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. 206 OF 2008

SAIDI SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam.)

(Mruma, J.)

dated the 22nd day of May, 2008
in
Criminal Appeal No. 35 of 2007
.....

JUDGMENT OF THE COURT

6th & 21st April, 2016

LUANDA, J.A.:

The above named appellant and three others, were charged in the District Court of Temeke with six counts of armed robbery. Out of those four accused persons, one was acquitted; whereas the appellant and two others were found guilty as charged. The record, however, does not show the trial District Court to have entered conviction in respect of those three. Be that as it may, the appellant and one Rajabu s/o Mohamed Kembeije were each sentenced to 30 years imprisonment for each count. The

sentences were ordered to run concurrently. The other one was discharged absolutely under the provisions of S. 38 of the Penal Code, Cap. 16 RE 2002. Over and above the sentences imposed, each of them was ordered to pay a sum of money. But it is not shown the purpose of paying such amount of money.

Whatever the position, the appellant and Rajabu s/o Mohamed Kembeije were aggrieved by the finding and sentences meted out against them. They appealed to the High Court of Tanzania (DSM Registry) where Rajabu was successful; he was set free. The appellant was not, hence this second appeal.

The appellant has raised six grounds in his memorandum of appeal, which we reproduce for ease of reference:-

1. That your lordships both the trial magistrate and the appellant judge erred in law and fact by considering a caution statement marked as Exh. P1 tendered by PW 8 un – procedural, as it was not read over to the appellant before its admissibity into evidence and obtained contrary to the mandatory provision of sections 50 (i) (a) (b) of the CPA CAP 20 RE 2002.

2. That both the trial magistrate and the appellant judge erred in law and fact by taking into account the uncredible visual identification of PW 7, thus common knowledge dictates that offender (s) cant flash torch light to each other or towards oneself at the "LUCUS QUO" (sic) for their easy identification by the victim (s).

3. That both the trial magistrate and the appellant judge failed in law and fact by not drawing an adverse inference against the prosecution for not having summoned the civilian (s) who its allaged (sic) apprehended the appellant to testify as to whether his apprehension had any connection to the crime (s).

4. That the appellant judge erred in law and fact by mis assessing Exh. P.2 the Khangas tendered by PW 5 there by presuming that their the ones robbed from PW7, which weren't identified properly by the claimant before court.

5. That both the trial magistrate and the appellant judge erred in law and fact by convicting the appellant on the weakness of his defence against a poor prosecution case.

6. That both the trial magistrate and the appellant judge erred in law by convicting the appellant on basis of unjustified corroborated evidence.

Briefly the prosecution case was that, on the fateful day around night time a group of armed bandits, about ten in number ambushed a residential house where several witnesses were renting and residing therein. The bandits took away a number of items including clothes, television sets, hand sets of mobile phones, cash money etc. The matter was reported to Chang'ombe Police Station and the wheels of investigation were put in motion. We will come to the details later. Suffice to say that the police having been satisfied that the appellant and his colleagues were the ones who committed the offence, they preferred to charge them as said earlier on. On the other hand the appellant denied any involvement.

In this appeal Mr. Mutalemwa Kishemi learned Senior State Attorney assisted by Ms. Lilian Rwetabula learned State Attorney did not resist the appeal and rightly so. The appellant was unrepresented and so he fended for himself.

But before Mr. Mutalemwa took us to the merits of the appeal, he drew our attention to one material irregularity in that the trial District Court did not enter conviction and so there is no judgment worth a name as is provided under S. 312 (2) of the Criminal Procedure Act, Cap. 20 RE 2002 (the Act). Indeed, we have shown earlier on in this judgment that the trial District Court to have not at all entered conviction. Page 55 of the record shows very clearly that the trial District Court did not enter conviction. With due respect, we agree with Mr. Mutalemwa.

Arguing about the legal implication of failure to enter conviction, Mr. Mutalemwa said a judgment which lacks conviction is not a valid judgment in terms of S. 312 (2) read together with S. 235 (1) of the CPA. He submitted that the judgment of the trial District Court is a nullity. The same is liable to be quashed. Since the judgment upon which the appellant intended to challenge in the High Court has no leg to stand on, the entire proceedings of the High Court are a nullity, he argued. He referred us to the decision of this Court in **Sam Sempembwa & Another V R**, Criminal Appeal No. 169 of 2010 (CAT – unreported).

S. 235 (A) of the CPA which is couched in mandatory terms imposes a duty on the part of the trial subordinate court to the High Court to convict after the trial, if it is satisfied that the accused person is guilty of the offence he was charged with before embarking on the question of sentence. To put it neater there cannot be a sentence without entering conviction first. The section reads.

> *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.*

Since no conviction was entered in terms of the above cited and reproduced section, there was no valid judgment in conformity with S. 312 (2) of the CPA. The Section provides:-

> *312 (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.*

In a number of cases this Court has held that a judgment which lacks a conviction in terms of S.235(1) read together with S.312(2) of the CPA is no judgment at all (See. **Shabani Iddi Jololo and Three Others V R**, Criminal Appeal No. 200 of 2006; **Amani Fungabikasi V R**, Criminal Appeal No. 270 of 2008 and **Jonathan Mluguani V R**, Criminal Appeal No. 15 of 2011 (All unreported).

In view of the foregoing therefore, the judgment of trial District Court is a nullity. Since the finding of the High Court is based on that invalid judgment, the entire proceedings of the High Court are also a nullity. The same are liable to be quashed.

Ordinarily after quashing the judgment of the trial District Court we would have made an order of retrial or remit the record to the District Court so that it enters conviction. (See **Shabani Iddi Jololo** cited supra). But in this case, Mr. Mutalemwa informed the Court that there is no such need as the evidence on record is weak even though we quash the said proceedings. He said the prosecution relied on three sets of evidence.

One, the evidence of visual identification. It is Mr. Mutalemwa's submission that the incident took place at night time. Out of the witnesses who testified to be around was PW7 Elinangu Nuru Mnzava who claimed to have seen two persons, the appellant and another (Isihaka Bukuku). But how he managed to do so, Mr. Mutalemwa said this witness did not clearly say the source of light which enabled him identified the appellant as the lights were put off. So, under the aforesaid circumstances, it is doubtful whether he really identified the appellant.

It is in the record that the incident occurred during night time. PW7 merely claimed to have identified the appellant but the source of light was not clearly disclosed. Time and again this Court has been reminding trial courts to be very careful when dealing with evidence of visual identification lest they convict innocent people. We wish to take this opportunity to remind once again that no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight. (See **Waziri Amani V R**, [1980] TLR 250; **Philipo Rukaiza @ Kichwechembogo V R**, Criminal Appeal No. 215 of 1994 and **Antony Kigodi V R**, Criminal Appeal No. 94 of 2005 both

(unreported)). The evidence of visual identification as explained above is not watertight.

Next, Mr. Mutalemwa also said the evidence of stolen khanga allegedly to have been recovered in the possession of the appellant and his colleagues which were tendered by D/C Abdallah (PW5) without the same being identified by the complainant (PW7) was not proper and leaves much to be desired.

Before the Court can rely on the doctrine of recent possession, Mr. Mutalemwa submitted that the prosecution must establish, *inter alia*, the recovered property must be positively identified by the complainant. He made reference to our decision in **Rajabu Nassoro @ Rasta V R**, Criminal Appeal no. 42 of 2006 (unreported). We entirely agree with Mr. Mutalemwa. D/C Abdallah (PW5) who was not the owner of the khanga was not the right person to establish that the alleged khanga were indeed the property of PW7 and stolen from him. In **Rajabu case** cited supra, this Court said, *inter alia*:-

"... before a Court can rely on the doctrine of recent possession as a basis of conviction in a Criminal trial, the possession must be positively proved, that is, there must be positive proof, first that the property was found with the suspect. Secondly, that the property is positively identified as the property of the complaint, thirdly the property was stolen from the complainant and lastly the property was recently stolen from the complainant."

Like the evidence of visual identification, the evidence of the doctrine of recent possession was weak too.

Last but not least, Mr. Mutalemwa told the Court that the prosecution also relied on the evidence of the cautioned statement. But the said document was not read out to the appellant. That omission is contrary to a well-established practice which demand that after tendering of such exhibit, it should be read out to the accused person. He cited our decision in **Robinson Mwanjisi & Three Others V R** [2003] TLR 218.

Page 24 of the record shows that Cpl Edward (PW8) was the one who took the alleged cautioned statement and testified to that effect. The same was then tendered as exhibit (P2). It was however, never read out to the appellant. It is clear then that the appellant did not know the contents contained therein. That is contrary to one of the well established practice of conducting a criminal trial, that is, once a document is admitted in evidence, its contents must be read out so as to enable the accused person know the case he is facing (See **Mwanjisi case** cited supra). To do otherwise is to deny the accused person a fair trial.

In fine, we are in agreement with Mr. Mutalemwa that in view of the prosecution evidence on record, we don't think it is proper and in the interest of justice to order a retrial or order the record be remitted to the District Court to enter conviction.

Exercising our revisional powers as they are provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap141 RE 2002, we quash and set aside the so called judgment of both the District Court and the entire proceedings and judgment of the High Court. We order the appellant to be

released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

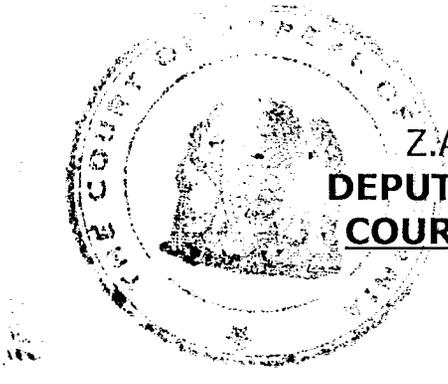
DATED at **DAR ES SALAAM** this 15th day of April, 2016

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
DEPUTY REGISTRAR
COURT OF APPEAL