

IN THE HIGH COURT OF TANZANIA

bias

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 66 OF 2006

(Originating from Criminal Case No. 1164 of 2007 Kisutu Resident Magistrate's Court at Kisutu before Hon. S.D. Msuya, RM)

SIMON DUNIA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last order – 2/12/2008

Date of Judgment – 17/2/2009

J U D G M E N T

Shangwa, J.

This appeal arises from the decision of the court of the Resident Magistrate at Kisutu, Msuya, RM in Criminal Case No. 1164 of 2007. It is against both conviction and sentence. The trial court's record shows that the Appellant was charged on two counts. On the 1st count, he was charged with Criminal Trespass c/s 299 (a) of the Penal Code. It was alleged on this count that on the 6th day of

July, 2007 at about 20.30 hours at Kawe Beach area within Kinondoni District in the city and Region of Dar es Salaam unlawfully did enter upon Plot No. 710 in the possession of Oscar Kombo with intent to commit an offence thereto and annoy him. He was convicted on this count and sentenced to 3 months imprisonment.

On the 2nd count, he was charged with Malicious Damage to property c/s 326 (1) of the Penal Code. The prosecution alleged on this count that on 6th July, 2007 at about 20.30 hours at Kawe Beach area within Kinondoni District in the City and Region of Dar es Salaam willfully and unlawfully did destroy four timbers and damaged iron sheets wall fence of Plot No. 710 all total valued at Tshs.799,400/= the property of one Oscar Kombo. He was convicted thereof and sentenced to 5 years imprisonment.

In his petition of appeal which was drawn and filed by Prof. L.P. Shaidi, Advocate, the Appellant is complaining

that, the trial Magistrate was biased against him. That, the trial Magistrate denied him his right to legal representation. That, the trial Magistrate convicted him without credible and sufficient evidence to prove the charge against him and that the sentence is excessive in the circumstances of this case.

On the first ground of appeal Prof. L.P. Shaidi submitted that the trial Magistrate was biased against the Appellant. He gave two reasons for his submission. One, that the trial Magistrate denied the Appellant bail on two consecutive days despite the fact that he had sureties who were ready to put up bail for him. Two, that the trial Magistrate refused to withdraw from hearing the Appellant's case when he was requested to do so.

Prof. L.P. Shaidi contended that as the trial Magistrate was biased and refused to withdraw from hearing the case when he was requested by the Appellant to do so, the whole proceedings were vitiated and that therefore the conviction

should be quashed. He cited two cases decided by the Court of Appeal of Tanzania in order to show the circumstances under which bias may be established and the action that should be taken by the judge or magistrate in cases where bias has been alleged against him or her. First, he cited the case of **HAPPY SAUSAGES LTD & Others Vs. Registered Trustees of Social Action Trust Fund and Another** (CAT Arusha) Civil Appeal No. 70 of 2002 in which it was observed as follows and I quote:

"The test for apparent bias is whether the alleged circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the court was biased"

Second, he cited the case of **Kishore Vallabhdas and Another Vs. SMZ** (Zanzibar) Criminal Appeal No. 80 of

1999 in which the Court of Appeal of Tanzania held as follows and I quote:

"Where bias has been alleged then unless there be very good reasons, it is prudent for the judge or magistrate concerned to step down not to insist on hearing the matter."

On her part, the learned State Attorney Ms. D.D. Saiga was of the view that the trial Magistrate was not biased. She argued that two days delay in granting him bail cannot establish bias on the part of the trial Magistrate neither can the trial Magistrate's refusal to withdraw from hearing the Appellant's case establish that he was biased.

The issue which arises from the first ground of appeal is whether or not the trial Magistrate was biased in dealing with the Appellant's case and whether his refusal to withdraw from hearing the case vitiated the whole

proceedings. From the outset, it is important to know what 'bias' means and the principles behind it. The word 'bias' is defined at page 104 of **MITRA'S Legal and Commercial Dictionary Fifth Edition** to mean an inclination of temperament or outlook, especially prejudice; bent, tendency. There are two principles behind the doctrine of bias which are mentioned in the said Dictionary at the same page namely **(i) no man shall be a judge in his own cause (ii) justice should not only be done but manifestly and undoubtedly seen to be done.**

The major reason in this case which makes the Appellant think that the trial Magistrate was biased is his refusal to approve his sureties on 16/7/2007 when he was remanded in remand prison at Keko and his refusal to withdraw from the case. The sureties who went to court to put up bail for him are one Anthony Masanika and one Bibi Afadhali Mzeru. The two sureties had letters of introduction

from their relevant offices which were filed in the trial court's record. The following is what the trial Magistrate jot down on record on 16/7/2007 after the Appellant's prayer for bail:-

*"Court: Two sureties one to be civil
servant and other normal residence,
sum of 700,000/= T.shs."*

As it can be seen from what the trial Magistrate put down on record on that day is that the court did not grant the Appellant's prayer for bail but simply laid down the conditions for granting him bail. The reason why the trial Magistrate did not grant the Appellant bail is best known to himself. One might think that the trial Magistrate was enforcing the interests of the complainant to have him remanded in prison even for a day as the complainant did not like him. As already said, the Appellant's sureties were present on the day he was charged in court with two offences which are bailable.

On 31st July, 2007, the Appellant wrote a letter to the Principal Resident Magistrate in charge at Kisumu stating that he had no confidence in the trial Magistrate S.D. Msuya, RM on grounds that the said Magistrate will not do him justice. When this letter was put to his attention, the trial Magistrate wrote a ruling in which he stated as follows and I quote:

"The issue that the accused person was denied bail has no leg to stand and there is no reasons stated why I should disqualify from this case. For that matter I order that the matter to proceed for hearing."

After making the said ruling, he proceeded with the hearing of two witnesses who were called by the prosecution and recorded their testimonies. Quite surprisingly, he did so in the absence of the Appellant's Advocate Mr. J.F.A.

Mwakajinga. Finally, he convicted the Appellant of the offences charged and sentenced him to imprisonment.

In my view, as the Appellant had sureties on the date he was charged in court with the offences which are bailable but all the same the trial Magistrate did not grant him bail, and as the Appellant had an Advocate to represent him but all the same the trial Magistrate proceeded to hear his case in the absence of his Advocate, and as the Appellant asked the trial Magistrate to disqualify himself but he refused to do so and ended up in convicting him and sentencing him to prison, I do not think that justice was manifestly seen to be done.

The test for bias that was laid down by the Court of Appeal of Tanzania in the case of **Happy Sausages Ltd & Others Vs. Registered Trustees of Social Action Trust Fund and Another** which was cited by Prof. L.P. Shaidi is that of "real possibility of bias". Now, do the circumstances

of this case meet that test? The answer is yes. The said test is similar to the test of "real likelihood of bias" which was laid down by the court in England during the nineteenth century in the case of **R.V. Rand (1866) L.R. 1 Q.B. 230**. There is another test of bias which was laid down by the same court sometimes much later. That of "reasonable suspicion of bias". This test was laid down by Lord Denning M.R. in the case of **Metropolitan Properties (F.G.C.) Ltd Vs. Lannon** [1969] 1 QB. 577. Now, in the circumstances of this particular case can one reasonably suspect that the trial Magistrate was biased? The answer is yes. This disposes of the first ground of appeal which succeeds.

The issue which arises from the second ground of appeal is whether or not the trial Magistrate erred in law in denying the Appellant his right to legal representation by proceeding with the hearing of the case in the absence of his Advocate. As I held at page 6 of my typed Ruling

delivered on 7/5/2008 in Misc. Criminal Application No. 22 of 2008 which was an application for bail pending the determination of this appeal, the Appellant's right to legal representation was partly infringed by the trial Magistrate who heard and recorded the testimonies of P.W.1 Abasi Athumani and P.W.2 Shabani Abdallah Chamote in the absence of his Advocate. I wish to say here that the trial Magistrate's failure to give the Appellant his full right to legal representation did occasion a miscarriage of justice of the highest order as it infringed his statutory right under S.130 of the Criminal Procedure Act [Cap.20 R.E. 2002]. As it was held by this court (Rubama, J) in the case of **DPP Vs. Arbogast Rugaimukamu [1982] TLR 139** cited by Prof. L.P. Shaidi, legal representation of an accused is a statutory right, and if an accused is denied the right and convicted, such conviction cannot be allowed to stand on appeal. This disposes of the second ground of appeal which succeeds also.

The issue which arises from the third ground of appeal is whether or not the trial Magistrate erred in law and fact in convicting the Appellant of the offences charged in the absence of credible and sufficient evidence. At page 7 of her written submissions, the learned State Attorney Ms. D.D. Saiga conceded to the fact that the case against the Appellant was not proved beyond reasonable doubt. This is what she said and I quote:

"Going by the offence up on which the Appellant was convicted and the evidence adduced in the court in proving it, we are highly convinced that the case was not proved beyond all reasonable doubts."

This means that the learned State Attorney concedes that there was no sufficient evidence upon which the trial court could safely base its conviction. In fact, she did not

support conviction. One of the reasons as to why she did not support conviction is that P.W.1 and P.W.2 did not state in their respective testimonies on how they managed to identify the Appellant as the alleged incidents are said to have taken place during the night.

Prof. L.P. Shaidi contended that the failure by the prosecution to adduce evidence showing that the accused was the actual person alleged to have been seen at night time breaking the fence, is a serious matter. He cited the case of **Raymond Francis V. R. [1994] T.L.R. 100** in which the Court of Appeal of Tanzania commented on the necessity for the witnesses to describe in detail the identity of the accused when they saw him at the time of the incident. Its comment was that:

"Since all the witnesses admitted seeing the appellant for the first time during the incident that day, it was necessary

in their evidence to describe in detail the identity of the appellant when they saw him at the time of the incident”.

In this particular case, P.W.1 and P.W.2 told the trial court in their respective testimonies that they are watchmen at Plot No. 710 Kawe Beach where they are employed by one Oscar Kombo (complainant) and that on 6/7/2007 during the night, they saw one person who went there with a car and that he got out of the car and started breaking the fence. They said that they phoned the complainant who went there at the time when that person had left the place.

As it can be seen, these witnesses did not describe in detail the identity of the person whom they saw at the time of the incident which is alleged to have occurred during the night. It is therefore not clear as to whether the person they saw was the Appellant or any other person. In fact, their testimonies bear some elements of incredibility. I say

so because if at all it is true that they saw the Appellant breaking the complainant's fence made of iron sheets and destroying the timber on plot No. 710 Kawe Beach which they were employed to guard during the night why did they not arrest him on the spot as it was their duty to do so. It is not even indicated that they tried to arrest him but he overcame them.

On his part P.W.3 Oscar Kombo (complainant) told the trial court that on 6/7/2007 during the night, he received a telephone call from P.W.1 and P.W.2 who are his watchmen at plot No. 710 Kawe Beach who informed him that the Appellant broke his fence on that plot and damaged his timber and that when he went there on the following day he found it badly damaged together with his timber.

As it appears, the testimony of P.W.3 was not direct evidence. He did not see the Appellant causing damage to any of his properties at Plot No. 710 Kawe Beach. He was

just informed about the incident by P.W.1 and P.W.2 who are his watchmen.

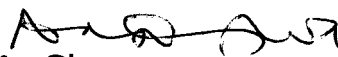
Another witness who testified before the trial court on behalf of the prosecution is P.W.4 D.8548 D.C. Elia who is a police officer at Kawe Police Station. This witness told the trial court among other things that he conducted investigation into the offences charged and that during investigation he took the Appellant's cautioned statement and that the Appellant denied to have committed the offences charged. Thus, there is nothing in the testimony of P.W.4 which incriminates the Appellant.

In general, I think that the evidence of P.W.1, P.W.2, P.W.3 and P.W.4 is not sufficient to base a conviction. I therefore agree with both counsel for the parties that the conviction should be quashed. I hereby quash it. This disposes of the third ground of appeal which succeeds as well.

As I have quashed the trial court's conviction, I do not think that it is of any use to deal with the Appellant's fourth ground of appeal against the sentence of 3 months imprisonment which was imposed by the trial court on the 1st count, and the sentence of 5 years imprisonment which was imposed by the same court on the 2nd count and which the Appellant's counsel says it is excessive under the circumstances even if the conviction was proper. I therefore set aside the said sentences which have no legs to stand so far. This disposes of the fourth ground of appeal which succeeds also.

In the final analysis, I allow this appeal and restore the Appellant's constitutional right to his personal freedom.

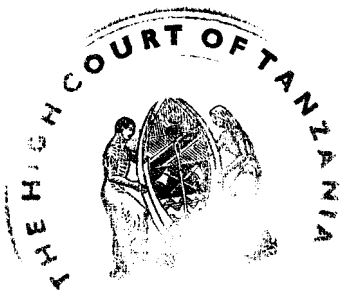


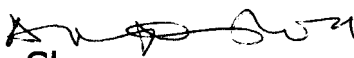

A. Shangwa

JUDGE

17/2/2009

Delivered in open court this 17th day of February 2009 in
the presence of Prof. .P. Shaidi for the Appellant and Ms.
Saiga State Attorney for the Respondent.




A. Shangwa

JUDGE

17/2/2009