

**IN THE SUPREME COURT OF UGANDA**

**AT MENGO**

**CORAM: WAMBUZI, C.J., MANYINDO, D.C>J. & PLATT, J.S.C.)**

**CRIMINAL APPEAL NO. 1 OF 1988.**

**BETWEEN**

**ABDU KOMAKECH ::: APPELLANT**

**AND**

**UGANDA ::: RESPONDENT**

(Appeal from the Judgment of Ouma, J.  
dated 8-3-88 in High  
Court Cr. S. C. No. 71 of 1987).

**JUDGMENT OF THE COURT:**

On 8<sup>th</sup> March 1988, Ouma, J. convicted the appellant in the High Court of simple robbery, contrary to sections 272 and 273(1) of the penal code. He sentenced him to six years imprisonment. The appellant was in addition ordered to receive six strokes of cane and to compensate the complainant in the sum of shs. 55,000/= which was alleged to have been taken from her by the robbers. The other mandatory order for police supervision was not made when it should, under Section 123 of the Trial on Indictments decree.

The facts of the case were given by the sole eyewitness to the robbery, Susana Obiro (PW1), who was the victim of the robbery. Briefly, they are that on 6<sup>th</sup> August, 1986, in the morning hours, she was brewing a local drink known as Kwete at Kisenyi in the city of Kampala when she was visited by the appellant who wished to buy some of that drink.

The appellant offered to exchange his maize flour for the Kwete. The complainant readily agreed to the proposition and then decided to go with the appellant and look at the stuff at the

stuff at Katwe which is nearby. On the way to Katwe the complainant was attacked by two men one of whom was armed with a pistol. The appellant joined the attackers and, together, they robbed the complainant of shs. 55,000/= which she was carrying.

The appellant denied the charge. At the close of the prosecution case he was called upon to make his defence but opted to keep quiet. We will see more about this later in the judgment. His appeal was based on five grounds, but at the hearing the fourth ground was abandoned. The first ground related to the constitution or composition of the court that tried him. It is his contention that the trial was a nullity as the court lacked jurisdiction because one of the two Assessors who assisted the trial judge was an impostor.

What happened was this. When the case first came up for trial on 7<sup>th</sup> December, 1987, two Assessors were selected and agreed to by the parties in the case. They were Abiasali Kidza and John Zankumbi. They were not sworn and the hearing of the case was adjourned to 13<sup>th</sup> January, 1988. On that day (13-1-88) two Assessors in the same names as those selected on 7<sup>th</sup> December, 1987, were sworn and the trial commenced.

The complainant testified and was cross examined.

The case was then adjourned to 14<sup>th</sup> January, 1988 for further hearing. On that day the prosecution led more evidence and then closed its case.

There was a further adjournment and the case came up again on 1<sup>st</sup> February, 1988. It was then that it transpired that John Zankumbi had not been participating in the trial. He had been sitting with a different judge in a different case. At his instance, a Mr. Mubiru Zirimu had taken his place. This arrangement between Zankumbi and Zirimu had been made without the knowledge of the trial Judge or Counsel.

On discovering this unfortunate state of affairs the trial judge discharged Zirimu and the trial proceeded with the remaining Assessor, Kidza, throughout. The Judge purported to act under Section 67(1) of the Trial on Indictments Decree which provides as follows:-

**“67(1) if, in the course of a trial before the High Court at any time before the verdict, any Assessor is from sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable immediately to enforce his attendance, the trial shall proceed with the aid of the other Assessors.”**

It is not clear from the record of proceedings exactly when Zankumbi left Court and was replaced by Zirimu.

Counsel for the appellant argued that Zankumbi could have gone away on the very day he was chosen to be an Assessor so that the person who was sworn in as Zankumbi on 13<sup>th</sup> January, 1988, was in fact Zirimu.

It would follow, argued Counsel that the trial Judge had in effect sat with only one Assessor, Kidza, through the trial since Zankumbi did not sit and Zirimu was an impersonator. He submitted, quite rightly, that the trial of a criminal case in the High Court must start with at least two Assessors chosen by the trial Judge under Section 63 of the Trial on Indictments Decree. He thought that failure to start the trial with the aid of two Assessors is an incurable procedural irregularity.

It was also his contention that Section 67(1) of the Trial Indictments Decree quoted above should not have been invoked by the trial Judge since Zankumbi had never participated in the trial of the case at all and that, in any case, it had not been established that he was absent for good cause or that he could not be found and brought to court without delaying the trial.

In reply, State Attorney Mr. Ogwal-Olwa took the position that once the Assessors were sworn, the trial of the case had in fact started and that therefore, the trial Judge was entitled to forget all about Zankumbi and proceed with the trial with the remaining Assessor.

In our view, the trial of the case in the High Court or in a Magistrate's Court for that matter, only begins when some evidence is led. See **RV Cvaske, Exparte Commissioners of Police (1957) 2 All E.R. 772**. That is why in the High Court the chosen Assessors do not even participate in the preliminary hearing held under section 64 of the Trial on Indictments Decree for the sole purpose of admission of formal matters so as to expedite the trial. It is only at the conclusion of the preliminary hearing, if any, that the Assessors are sworn and take their places – Section 65. We find support here in the provision in Section 63 that if the accused person pleads not guilty and after the preliminary inquiry, if any, has been held, the court shall proceed to choose the Assessors and “to try the case.”

It is true that in the instant case no preliminary hearing was held. The problem is that after the Assessors were sworn in, the case was adjourned for some time to enable the court clerk find an appropriate court re-assembled at 11:35 a.m. when PW1 started to give her evidence. Assuming that Zankumbi had been in court and had even taken the oath, it is not certain that he was still in court at 11:35a.m., after the adjournment. For all we know he could have deserted, so to speak, at the first opportunity which was during the adjournment.

We agree with the learned State Attorney that if during the trial one of the Assessors disappears, as it were, then the trial can proceed with the other Assessor under Section 67(1) quoted above and on the strength of the decision of the Court of Appeal for East Africa in *Kashaija & 2 others v. Uganda*, Criminal Appeal No. 131 of 1976 (reported in 1976 H.C.B. 51), that the word “Assessors” which is the last word of Sub-Section 1 of section 67(1) means “Assessors” or “Assessor.” However, the trial Court must be satisfied, in the first place, that the Assessor is absent for good reason or that he cannot be found without unnecessarily delaying the trial.

In the case before us it is not clear, as we have already pointed out, whether Zankumbi was even sworn in as an Assessor or that he was even present when the trial began. Going by the

record we are inclined to find that he did not participate in the trial of the appellant. Since Zirimu acted as an Assessor fraudulently, we find that the trial Judge sat with only one Assessor throughout the trial. This irregularity is fundamental as it goes to jurisdiction. It has occasioned a miscarriage of justice and it is not therefore curable under Section 137 of the Trial Indictments Decree. On this ground alone this appeal would succeed.

The learned State Attorney has asked us to order a retrial if we find, as we have done, that there was a mistrial. This court has a discretion to order a retrial, but, as we pointed out by the Court of Appeal for East Africa in **Fatehali Manji V Republic (1966) E.A. 343 and 344** quoting parts of its judgment in **Salim Muhsin v. Salim Bin Mohamed & others:-**

“.....the discretion must be exercised in a judicial manner ....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should be made where the interests of justice require it and it should not be ordered where it is likely to cause an injustice to the accused person.”

ordinarily, we would have ordered a retrial of this case as the first trial was defective. However, after a careful reappraisal of the evidence of the prosecution, we agree with the submission by Counsel for the appellant that the complainant's account of the robbery is highly suspect. The robbery is said to have occurred in a very busy part of the city and in broad-day light. We wonder why it was witness only by the complainant.

Why did she not raise an alarm? Admittedly, she did not even report the incident to anyone for at least two weeks. And her claim that she eventually reported the matter to the Chairman of the area resistance Committee was contradicted by Mohamed Mulindwa (PW2) who stated that by then the Resistance Committees had not been established in Kisenyi. No wonder then that no such Chairman was called to testify, for what it was worth.

The complainant contradicted herself in her account of how the robbery occurred. In one breath she stated that she was attacked by two men who were seated on a verandah near a foot path and in another breath she said that the robbers had come from nowhere. In the circumstances, we doubt if the alleged robbery ever took place.

With respect, we feel that the learned trial Judge did not give the complainant's evidence the scrutiny that it deserved as she was the only eyewitness to the robbery. It was wrong of him to accept it as true simply because it had not been challenged by the defence in cross - examination and that it was not "inherently incredible or palpably untrue." It also seems clear to us that the trial Judge was not happy at the failure of the appellant to put up a defence.

This is what he said in his judgment on the point:-

"In my view, if the Court after the close of the prosecution evidence considers that there is sufficient evidence that the accused committed the offence, he or she should be required at least to give an explanation to justify his plea of not guilty."

We would like to think that the appellant's choice not to defend himself was not held against him because that would be wrong in law. It would in our view violate the fundamental common law principle, now enshrined in Article 15(2)(a) of the Constitution of this Country, that an accused person shall be presumed to be innocent until he is proved guilty.

This was a rather unusual case in that although the appellant was availed Counsel by the State to assist him in his defence, the Counsel did not in fact defend the case. Perhaps the trial Judge

did not in fact appreciate this fact hence his conclusion that as the appellant had not seriously challenged the prosecution evidence, he must be deemed to have accepted it as true.

We are surprised that the fact the appellant did not make his dection nor he could defend himself instead Counsel merely informed Court that the appellant would say nothing in his defence. Apparently even the Court did not even bother to ascertain from the appellant if that was correct.

We also note that after the State Attorney had made his final address to the Court and prayed for a conviction, the Counsel for the appellant stood up and only made this somewhat extraordinary statement to the Court:-

“I do not have much to add or to point out to what the learned Counsel for prosecution has said or pointed out in his summing up the prosecution case. Loopholes in the prosecution case have been ably filled by my brother in his submission. I pray that should court believe the prosecution evidence, it should deal with the accused with leniency.  
That is all”

We do not know why the Learned Counsel acted as he did, but we suspect that he had not quite found his feet in Court. Be that as it may, it is doubtful that a court directing itself properly on the law and evidence would find the appellant guilty of the offence charged.

Accordingly, we quash the conviction and set aside the sentence and orders of the lower court and order that the appellant shall be set free forthwith unless he is otherwise lawfully held.

Dated at Mengo this 30<sup>th</sup> day of April 1990.

**S.W.W. WAMBUZI**

**CHIEF JUSTICE**

**S.T. MANYINDO**

**DEPUTY CHIEF JUSTICE**

**H.G. PLATT**

**JUSTICE OF THE SUPREME COURT**