

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

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

CRIMINAL APPEAL NO. 222 OF 2008

ALEX MGUNDA.....1st APPELLANT
TIBE MGUNDA.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Jundu, J.)

**dated the 6th day of August, 2008
in
(DC) Criminal Appeal NO. 26 OF 2006**

.....

JUDGMENT OF THE COURT

24th August & 1st September, 2010

KIMARO, J.A.

In the District Court of Iringa at Iringa the appellants were convicted of armed robbery contrary to sections 285 and 287A of the Penal Code, [CAP 20 R.E.2002]. Each of them was sentenced to suffer the minimum imprisonment term of thirty years prescribed by the law. The appellants were alleged to have jointly and together on the night of 10th December 2004 at about 01.30 hours at Uhalimbingweta village in Kilolo District and Region of Iringa, while loaded with a gun invaded the house of one Sarah Paklant. Therein, they stole an assortment of items estimated to be worth

Tshs. 413, 000/= . Before stealing, they used actual violence on the complainant by firing in the air to threaten her.

Being aggrieved by the conviction and sentence, the appellants appealed to the High Court. The High Court sustained their conviction because of caution statements the appellants made to the police admitting the commission of the offence. The caution statements of the appellants were purportedly admitted in evidence as exhibits P5 and P6 for the first and second appellants respectively. In dismissing the appellants' appeal the learned judge on first appeal remarked:

"The appellants cannot escape criminal liability in this particular armed robbery case under appeal. This is because in their caution statements that is Exhibits P5 for the 1st appellant and Exhibit P6 for the 2nd appellant the trial magistrate firmly held that as submitted the learned State Attorney in this court that they had admitted to have participated in the commission of the said armed robbery at the house of the said Sarah d/o Paklant on the particular material night . In this court and in the trial court, the appellants have gallantly tried

to disown the said caution statements arguing that they were not taken voluntarily but as a result of being beaten. However, I am satisfied that the trial magistrate had given due weight to the said complaint from the appellants when he conducted a trial within a trial as is vividly seen in the proceedings of the trial court . At the end of the said trial within trial he concluded as I hereby do that the said caution statements were voluntarily made by the appellants. The evidence in the said caution statements Exhibit P5 and exhibit P6 in my considered view implicates the Appellants fully in their involvement in the said armed robbery at the house of the said Sarah d/o Paklant on the material nightI hold that the prosecution side had proved the charge of armed robbery against the appellants ...beyond reasonable doubt."

Still aggrieved the appellants have come to the Court with this second appeal. Among the grounds of appeal filed by each of the appellant was a complaint that the first appellate judge on appeal wrongly sustained

the conviction basing it on the caution statements because the caution statements were not voluntarily made. We chose to be focused on this ground only because as shown above, it was the sole ground relied upon by the first appellate court to sustain the conviction.

At the hearing of the appeal the appellants appeared in person. The respondent/Republic was represented by Ms Neema Mwanda learned Senior State Attorney. In support of the appeal, each appellant relied on the grounds of appeal filed without expounding them. On the part of the respondent, the learned Senior State Attorney at first supported the conviction and sentence meted out to the appellants. In her view, the trial court having conducted a trial within trial to ascertain the voluntariness of the statements, and having been satisfied that they were made voluntarily, the ground of appeal had no merit.

On intervention by the Court, the learned Senior State Attorney was required to say when and who tendered the caution statements in the trial court. After perusing the record of appeal at pages 34 and the proceedings that followed thereafter up to page 50 Ms Mwanda said that when No. E 7141 D/C P C Otieno (PW 5) testified in the trial court, he wanted to tender the caution statements as exhibits. At that juncture the

appellants objected to their admissibility claiming that they were not voluntarily made. Much as a trial within trial followed, and a ruling made that the statements were voluntarily made, there is no indication that the witness was re-summoned after resuming the trial to tender the statements. Instead, the trial magistrate remarked in the ruling he made on the trial within trial, that the caution statements were admitted in evidence as exhibits P5 and P6. After conceding that there was a flouting of the procedure on this aspect, the learned Senior State Attorney abandoned her earlier submission and supported the appeal.

We are mindful that in a second appeal our jurisdiction has to be exercised with caution. We cannot interfere with concurrent findings of fact made by the courts below, unless there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of the law or practice. There is a long list of authorities on this point. Among them is **Daniel Nguru and Four others Vs Republic**, Criminal Appeal No 178 of 2004 (unreported), **Deemay Daati and Two Others V Republic** Criminal Appeal No. 80 of 1994 (unreported) and **Peters V Sunday Post Ltd** [1958] EA 424

Production of documents in evidence is governed by section 173 of the Law of Evidence [CAP 6 R.E.2002]. Under the said section it is provided that:-

"(1)A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility, but the validity of any such objection shall be decided on by the court."

Part III of the Law of Evidence Act, [CAP 6 R.E.2002] deals with the manner of questioning of witnesses. It is provided under section 148 of the same Act, that a person summoned as a witness to produce a document can be cross-examined by an adverse party. Under section 147 of the same law an adverse party has a right for cross-examination of a witness who testifies against him or her if the party so requires.

The learned Senior State Attorney submitted, correctly, that the record of appeal at page 34 shows that when PW5 wanted to tender the caution statements of the appellants, they both objected to their

admissibility on the ground that they were not voluntarily made. Although the trial magistrate conducted a trial within trial to ascertain the voluntariness of the statements and was satisfied that the statements were made voluntarily, PW5 was not re-called in court to tender the statements and for cross-examination as required by sections 147 and 148 of the Law of Evidence Act. In this respect, the trial court erred in remarking in the ruling on the voluntariness of the statements that they were admitted in court as exhibits P5 and P6 respectively. The omission by the trial court to recall PW5 to tender the caution statements in evidence, had two effects; **One**, the appellants were denied their right of cross-examination under sections 147 and 148 of the Evidence Act. In terms of the case of **Daniel Nguru and Four Others V Republic** (supra), that occasioned a miscarriage of justice to the appellants. There was a violation of some principle of the law. **Two**, the caution statements did not form part of the prosecution evidence which the first appellate judge relied upon to sustain the conviction of the appellants.

As we have indicated above, the first appellate court sustained the conviction of the appellant because of the caution statements. But there were no caution statements tendered in the trial court by any witness. The

appellants' conviction in the High Court was therefore sustained on none existent evidence.

Since the learned judge on first appeal agreed with the appellants that the remaining grounds of appeal raised in the High Court had merit, and sustained the conviction, as we have shown, on none existent evidence, we must, with respect to the learned judge on first appeal, say that he erred. In the event, we quash the conviction and sentence and order the immediate release of the appellants from prison unless they are held for any other lawful purpose. It is ordered.

DATED at IRINGA this 30th 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