

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MBAROUK, J.A., MMILLA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 269 OF 2014

DEOGRATIAS MLOWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision High Court of Tanzania

at Songea)

(Kalombola, J.)

dated the 21st day of June, 2012

in

Criminal Session No. 1 of 2008

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JUDGMENT OF THE COURT

24th & 27th August, 2015

MMILLA, J. A.:

The appellant, Deogratias Mlowe, was arraigned before the High Court of Tanzania at Songea on a charge of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. Upon a **verdict of guilty**, he was **sentenced** to suffer death by hanging. He was aggrieved, hence the present appeal to this Court.

The brief background facts leading to the present matter were that on 23.10.2006, the deceased, Frank s/o Komba, went to his brother in law one

Hamisi Issa (PW3) at Mpandangindo village and borrowed a motorbike so that he could go to his friend in town. PW3 agreed on condition that he returned it within a span of thirty minutes. It is alleged that the deceased did not return within the agreed time. Having comprehended that there was no sign of his return, and on account of his fear that the police could have nabbed him for traffic offences as there was an operation on that day, at 7.00 pm he made inquiries at Songea Police Station. He satisfied himself that his motorbike was not among those seized by the police on that day, and his brother in law never went there. He went back home.

Two days later, PW3 reported at Songea Police Station that his brother in law was still missing. They asked him to continue making inquiries. On the third day however, he received a phone call from Mkuzo village, informing him that they had seen a dead body of an unknown person and asked him to go and identify it. He went there and identified the dead body to be that of his brother in-law, Frank Komba. Later on, after exhausting the requisite police procedures, PW3 and his relatives were allowed to take the body home for burial.

Two days later, PW2 Bernada Komba from Mkuzo village approached PW3 at his home and told him that he knew the person who was driving his motorbike on 23.10.2006. On relaying the news to the police, he was told that

they were aware about that, and had arrested the suspect. They informed him that the appellant was taking them to Dar es Salaam to the person who bought that motorbike with a view of collecting and bring it back to Songea.

On 15th November, 2006, PW7 No. E. 8888 D/C Noah, DC Dunstan and the appellant left Songea for Dar es Salaam and arrived there in the evening of that day. On 16th November, 2006, the appellant took them to Keko Magurumbasi where at a distance; he showed them the house of one Saidi Masawanga at which he allegedly kept the motorbike. They returned to Central Police Station. On 17th November, 2006 they went back to Keko and arrested Saidi Masawanga and interrogated him. He admitted that the appellant asked for his assistance in finding a buyer of his motorbike, and that he introduced him to his brother one Abdallah Masawanga who bought the said motorbike. From there, they went to his brother's home at Yombo and arrested him. On being interrogated, Abdallah Masawanga admitted knowing the appellant and told them that the said motorbike was taken to one Baraka Issa of Magomeni. The latter led them to Baraka Issa's home and they arrested him. Baraka Issa told them that he sold the motorbike to his relative one Zacharia Hashim Nkya of Magomeni Kagera. He led them to Nkya's home and they found him. On searching his house, they found that motorbike. Subsequent to that, taking the motorbike with them, they

travelled back to Songea. On arrival, PW3 was summoned at Songea Police Station and asked to identify the motorbike of which he did. On the basis of that evidence, they charged the appellant with the offence of murder.

When the appeal was called for hearing, Ms Eneles Kitta, learned advocate appeared for the appellant while Mr. Shaban Mwegole and Ms Tulibake Juntwa, learned State Attorneys, represented the respondent Republic.

While signifying that she was ready to proceed with the hearing, Ms Kitta raised her concern that two vital documents namely; the appellant's extra judicial statement and the search warrant were missing from the Court record. She asked for Court's direction.

On the other hand, whilst appreciating the seriousness of that omission, the Court found it opportune to inform her of an equally serious setback concerning failure by the trial High Court to convict the appellant after it found him guilty of the charged offence and asked for her opinion. After satisfying herself that conviction was not entered, she unhesitatingly submitted that it is a serious irregularity because it offends the mandatory provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act Cap 20 of the Revised Edition, 2002 (the CPA), therefore that the sentence that ensued was illegal. She urged the Court to quash that court's judgment and set aside the sentence under the

powers conferred on it by section 4 (2) of the Appellate Jurisdiction Act (the AJA), and remit the record to the trial High Court to give it chance to make good the error by preparing a fresh judgment according to sections 235 (1) and 312 (2) of the CPA.

On his part, Mr. Mwegole supported his learned sister's concession as well as the attending consequences to that irregularity.

Admittedly, the trial High Court did not convict the appellant. As rightly asserted by both counsel, the omission violated the mandatory requirements of sections 235 (1) and 312 (2) of the CPA. Section 235 (1) thereof provides that:-

*"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 dismiss the charge under section 38 of the Penal Code."*

[Emphasis is ours]

On the other hand, section 312 (2) of that same Act stipulates that:-

*"**In the case of conviction** the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, **the accused person is convicted** and the punishment to which he is sentenced."*[Emphasis added].

There are a multitude of authorities in which the Court has had opportunity to emphasize compliance by the trial courts with these provisions by convicting the accused person(s) after being satisfied that the evidence on record established the prosecution case against him/her/them beyond reasonable doubt, thus guilty. In **Hassani Mwambanga v. Republic**, Criminal Appeal No. 410 of 2013, CAT (unreported), after quoting the provision of section 235 (1) of the CPA, it stated that:-

"As is abundantly clear from the above statutory provision, no sentence can be passed or imposed on an accused person unless and until he or she has been duly convicted of a particular offence"

See also the cases of **Jonathan Mluguani v. Republic**, Criminal Appeal No. 15 of 2011, CAT and **Shabani Iddi Jololo and Another v. Republic**, Criminal Appeal No. 200 of 2006, CAT (both unreported).

That being the requirement of the law, we agree with both counsel for the parties that there is justification to invoke the revisional powers conferred on us under section 4 (2) of the AJA, to quash the judgment of the High Court dated 21.6.2012 and set aside the sentence thereof as we accordingly do. We direct for the trial court's record to be remitted to that court for it to compose a proper

judgment in conformity with the directions of sections 235 (1) and 312 (2) of CPA.

In the meantime, the appellant shall remain in custody pending finalization and delivery of the judgment by the trial High Court.

Order accordingly.

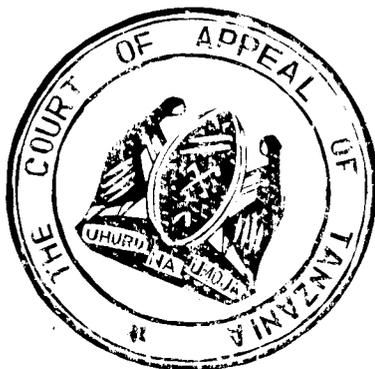
DATED at **IRINGA** this 25th day of August, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL