IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 242 OF 2009

DAUD NORBERT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Shaidi, J.)

dated the 16th day of July, 2009

in

Criminal Appeal No. 174 of 2007

.....

REASONS FOR JUDGMENT OF THE COURT

1ST June & 10th August, 2011

BWANA, J.A:

After hearing the appeal by Daud Norbert, the appellant and Mr. Tumaini Kweka, learned State Attorney for the respondent Republic, we allowed the appeal, set aside the sentence and ordered the appellant's release from prison forthwith unless lawfully held. We reserved our reasons for the decision. We now proceed to give the said reasons.

Before we do so, however, it is proper that we give a brief background to this appeal.

The appellant was charged with the offence of armed robbery contrary to section 287 of the Penal Code. Eventually he was sentenced to thirty (30) years imprisonment. We note that the said sentence was meted out by the trial court, the Ilala District Court, without first the appellant being convicted. The trial magistrate simply stated:-

> " Having taken into consideration (sic) on the requirement of the law, and the evidence adduced in the court. There was no doubt that the accused person did participate (sic) the commission of the offence charged."

After stating the above, the trial magistrate then proceeded to the next step, that of recording whether the accused had a previous conviction. That was followed by mitigation. **No conviction** was entered and or

recorded. That forms one of the grounds of appeal as we shall revert to shortly.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful, hence this second appeal.

In his memorandum of appeal the appellant raised eleven grounds but which basically may be consolidated into four namely.

1. That the trial court erred in sentencing the appellant without a conviction having been grounded.
2. That the first appellate court erred in law and fact in upholding a conviction which never existed.
3. That both the trial court and first appellate court erred in law in allowing the appellant to be charged under a wrong provision of the law, to wit: Section 287 of the Penal Code (the PC), a provision which does not govern armed robbery.
4. That there was no watertight visual identification of the appellant at the scene of crime.

Before us, the appellant was represented by Mr. Gabriel Mnyele, learned advocate and as stated above, the respondent Republic was represented by Mr. Tumaini Kweka, learned State Attorney.

Our decision to allow the appeal, set aside the sentence and order for the appellant's immediate release unless otherwise lawfully held, was based on the following considerations. Both Mr. Mnyele and Mr. Kweka apparently had similar views. First and foremost was the procedural irregularity that led to the appellant being sentenced to a prison term of thirty years without first having been convicted of the alleged offence of armed robbery.

Section 235 of the Criminal Procedure Act (the CPA) lays down the procedure to be followed by a trial court before convicting and sentencing an accused person or before an acquittal is entered.

It provides thus:-

" S. 235

(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, **shall convict the accused and pass sentence** upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code.

(2) If the court acquits the accused, it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court shall record or cause it to be recorded." (emphasis provided).

It is not in dispute that, and as quoted above, the trial magistrate did not enter a conviction before sentencing the appellant. That was not proper in law and therefore the sentence imposed subsequent thereto, was illegal. This Court has revisional jurisdiction under the provisions of section 4 (2) of the Appellate Jurisdiction Act, which it could invoke and correct the

error apparent. On further consideration, however, we were of the view that the other issues raised by the appellant in his memorandum of appeal ought to be taken on board as well. Such other issues included the following:-

(i) Citing the wrong provision of the law; and

(ii) The defect in the dates.

Both Mr. Kweka and Mr. Mnyele do concur with us that by citing section 287, instead of sections 285 and 286 which govern armed robbery, the charge sheet was defective. That is not all. The particulars of offence suggest that the armed robbery was committed against Jacob Joel, who testified as PW1. He was the owner of the bar which is the **locus in quo**. However, in his evidence, PW1 everred that at the time of the robbery, he was not at the scene of crime. In our view, he could not have been robbed if he were not at the scene of crime.

The other defect apparent is the date and time the armed robbery is alleged to have taken place. The charge sheet states that it was on the

20th day of February 2006. However, the prosecution witnesses averred that the robbery took place on the 26th day of February 2006. We hold this to be a material defect, which shows that the said prosecution witnesses gave evidence on a non existent offence.

This Court is empowered, under section 388 of the CPA, to use its discretion and correct such discrepancies. It can, however, invoke such powers, if in its considered view, such error, omission or irregularity did not occasion failure of justice. We have carefully looked into the matter and came to the conclusion that the errors above noted did occasion a failure of justice. Therefore section 388 of the CPA cannot be invoked to rectify the said errors.

Visual identification is another issue raised by the appellant and which needs our determination. The issue is whether, given the circumstances under which the alleged armed robbery took place, was the visual identification of the appellant watertight, that is, did the conditions favouring a correct identification exist?

The law governing visual identification is well settled, based on the principles of law as rightly stated by the Court in the much celebrated case of **Waziri Amani V Republic** (1980) TLR 250. The epicenter of the said principles is that watertight evidence on visual identification can be said to exist when it leads to the exclusion of all possibilities of mistaken identity. The court should take into account, inter alia, the following factors.

First, how long did the witness had the accused under his observation .

Second, if it were at night, which kind of light did exist and what was its intensity.

Third, had the witness seen or known the accused before the day and time of crime. If so, when and how often.

Fourth, the whole evidence before the court considered, were there material impediments or discrepancies affecting the correct identification of the accused by the witnesses.

The factual evidence on record suggest that the following pertinent points did exist.

First, that the appellant was a frequent customer of the material bar. In fact he resided in the neighbourhood. One would therefore raise an unavoidable question: could the appellant commit such an offence at an area where he frequents and is well known? We are reluctant to hold so. Further, there is no evidence suggesting that the key prosecution witnesses lived in the neighbourhood as well.

Second, it is on record that the appellant and PWI were not in good terms. Being an employee of Yono Auction Mart, the appellant was assigned on 20th March 2006 to impound unregistered taxis. He did so by impounding seven such taxis, two of which were the property of PW1 who, it is on record, that he was angered by the appellant's action and indicated that he would revenge. Some days later, the appellant was arrested and charged with the offence of armed robbery. His arrest on 26th April, that is, two months after the alleged crime was committed without any evidence of disappearance from the vicinity lends credence to his averment which we do not take lightly. The evidence before the court could have been framed up.

Third, is the evidence that immediately before the robbery, lights went off save only one tube light at the bar counter. PW1 was not at the scene. One of those who were at the scene , that is, PW2, testified that he was about 15 metres away from the bar counter. The other witness, PW3, gave evidence to the effect that during the robbery, all people were ordered to lay down and lights went off. If this were so, we would believe that under such a situation, it was impossible to make positive identification of the bandits. The above considered, were are of the view that there was a possibility of mistaken identity.

It is equally important to point out that if there was no offence committed on the 20th February 2006, the evidence suggesting that the appellant committed the same on the 26th February 2006, appears to be far fetched. Likewise, the visual identification said to have taken place on that date cannot be said to be real and watertight. Therefore the decisions of both courts below were, in our conclusion, faulty and regrettably, in accurate.

Having considered the above reasons, we were left with no option other than to allow the appeal, set aside the sentence and order the appellant's release from prison, unless lawfully held.

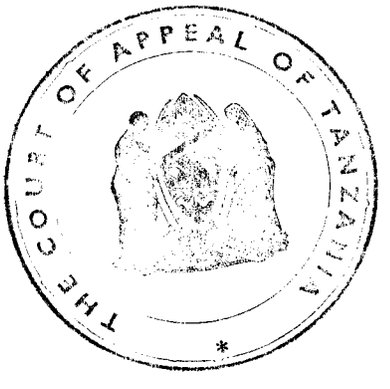
DATED at DAR ES SALAAM this 19th day of July 2011

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL