IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MZIRAY, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 238 OF 2015

DOTTO PETER BANGUSILO ..... 1ST APPELLANT

REMMY LEONARD .....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mwakipesile, J.)

Dated 11th day of February, 2015
In
HC. Criminal Appeal No. 41 of 2013

JUDGMENT OF THE COURT

Date:6th & 19th September, 2016

MZIRAY, J.A.:

The appellants, Dotto Peter Bangusilo and Remmy Leonard, were jointly and together charged before the District Court of Kibaha at Kibaha with the offence of Armed Robbery c/s 287A of the Penal Code, Cap 16 R.E. 2002.

After a full trial, they were found guilty and each was sentenced to serve 30 years term in jail. Their appeal to the High Court was unsuccessful. Being dissatisfied, they filed this second appeal.

According to the charge sheet and the evidence that was led in the trial court, the offence was committed on 17th day of May, 2011 around 22.30 hrs at Maili Moja area within Kibaha District in which Tshs 1,500,000/= and one cash book, the property of Karim Jumbe was stolen. The appellants' conviction was based on the evidence of identification by PW1, Karim Jumbe, PW2 Mwanahamisi Hamisi and PW4 Abdallah Mustapha who were at the scene during the time the offence was committed. The trial court was satisfied that the identification of the appellants by PW1, PW2 and PW4 left no doubts. As already stated the appellants appeal was dismissed by the High Court. The High Court, Mwakipesile, J. upheld the finding of the trial court that the appellants were properly identified at the scene of crime.

Before us, all the appellants appeared in person and fended for themselves, while Mr. Credo Rugaju learned Senior State Attorney and Ms. Lilian Rwetabula learned state Attorney represented the respondent Republic.

The appellants filed separate memorandum of appeal. The first appellant's memorandum raised four (4) grounds, while that of the second appellant raised six (6) grounds. Upon scrutiny of the same, those grounds resemble and are repetitive, therefore they can conveniently be bridged into three main grounds; **one** that they were not correctly identified at the scene of crime; **two** that their defence evidence was not considered at all and **three** that, the case was not proved beyond all reasonable doubt.

At the hearing of the appeal, when offered their right to submit on their grounds of appeal, the appellants opted to give a chance to the respondent/Republic to respond first. Mr. Rugaju, learned Senior State Attorney supported the appeal. In addition to that, he raised another infirmity in relation to the procedure adopted in the trial of the appellants. He pointed out that the judgment has no conviction. The conviction was entered after the judgment has been read over. That was wrong, he argued. To put it clear, the learned Senior State Attorney submitted that conviction should be part of the judgment and at any rate the same should not be in a form of an order after the judgment has been read over, like in the case at hand.

We have considered the argument and with respect, Judgment writing in subordinate courts is governed by section 235 and 312 of the Criminal Procedure Act (CPA), Cap 20 RE 2002.

Section 235(1) provides,

> *"The court having heard both the complainant and the accused person and their witnesses and 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."*

And section 312(2) of the same Act 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."*

It is clear that both provisions of the CPA require that in the case of a conviction, the conviction must be entered. (See also **Amani Fungabikasi v. Republic,** Criminal Appeal No. 270 of 2008, **Shabani Iddi Jololo and Three Others v. Republic** Criminal Appeal No. 200 of 2006, **Hassani Mwambanga v. Republic,** Criminal Appeal No. 410 of 2013 and **John Charles v. Republic,** Criminal Appeal No. 190 of 2011 (both unreported).

In **Amani Fungabikasi** case this Court stated:-

> *"It was imperative upon the trial District Court to comply with the provisions of section 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 doubt. In the absence of conviction it follows that one of the prerequisites of a true judgment in terms of section 312 (1) of the Act was missing. So, since there was no conviction in terms of section 235 (1) of the Act there was no valid judgment upon which the High Court could uphold or dismiss".*

In **Mwambanga's case** the Court put it in this way:-

> *"It is now settled law that failure to enter conviction by any trial court, is 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 the present case, the record at page 52 shows as correctly submitted by the learned Senior State Attorney that the trial court having declared the appellants guilty did not enter conviction against them in terms of section 235(1) of the CPA.

