

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 24 OF 2013

JOFREY S/O LEIBOO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Arusha)**

(Massengi, J.)

dated the 27th day of December, 2012

in

Criminal Appeal No. 24 of 2012

JUDGMENT OF THE COURT

16th & 19th February, 2015

KAIJAGE, J.A.:

The appellant was found guilty as charged of the offence of robbery with violence by the District Court of Kiteto at Kibaya. He was consequently sentenced to serve a term of ten (10) years imprisonment. His appeal to the High Court at Arusha was dismissed, hence the present appeal.

At the trial, the prosecution led evidence to prove that on 30th day of December, 2010 at about 10.00 hours at Orkesumet within Simanjiro District in Manyara Region, the appellant stole motorcycle registration No.

T.691 BMP make Cruiser worth TShs.1, 600,000/= the property of one Paul Lazaro and immediately before such stealing he used actual violence in order to obtain the said property.

The appellant filed a memorandum of appeal listing three (3) grounds which, in essence, boils down to a sole main ground namely; that the case for the prosecution was not proved beyond reasonable doubt.

Before us, like in the lower courts, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Rose Sule assisted by Ms. Elizabeth Swai, both learned State Attorneys.

When the appeal was called on for hearing, Ms. Sule pointed out a fundamental procedural error apparent on the face of the record. She asserted that the trial court having found the appellant guilty as charged, no mandatory conviction against him was entered in terms of section 235 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the C.P.A.) which provides:-

*"S.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.]

Ms. Sule further maintained that in view of the explicit mandatory provisions of section 235(1) of the CPA, no lawful sentence could have been passed by the trial court without there being a conviction entered against the appellant. Upon this brief but focused submission, Ms. Sule urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act) to correct the said fatal irregularity besetting the judgment of the trial which, in turn, affected the competence and validity of the proceedings and the judgment of the first appellate court. In this regard, she referred to our decision in **ELIA JOHN Vs R**; Criminal Appeal No. 267 of 2011 (unreported).

Understandably, the appellant who is a layman, made no significant response to the legal issue raised on behalf of the respondent Republic.

On our part, we are, with respect, in total agreement with Ms. Sule. It is gathered from the purported judgment of the trial court that the appellant was condemned to serve a term of ten (10) years imprisonment, without being convicted. This was, certainly, violative of the mandatory provisions under section 235(1) of the CPA. As we held in **KHAMIS RASHAD SHABAN Vs THE DIRECTOR OF PUBLIC PROSECUTIONS ZANZIBAR**; Criminal Appeal No. 184 of 2012 (unreported), such a violation was prejudicial to the appellant who could only validly appeal against sentence if he had been duly convicted.

That apart, we hold a firm view that failure by the learned trial magistrate to record a conviction was a fatal and an incurable irregularity. (See, for instance, **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 (both CAT unreported). We also agree

that such an irregularity warrants this Court's intervention under section 4(2) of the Act.

Accordingly, in the exercise of our revisional powers under section 4(2) of the Act, we hereby quash and set aside the proceedings and the judgment of the first appellate court based on the null judgment of the trial District Court which we also hereby set aside. We further remit the record to the trial District Court for it to compose a proper judgment in accordance with the mandatory provisions of sections 235(1) and 312(2) of the CPA. In the meantime, we order that the appellant shall remain in prison custody pending finalization and delivery of the valid judgment by the trial District Court.

Indeed, considering the period that the appellant has so far spent in prison, we further hereby direct, in the interest of justice, that the sentence to be meted out against the appellant consequent upon conviction should start to run from the day the appellant was initially incarcerated on 9/6/2012.

The orders and directions made hereinabove should be expeditiously executed by the trial District Court.

DATED at **ARUSHA** this 18th day February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL



K. M. MUSSA
JUSTICE OF APPEAL

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


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL