IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 8 OF 2016

ALOYCE THOMAS @ MABELEE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwingwa, J.)

dated the 14th day of November, 2015
in
DC. Criminal Appeal No. 10 of 2015

.....

JUDGMENT OF THE COURT

17th & 20th October, 2016
MJASIRI, J.A.:

In the Resident Magistrate's Court at Rombo in Kilimanjaro Region, the appellant Aloyce Thomas Mabelee was charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R. E. 2002]. He was convicted as charged and was sentenced to thirty (30) years imprisonment. Being dissatisfied with the conviction and sentence, he appealed to the High Court. His appeal was unsuccessful, hence his second appeal to this Court.

It was the prosecution case that on the 8th day of March, 2013 at about 1:30 hours at Ubetu Village within Rombo District the appellant and one Jonas Ludovick did steal three (3) plastic pipes valued at Shs.60,000/=, one television set valued at Tshs.148,000/= and two television decks valued at Shs.180,000/=. The properties had a total value of Shs.388,000/= and belonged to one Olympia Josephat (PW 5).

The accused persons were alleged to have used a panga, a club and a big stone, immediately before or at the time of such robbery in order to obtain or retain the said property.

According to Stella Josephat (PW1) who was the mother of PW5 the appellant was their relative and neighbor and was well known to them. When she heard a noise she went out to see what was happening. She claimed to have seen the appellant from behind and did not see his face. PW5 also claimed to have seen the appellant but did not indicate in her testimony where exactly she saw him as other witnesses testified that the appellant was not at the scene. Both PW1 and PW5 stated that there was light inside and outside the house. They were using solar energy and had tube lights.

PW6 a neighbor of PW1 also came to see what was going on when he heard a bang and noises coming from PW1' house. He did not see the appellant, but saw the second accused and heard him saying that he was sent there by Mabele, that is the appellant. According to PW6 it was dark when he arrived, and he used a flash light. The appellant was not at the scene.

The appellant presented a five-point memorandum of appeal which can be summarized as follows:-

1. *The High Court Judge erred in law and in fact in holding that the charge against the appellant was proved beyond reasonable doubt.*
2. *The High Court Judge erred in law and in fact in relying on the evidence of identification when the surrounding circumstances were not conducive to positive identification.*
3. *The appellant's conviction was based on suspicion and not concrete evidence.*
4. *The High Court Judge did not re-evaluate the evidence as required under the law.*
5. *The first appellate Court relied on weak, contradictory, inconsistent and uncorroborated evidence.*

The appellant also filed three additional grounds of appeal which are reproduced as follows:-

1. *The conviction and sentence of the appellant was null and void for failure to cite the relevant section of the law.*
2. *Failure to comply with section 312 (1) of the CPA by not signing the judgment.*
3. *Failure to comply with section 235 (1) of the CPA.*

The appellant also filed comprehensive written submissions.

At the hearing of the appeal, the appellant appeared in person and was unrepresented while the respondent Republic was represented by Ms. Adelaide Kassala, learned State Attorney.

The learned State Attorney did not support the conviction of the appellant. She submitted that the additional grounds of appeal were valid as the trial Court did not comply with the requirements under sections 235 (1) and 312 (1) of the Criminal Procedure ACT, [Cap 20 R.E 2002] (the CPA). She made reference to page 32 of the record where no conviction was entered.

In addition to this non-compliance, Ms. Kassala contended that the evidence on record was not sufficient to establish the offence. The basis of the findings of the two courts below was that the appellant was identified. She stated that going through the record, there is no concrete evidence that the appellant was identified. PW1 admitted on cross examination that she did not see the appellant's face. Neither PW5 nor PW1 clearly came out to state that the appellant was present at the scene. Even though PW1 and PW5 testified that there was light, PW6 testified to the contrary. He stated that the place was dark and he used a flash light.

Given the circumstances she asked the Court to nullify the proceedings under Section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002] (the Act).

The appellant being a layman did not have anything to say. He simply agreed with the submissions made by the learned State Attorney.

We on our part are inclined to agree with the learned State Attorney. The identification of the appellant was not water tight. The surrounding circumstances were not conducive to correct identification. It was not clearly established that the appellant was identified. See **Waziri Amani v**

Republic (1980) TLR 250 and **Shamir John v Republic,** Criminal Appeal No. 166 of 2004 (unreported).

Section 235 (1) of the CPA provides thus.

> *"The Court, having heard both 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."*
>
> [Emphasis provided].

In the instant case, the trial magistrate after analyzing the evidence presented in court and the law applicable reached the following conclusion on page 32 of the record:-

> *"The court is of the view that the prosecution side has managed to prove their case against the 1st accused as they are required by the law in the case of* ***Jonas Nkiza v. Republic*** *(1992) TLR 213 and not doing so to the 2nd accused and therefore acquit him forthwith under section 235 of [CPA RE. 2002]."*

The trial court then proceeded to sentence the appellant to 30 years imprisonment. It is evident from the record that the after finding the

appellant guilty of armed robbery, the learned trial Magistrate passed sentence without entering a conviction.

Section 235 (1) is couched in mandatory terms. Therefore in terms of sub-section (1) the court must proceed to enter a conviction before proceeding to sentence an accused person.

Section 312 (2) of the CPA provides:-

> *"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 supplied]

In view of the clear mandatory language under sections 235 (1) and 312 (2) of the CPA, there is no valid judgment when no conviction is entered. A valid judgment must contain a conviction. See – **Shabani Iddi Jololo and Others v. Republic,** Criminal Appeal No. 200 of 2006, **Amani Fungabikasi v. Republic,** Criminal Appeal No. 270 of 2008, **Jonathan Mluguani v. Republic** and **Abdallah Ally v. Republic,** Criminal Appeal No. 253 of 2013 CAT (all unreported).

In the case of **Amani Fungabikasi v. Republic** the Court stated thus:-

> ***"So, since there was no conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon which the High Court could uphold or dismiss."***
>
> [Emphasis provided].

Failure to enter a conviction is fatal and is not a mere irregularity which is curable under section 388 (1) of the CPA.

Having concluded that Section 235 (1) of the CPA was not complied with, the next step would have been to quash the decision of the High Court and to set aside the sentence of thirty (30) years imprisonment, and to remit the record to the trial court in order to compose a proper judgment by entering a conviction. However given the nature of the evidence on record, this would not be the best route to take in order to meet the ends of justice. Therefore by the powers vested in us under section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] we hereby nullify the proceedings and judgments of the High Court and the trial Court and set aside the sentence meted out to the appellant. Consequently

the appellant should be released from custody forthwith unless otherwise lawfully held.

Order accordingly.

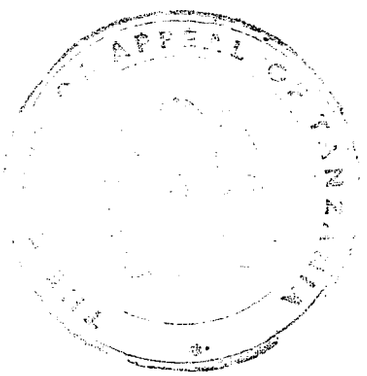
DATED at **ARUSHA** this 18th day of October, 2016

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL