Mr. Vicent Tangoh, learned Senior State Attorney, appeared.

When the grounds of appeal were read out to the appellant, he adopted them and had nothing to say in elaboration. For his part, Mr. Tangoh vigorously resisted the appeal and supported the conviction of the appellant.

In deciding this appeal, we have found it convenient to dispose of first the second ground of complaint. It is the contention of the appellant that since PW3 Eva is the wife of PW1 Edward, their evidence ought not to have been acted upon without being corroborated by some other independent evidence. The appellant took this view because he believed the two witnesses being "family members" had their own interests to serve in the case.

This ground of objection to the appellant's conviction was, to Mr. Tangoh, not persuasive at all. It has no legal leg to stand on, he said. Relying on section 127 (1) of the Evidence Act, Cap 6, Mr. Tangoh argued that both PW 1 and PW 3 were independently competent and compellable

Notwithstanding the non compliance of the law in receiving the evidence of PW1, the learned first appellate judge relying on the principle propagated in the cases of **Deemay Daati Vs R.** Criminal Appeal No. 80 of 1994 (unreported) and **Herman Henjewe V R.** Criminal Appeal No. 164 of 2005 (unreported) was of the view that the evidence of PW1 should be treated as unsworn evidence which required corroboration. The first appeal court was satisfied that the evidence of PW1 was corroborated by that of her mother PW2 who examined her private parts and found her vagina with sperms and that of the medical doctor. The appeal was dismissed but the sentence of life imprisonment was reduced to thirty years.

The appellant still contesting his innocence came before us with various grounds of appeal. Before us he was not represented. The respondent Republic was represented by Ms Neema Mwanda, learned Senior State Attorney. The appellant opted not to elaborate his grounds of appeal before hearing what the learned senior State Attorney had to say. As she submitted in support of the conviction and the sentence, Ms. Mwanda conceded that there was no compliance with the requirement of section 127(2) of the Evidence Act. She supported the judgment of the

first appellate court that the evidence of the complainant was rightly treated as unsworn evidence which required corroboration.

When the Court required her to read the provisions of section 127(2) of the Evidence Act through lines, she agreed that a '*voire dire* examination' to a child witness below the age of fourteen years was mandatory before the provisions of section 127(7) could be invoked to look for corroboration. At that juncture she changed her stand and supported the appeal but prayed for a re-trial. According to her, had it not been for the omission by the trial court to conduct '*voire dire* examination' on PW1 before her evidence was received on record, there was sufficient evidence to uphold the conviction of the appellant.

On our part we do not need to embark on the grounds of appeal filed by the appellant because non-compliance with section 127(2) of the Evidence Act suffices to dispose of the appeal. We have reproduced the provisions of section 127(2) above. Under the said provision it is not only mandatory to conduct a "voire dire examination" but the examination must be recorded in the proceedings. That is the questions asked, as well as the answers given by the child witness. The Interpretation of Laws Act, [CAP 1 R.E.2002] says in section 53 (2) that:-

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"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

(Emphasis added)

Sections 127(2) of the Evidence Act read together with section 53(2) of the Interpretation of Laws Act make it clear that a "voire dire examination" must be conducted on a child witness below fourteen years before his/her evidence is taken. The examination must be recorded in the proceedings. This position has been taken in various decisions of this Court. For instance, in the case of **Augustino Lyanga V Republic** Criminal Appeal No.105 of 1991(unreported) the Court said:-

"If we are to paraphrase the provisions of section 127(2) a court may only receive evidence of a child of tender years who does not understand the nature of an oath if in the opinion of the court the child is possessed of sufficient intelligence and understands the duty of speaking the truth. These

requirements must be recorded in the proceedings... It is our considered view the two requirements are conditions precedent to receipt of evidence from a child of tender years whose evidence has not been received on oath or affirmation."

See also the cases of **Wilberd Kimangano Vs R** Criminal Appeal No.235 of 2007, **Jackson Mlonga V R** Criminal Appeal No. 200 of 2007 (unreported) and that of **Omary Kurwa V R** Criminal Appeal No. 89 of 2007. In the latter case the Court said:-

"The Court has set standards which must be followed before the evidence of a child of tender years is considered. First, the Court must form an opinion on whether or not the child understands the nature of an oath. Second, the Court must form an opinion, and record this opinion in the proceedings, whether the child is possessed of sufficient intelligence to justify the taking of the

child' evidence at all, and if the Court finds the child is intelligent to testify, whether or not the child understands the duty of speaking the truth."

Given the long list of authorities warning on the consequences of failure to comply with the mandatory provisions of section 127(2) of the Evidence Act, the evidence of PW1 which was received without first conducting a "*Voire dire examination*" must be expunged from the record. Once the evidence of PW1 and the cautioned statement which was also wrongly admitted in evidence, are discounted, there is no evidence left sufficient to sustain the conviction of the appellant. Under the circumstances, we agree with the learned Senior State Attorney for the respondent Republic that the appeal must succeed. We thus allow the appeal.

The learned Senior State Attorney requested the Court to order a re-trial. In our view, this is a proper case for retrial. After appraising the evidence on record, we are satisfied that had the trial court been diligent in the discharge of its functions by complying strictly with the procedure as provided by the law, under section 127(2) of the Evidence Act, the

outcome of this appeal would have been different. In the case of **Athuman Ndagala @ Milungano V Republic** Criminal Appeal No. 63 of 2007 (unreported) the Court after noting a serious irregularity in the trial court said:-

"The exclusion of exhibits, P1 and P4 from the case, in our considered opinion, cannot be said with certitude not to have adversely affected both parties to this appeal. This has, unfortunately, come about because of the serious procedural irregularities committed by the High Court. In the circumstances given the nature of the case, the interests of justice demand that ... a retrial be ordered."

Since it is the trial court which failed in its duties by omitting to conduct "*voire dire examination*" and justice had to be seen that it was done, we grant the prayer requested by the learned Senior State Attorney and order a retrial. This must be done as expeditiously as possible. It is accordingly ordered.

DATED AT IRINGA this 21ST day of August, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL



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

J.S. MGETTA
**DEPUTY REGISTRAR
COURT OF APPEAL**

