IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 38 OF 2014

OMARY SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Songoro, J.)

dated the 6th day of December, 2013
in
(DC) Criminal Appeal No. 25 of 2011

JUDGMENT OF THE COURT

25th & 27th November, 2015

MASSATI, J.A.:

The appellant along with another person not before the Court, were charged with the offence of armed robbery, in the District Court of Shinyanga. It was alleged there that, on the 8th August 2007 at 2.00 hrs. at Migunga Village, within the district of Kishapu in Shinyanga Region, the duo stole the sum of Tshs. 461,000/= cash and a bag full of clothes worth Tshs. 100,000/= the property of Robert Madaha after injuring him on his head by using a bush knife. They pleaded not guilty.

In brief, the prosecution case is as follows. REUBEN MADAHA (PW1) was at his home on the night of 8/8/2008 when his house was broken into and two people entered. He identified one of the persons as the appellant, who was wearing glasses and a jacket. After threatening, and injuring him they demanded and stole a bag full of clothes and a sum of money worth Tshs. 100,000/= and Tshs. 461,000/= respectively. He reported the matter to the police who issued him with a PF3, and was rushed to the hospital for treatment.

PW1's story was confirmed by PW2 RAHEL MASESA, his wife. She repeated what PW1 told the trial court and claimed to have also identified the culprits. PW3 REGINA MKELEZA and PW4 RENARD MANWEKI were mother and son respectively, but also related to the appellant. Essentially their evidence was that on 7/8/2007 the appellant visited them. He was given a room to spend the night, but sometime later, PW4 saw him borrowing and putting on PW4's jacket and left. He was not seen until the next morning, when he came back without the jacket. Both were then called to identify the jacket which was tendered in court as Exhibit P2.

In defence, the appellant gave a lengthy, sworn testimony, denying involvement in the commission of the offence. Essentially his defence was

that this case was fabricated against him because of a misunderstanding between him and PW3 that arose from him selling his pieces of land. His witness DW2 MUGUMBA MWANAMWAZALIMA, confirmed the sale of land by the appellant, and that when he came in August 2007 he was paid in full.

After a full trial, the trial Court was satisfied that the appellant was guilty of armed robbery contrary to section 287A of the Penal Code, and proceeded to sentence him to a term of 30 years imprisonment. On first appeal, the High Court found:

> *"the conviction of the appellant by the trial Court...proper".*

and so dismissed the appeal for lack of merit. Aggrieved, the appellant has filed the present appeal.

In his memorandum of appeal, the appellant has raised three grounds namely. **First**, that the High Court erred in law in upholding a conviction which was not there; **Second**, the evidence of identification of the jacket featured by PW1, PW2, PW3 and PW4 was contradictory; and **lastly**, the evidence of his identification by PW1 and PW2 was otherwise not watertight.

At the hearing of the appeal the appellant appeared in person and adopted his memorandum of appeal, and opted to let the respondent/Republic begin, reserving his right to reply.

Mr. Rwegira Deusdedit, learned State Attorney, declined to support the conviction and sentence on the major ground that the trial court did not enter a conviction and that this violated section 235(1) of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the CPA). As to the way forward, the learned counsel submitted that, the effect of the omission was to vitiate all the proceedings of the courts below, and the natural course would have been to order a retrial. However, in view of the weakness of the prosecution evidence it would not be in the interests of justice to do so. So he prayed that the appeal be allowed, and the appellant be set free.

In response, the appellant first agreed with the respondent on the omission to enter a conviction and as to its effect. He was also emphatic that the prosecution evidence on record regarding his own identity and that of the jacket left a lot to be desired. So, he prayed that his appeal be allowed.

In our judgment, it is our finding that contrary to section 235 (1) and 312(2) of the CPA, the trial Court did not enter a conviction after finding the appellant guilty of the offence charged.

Section 235(1) of the CPA provides:

> *"The Court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused person 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."*

On the other hand, section 312(2) of the CPA 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."*

The effect of an omission to enter a conviction has been the subject of discussion in this Court before; but what is settled is that, no sentence can be passed without a conviction even if an accused is found guilty. Thus, in **MARWA MWIBAHI v R**, Criminal Appeal No. 7 of 1995 (unreported) it was held:

> *"... although there was a finding that the appellant was guilty he was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by conviction, whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of CPA 85 (where there has been a trial).*

The discussion took a different dimension in the Court's recent decisions. Following its earlier decision in SHABANI **IDDI JOLOLO AND THREE OTHERS v R**, Criminal Appeal No. 200 of 2006 (unreported) the Court in **AMANI FUNGABIKASI v R**, Criminal Appeal No. 270 of 2008 (unreported) said:

> *"It is true, ... that in the light of the above shortcoming we could make an order for a retrial. But it is also true that we could have easily set aside the decision of the High Court and consequently direct that the record be remitted to the District Court so that it enter a conviction."*

These and other authorities were comprehensively reviewed in **MATOKA KAJUNI AND TWO OTHERS v. R,** Criminal Appeals No. 145, 146, and 147 of 2011 (unreported), where it was held:-

"failure to enter a conviction is a fatal and incurable irregularity which will render such judgment a nullity."

In its analysis, the Court agreed in effect, that an omission to enter a conviction renders the trial court's judgment a nullity, which could not have founded a competent appeal before the High Court. This means that even the proceedings and judgment of the High Court on first appeal would thereby be vitiated.

But in **KAJUNI's** case, the Court was not prepared to order a retrial. Instead, after reviewing the evidence on record, it thought that it would not be in the interests of justice to do so.

In sum total therefore, the position of the law may be stated as follows: where a trial court passes a sentence on an accused person without a conviction, the judgment and therefore the sentence would be invalid. So would any subsequent proceedings on first appeal, which would be quashed. Where this happens, the Court may order either to remit the defective judgment to the trial Court for it to compose a legally valid judgment; or exercise its revisional jurisdiction, step into the shoes of the High Court, review the evidence on record, and determine whether a retrial would be warranted or make such orders as it may consider appropriate. So each case

would be decided on the basis of its own peculiarities, guided by the overwhelming interests of justice.

From the foregoing analysis, and in view of our earlier findings that the trial court omitted to enter a conviction we first declare that the judgment of the District Court is to that extent fatally defective. Since the trial court's judgment was invalid, it could not have founded a proper appeal before the High Court. Consequently, both the trial court's judgment and all the proceedings and judgment of the High court on first appeal are vitiated, and are hereby quashed. The next question is what do we do with the appellant's fate?

First, since the proceedings and judgment of the High Court are invalid, no competent appeal could be lodged from those proceedings. The present appeal is therefore incompetent and is struck out. But since the proceedings are already in this Court, we are minded to exercise our revisional jurisdiction and examine the records of the lower court.

Our resume of the evidence on record, shows that the appellant was convicted on the basis of two pieces of evidence. The first piece of evidence was that of visual identification by PW1 and PW2. The second piece was

that of the jacket which was identified by PW3 and PW4 to belong to PW4 which had the effect of corroborating the evidence of PW1 and PW2.

The evidence of visual identification is beset by several shortcomings. First, the incident occurred at night. According to PW1 and PW2 there was no electricity at his house but only a lantern lamp. The intensity of that source of light is not described. PW1 did not describe how he described the appellant except by face, voice and the jacket. This means he did not know him from before. But there is no record whether he described his face or how he came to know his voice. Thirdly, PW1 said that there was an identification parade at Mhunze police Station, where he identified the appellant, but no police officer came to testify on the alleged identification parade. But according to PW2, there was no identification parade. This puts the evidence of PW1 and PW2 in a serious credibility crisis.

The testimony of PW3 and PW4, was relevant because they allegedly identified the jacket (Exh. P2).

From the record, PW3 was called for purposes of identifying the jacket. But there are a number of problems. From her evidence when she received the report of the lost jacket, she did not see it, because it was at the militiamen office. Secondly, it was not she, but her father, who went to the

said office to see the said jacket. Thirdly, no militiamen or PW3's father, came to testify to confirm the identity of the jacket and where and how it was picked. Lastly, although, it was admitted as an exhibit during her testimony, she was neither asked to identify it, nor tender it as an exhibit. So, that part of her evidence, remains hearsay. Instead it was the prosecutor who "prayed for the jacket which was found at the scene of crime to be tendered as prosecution exhibit". The trial court proceeded to receive it as an exhibit P2.

We think this was wrong. First, no proper foundation was laid for the reception of the said exhibit. Secondly, the prosecutor was not a witness and so save at the preliminary stage of trial such as a preliminary hearing if there was no dispute, he could not have tendered any exhibit, because he could not be put to the dock for cross-examination, as to the chain of custody of the exhibit. Therefore in our judgment, the jacket was received in evidence illegally and its evidence should be discounted. This, however, does not affect the admissibility of oral evidence regarding the article, though, its weight is thereby considerably reduced. This leads to the conclusion that, the evidence of PW1 and PW2 regarding the appellant having put a jacket on that night lacks corroboration, even if those witnesses were credible.

All the above infirmities go to show that the evidence against the appellant is so discrepant, and so it would not be in the interests of justice to remit the case file to the trial court for it to compose a proper judgment according to law. Instead, in exercise of our powers under section 4(3) of the Appellate Jurisdiction Act (Cap. 141), we quash the conviction and set aside the sentence. We order that the appellant be released from prison immediately, unless he is held for some other lawful cause.

Order accordingly.

DATED at **TABORA** this 26th day of November, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL