IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 115 OF 2016

MTANGI MASELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Sumbawanga)

(Sambo, J.)

Dated the 24th day of September, 2014
in
DC. Criminal No. 23 of 2014

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JUDGMENT OF THE COURT

10th & 13th December, 2018

MWAMBEGELE, J.A.:

Before the District Court of Sumbawanga sitting at Sumbawanga, the Appellant Mtangi Masele was arraigned for two counts; arson contrary to section 319 (a) and grievous harm contrary to section 225 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). At the end of the trial, he was convicted and awarded a prison term of thirty years in respect of the first count and seven years in respect of the second. The conviction and sentence irritated the appellant. He appealed to the High Court where Sambo, J. dismissed his appeal. Undeterred, he has come to this Court on a

second appeal armed with a five-ground memorandum of appeal which, for reasons that will become apparent shortly, we will not reproduce.

The appeal was argued before us on 10.12.2018 during which the appellant appeared in person, unrepresented. Mr. Hebel Kihaka and Ms. Rosemary Mgenyi, learned State Attorneys, joined forces to represent the respondent Republic.

When called upon to argue his appeal, the appellant, fending for himself, sought to adopt the grounds in the memorandum of appeal to form part of his oral arguments and asked the Court to allow the Republic to respond after which he would rejoin if need arose.

For the respondent Republic, Ms. Mgenyi, at the very outset intimated to the Court that there was an ailment apparent on the face of the record which she wished to address first. She took us to p. 18 of the Record of Appeal where it is shown that the appellant after being found guilty as charged, was not convicted before the sentence was passed on him. She stated that the ailment was fatal, vitiating the whole judgment, as it offended the provisions of section 235 (1) read together with section 312 (2) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA). She thus asked us to invoke the powers of revision bestowed upon us by section

4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA) to revise the judgment of he trial court as well as the proceedings and judgment of the first appellate court and remit the file to the trial court for proper sentencing according to law. To buttress this proposition, she referred us to the case of **Kelvin Myovela v. Republic**, Criminal Appeal No. 603 of 2015 (unreported). However, on being probed, she shifted the goal posts and prayed that, in view of the fact that the evidence for the prosecution was shaky to mount a conviction, the appellant should be set free.

On his part, the appellant, having heard the learned State Attorney submit in his favour, had nothing useful to add. He just prayed that he should be set free.

We have considered the learned arguments brought to the fore by the learned State Attorney for the respondent Republic. We agree that the law on the point is as put by the learned State Attorney. We have held times without number that failure to comply with the mandatory provisions of section 235 (1) of the CPA is fatal. This subsection reads:

> *"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 ..."*
[Emphasis supplied].

The subsection is couched in imperative terms. As already alluded to above, this Court has time and again held that failure to convict an accused person before sentencing is a fatal ailment – see: **Shaban Iddi Jololo and 3 others v. Republic**, Criminal Appeal No. 200 of 2006, **Paul Emmanuel @ Ntorogo & another v. Republic**, Criminal Appeal No 19 of 2008**, Jonathan Mluguani v. Republic**, Criminal Appeal No. 15 of 2011, **Amani Fungabikasi v. Republic**, Criminal Appeal No. 270 of 2008, **Khamis Rashad Shaban v. Director of Public Prosecutions Zanzibar**, Criminal Appeal No, 184 of 2012, **Omari Hassan Kipara v. Republic**, Criminal Appeal No. 80 of 2012 and **Karoli Mathias Jackson & 2 Others v. Republic**, Criminal Appeal No. 59 of 2013; all are unreported decisions of the Court.

In **Shaban Iddi Jololo**, for instance, the Court went an extra mile to observe that the absence of a conviction connoted that one of the prerequisites of a judgment in terms of section 312 (2) of the CPA would be missing. The provisions of this subsection read:

"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 Court went on:

"Hence, in the absence of a conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon which the High Court could uphold or dismiss."

In the instant case, that the appellant was not convicted is no gainsaying. The last paragraph of the judgment of the trial court as appearing at p. 18 of the record of appeal has only one sentence which simply reads:

"The accused person is found guilty for both counts i.e Arson and Wounding".

And after that finding, the trial court proceeded to ask the appellant's mitigations and thereafter the prosecution was asked for his previous conviction or convictions, if any, and ultimately sentenced him. This was, to say the list, a flagrant disregard of the provisions of section 235 (1) read together with section 312 (2) of the CPA; it was a fatal irregularity.

We are of the considered view that after the trial court found the appellant guilty as charged, it was incumbent upon it to convict him before passing sentence. As we observed in **Shabani Iddi Jololo** (supra), in the absence of a conviction, one of the prerequisites of a judgment in terms of section 312 (2) of the Act was missing. That sub-section reads:

> *"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."*

As already alluded to above, the ailment vitiated the judgment of the trial court which we hereby declare a nullity. As the proceedings and the judgment of the first appellate court stemmed from a nullity judgment, they are also a nullity and so declared.

As for the way forward, ordinarily, we would have quashed the proceedings and judgment of the High Court and consequently directed that the record be remitted to the trial court so that it enters a conviction in accordance with the dictates of section 235 (1) of the CPA. However, we agree with the learned State Attorney that the evidence for

the prosecution was shaky to mount a conviction. We shall demonstrate.

The prosecution fielded three witnesses to prove its case – Dafroza Mzuka (PW1), Renatus Matheo (PW2) and Sawson Mdinde (PW3). PW1 is alleged to be the identifying witness to an offence committed at night. She does not state the conditions obtaining at the scene of crime and how she managed to identify the assailant. Neither does she state the source of light which enabled her to identify the appellant. Her evidence was certainly shaky; it was not watertight as to establish with certainty the assailant's identity. In the oft-cited **Waziri Amani v. Republic [1980]** TLR 250, at pp. 251 – 252, Court observed:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

The remaining witnesses; PW2 and PW3, were not sworn. Unsworn testimonies of witnesses have no evidential value as they

offend the mandatory provisions of section 198 (1) of the CPA. The sub-section provides:

> *"(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary; be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."*

In **Juma Ismail & another v. Republic**, Criminal Appeal No. 501 of 2015 (unreported), we grappled with an akin situation and relied on our previous unreported decision in **Mwita Sigora @ Ogora vs Republic**, Criminal Appeal No. 54 of 2008 to hold that the evidence of a witness which is given without oath or affirmation has no evidential value – see also **Godi Kasenegela v. Republic**, Criminal Appeal No. 10 of 2008, **Thomas Makoye v. Republic**, Criminal Appeal No. 66 of 2011 **Juma Hamad v. Republic**, Criminal Appeal No. 141 of 2014 and **Peter Pinus & 3 Others v. Republic**, Criminal Appeal No. 10 of 2016 (all unreported).

On what should be taken into account on whether or not an order of retrial is to be made by the Court, the case of **Fatehali Manji v. Republic** [1966] EACA 341; the decision of our predecessor the East

African Court of Appeal, provided the following guidance which has consistently been followed by the Court:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

Adverting to the case at hand, we think, for the reasons stated above, this is not one of the cases in which a retrial order will meet the justice of the case. We have already said that the evidence brought to the fore by the prosecution was not sufficient to mount a conviction of the appellant. That a criminal case must be proved beyond reasonable doubt is still part of our laws which we cherish. In the circumstances, like the learned counsel for the respondent Republic, we think an order for the release of the appellant will make justice smile.

The above said, like we did in **Shabani Iddi Jololo** (supra) and **Amani Fungabikasi v. Republic**, Criminal Appeal No. 270 of 2008 (unreported), we engage section 4 (2) of the AJA to quash the judgment of the trial court and set aside the sentence meted out to the appellant. The proceedings and judgment of the first appellate court, having been emanated from a nullity judgment, are also quashed. We order that the appellant Mtangi Masele be released from prison custody unless held there for some other lawful cause.

Order accordingly.

DATED at **MBEYA** this 12th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
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