**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: LUANDA, J.A., MJASIRI, J.A., And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 145 OF 2011, 146 of 2011 & 147 of 2011**

1. **MATOLA KAJUNI**
2. **ENOCK ELIA** .....**APPELLANTS**
3. **MANDELA JIMMY**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mbeya)**

**(Msuya, J.)**

**Dated 8th day of June, 2011**
**in**
**Criminal Appeal No. 18 of 2009 & 42 of 2009**

.....

## JUDGMENT OF THE COURT

**7th & 12th JUNE 2013**

## LUANDA, J.A:

In the District Court of Kyela sitting at Kyela the above named appellants were charged, "convicted" and each was sentenced to 30 years imprisonment for armed robbery contrary to section 287 A of the Penal

Code. Aggrieved by both "conviction" and sentence, they unsuccessfully appealed to the High Court. Still dissatisfied, they have come to this Court on second appeal.

Each appellant has separately filed his memorandum of appeal challenging the decisions of the lower courts.

In this appeal the appellants appeared in person, unrepresented and so they fended for themselves. The respondent/Republic was represented by Mr. Achiles Mulisa learned State Attorney.

Before hearing the parties on the merits or otherwise of the appeal, the Court wished to hear from the parties on whether the trial Court had entered conviction. The Court referred to page 30 of the record where the trial Resident Magistrate concluded in his judgment thus, we reproduce:-

> *" On those reasons, I hold that the prosecution has successfully proved the case beyond reasonable doubt. And the accused are found quilty as charged."*

He then proceeded to sentence the appellants.

Mr. Mulisa informed the Court and rightly so that no conviction had been entered. He accordingly urged us to quash and set aside the judgment of the trial subordinate Court as it is contrary to the provisions of section 235(1) of the Criminal Procedure Act, Cap. 20 RE. 2000 (the CPA) and remit the trial court record with direction to enter conviction. Since the trial court judgment has no leg to stand on, the High Court judgment follow suit, he charged.

The appellants being laymen had nothing to say to the legal point raised.

Section 235(1) of the CPA provides:-

> *(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. [Emphasis supplied]*

Section 235(1) of the CPA which is couched in mandatory terms demands the trial subordinate Court to enter conviction before proceeding to deal with the question of sentence. To put it differently a sentence cannot be passed before entering a conviction.

In ***Amani Fungabikasi VR***, Criminal Appeal No. 270 of 2008 the court said:-

> " *It was imperative upon the trial District Court to comply with the provisions of Section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt."*

In ***Jonathan Mluguani VR***, Criminal Appeal No. 15 of 2011 the Court Observed:-

> *" Section 235 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 imposes a duty on the trial Court to enter conviction before embarking on the question of sentence. In other words conviction to precede sentence. To put it neater there cannot be a sentence without conviction"*

In ***Khamis Rashid Shaban VR***, Criminal Appeal No. 184 of 2012 the Court said:-

> *" An accused for instance, cannot be lawfully sentenced to any punishment, unless and until, he or she has been duly convicted of a particular offence."*

(See also ***Shabani Iddi Jololo and Another VR***, Criminal Appeal No. 200 of 2006) And in ***Amani Fungabikasi*** cited supra the Court Said:-

*" In the absence of conviction, it follows that one of the prerequisites of a true judgment in terms of Section 312(2) of the Act was missing."*

So, a failure to enter conviction is a fatal and incurable irregularity which will render such judgment a nullity.

In our case we have shown that no conviction was entered. In terms of S. 235(1) of the CPA there was no valid judgment upon which the High Court could uphold or dismiss.

Mr. Mulisa suggested to us that in the light of the above irregularity, we could direct the record be remitted to the District Court so that it enters a conviction. We have considered his prayers. However for the reasons to follow shortly thereafter, we are not prepared to do so.

We had the occasion of going through the proceedings of the case. We have found out that the appellants' conviction was based on two sets of evidence, namely visual identification and the doctrine of recent possession.

Briefly the prosecution case was that when Tuje Kalisi (PW1) and Leah Gilson (PW2) were asleep in their house in different rooms, four armed bandits forced open the door and entered. The assailants beat them and later they took a number of items and took to their heels.

As regards visual identification, PW1 and PW2 claimed to have identified the appellants through a lantern lamp. But the two did not say the type of the light it illuminated and the place it was positioned; the size of the room; the distance they were vis-à-vis the assailants; the time the incident took place etc. These factors are crucial for the Court to determine whether the conditions were conducive for visual identification. This is because the evidence of visual identification is the weakest kind and most unreliable. Courts should not act upon that evidence unless all possibilities of mistaken identity are eliminated. (**See** ***Waziri Amani VR*** [1980] TLR 250).

Since those questions posed were not satisfactorily answered, it is doubtful whether the appellants were positively identified.

Regarding the recovery of properties. It is in the record that one hand set of mobile phone, one bag, one plastic weapon and one radio were recovered from the house of the 3rd appellant. The items were produced and tendered by PW1 as exhibits without saying how she came about, if really they were stolen. And Asst Inspector Ngwala (PW3) who claimed to have retrieved the properties from the 3rd appellant did not say the manner and the place the complainant had identified the properties in question. In order for the doctrine of recent possession to hold, the prosecution must establish, inter alia, beyond any doubt that the alleged recovered property which is the subject matter of the charge to have been duly identified and belong to the complainant.

In our case it is neither established that the items enumerated above were recovered under the possession of the 3rd appellant nor duly identified by the complainant. The doctrine was not properly invoked.

Since the evidence in the prosecution side is wanting, hence refusal to remit the record to the District Court.

In the exercise of our revisional powers as they are provided under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 RE.2002 we quash and set aside the proceedings and judgments of both the District Court and the High Court. We order the appellants to be released from prison forthwith unless they are otherwise lawfully held.

Order accordingly.

DATED at MBEYA this 11th day of JUNE 2013.

B.M. LUANDA
**JUSTICE OF APPEAL**

S. MJASIRI
**JUSTICE OF APPEAL**

I.H. JUMA
**JUSTICE OF APPEAL**

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

P. W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**