

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 85 OF 2015

RASHID OMARY KIBWETABWETA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision High Court of Tanzania

at Iringa)

(Fikirini, J.)

dated the 27th day of august, 2014

in

Criminal Appeal No. 22 of 2014

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JUDGMENT OF THE COURT

19th & 25th August, 2015

MMILLA, J. A.:

The appellant, Rashid Omary Kibwetabweta, was charged in the District Court of Songea in the Municipality of Songea in Ruvuma Region, along with four other persons namely; Sunday Mlaponi, Hassan Nanyanga Nanyalika @ Hamisi, Mohamed Abdalla Mswahili and Japhet Nyoni, with two counts; armed robbery contrary to section 287A of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by Act No. 4 of 2004, and conspiracy to commit the offence of armed robbery contrary to section 384 of the same Act. While a nolle prosequi was entered in favour

of Japhet Nyoni who was subsequently released, the rest were found guilty and sentenced each to serve thirty (30) years imprisonment term for the first count, and seven years imprisonment term for the second count. Aggrieved by that decision, they appealed to the High Court of Tanzania at Songea against the **"purported conviction"** and sentence. While their appeal was fruitful to his colleagues, the appellant partially succeeded in that while the **"purported conviction"** and sentence in respect of the first count was upheld, he succeeded in respect of the second count whereby the **"purported conviction"** was quashed and sentence thereof was set aside. Undaunted, he instituted the present appeal.

The appellant's memorandum of appeal raised seven grounds which mainly hinged on the issues of visual identification, improper admission of cautioned statement, improper application of the doctrine of recent possession, and generally insufficiency of the evidence on which his **"conviction"** was founded.

The brief facts of the case were that on 24.2.2013 at about 22.00 hours, PW1 Amiri Yassin @ Nyoni was at Bombambili area at Kadogoo Stand. He had a motorcycle with Reg. No. T 592 CEE, Make SANLG, red in colour, the property of PW2 Nizai Ndembo @ Raphael which he was

operating for hire. While there, the appellant allegedly approached him and asked to be taken to Bombambili Secondary School. After some negotiations on the aspect of fare, the latter agreed to take the former to his destination at the price of T.shs. 1,500/= and they left. On arrival at Tembo Primary School at Bombambili area however, PW1 noticed that something strange was happening as his passenger was swinging from one side to the other. On turning back to find out what the problem was, he was surprised to find the appellant holding a knife which he suddenly put on the former's mouth, and injured him. PW1 dropped the motorcycle and ran away while raising an alarm. Before he disappeared, he saw four persons joining the appellant. While two of them assisted the appellant in pushing the motorcycle into the bush, the two others pursued him. At a certain stage however, his pursuers despaired and ran toward the direction of their colleagues in the bush.

On arrival at Bombambili Secondary School, PW1 saw a motorcycle coming. He stopped it and explained to the driver all what had happened to him. The latter asked him to hang around that place while he rushed to Kadogoo Stand at Bombambili to inform the other motorcycle drivers

about the incident. PW1 agreed. He however, contacted PW2 by phone and informed him of what happened.

After a while, the motorcycle drivers from Bombambili stand together with PW2 arrived at the place where PW1 was waiting. As he was explaining the incident to them, the police officers appeared thereat. PW1 told them the whole story. They took him to the Songea District Police Station where he was given PF3 with instructions to go to hospital for treatment.

On 25.2.2013 at about 06:00 hours, PW3 Paschal Umbu, a Mbangamawe village veterinary officer and acting executive village officer, received a phone call from Miraji Mbiro, also of Mbangamawe village, informing him that there was a person coming from Songea town heading to Njombe who was pushing a motorcycle because it had no fuel, and that that person was looking for a temporary job with a view of getting money to buy fuel for his motorcycle. Meanwhile, PW3 asked the appellant to follow him to the ward executive officer, one Selemani Wabu (PW6). The appellant agreed. On arrival at the office of PW6, PW3 narrated the incident to him and suggested that he interrogated the appellant carefully before taking any further action. PW6 did so. He found the appellant's

narration incredible. Although he let him go, like PW3, he suspected him to be a thief.

PW3 went to his office where he found militia men and ordered them to go and arrest the appellant. The militia men obliged, and that at the time they arrested the appellant, they found him in possession of the said motorcycle. The appellant was taken to PW3's office after which he phoned the police officers who arrived at about 23:45 hours and took the appellant to Songea Police Station. After investigation, they charged him and his colleagues with the two afore mentioned offences.

Before us, while the appellant appeared in person and was unrepresented, Mr. Shaban Mwegole, learned State Attorney, represented the respondent Republic.

At the commencement of hearing of the appeal, the appellant successfully prayed to add three more grounds which touched on the prosecution's failure to tender the complaint's PF3 to prove that the latter was truly cut with a knife on his mouth as alleged, the prosecution's failure to take the knife which was tendered as evidence in court to the government chemist for establishment that it was the same knife used to

cut PW1, further on the prosecution's failure to organize the identification parade to enable PW1 to identify him. He then elected for the Republic to begin, opting to submit later on if necessary.

Mr. Mwegole submitted at the outset that he was supporting **"conviction"** and sentence. The mention of **"conviction"** however, prompted the Court to ask him if the trial court ever convicted the appellant in this case. After carefully consulting the record, he hastened to concede that the trial magistrate did not enter conviction against the appellant as required by section 235 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA) which makes it mandatory for the sentence to be preceded by a conviction. He emphasized that failure to convict the appellant before passing the sentence was a fatal irregularity. He urged the Court to invoke the provision of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) to nullify the judgment of the trial court and the proceeding and judgment of first appellate court, set aside the sentence and direct the matter to be remitted to the trial court to give it chance to prepare a fresh judgment according to the dictates of the law.

In a brief rejoinder submission, the appellant who is a layman, had nothing useful to say serve for his plea to the Court to set him free.

There is no controversy that the trial court did not comply with the mandatory requirements of the provisions of sections 235 (1) and 312 (2) of the CPA. These provisions enact that once the trial court finds an accused person guilty of the offence charged; it is duty bound to enter a conviction before passing a sentence. Section 235 (1) thereof provides that:-

*"The Court, having heard both the complainant and the accused person and their witnesses . . . , **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 added].

On the other hand, section 312 (2) of that Act provides 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].

This requirement was underscored in **Hassani Mwambanga v. Republic**, Criminal Appeal No. 410 of 2013, CAT (unreported) where the Court said that:-

“. . . 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.”

Equally important is the emphasis which was given by the Court in **Oroondi Juma v. Republic**, Criminal Appeal No. 236 of 2012 CAT (unreported), that:-

"Non compliance with the requirement to convict the accused as directed under sections 235 (1) and 312 (2) of the CPA rendered the judgment of the trial court incompetent . . ."[Emphasis added].

See also the cases of **Shabani Iddi Jololo and four others v. The Republic**, Criminal Appeal No. 200 of 2006, CAT, **Amani Fungabikasi v. Republic**, Criminal Appeal No. 270 of 2008 CAT, and **Kimangi Tlaa v. Republic**, Criminal Appeal No. 22 of 2013 (all unreported).

Having found that the appellant was not convicted of the offences he was faced with, and since the law stresses that no sentence may be passed or imposed unless and until that was done, it follows that the sentence which was imposed by the trial court was illegal, so also that neither the appeal before the High Court nor the appeal before us is competent. The big question becomes; what are the legal consequences?

As submitted by Mr. Mwegole, the only course available to us in the circumstances is to intervene under the revisional powers bestowed on us under section 4 (2) of the AJA and proceed to, and we hereby quash the purported judgment of the trial court and set aside the sentence of thirty year imprisonment it wrongfully imposed on the appellant. Also, we quash the proceedings and judgment of the High Court which have no leg to stand on for having resulted from a nullity. We order the record to be remitted to the trial court with instructions that it prepares and delivers a judgment in accord with the mandatory requirements 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 court. We further direct, in the interests of justice, that eventually when a conviction is

entered, the prison sentence should start to run from the time when the appellant was first sentenced on 4.3.2014. Also, the appellant is informed that he will be at liberty, if he desires, to process his appeal in the manner provided under the law.

Order accordingly.

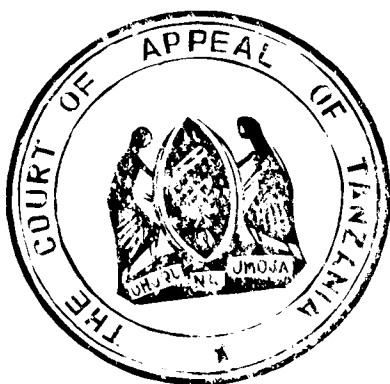
DATED at **IRINGA** this 24th day of August, 2015.

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