**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: RUTAKANGWA, J.A., LUANDA, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 235 OF 2009**

1. **CHRISTOPHER CHACHA @ MSABI ..... 1ST APPELLANT**
2. **ELIAS MATHAYO @MAGOLE ..... 2ND APPELLANT**
3. **PETER MATIKU @ CHACHA ..... 3RD APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es salaam)**

**(Aboud, J.)**

**Dated the 03rd day of April 2009**
**In**
**HC. Criminal Appeal No. 69 of 2008**

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# JUDGMENT OF THE COURT

**8th & 27th April, 2016**

## RUTAKANGWA, J.A.:

The three appellants, Christopher Chacha Msabi (1st Appellant), Elias Mathayo Magore (2nd appellant) and Peter Matiko Chacha (3rd appellant), were taken to the Court of the Resident Magistrate of Kivukoni ("the trial court") to answer a charge of Armed Robbery.

The appellants were alleged to have, jointly and together, stolen *"mobile phone, Golden ring, ear rings and one laptop TOSHIBA, and cash money Tshs 53,000/=",* all with a total value of Tshs 4,371,000/=. The said

property was said to belong to one Lucas Martine, whom they *"beat... by panga and (sic) his legs and on head in order to retain the stolen property."*

The appellants denied the charge against them. After a full trial, in which six (6) witnesses testified for the prosecution, and three (3) witnesses testified for the defence, the learned trial Resident Magistrate found them "guilty." We have used the phrase *"found them guilty"* not without good cause. This is because, contrary to the mandatory provisions of section 235(1) of the Criminal Procedure Act, Cap 20 *("the C.P.A.")* read together with section 312 of the same Act, no conviction for any known offence was entered against them.

Notwithstanding the above serious omission, the learned trial Resident Magistrate purported to sentence them to thirty years imprisonment each. This was on 25th February, 2008. Curiously, the *"sentence"* was ordered *"to run concurrently".* This was another serious lapse, since one sentence cannot be ordered to run *"concurrently"* with itself.

Aggrieved by the imagined conviction and sentence, the appellants appealed against the *"conviction"* and sentence to the High Court at Dar es Salaam. The learned first appellate judge, found the appeal wanting in

merit. She accordingly found herself with *"no other option than deciding that the appeal is not allowed"*.

It is axiomatic that where there is a right, there is always a remedy. In this particular case, the remedy is provided by section 6(7) (a) of the Appellate Jurisdiction Act, Cap 141 ("the AJA"). This provision reads thus:-

> *"Either party-*
>
> *(a) To proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact".*

The said Part X deals exclusively with appeals from and revisions of decisions of subordinate courts save primary courts (in the exercise of their original jurisdiction) in the High Court.

Dissatisfied with the entire decision of the High Court, the appellants duly lodged this appeal.

Each appellant lodged his own memorandum of appeal believing that they were duly convicted. However, their grounds of complaint are similar. Briefly, they are as follows:-

(i) That their "conviction" was predicated on very weak visual identification evidence of the victims of the armed robbery.

(ii) That the conduct of the identification parade whose results were relied on by the two courts below as lending support to the otherwise totally unreliable visual identification evidence was fundamentally flawed.

(iii) That the doctrine of recent possession was wrongly invoked as it was not positively proved that any one of them was found in possession of any of the robbed properties.

The appellants who appeared before us in person to prosecute their appeal had nothing to say in elaboration of the grounds of appeal. However, as luck would have it, they were supported by the respondent Republic, which urged us to allow the appeal in its entirety.

Ms. Ester Kyara, learned Senior State Attorney for the respondent, supported the appeal on the basis of the above three grounds of appeal. Furthermore, she invited us to invoke our revisional powers under s. 4(2) of the AJA to quash the fatally defective "judgment" of the trial court on account of failure to enter a conviction as mandatorily required under the C.P.A. which duty was not discharged by the High Court. She went further and

urged us to revise, quash and set aside the appellate proceedings in and judgment of the High Court which were premised on a conviction of the appellants for armed robbery, a conviction which never was.

In disposing of this appeal, we have found it convenient to canvass first the issue of non – compliance with the mandatory requirements of sections 235(1) and 312 of the C.P.A.

Section 235(1) of the C.P.A. provides as follows:-

> *"The court, having heard both the complainant and the accused 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].

In addition, section 312(1) and (2) prescribes as follows:-

> *"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determinations,* ***the decision***

*thereon and the reasons for* ***the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

*(2)* ***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 is ours].*

We have no flicker of doubt in our minds that words "shall" used in both sections, imposes a duty, and leaves no room for discretion, to enter a conviction or not. Furthermore, the words "decision" appearing in s. 312(1) have reference to either a conviction or an acquittal and not a finding of guilt or innocence.

Given these facts we are convinced that the issue of non-compliance with the clear mandatory provisions of ss 235(1) and 312(1) and (2) of the C.P.A., should not unduly detain us. The law on the issue in our jurisprudence is well settled. No lawful sentence can be imposed on an accused person unless and until he or she has been duly convicted of a particular offence: See for instance, **Khamis Rashid Shaban v Republic,**

Criminal Appeal No. 184 of 2012 and **Matola Kajuni and Two Others v. Republic**, Criminal Appeal Numbers 145-7 of 2011 (both unreported).

To the question, *"what are the legal consequences, where no conviction is entered by the trial court?",* this Court has in the past succinctly pronounced itself thus:-

> *"The answer to this pertinent question is found in a plethora of the Court's decisions on the issue. The Court has persistently maintained that it is imperative upon the trial District Court to comply with the provisions of s. 235 (1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubts",*: ***Aman Fungabiliasi v. Republic.,*** *Criminal Appeal No. 270 of 2008 (unreported)...the Court stated that " in the absence of a conviction, it follows that one of the prerequisites of a true judgment in terms of section 312(2) of the Act are missing." See also,* ***Jonathan Mlugani, v. Republic,*** *Criminal Appeal No. 15 of 2011,* ***Shabani Iddi Jololo and Another v Republic,*** *Criminal Appeal No. 200 of 2006,* ***Ruzibukya Tibabyekoma v. Republic,*** *Criminal Appeal No. 218 of 2011.... From all these decisions,*

> *it is now settled law that failure to enter a conviction by any trial court is a fatal and incurable irregularity which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction": In* ***Hassan Mwambanga v. Republic*** *Criminal Appeal No. 410 of 2013* (unreported).

This being the case, we accede to Ms. Kyara's prayer without any inhibitions. We, therefore, proceed under s. 4(2) of the A.J.A. to quash and set aside the invalid judgment of the trial court and the sentence of imprisonment imposed on the appellants. Cororally to this, we also quash and set aside the proceedings in and the judgment on appeal of the High Court.

All things being equal, we would have remitted the trial court's record to it with directions to compose and deliver a valid judgment in the case. We shall not do so. It was Ms. Kyara's strong submission that that path will lead to grave injustice being occasioned on the appellants who have been in custody for nearly ten years now.

Ms. Kyara was very categorical that the prosecution case which was mainly based on visual identification evidence was not proved beyond reasonable doubt. She took us through the prosecution evidence and pointing out its inherent weaknesses.

Briefly that evidence is as follows: The undisputed armed robbery was committed at night when PW1 Lucas Martin and his wife PW3 Angelina Lucas were watching a TV program in the upper living room of their residence. Their tranquility was disturbed by a group of unknown bandits who burst into the room, armed with a pistol, a club and an axe, and ordered them to lie down. On obeying the order promptly, the bandits assaulted the two witnesses threatening to kill them, if they were not given money. In the process PW1 Lucas was cut with an axe on the head and seriously injured to the extent of becoming unconscious. The bandits also attacked PW2 Delfina Martin who was in another room. When the assault was over and the dust had settled, it was discovered that the bandits had made away with what was described as a hand bag, a beauty case, wedding ring, a watch, an unspecified laptop and mobile phone belonging to PW2 Delphina; one handset, cash Tshs 33,000/=, one Nissan Patrol vehicle ignition key and one Nokia mobile phone belonging to PW1 Lucas. We have found it

inescapable to mention at this juncture, that out of these allegedly robbed properties, only an unidentified, at least by make, **mobile phone,** was the subject of the charge against the appellants.

After the departure of the bandits, a report of the robbery was made at Kawe police station and PW1 Lucas was taken to hospital. At the Kawe police station none of the three witnesses gave any description of the bandits when making the first report of the robbery. Indeed, PW1 Lucas while under cross–examination from the 1st appellant, said:-

> *"While at Police Kawe I only said that, if I will see the person, I can identify him."*

PW2 Delphina was equally unequivocal in her evidence saying:-

> *"No, I did not describe the outlook of the accused before the parade."*

On her part PW4 Martina Anthony who was at the scene of the crime and residing with PW1, PW2 and PW3, told the trial court that she did not identify any of the armed bandits.

Although no description of any bandits was given by the eyewitnesses, the three appellants were arrested on divers dates. The prosecution

evidence is silent on when, where, why and by whom the appellants were arrested. It was only PW5 No. D 7974 EPD/Sgt Innocent who testified that on 6th July, 2006, he interrogated the 1st appellant at Magomeni Police Station where he (PW5) was based, and during the course of the interrogation, this appellant allegedly confessed to have been one of the bandits and mentioned the 3rd appellant to have been with him. On an undisclosed date, he led the police to the latter's house at Mtoni kwa Azizi Ally from where they seized, in the absence of Peter *"one NOKIA cellphone and ... one sim card"*, which allegedly belonged to PW1 Lucas.

After the arrest of the 1st and 3rd appellants, PW6 Insp. Cosmas conducted an identification parade on 15th July, 2006 at Kawe Police station at which the two appellants were picked out.

The learned trial Resident Magistrate had found the appellants guilty on the basis of the evidence of PW1 Lucas, PW2 Delphina and PW3 Angelina who asserted that they had identified the appellants at the scene of the robbery, which evidence was bolstered by the results of the identification parade. The fate of the 3rd appellant, according to the learned trial Resident Magistrate, was sealed by the discovery of the Nokia Mobile phone at his house.

The learned Resident Magistrate evidently disregarded, and rightly so in our considered opinion, the alleged oral confession of the 1st appellant. We are increasingly of the view that this confession was a figment of PW5 Sgt Innocent's own imagination. We are of this firm opinion, because had this appellant actually so confessed, he could not have failed to mention the 2nd appellant who, firstly, PW1 Lucas, PW2 Delphina and PW3 Angelina swore to have seen in the company of the other two appellants. Secondly, if the 1st appellant had so confessed, PW5 Sgt. Innocent would not have failed either to record his cautioned statement or to have his extra-judicial statement taken by a Justice of Peace.

Regarding the reliance on the doctrine of recent possession, we find ourselves in full agreement with the contentions of the appellants and Ms. Kyara that it was wrongly invoked here. The claim by PW5 Sgt. Innocent that he seized one of the robbed articles, namely "*one NOKIA cell phone and... one sim card.(chip) celtel*" is highly suspect.

It was the evidence of PW5 Sgt. Innocent that the so called Nokia cell phone was recovered in the absence of the 3rd appellant at his house but in the presence of his wife and the house lady. None of the two ladies, particularly the house lady, testified in the case. Furthermore, no positive

proof was given to show that the Nokia handset was the property of PW1 Lucas. PW1 Lucas never identified it in court. Worst of all, no receipt was issued at all in terms of s. 38(3) of the CPA. In the absence of such a receipt signed by the 3rd appellant's wife, the house lady and/or the 1st appellant, it will be highly preposterous to imagine, leave alone holding, that there was such a seizure.

Coming to the purported evidence of visual identification, we have found it totally wanting in cogency. This Court stated lucidly in **Ayubu Zaoro v. Republic,** Criminal Appeal No. 177 of 2004 (unreported) that:

> *"In considering whether conditions are favourable for correct identification, the Court has consistently held that in identifying an accused person, where a witness saw the accused for the first time, there is need for the witness to describe the identity in detail."*

Bare assertions that *"we identified them"* are insufficient. See also, **Mohamed Alhui v. Republic** (1942)9 EACA 72, **Raymond Francis v. Republic** [1994] TLR 100, etc., on the necessity of such witnesses giving prior description of an unknown suspect prior to seeing him in police custody or in the dock.

The three identifying witnesses here admitted that the bandits were strangers to them. As already indicated earlier on, none of them gave a description of any of the bandits, and it was not on the basis of their naming or describing the bandits, that the appellants were arrested. For this reason, the subsequent identification parade conducted on 15th July, 2006 was valueless. This is because *"for any identification parade to be of any value, the identifying witness (es) must have earlier given a detailed description of the suspect before being taken to the identification parade"*: **Ahmad Hassan Marwa v. R.** Criminal Appeal No. 264 of 2005. See also, **Emmilian Aidan Fungo @ Alex and another v. Republic**, Criminal Appeal No. 278 of 2008 (unreported), etc. We, therefore, accord no weight at all to the evidence relating to the identification parade whereat, after all apart from being conducted in utter disregard of the requirements in the Police General Orders, PW1 Lucas failed to identify any person as one of the robbers and PW3 Angelina purported to pick out only the 2nd appellant. No identification parade was conducted in respect of the 3rd appellant.

We are then left with only one piece of evidence; the purported visual identification evidence at scene of the crime. This evidence is of the weakest character and should be acted upon only when all possibilities of mistaken

identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. Not only that. Also the credibility of the identifying witnesses should be considered: **Jaribu Abdalla v. Republic,** Criminal Appeal No. 220 of 1999 (unreported).

In the case under scrutiny, we are far from being convinced that given the conditions prevailing at the scene of the crime the three identifying witnesses made an impeccable identification. This is because they never mentioned how they were able to identify the appellants among the robbers. They only made bare assertions. It was only PW3 Angelina while answering a question from the 1st appellant, who belatedly said:-

> *"I identified you because the light were on inside and outside".*

She never elaborated on the source of that light nor its intensity. This was a fatal omission.

In the case of **Kulwa s/o Makwajape and Two Others v. Republic,** Criminal Appeal No. 35 of 2005 (unreported), this Court held that:-

*"...the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified."*

Placing greater emphasis on this, the Court in **Issa Mgara @ Shuka v. Republic.,** Criminal Appeal No. 37 of 2005 (unreported) thus stated:-

*"...even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance..."*

On top of these patent weaknesses in the identification evidence, we are increasingly of the view that these witnesses were not truthful. It is glaringly clear from the Identification Parade Register (exh. P3) that PW1 Lucas did not identify any suspect at this parade. PW6 Insp. Cosmas unequivocally stated so in his evidence. Yet in his evidence, PW1 Lucas had the audacity of testifying that he identified the 1st appellant at the parade. He was lying. PW2 Delfina equally lied when she testified to have identified the 3rd appellant at an identification parade held at Magomeni Police Station, when the police evidence on record shows that only one such parade was held at Kawe Police Station.

From the above discussion, we are of the firm view that the appellants were not identified at all at the scene of the crime. They ought to have been acquitted.

All said and done, we find a lot of merit in this appeal, which we hereby allow as already indicated above. The appellants are to be released forthwith from prison unless they are otherwise lawfully held.

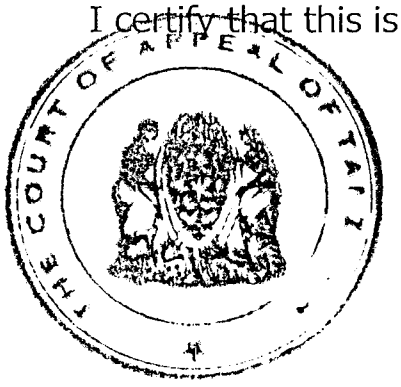
**DATED** at **DAR ES SALAAM** this 21st day of April, 2016.

E. M. K. RUTAKANGWA
**JUSTICE OF APPEAL**

B. M. LUANDA
**JUSTICE OF APPEAL**

B. M. MMILLA
**JUSTICE OF APPEAL**

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




Z. A. MARUMA
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