

TANZANIA / JUDGMENT

20100813 TZHC Tanga

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IN THE HIGH COURT OF TANZANIA ATTANGA '- · CRIMINAL APPEAL NO.8· OF 2010
{Originating from Tanga District Court Criminal Case No.442 of 2007) FARIJALA MOHAMED! @
MAJID APPELLANT VERSUS THE REPUBLIC RESPONDENT Date of last
order: 23/07/2010 Date of judgment: 13/08/2010

JUDGMENT

.MUSSA, J: The appeal originates from criminal case No. 442 of 2007 instituted in the District court of Tanga. · The appellant, here1n, was arraigned for obtaining goods by false pretences, contrary to section 302 of the Penal Code, chapter 16 of the laws. . The particulars alleged. that, on the·, 11th October, 2007; at Chumbageni Police Station, within the City of Tanga, by false pretence and with the intent to d_efraud, the appellant obtained for himself two pairs of· trousers, two shirts and a mobile phone; having falsely represented - . himself to a certain Naziel Sabuni @ Mchome as a person_ e_mployed in the Janzariia .Police· Force. The appellant refuted_ the accusa.tiq_n; whereupon, three prosecution witnesses were lined up in support : ' _ _ ,... '!', ~"! :~ ~ :,thereof. · -At the close of the enquiry, a conviction was had, in the , · : ·U ., · ·-~ '... J~ " ;_ - .~"!! • ... ::- · :~ · ~ course of which, the appellant was sentenced to a term of .seven ~~~ ~----- · ---- -- '-_ ~ ~! ~:_ years imprisonment. T[le appellant is, presently, aggrieved upon .a lengthy petftion comprised of seven points of grievances. At the hearing befo~e me, the· appellant,· unrepresented, fully adopted the petition; whereas, Mr. Marandu · fdr the respondent Republic did not support the conviction. For reasons that will become apparen,t within a s~o~ run, ·I need not even explore the f~ctual setting. Suffice it to say, the case for the prosecution, on the· whole, was comprised upon an alleged episode unto which the appellant was depicted to have falsely repr~ented himself to the complaint as· a police officer and~· thereby, obtained for himself the properties in reference. Coincidentally and; perhaps, quite unfortunately, I was occasioned to hear and determine some previous. appeal involving this same appellant· and; by the way, presided over by the same Magistrate. That was Criminal Appe?I No.1 of 2010 and; I now · notice that the issues involving both appeals are one and the same._ - At the close of the case for the prosecution, as was the case In the previous and; the trial court having found sufficient evidence with . --- which to require him make his defence; the appellant opted the unusual as recorded thus:- Accused: -· I shall defend myself on 'A!_ritten submis~ion. · · To this, again, in a rather unprecedented gesture, ., the trial court was obligatory; which is where the mish':1P lies. In the earlier referred appeal. the. appellant sought 'and defended himself upon

affidavit sworn before another Magistrate aside from the presiding officer. As to what transpired in the matter presently at hand, a type . written document titled "WRITTEN SUBMISSION", was prepared, of 2 ---il">O.= .. -> .• ... which, the appella~t thumb printed. Thereupon, a rejoinder to a written prosecution reply, was_ sought to be effected upon ?ffidavit but; s~rp:isi~gly enough, the same was attested by the presiding trial. Magistrate. To say the least; the law as well as legal etiquette demand that one should not attest upon a matter he/she is _interested. Quite aside, upon the filing of the documents wjth the - trial court, the prosecution, then, cross-examined the appellant and; that done, it was perceived, such was all what was required of the appellants' defence and; a verdict was, eventually, handed down. As earlier, the issu~ I am all along anxious about is whether or not the adopted mode of receiving evidence was legally acceptable. Obviously, that travels one to the relevant provisions of the law with respect to the mariner in which evidence ought to be received in _a I criminal trial. To begin with, I _think it is well worth the remark_that where a person accused enters a defence, he/she is on the same plane as any other witness; particularly, when it comes to his/her _standing with _ respect . to the rules governing the reception of witnesses' testimony. Coming now to the bone of contention and; as of a general rule, in terms of section 61 ·9f the Evidence _Act, all facts, except the contents of documents may be proved by oral evidence. ~Even though, I should note, ·on the face of ~he definition of "oral evidence" as comprised under section 3 (15; one may· adjudge the expression to , be all embrasive, more so, as it includes "statements"; should of which carry general connotations but; I should suppose, · what was ' desired is that the expression "oral evidence" be restricted to -, j I t fil'f"AZm¼iim'iri:-~..;----- -- 1 witnesses te_stimony in the physical communicative or demonstrative, mode.. To insist upon more will be to render nugatory any distinction . there is between,. say, (?ral testimony and" doc_umentary evidence. Thus, alive to the distinction and; remarkable in the stipulatron, is the ~ rider excepting proof of the contents of documents, of which, it is . common knowledge, that the same are proved by documentary . : evidence. Lest it is forgotten that, as a mode of proof, the legislator chose the word "may," to refer to oral testimony under section 61; ···in itself bei"ng recognition that, on occa_sion, some other mode of proof may take the place of testimonial evidence. If is commonplace, for instance, that there may be a situation, more particularly, in a civil proceeding; whereof, a particular fact is allowed to be proved by affidavit. If it so obtains, it is on account that Rule 1 of Order XXIX . . . of the Civil Procedure Code, _specifically empowers a court to authorize such course of action. As for criminal proceedings, the regulatory law and practice are elsewhere and; to me, quite the opposite. In this regard, sections 198 and 210 of the Criminal Procedure Act; as well as, sections 146 and 147 of the Evidence Act; are instructive. If I may single out section 198 for a start, it is provided therein:- Every witness in a criminal cause or matter shall, · subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the oaths and Statutory Declarations Act. 4 · "Examined", as I suppose, is. used here in_ reference to. the communicative process of questioning a witness under oath or 4 . ' affirmation. As to how such is to be effected on the ground by the trial-court section 210 (1) and (2) comes into aid;- . 1. In tria_ls, other than trials, under section 21~, by or before a Magistrate, the evidence of the witness shall be recorded in the following manner -

- a) The evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and
 - b) The evidence shall not ordinarily be taken in the form of question and answer but, subject to subsection (2), in the form of a narrative.
2. The Magistrate may, in his discretion, take down or cause to be taken down any particular question and answer. . . ~ !~:~ Thus, as one would immediately apprise from the extract above, posting evidence upon record is an exclusive business of the presiding officer and; when, finally, it comes to the mannerism of presentation by the parties; the same is regulated by the Evidence Act. It is elementary knowledge and; in terms of section 146, the examination of a witness by the party who calls him/her is assigned the expression "examination-in-chief;" whereas, the examination of a witness by the adverse party is christened "cross-examination" and/ if desired, the examination of a witness subsequent to the cross-examination by a party who called him/her; is referred to as, "re-examination." Coming now to how such is done in a courtroom, section 147 (1) is directly on:- Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so-desires) re-examined. "Examined-in-chief," as I, again, so suppose, it is meant the process through which testimonial evidence is elicited from a witness in the course of a verbal communicative exchange. Thus, for instance, a person accused calls a witness apart from himself/herself; he/she will be the one taking the leading role in the examination-in-chief. Conversely, where, as here, the person accused, unrepresented; calls only himself to the witness box; the presiding officer should take a role in leading the accused to a narrative. So elementary and common knowledge are these requirements in practice but; given what has just cropped out, I thought they are well worth reminding for the benefit of presiding officers downstairs. All said and; addressing now the subject of receiving evidence in a criminal trial, neither of the foregoing provisions is to be read in isolation from the other, rather, all have to be consulted in conjunction. Once that is achieved, I should suppose, a scheme is ascertainable therefrom; according to which, in so far as criminal proceedings are concerned; the evidence of any witness must be derived of an oral narrative to be recorded by the presiding officer or as the case may be, under his/her personal superintendence. To put it differently and; as has been held previously, the present regulatory scheme of criminal trials gives no room for reception of affidavit evidence let alone, written submissions. (Raphael V Republic - (1973) 1 EA 473 (CAD). To this, I should distance ancillary proceedings such as bail applications, whereof; affidavits are accepted as of a normal run of business. Allowance is further to instances whereof, in terms of the law, a written statement is admitted in lieu of oral testimony. With so much for the, rather, disquieting aspect of the proceeding at hand; I am drawn to the conclusion that the trial court had no authority to accept the so-called submission and/or affidavit to form the basis of the appellants' defence. From where I am standing, the situation is as if the appellant did not enter a defence at all. That alone would suffice to vitiate the entire proceeding and; the

aftermath I toyed with for a while, was whether . ,; or not to order _a . . . new trial. To this, Mr. Marandu for the Republic was. disi.Dclined; ':. . ~ . . . ~ : " ' .. -~-:;, . . more so, as he did not support the conviction, in the first place .. To- : _.__ . . hi_m, a conviction was unlikely even upon a new t~ial. . Agr~eing and; additiona.Uy, in view of the fact that the appellant has don~e a :substanti_9.l p'ortidfY~cf his term; it will riot be in the interests of justice -~:, 7 I' to' order a re-trial~. That d~ags me to the only viable. option of . . . requiring the immediate release of the appellant; unless he be held in .. ~ cdstody for some other lawrul cause.~ It is, accordingly, ordered. K.M. SA, J; 12/08/2010 Coram: Mussa, J; Appellant:~ present ~ Respondent: Miss Mdegela Judgment delivered. K.M. M A, J; 13/08/2010 8

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