

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: MSOFFE, J.A., ORIYO, J.A., And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 320 OF 2013**

**MANG'ERA MARWA KUBYO.....APPELLANT**

**VERSUS**

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

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

**(Bukuku, J.)**

**dated the 7th day of August, 2013  
in**

**Criminal Appeal No. 77 of 2012**

-----

**JUDGMENT OF THE COURT**

**23<sup>rd</sup> & 30<sup>th</sup> October, 2014**

**ORIYO, J.A.:**

This is a second appeal. The appellant was before the District Court of Tarime charged with the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 [R.E 2002]. He pleaded not guilty and upon a full trial, he was sentenced to imprisonment for five years for the offence of breaking into a building contrary to section 296(a) of the Penal Code and another three years for the offence of stealing contrary to section 265 of the same Act. The sentences were ordered to run concurrently. Aggrieved by the "convictions" and

sentences, he lodged his appeal to the High Court at Mwanza which was unsuccessful. Still believing to be innocent he has lodged this appeal.

At the trial the prosecution case was that on the 21<sup>st</sup> day of February, 2011 at about 05:00 hours, bandits raided the homestead of Ayubu Mwita and they managed to steal various properties with a total value of Tshs. 6,885,000= . The stolen properties included two generators; one normal Homai make and the other one of Astra make, two bicycles, one computer and printer, and a kerosene cooker. It was in evidence that, after a search was conducted, some of the stolen items were found in the house of the appellant while a few others were found in the house of DW2, a co- accused who was acquitted at the trial, to whom the appellant had sent some of the stolen properties for repairs.

The appellant lodged a memorandum of appeal containing four grounds of appeal. However the major grounds of appeal can be summarized as: - **One**, the trial court erred in law to rely on the evidence of a single witness (PW1) in respect of visual identification while the conditions were not favourable. **Two**, the **doctrine of recent possession** was not properly invoked. **Three**, that the case was fabricated against him as proper inference was not drawn concerning

the searched house which did not belong to him. **Four**, the court overlooked the contradictions and inconsistencies in the testimonies of the prosecution witnesses.

Before us, the appellant appeared in person and prayed the Court to adopt his grounds of appeal while the respondent Republic was represented by Mr. Juma Sarige, learned State Attorney, who informed the Court that he was supporting the appeal.

Before hearing the parties on the merits of the appeal or otherwise, the Court **suo motu** inquired from them on whether or not there was a conviction; and what are the consequences if any, if it is established that there was no conviction entered before sentencing, in terms of section **235(1) of the Criminal Procedure Act, Cap 20 R.E 2002**.

On reflection, Mr Sarige forthrightly submitted that the record is clear that the trial court neither made a finding that the appellant was guilty nor entered a conviction against him before sentencing which offended section **235(1) of the Criminal Procedure Act**. Section 235(1) is couched in the following words:-

*"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"*  
(Emphasis ours.)

In our view, subsection (1) of section 235 (supra), imposes a mandatory duty on trial courts to enter convictions first before sentencing. Section 235(1) is couched in mandatory terms and leaves no room for trial courts to do otherwise as was done in the present case, where the trial court stated the following before sentencing;-

*"In that respect I do hereby **conclude** and **find** that the first accused did not commit the offence of armed robbery but stone breaking(sic) contrary to section 296(a) of the Penal Code and stealing contrary to section 265 of the Penal Code."* (Emphasis ours.)

Apparently, the first appellate court failed to notice the irregularity in the judgment of the trial court. Regarding non-compliance with the statutory duty imposed on trial courts under section 235(1), the immediate issue before us now is on the consequences of such non-compliance. The learned State Attorney was quick to react. He invited the Court to invoke its powers of revision under section **4(2) of The**

**Appellate Jurisdiction Act, Cap 141, R.E 2002**, and remit the record to the District Court for entering a conviction.

It follows, therefore, that having found the accused person guilty of the offence charged, it was imperative upon the magistrate to convict him before passing sentence. In the absence of a conviction entered in terms of section 235 (1) of the Act, there was no valid judgment which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no leg to stand on. It was a nullity - See the cases of **Jonathan Mluguani versus Republic, Criminal Appeal No 15 of 2011, Amani Fungabikasi versus Republic, Criminal Appeal No 270 of 2008, and Fredrick Godson and Another versus Republic, Criminal Appeal No 88 of 2012;** (all unreported).

In view of the foregoing, there was no competent appeal before the High Court and similarly before this Court.

In the circumstances, we are enjoined, as correctly advised by Mr. Sarige, learned State Attorney, to exercise our revisional powers under **section [4] [2] of The Appellate Jurisdiction Act**, as we hereby do, nullify the sentences meted by the District Court because they were not based on any valid conviction. Likewise we nullify the proceedings and judgment of the High Court because they were based on an

incompetent appeal. We remit the record to the trial court with directions to **find** the appellant **guilty, enter a conviction** and pass sentences according to law.

For the avoidance of doubt, once the above are done the appellant's right of appeal to the High Court will always be there from the date of entering conviction and sentences. In serving the sentences, the period the appellant has spent in prison should be taken into account.

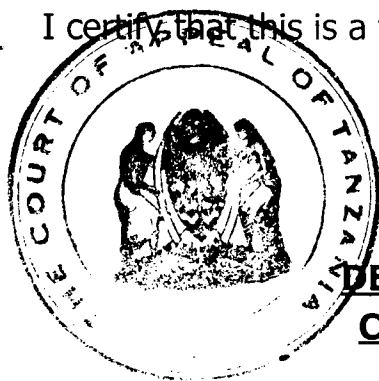
DATED at MWANZA this 30<sup>th</sup> day of October, 2014.

**J.H. MSOFFE**  
**JUSTICE OF APPEAL**

**K.K. ORIYO**  
**JUSTICE OF APPEAL**

**B.M. MMILLA**  
**JUSTICE OF APPEAL**

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



  
Z.A. MARUMA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**