

A same party contested a parliamentary seat, it was considered appropriate to consider the margin of victory between the two contesting candidates, and to pose the question whether the results would be different if the estimated votes were given to the losing candidate. If the answer was in the affirmative, the election results would be held to be affected. See the cases of *Ngweshemi v. Attorney General* (1) and *Bura v. Sarwat* (2). We are of the considered opinion that the rule in these cases decided by the High Court, permitting adjustment of votes in favour of the losing candidate, is no longer good law under the newly adopted multi-party electoral system, where more than two candidates, sponsored by more than one political party, do contest elections. We think the correct approach under the multi-party system is to make a *pro rata* apportionment of the estimated votes between the contesting candidates. If the outcome of such exercise eliminates or considerably reduce the margin of victory, the court may, in our view, hold that the election result is affected.

E The other complaint by Mr Makani relates to the views of the learned trial judge in respect of the status of the various forms prescribed for recording complaints in the electoral process, such as CF7 and CF4. We think there is merit in Mr Makani's complaint. The learned trial judge's view is more clearly expressed in another part of his judgement that:

G Where such prescribed complaint form is signed by both the presiding officer on one hand and the polling agent or the candidate, on the other, the form so signed constitutes a written agreement between the Electoral Commission and the candidate, on the contents of such complaint form. And where any party entitled to so register a complaint about the conduct of election is made aware of the existence of such complaint forms but deliberately ignores to register his complaint in the prescribed forms at the relevant stage of the electoral process, he does so at his own peril as that would be violation of the law, and his complaints would rightly betaken to have been an afterthought or frame-up complaints. For such provisions under the Elections Act, do, clearly fall under the provisions of section 100(1) and section 101 of the Evidence Act 1967 as amended....

A These views of the learned trial judge to the effect that the prescribed complaints forms, once utilized by the persons concerned, constituted a contract, the contents of which could not be contradicted by oral evidence, is with respect, a clear misdirection on the law. The correct legal position is that the prescribed forms are intended to serve only as material for testing the credibility of complaints made in respect of the electoral process. This means that the evidence of a witness who could have recorded his or her complaint in a prescribed form but fails to do so would not be relied upon unless he or she explains the failure to record the complaint at the appropriate stage of the electoral process.

D This misdirection however does not detract from the main finding of the learned trial judge to the effect that the petitioner had failed to prove to the standard required by law that there were voters who were prevented from voting by the non-compliances in question.

E In the final analysis therefore there is no ground upon which this appeal can succeed and we are bound to dismiss it in its entirety with costs, and we order accordingly.

F JUMANNE RAJABU *alias* NGALAMGONGO AND ANOTHER v. REPUBLIC

G HIGH COURT OF TANZANIA
AT TABORA
(Mchome, J.)

H CRIMINAL APPEALS Nos. 195 AND 249 OF 1991

(From the decision of the District Court of Tabora District, at Tabora, GW Mirumbe, Esq, RM, in Criminal Case No. 36 of 1990)

I *Criminal Practice and Procedure – Judges Rules – Statement of accused before the Police – Failure to comply with Judges Rules – Effect of non-compliance.*

A *Evidence – Judges Rules – Statement of accused before the Police – Must be certified by the accused.*

Criminal Practice and Procedure – Trial within a trial – Statement of accused – Burden is on the prosecution to prove that it was made voluntarily.

B *Evidence – Alibi – Whether the burden is on the accused to prove alibi.*

In a charge of armed robbery and causing grievous bodily harm, the two appellants were found guilty and sentenced by a District Court. The evidence supporting the conviction of the first appellant was of a ballistic expert who testified that the spent cartridges found at the scene of crime were fired from the sub-machine gun found in possession of the appellant. The pieces of evidence against the second appellant were two. The first was his own retracted confession before the Police. The appellant had not signed or certified a copy of the statement he made. Further, in a trial within a trial, he disowned his statement, whereupon the court placed the burden on him to prove that his statement was not voluntarily made. The second piece of evidence was that he was mentioned by a co-accused in the latter's confession. At the trial, this appellant raised an alibi which the court rejected because he had failed to prove it. The High Court considered the propriety of the proceedings of the Lower Court.

Held: (i) Under section 33(1) of the Evidence Act 1967, the evidence of a co-accused in his confession cannot be considered against the second appellant;

F (ii) An accused person bears no burden to prove an alibi; an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the accused person in such a case;

G (iii) Any statement made in accordance with the Judges Rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish;

H (iv) Judges Rules do not have the force of law; however, they are administrative directions for the guidance of police authorities and if not complied with the presiding judge may reject evidence obtained in contravention of the Rules;

I (v) The statement before the Police was not properly taken as it was not in compliance with the Judges Rules;

(vi) The evidence of a ballistic expert has to be regarded with suspicion if there is no conclusive proof that another similar weapon could not have made similar marks as those found in cartridges examined by the expert, and the first appellant ought to have been given the benefit of that doubt.

Appeals allowed

Cases referred to:

- (1) *R. v. Bass* [1953] 1 All ER
- (2) *R. v. Nyungindo s/o Luhende* (1948) 15 E.A.C.A 132
- (3) *Jumanne Rajab Ngaramgongo v. The Republic* [1999] T.L.R. 69
- (4) *Rajabu v. Republic* [1970] EA 395

JUDGMENT

(Dated 15 May 1998)

MCHOME, J.: Jointly with six others, the appellants in Criminal Appeal Number 195 and 249 of 1991 were charged with two counts in original Tabora District Court Criminal case Number 36 of 1990. The first count was Armed Robbery contrary to sections 285 and 286 of the Penal Code. The second one was grievous harm contrary to section 225, also of the Penal Code. The first appellant, Jumanne Rajabu Ngaramgongo was the original first accused while the second appellant, Rajabu Makumbi, was the original eighth accused person.

The original seventh accused person pleaded guilty and was convicted on his own plea of guilty and sentenced to thirty years' imprisonment on the first count. The second, third, fourth fifth and sixth accused persons were found guilty, convicted, and sentenced to thirty years' imprisonment and six strokes punishment each on the first count, and to three years' imprisonment each on the second count. Aggrieved, they have now appealed to this court against both convictions and sentences.

A Their appeals have been consolidated as they originate from the same criminal case as I have already pointed out.

B Briefly, the facts of this case are that the shop one Musa Katambala, PW1, commonly known as "Mawese shop," was on the 21 February 1990, broken into at night by a gang of robbers, armed with a sub-machine gun and a pistol. The robbers fired gun shots in the air to scare the shit out of the inmates and neighbours who would attempt to come to their victims' aid.

C But one daring neighbour, Yassin Ramadhani, PW2, came to the scene. But a gun bullet from the robbers got him below his abdomen and perforated his bladder. From this and other injuries, PW1 was rushed to the hospital, where, after a long hospitalization period, he was lucky to recover.

E That night the thieves stole several items from the said Mawese shop total valued at TZS. 94 000. None of the inmates of the shop identified the robbers save one Mashaka Iddi. Mashaka was not called as a witness at the trial.

F There is no direct evidence against the appellants. They were not identified at the scene as the robbers were said to be marked. And none of the stolen property was found in either of the appellant's possession.

G The only evidence against the second appellant (original eighth accused person) is this retracted confession before the police and his being mentioned by the original seventh accused person in the latter's confession.

H The evidence of the seventh accused, under section 33(1) of the Evidence Act 1967, cannot be considered against the second appellant. There then remains only his own confession which the second appellant had retracted and repudiated.

I In convicting the second appellant on the repudiated confession the learned trial magistrate held, *inter alia*:

A The eighth accused's line of defence did not comply with the provisions of section 194(4) of the C.P. i.e. he did not give notice that he would rely on the defence of an alibi. .. He did not call the *sungusungu* vigilantes who he claimed to have locked him in during the material night. Accused person does not have to prove an alibi. See *Ali Salehe Msutu v. Republic* B [1980] T.L.R. I. Also in *Elias Stephen v. Republic* [1982] T.L.R. 313, this court held: "an accused person who puts forward an alibi as an answer to a charge does not assume any burden proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case." C

The learned trial magistrate misdirected himself in this case by requiring the second appellant to have called the "*sungusungu*" to prove his *alibi*. The rejection of the alibi is one of the reasons which made the trial court think it safe to convict on the uncorroborated repudiated confession. Had he not improperly shifted the burden to prove an alibi to the 2 and appellant it is most likely the learned trial court would have not found it safe to convict. D

E The statement before the police was not properly taken either. The Judges' Rules require that after warning him and taking his statement the police officer or justice of the peace reads over the statement to the accused and the latter certifies that it is true. But here instead of the accused it is the police officer who certified the statement F to be correct. Rule 9 of the Judges Rules (See Philip Durand, "**Evidence for Magistrates**" page 256) reads:

G Any statement made in accordance with the above rules should whenever possible, be taken in writing and signed by the person making it after it has been read to him, and he has been invited to make any corrections he may wish.

H In *R. v. Bass* (1) it was held:

I ... this court has said on many occasions that the Judges Rules have not the force of law, but the administrative directions for the guidance of police authorities. That means, if they are not complied with, the presiding judge may reject evidence obtained in contravention of them...

A In our case if the learned trial Resident Magistrate had queried the propriety of the non-compliance with the rules on procedure in recording the statement by the police officer, there are chances that he would have refused to admit the statement.

B In a trial-within-trial, the burden is also on the prosecution to prove that the accused made his statement voluntarily. But the learned trial Resident Magistrate in this case shifted that burden to the accused.

C It is the accused (second appellant) who testified first in the trial-within-trial, and at some length. The police officer was called and in a short statement of three short sentences carried the day and the court ruled that the statement was admissible. See *R. v. Nyungindo s/o Luhunde* (2).

D The second appellant denied to have made any statement at all. The trial court ought to have checked with the accused's signature to see if it is similar to the one alleged to be his in the statement. I have looked at the appellant's petition of appeal to see if there is a signature of his to compare with the one in the statement. The petition of appeal has a right-thumb-mark instead of a signature. This raises a doubt whether the second appellant is literate, and the author of that signature on the confession statement tendered by the police.

F With all these irregularities I have tried to point out the admission of the second appellant's statement is questionable. It is definitely unsafe to convict on such a statement without corroboration.

G The evidence against the first appellant, Jumanne Rajabu Ngaramgongo, is that of a gun found in his compound and cartridges found at his mother's house. The first appellant denies possession of these weapons. The said weapons were recovered on 24 February 1990, three days

H after this robbery was committed. They were tendered in court in Criminal (Economic) Case Number 5 of 1990. In that case the first appellant was charged with unauthorized possession of arms and ammunition, contrary to section 13(1) and (2) of the Arms and

I Ammunitions Ordinance Chapter 223 read together with paragraph 21

of the Economic and Organized Crimes Control Act Number 13 of 1994, as amended by Act number 10 of 1989. A

He was found guilty of the "Economic Crime" by the Resident Magistrates Court of Tabora (Shayo, S.R.M.) and sentenced to fifteen years imprisonment and twelve strokes of the cane. His appeal against that conviction and sentence were summarily rejected by this court (Honourable B.D. Chipeta, J.) as: B

The S.M.G. (sub-machine gun) and 29 rounds of ammunition were found in his house and compound. There was fulminating evidence to that effect. The appellant utterly failed to give account as to how he came by the said gun and ammunitions. The conviction, therefore, was inevitable ... C

Like in his defence, in his Memorandum of Appeal, the first appellant denies possession of the gun and rounds of ammunition. But as his appeal against conviction for the unlawful possession of that gun has been summarily dismissed and he has preferred no further appeal, he has no right to deny his possession of those weapons. That judgment was final, and proof of his possession of the arms contained in that judgment is conclusive. And as stated in "**Osborn's Concise Law Dictionary**" (6 ed) page 289: D

A thing adjudicated is received as the truth. A judicial decision is conclusive until reversed, and its verity cannot be contradicted. F

As stated earlier the only evidence against the first appellant is his unlawful possession of the gun and cartridges. No one identified him at the scene of crime. Even his two original co-accused did not mention the first appellant as a co-participant in this crime. Even the original seventh accused person who pleaded guilty did not implicate the first appellant in this crime. G

The issue now is whether the weapon the first appellant was found in possession of three days after the robbery is the one used in the carrying out of the robbery. H

The evidence of the ballistics expert. PW7, Superintendent of Police Idi Kingmte, is most relevant to this issue. It is partly as follows: I

A I recall on 22 March 1990 I received the following Exhibit from D/Sgt. Phillip:

One submachine gun with number 2C 882 which I marked as Exhibit "A".

B 4 cartridges (shells) which I marked as Exhibit "C"1-"C4" respectively.

These cartridges were found in the scene of offence in relation to this case. The gun was apprehended in an incident Ref. Tbr.LR/405. After receiving these Exhibit I started to examine them.

C I examined the gun itself and found that its butt and muzzle were both cut off. I made an experiment to see if it was in a working order. I took two rounds of ammunition from our laboratory and fired from the gun. After firing two shots I made a finding that the gun was in a working order. After that I took the two cartridges I fired myself and compared them to the four cartridges brought from Tabora (picked from the scene of crime) using a microscope After careful examination I found that all the cartridges had the same marks. This showed that the four cartridges were also fired from the same gun ...

His report was tendered as Exhibit P.IV. It states, *inter alia*:

F A convincing matching pin impressions and breech-face characteristics on the test fired cartridges and on the spent cartridges... Were noted; and to my opinion the spent cartridges... purporting to have been found at the scene of crime were fired from the sub-machine gun number 2C 882...

G In convicting the first appellant, the learned President Magistrate stated:

I have made up my mind that the ballistic expert evidence cannot be faulted.

H Can it not be faulted? In *Jumanne Rajabu Ngaramgongo v. Republic* (3) (Tabora Registry, unreported), this same first appellant, Ngaramgongo, was found guilty of armed robbery, using the same gun number 2C 8882, which had been tendered in Economic Criminal Case Number 5 of 1990, and on the same ballistics experts opinion. In allowing his appeal, my learned brother Makanja, J. Held:

A Another matter which was given undue weight was the ballistic expert's report we said that the gun be examined was the same as the one which was used at the scene of crime.... It should be remembered that expert witnesses give no more than their expert opinion. A ballistic expert will be outside the province of his expertise if he asserts as PW3 did that the B gun he examined was the one and no other gun of identical calibre, which discharged the five shells which were found at the residence of the complainant. If we take this evidence wholesale we will be saying that every submachine C gun impresses its own peculiar characteristics on empty shells which are fired from it ...

While armed robbery cases abound in this country reported cases on fire arms experts opinions are very hard to come by.

D One such "rare commodities" is the case of *Rajabu v. Republic* (4). The summary of the facts of that case reveal that in October, 1968 a spent shotgun cartridge was found at the scene of a robbery. In November 1968, a man was killed by a shotgun during a robbery E and a spent shotgun cartridge was found at the scene. In February 1960 the appellant was found in possession of a shotgun. At the trial of the appellant on a charge of murder a police officer gave evidence identifying with absolute accuracy the cartridges as having F been fired from the shotgun found in the appellant's possession. No other evidence connected the appellant with the murder. The appellant was convicted of murder and appealed. At the hearing of the appeal their Lordships, the Justices of the East African Court of Appeal, referred to text books concerning firearms identification. Their Lordships G quoted at page 397 from one of the text books, "**Firearms Investigation and Evidence**," by Major-General Hatcher, Ltd. - Colonel Jurey and Jacwellr:

H The more one sees of the breech faces of different weapons and their fixing pins, as well as the way that these surfaces are finished, the more one becomes convinced that similarity of cartridge case makings is rare and identity never encountered at all. For some reason every revolver I and automatic will impart some striking mark or marks. The presence of

A these on two different cartridges is a strong indication of identity; however, in the absence of other similar points, it should never be taken as positive.

And from page 337 of that text on the pin impressions of shotguns the authors are quoted to have said:

B Unfortunately, for identification purposes the pressure inside the chamber of a shotgun is far lower than that encountered even in hand guns. This is a particular disadvantage... since the family characteristics are even fainter than breech face and firing pin impressions from pistols. These makings, however, can be extremely illuminating in some cases.... The identifying laboratory will not want to state definitely in any given instance the exact make and model firing a crime shell: however, no harm at all will be done to your prestige if you state a probability that turns out to be correct.

D From "**An Introduction to Tool Marks, Firearms and Stereograph,**" by John E. Daries, their Lordships quoted from page 78:

E Firing pin impressions are quite often specifically identifiable with the weapon in which firing took place.... While most firearm examiners have made a study of the shapes and styles of rim fire (particularly the 0.22 calibre) firing pin marks with a view to determining the probable weapon used, it seems less consideration has been given to centre fire marks.

F And lastly their lordships quoted from page three of "**Firearms Identification,**" by J.H. Matthews:

G Similarly the marking produced on the head of a fired cartridge (shell) of ten can give valuable information as to the type and make of a gun used and often can identify the particular gun when located.

Then their Lordships observed:

H As there was no other evidence linking the appellant with the murder of Simba it was clear that the conviction could not be upheld unless, first, the evidence left no doubt the gun found in the possession of the appellant had fired the cartridge found at the scene of the murder and secondly, that the only possible reasonable inference to be drawn from the fact that the appellant was found in possession of the murder weapon was that he fired that at the time of the murder...

They then concluded:

A An expert witness merely gives opinion evidence 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... We have come to the conclusion that the opinion evidence of Assistant Superintendent of Police Malangalila identifying beyond doubt the cartridge found at the scene of the murder as having been fired from the greener shotgun found in the possession of the appellant cannot be accepted, and that any such evidence given by this officer in the courts should be regarded with suspension and and not accepted unless other factors exist.

D It would have been proper to apply the doctrine of recent possession to this case as the first appellant was found in possession of the alleged crime weapon only three days after the said crime was committed.

E But the expert evidence, like in the Eastern African Court of Appeal case cited above has to be regarded with suspicion. There is no conclusive proof that another similar weapon can not have made similar marks as those found in the cartridges examined by PW7.

So the appellant ought to have been given the benefit of that doubt.

F For these reasons I allow these appeals and quash the convictions and set aside the sentences against both appellants. They are both to be released from custody immediately unless held further in connection with other lawful matters.

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