This is what the record reflects;

> *".....prosecution has proved the case against accused persons beyond reasonable doubt as required by the law. I therefore find the accused persons guilty of the offence they are charged with."*

Since the trial Court did not enter conviction, the judgment and the subsequent sentence were a nullity. Since they were a nullity there was nothing which the High Court could have upheld. Basing on that alone, we invoke the provision of section 4(2) of the Appellate Jurisdiction Act to quash and set aside the alleged judgment and sentence of both the trial court and the High Court. Ordinarily we would have ordered the case be remitted to the trial Court to enter conviction or retrial. But for the foregoing reasons we find no need of doing so. This is because the evidence on record is wanting.

Submitting on the grounds of appeal, the learned Senior State Attorney contended that on the basis of the evidence on record it appears that the case against the appellants was not proved beyond all reasonable doubt. He pointed out that the evidence on the visual identification adduced by PW1, PW2, and PW4 was very weak. He argued that in a case where identification is to be relied upon to prove the case, the evidence of visual identification of a suspect has to be watertight so as to avoid mistaken identity. In support of his contention, he cited to us the case of **Scupu John & Another v. Republic,** Criminal Appeal No. 197 of 2008 (unreported). He strongly

argued that in the instant case, the incident happened at 10.00 pm in the night and all the witnesses, PW1, PW2 and PW4 alleged that they identified the appellants through the electric lights from the neighbours houses, but neither the intensity of the light nor the distance from where the source of light emanated to the place where the crime was committed was explained by the witnesses which was very important in avoiding mistaken identity. To support his argument, he cited the case of **Isdori Cornel @ Rweyemamu v. Republic,** Criminal Appeal No. 32 of 2014 in which the Court insisted the need to show the distance from where the source emanates to the place where crime is committed. The learned Senior State Attorney however, added that since the appellants and the witnesses knew each other why did they not mention the appellants to the police shortly after the incident? The learned Senior State Attorney submitted that failure to name the appellant shortly after the incident creates doubts. He referred this court to the decisions in the cases of **John Gilokola v. Republic,** Criminal Appeal No. 31 of 1999 (unreported) and **Marwa Wangiti v. Republic** [2003] TLR 39.

For these reasons, the learned Senior State Attorney urged us to find that under those circumstances, the case against the appellants was not proved beyond all reasonable doubt as required in law.

On their part the appellants had nothing useful to add.

On our part, we too join hands with the submission by the learned Senior State Attorney that the evidence adduced did not prove the case beyond reasonable doubt to establish the guilt of the appellants.

We are of the view that the decision of the trial court in this case was mainly centred on the issue of identification of the appellants at the scene of crime. However, it is now settled that if the witness is relying on some sources of light as an aid to visual identification, he/she must clearly describe the source and intensity of that light. This has been the decision of this Court in time and again. See for instance **Issa Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, **Lubeleje Mavina and Another v. Republic,** Criminal Appeal No. 172 of 2006 and **Emmanuel Luka and Others v. Republic,** Criminal Appeal No. 325 of 2010 [both unreported].

Since the witnesses did not disclose the intensity of light and the distance from where the source of light emanated to the place where the crime was committed, this might be a case of mistaken identity. The benefit ought to be resolved in favour of the appellants. Since the evidence on

prosecution is wanting we cannot in the circumstances remit record for the trial court to enter conviction.

Taking this into account, we are neither prepared to order for a retrial nor remit the record to the District Court. In the result therefore, we order that the appellants be released from custody forthwith, unless otherwise lawfully held.

DATED at **DAR ES SALAAM** this 14th day of **SEPTEMBER,** 2016.

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL