IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 19 OF 2008

PAUL s/o EMMANUEL @ NTOROGO ..... 1ST APPELLANT
SIWEMA s/o TASIANO ..... 2ND APPELLANT

VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(S.S.S. Kihiyo, J.)

dated 14th day of December, 2007
in
Criminal Appeal No. 102 CF 103 of 2006

JUDGMENT OF THE COURT

18th & 24th April, 2013

KAIJAGE, J.A.:

Before the District Court of Urambo at Urambo, the two appellants and twelve other persons were prosecuted in respect of charges preferred under two counts. On the first count, they were jointly charged with armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. On the second count, they stood charged with grievous harm contrary to section 225 of the same Code. At the conclusion of the trial, the

appellants and another person were found guilty on both counts and each was sentenced to serve a term of thirty (30) years imprisonment on the first count and three (3) years imprisonment on the second count. Sentences were ordered to run concurrently. Appellants appeals' to the High Court at Tabora were dismissed, hence this appeal.

At the trial, the prosecution led evidence to prove that during the night of the 10th day of May, 2003, the appellants and twelve others, armed with a gun, stormed into and ransacked the house of Chiku d/o Haruna (PW2) from which they subsequently made away with an assortment of various items plus cash money to the tune of Tsh. 900,000.

Before us, like in the lower courts, the appellants appeared in person, unrepresented. The respondent/Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney.

The appellant filed a memorandum of appeal consisting of five (5) grounds which, in essence, boils down to one ground namely; that the case for the prosecution was not proved beyond reasonable doubt.

When the appeal was called on for hearing, Mr. Ngole rose to submit that he was not supporting appellants conviction. At this juncture, the court drew his attention by pointing out fundamental procedural errors apparent on the face of the record. Mr. Ngole acceded to the existence of such errors and invited us to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, to correct the errors.

The first procedural error which we pointed out, touches on non-compliance with the provisions of s. 231 (1) of the Criminal Procedure Act (the CPA), Cap 20 R.E 2002 which provides:-

> *"S. 231 (1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made against the accused person sufficient to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right:-*

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witnesses in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

This section not only guarantees to an accused person a right to be heard on his own behalf and to call witnesses in his defence, but also imposes a duty on the trial court to record and inform him fully of these rights. The record of appeal does not show that the trial court discharged its mandatory obligations under section 231 (1) of the CPA. **First**, the record does not show that the trial court closed the prosecution case upon any prayer forthcoming from the prosecution side. As matters stands, it appears that the Court took upon itself to close the case for the

prosecution. **Secondly**, the record does not show that a finding was made, by the trial Court, to the effect that a case was made against the appellants sufficient to require them make their respective defence in relation to the charges they were subsequently declared guilty. Thus the appellants were allowed to proceed with their defence without there being any such finding. **Thirdly**, the record does not show that the substance of the charges were, once again, explained to the appellants and the latter informed of their rights to call their witnesses in defence. It be noted, at this stage, that these irregularities escaped the attention of the first appellate Court.

Upon these shortcomings, Mr. Ngole submitted, with respect, correctly, that since the trial Court judgment was given before compliance with the mandatory provision of section 231 (1) of the CPA, a miscarriage of justice was occasioned thereby. He urged us to nullify the judgment of the trial court and give an order that the provisions under section 231 of the CPA be complied with.

The second fundamental procedural error which we pointed out, relates to non-compliance, by the trial Court, with the mandatory provisions of section 235 (1) of the CPA which provides:-

"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."*

The record of appeal shows that the trial court having in its judgment declared the appellants guilty, no conviction against them was entered. As earlier observed, Mr. Ngole conceded this fatal irregularity. Since there was no conviction entered in terms of section 235 (1) of the CPA, there is no valid High Court judgment validly upholding a non-existing trial court's conviction entered against the appellants. (see; **Jonathan Mluguani v R.**, Criminal Appeal No. 15 of 2011, **Shabani Iddi Jololo and Three others v R.**, Criminal Appeal No. 200 of 2006 and **Amani Fungabikasi v R.**, Criminal Appeal No. 270 of 2008 (all CAT, unreported). In the light of this fundamental irregularity, Mr. Ngole has argued us to set aside the decision of the High Court and consequently direct that the record be remitted to the trial court so that it enters conviction.

responses to the legal issues we raised.

After giving the matter a serious thought and consideration, we are constrained to agree with the learned Senior State Attorney that the shortcomings we have endeavoured to unearth, herein above, merit our intervention under section 4 (2) of the appellate Jurisdiction Act.

In the exercise of our revisional jurisdiction under that provision of law, we hereby quash and set aside the proceedings and judgment of the trial District Court appearing on record after PW4, No. 7570 D/sergeant Patrick had finished testifying on 23/9/2005. Should the Republic wish to further prosecute the appellants, we hereby direct the trial District Court to allow the prosecution side to close its case, without taking upon itself, as it did, to have it closed without any prayer or request forthcoming.

We similarly quash and set aside the proceedings, judgment and the order of the High Court based on the nullified judgment of the trial District Court. In other words, all that followed after PW4 had testified on 23/9/2005 up to and including the judgment of the High Court dated 14th day of December, 2007 has been nullified.

Considering the period that the appellants have spent in prison, the gravity and the nature of the charges, we further hereby direct, for the interest of justice, that the trial record be urgently restored to the District Court of Urambo at Urambo for the prosecution to close its case and, if the Republic sees it appropriate, proceed with the hearing of the case according to the dictates of the law. In that case, the District Court should resume the hearing of the case as expeditiously as possible from the date of this judgment. It is so ordered.

DATED at **TABORA** this 22nd day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL