

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

(CORAM: MJASIRI, J.A., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL CASE NO. 50 OF 2016

YAHAYA MUSSA BISEGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Feleshi, J.)

dated the 20th November, 2015

in

HC. CRIMINAL APPEAL NO. 95 OF 2015

JUDGMENT OF THE COURT

28th February, 8th March, 2018

MUGASHA, J.A.:

The appellant and another person were charged in the Resident Magistrate's Court of Kisutu with two counts of armed robbery. The prosecution alleged that, on 10/11/2012, the appellant and the other person stormed into Victoria Petrol Station within Kinondoni District in Dar-es-salaam region and stole Tshs. 20,000,000/= the property of

Victoria Petrol Station. Immediately before or after such stealing they did threaten one Maria Andrew who testified as PW2 with a gun in order to obtain and retain the said sum. The matter was reported to the Police which was followed by the arrest and arraignment of the appellant and the other person.

After a full trial, the other person was acquitted whereas the appellant was found guilty as charged and sentenced to thirty (30) years imprisonment in respect of one count. Aggrieved, the appellant unsuccessfully lodged an appeal before the High Court against the decision of the trial court. The appeal was dismissed hence this second appeal. In the memorandum of appeal the appellant has raised five grounds of complaint which we have not reproduced because of what will be apparent in due course.

At the hearing of the appeal, the appellant was unrepresented whereas the respondent Republic was represented by Ms. Rachel Magambo, learned Senior State Attorney.

The appellant opted to initially hear the submissions of the learned Senior State Attorney.

Before addressing us on the merits of the appeal, Ms. Magambo informed us on a material irregularity, that the trial court did not convict the appellant as per the mandatory requirements of Sections 235(1) and 312(2) of the Criminal Procedure Act [CAP 20 R.E. 2002]. In this regard, she argued that there was no valid decision to be appealed against in the High Court and subsequently this Court.

On the way forward, she urged us to remedy the anomaly by invoking Section 4(2) of the Appellate Jurisdiction Act, nullify the proceedings and judgment of the High Court and remit the case file to the trial court for it to compose a proper judgment according to law since on record, there is strong evidence to prove the case against the appellant.

On other hand, the appellant challenged the submissions of the learned Senior State Attorney particularly on the aspect of remitting the case file to the trial court. He pointed out that, in the first appellate court the judge did enter a conviction. Thus, he urged us

to hear the merits of the appeal because the fault is not of his own making and he has been in custody since 2012.

Having carefully considered the submission and the record of appeal, we are certain that the appellant was not convicted. This is reflected at page 102 of the record whereby, after being satisfied that the prosecution had proved its case against the appellant, the trial magistrate found the appellant guilty. Thereafter, the trial magistrate proceeded to record the appellant's previous record, mitigations and passed the sentence. The sentence did not follow the conviction as mandatorily required by section 235(1) of the CPA which provides:

*"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"*

Similarly, a judgment which lacks a conviction, misses one of the essential components of a judgment in terms of section 312 (2) of the CPA which 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".

The reading together of sections 235 (1) and 312 (2) of the CPA clearly indicate that, the conviction must precede the sentence. In the case of **JOHN S/O CHARLES VS. REPUBLIC**, Criminal Appeal No. 190 of 2011, the Court was confronted with the purported appeal whereby the appellant was found guilty but he was not convicted. The Court emphasized on the essence of compliance with the mandatory requirements of sections 235(1) and 312 (2) the Criminal Procedure Act, having said:

"It is clear that both the provisions of the CPA require that in the case of conviction, the conviction must be entered. It is not sufficient to find an accused guilty as

charged; because the term guilty as is not in the statute; and the legislature may have a reason for not using that term, but instead, decided to use the word "Convict"."

In view of the settled position of the law, in the absence of conviction, there can be no valid judgment upon which the High Court could uphold or dismiss. Therefore, failure to enter a conviction is a fatal and incurable irregularity and no appeal could stem before the High Court and the Court in the exercise of appellate jurisdiction. (See the cases of **JONATHAN MLUGUANI VS REPUBLIC**, Criminal Appeal No. 15 of 2011, **RUZIBUKYA TIBABYEKOMYA VS REPUBLIC**, Criminal Appeal No 218 of 2011 and **JUMA JACKSON @ SHIDA VS REPUBLIC**, Criminal Appeal No 254 of 2011, (all unreported).

Given the circumstances, on account of the missing conviction of the appellant, we think that, in the interests of justice this is a fit case for us to invoke our revisional powers under Section 4(2) of AJA. We hereby nullify the proceedings and the judgment of the High Court, quash and set aside the sentence. We order the case file to

be remitted to the trial court to comply with the requirements of Section 312(2) of the CPA. Meanwhile the appellant shall remain in custody. ..

DATED at DAR ES SALAAM this 6th day of March, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL