IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 287 OF 2016

1. **MUSSA ATHUMAN BUBELWA**
2. **KAPAMA HAMISI JUMA**
3. **LUCAS VICENT MABELA** .....**APPELLANTS**
4. **AMOS MATHAYO NDUHIYI**

VERSUS

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

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

(Ruhangisa, J.)

dated 3rd day of June, 2016
in
DC. Criminal Appeal No. 90 of 2015

JUDGMENT OF THE COURT

23rd & 29th August, 2018
LILA, J.A.

The four appellants together with one Zainabu Abdallah whose appeal was allowed by the High Court and did not appeal, were arraigned before the Resident Magistrate's Court of Shinyanga facing four charges of armed robbery contrary to section 287A of the Penal Code Cap. 16. R.E 2002, one count of unlawful possession of firearms and one count of unlawful possession of ammunition both contrary to section 4(1) and 34(2) of the Arms and Ammunition Act, Cap.223 R.E. 2002 and three counts of grievous harm contrary to section 225 of the

Penal Code, Cap.16 R.E 2002. They were found guilty of the offences and, each, sentenced to serve thirty (30) years imprisonment for each count of armed robbery, five (5) years imprisonment for each count of unlawful possession of firearms and ammunition, and two (2) years imprisonment for each count of grievous harm. The sentences were ordered to run concurrently. The appellants were also ordered to suffer twelve strokes of the cane each.

The trial court decision aggrieved the appellants and one Zainabu Abdallah Okeleky Mchau. They appealed to the High Court. The appellants' appeal was unsuccessful whereas that of Ms. Mchau succeeded and was set free. In his judgment dated 03/06/2016, the presiding judge (Ruhangisa, J.), stated:

> *"In the upshot and for the reasons stated I dismiss the appeal by 1st, 2nd, 3rd and 4th Appellants, and order that the record be remitted to the trial court to enter a conviction accordingly in respect of 1st, 2nd, 3rd and 4th Appellants whose prosecution evidence is overwhelming. After the trial Magistrate has entered conviction against the 1st, 2nd, 3rd and 4th Appellants, their respective sentence and commencement of sentence shall remain unaltered.*

For the reasons stated above I allow the appeal by 5th Appellant whose prosecution evidence is wanting. I order the 5th Appellant to be released from prison forthwith unless otherwise lawfully held.

It is so ordered

SIGNED
RUHANGISA, J.
03/06/2016"

In compliance with the above order, the record was remitted to the trial court and a conviction was entered in the presence of the appellants and Mr. Lwenge, Learned Senior State Attorney, on 17/06/2016. I hereunder quote, in extenso, the proceedings of that day:

"17/06/2016

Coram: N. GASABILE, RM

P.P: Lwenge, Senior State Attorney

C/C: M. Lutufyo, RMA

Accused: 1st –Present

2nd - Present

3rd - Present

4th - Present

Lwenge, SSA: *The case is coming for conviction followed (sic) the order of the High Court and we are ready to receive it.*

Court: *The case remitted for conviction from the High Court order dated 03/06/2016 and this court is hereby convict the 1st, 2nd 3rd and 4th accused persons for the offences stand charged with an offence of Armed Robbery in the 1st – 4th counts c/s. 287A of the Penal Code, (Cap. 16 R.E. 2002), of the Laws as amended by Act No. 4 of 2004, an offence of unlawful possession of fire arms in the 5th and 6th counts c/s. 4 (1) and 34 (2) of the Arms and Ammunition Act, (Cap. 223 R.E. 2002) and an offence of causing grievous harm c/s 225 of the Penal Code, (Cap. 16 R.E. 2002) in the 7th - 9th counts.*

N. GASABILE
RESIDENT MAGISTRATE
17/06/2016

Order: *The sentences shall run from 03/09/2014*

Signed
N. GASABILE
RESIDENT MAGISTRATE
17/06/2016"

Still protesting their innocence, in the meantime, the appellants filed the present appeal through their respective notices of appeal lodged on 8/6/2016 which were followed by separate

memoranda of appeal. For reasons soon to be disclosed we will not recite the grounds of appeal.

Before us the appellants appeared in person and unrepresented. They fended for themselves. The respondent Republic had the services of Mr. Juma Masanja who was assisted by Mr. Solomon Lwenge, both learned Senior State Attorneys.

The appellants expressed their view that they were ready to hear the learned state Attorney argue the appeal first. In the course, however, Kapama Hamisi Juma, the 2nd appellant, sought and was granted leave by the Court to add two grounds of appeal. For similar reasons as above, we will also not reproduce them.

At the very outset Mr. Masanja faulted the High Court order reproduced above as being, in the circumstances of the case, improper. He argued that after the presiding Judge had found that the trial court had not entered a conviction after finding the appellants guilty he ought not to have proceeded to determine the appeal on merits and then order the trial court record to be remitted to the trial court for it to enter a conviction. As it is true that the trial court did not enter a conviction, the trial court judgment was a nullity hence, in law, there was no judgment against which an appeal could lie to it, he said. He accordingly urged the

Court to invoke the powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and quash and nullify the judgment of the trial court and that of the High Court which emanated from a nullity. He said then the Court should be pleased to order the record be remitted to the trial court with a direction that a fresh judgment be composed according to law. In bolstering his arguments, he referred us to our decision in the case of **Yusuph Juma Vs. The Republic**, Criminal Appeal No. 90 of 2010 (unreported).

Our serious scrutiny of the record has left us with no flicker of doubts that, truly, the trial magistrate did not enter a conviction against the appellants before handing down the sentenses. This was a serious and fatal omission as it violated the mandatory requirements of a valid judgment stipulated under section 235(1) of the Criminal Procedure Act, Cap 20 R. E. 2002 (the CPA). That section, in very clear terms, states:

> *"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."[Emphasis added].*

The record bears out that after hearing the case for both the prosecution and defence, the trial magistrate stated:

> *"...this court (sic) satisfied without any doubts with the prosecution evidence and found the accused persons 1st, 2nd, 3rd, 4th and 5th one, guilty as they (sic) charged with nine counts under the Penal Code, Cap. 16 R.E. 2002 together with the Arms and Ammunitions Act, Cap. 223 R.E. 2002.*
>
> ***N. GASABILE***
> ***RESIDENT MAGISTRATE***
> ***3/9/2014"***

The trial Court thereafter proceeded to hear the mitigations and sentenced the appellants as above.

It is crystal clear that the trial court found the appellants guilty as charged. A finding of guilty is different from entering a conviction. The law requires the finding of guilty be preceded with a conviction. The Court had an opportunity to consider the import of sections 235(1) and 312(2) of the CPA in the case of **John Charles Vs. The Republic,** Criminal Appeal No. 190 of 2011 (unreported), and stated that:

> *"It is clear that both provisions of the CPA require that in the case of a conviction, the conviction must*

be entered. It is not sufficient to find an accused guilty as charged; because the term "guilty as charged" 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".

The obtaining consequence of failure to enter a conviction is well settled that there is no valid judgment as stipulated under section 235(1) read together with section 312(2) of the CPA. The later section (Section 312(2) of the CPA) provides:

"(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."

Given the above legal position, a trial court's judgment which lacks a conviction is invalid. It is a nullity. The Court reiterated this position in various decisions including **Khamis Rashid Shaban Vs. Director of Public Prosecutions, Zanzibar,** Criminal Appeal No. 80 of 2012, **Sam Sempembwa and Another Vs. The Republic,** Criminal Appeal no.

169 of 2010 and **Shabani Iddi Jololo and 3 Others Vs. Republic,** Criminal Appeal No. 200 of 2006 (all unreported).

Turning to our case, the reproduced passage from the judgment of the High Court clearly indicates that the presiding judge noted that the trial magistrate did not enter a conviction and yet he proceeded to determine the appeal on merits. This was irregular as there was no valid trial court's judgment against which an appeal could lie to the High Court. Upon noting the infraction committed by the trial court, the only course the presiding judge had was to remit the record to the trial court for it to compose a proper judgment according to law as demonstrated above. That is because the appeal before the High Court was a nullity. It follows, as day follows night, that the appeal before the High Court was incompetent and the resultant judgment was a nullity. This position was spelt out by the Court in the case of **Rashid Omary Kibwetabweta Vs. Republic**, Criminal Appeal no. 85 of 2015 (unreported). In that case the Court stated:

> *"Having found that the appellant was not convicted of the offences he was faced with, and since the law stresses that no sentence may be passed or imposed unless and until that was done,* ***it follows that the sentence which was imposed by the***

trial court was illegal, so also that neither the appeal before the High Court nor the appeal before us is competent. *The big question becomes; what are the legal consequences". [Emphasis supplied].*

The Court, then, went further to state the course now available to the Court thus:

"As submitted by Mr. Mwegole, the only course available to us in the circumstances is to intervene under the revisional powers bestowed on us under section 4 (2) of the AJA and proceed to, and ***we hereby quash the purported judgment of the trial court and set aside the sentence of thirty year imprisonment it wrongfully imposed on the appellant. Also, we quash the proceedings and judgment of the High Court which have no leg to stand on for having resulted from a nullity. We order the record to be remitted to the trial court with instructions that it prepares and delivers a judgment in accord with the mandatory***

requirements of sections 235 (1) and 321(2) of CPA.

See also the case of ***Kelvin Myovela Vs. Republic,*** *Criminal Appeal No. 603 of 2015(Unreported)."(Emphasis supplied).*

Having found as above and on the authority, we hereby invoke the powers of revision under section 4(2) of AJA and quash the trial court judgment for being a nullity and set aside the sentences meted on the appellants. In the same vein we also quash the proceedings and judgment of the High Court as they emanated from a nullity and also set aside the order remitting the record to the trial court for it to enter a conviction. Likewise, we hereby quash the subsequent proceedings and conviction entered by the trial court in compliance with the High court order. After all, the trial court wrongly dealt with the matter when already the notices of appeal to the Court were lodged. The notices, under Rule 68(1) of the Rules, initiated the present appeal hence the trial court lacked jurisdiction. We order the record to be remitted to the trial court for it to compose and deliver a judgment complying fully with the law.

The interests of justice demands that we should direct, as we hereby do, that the judgment be composed earliest and in the eventuality of a conviction being entered, the custodial sentences should be counted to have had started running from the date they were first sentenced by the trial court. And, considering the term the appellants have stayed behind bars, in case the appellants would thereafter prefer an appeal, the same should expeditiously be determined. Meanwhile the appellants shall remain in custody.

DATED at **TABORA** this 28th day of August, 2018.

K. M. Mussa
JUSTICE OF APPEAL

S. A. Lila
JUSTICE OF APPEAL

J. C. M. Mwambegele
JUSTICE OF APPEAL

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

A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL (T)