

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MMILLA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 444 OF 2015

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| 1. MUHIDIN MOHAMED LILA @ EMOLO | } | APPELLANTS |
| 2. EDWARD JOSEPH @ FADHILI KIDEVU | | |
| 3. HUSSEIN JUMA LUNGOLE @ MAX DUDE | | |
| 4. MUSTAPHA ABDUL MFAUME @ DUDU BAYA | | |

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)
(Kaduri, J.)**

**dated the 26th day of August, 2015
in**

HC Criminal Appeal No. 107 of 2014

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JUDGMENT OF THE COURT

9th & 20th March, 2018

NDIKA, J.A.:

This appeal arises from the judgment of the High Court of Tanzania sitting at Dar es Salaam (Kaduri, J.) in Criminal Appeal No. 107 of 2014 dismissing the appellants' challenge of conviction and sentence against them. Following a full trial before the Resident Magistrate's Court of Dar es Salaam at Kisutu in Criminal Case No. 92 of 2012, the appellants were convicted of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002]. They were each sentenced to a term of thirty years' imprisonment.

Briefly, the prosecution alleged that on or about 17th February, 2012 at Kimara Mavurunza area within Kinondoni District in Dar es Salaam Region the appellants, jointly and together, stole two Nokia cellphones, one Dell laptop, one Sony DVD deck, a pair of shoes, two flash drives and one modem all valued at TZS. 2,000,000.00, the property of one Saidi Rashidi, and immediately before the aforesaid stealing they threatened the said Saidi Rashidi with a machete and a gun in order to obtain the said property. The appellants denied the accusation.

In order to prove its case, the prosecution produced eight witnesses. In addition, the prosecution tendered a number of documents that included four cautioned statements and an identification parade register (Exhibits D.1 – D.3). On the other hand, each appellant gave evidence in their respective defence but called no other witness. The first appellant supported his defence with a statement attributed to PW1 (Exhibit D.1).

Aggrieved by the decision of the High Court, the appellants have lodged a joint memorandum of appeal containing ten grounds of appeal. The points of complaint include contentions on weakness in the evidence of visual identification, improperly conducted identification parade, illegally procured and admitted cautioned statements, non-compliance with section 230 of the

Criminal Procedure Act, Cap. 20 RE 2002, failure to consider defence evidence and consideration by the High Court of evidence not borne by the trial record.

Before us the appellants appeared for the hearing in person, unrepresented; whereas Ms Jane Theresa Kitali, learned Senior State Attorney, assisted by Ms Anna Mkongwa, learned State Attorney, represented the respondent Republic.

At the very outset, Ms Kitali drew the attention of the Court to an extremely disquieting concern apparent on the face of the impugned judgment of the High Court appearing in pages 149 to 156 of the record of appeal. She submitted that the judgment showed that the learned appellate Judge dealt with and determined the appeal before him based upon an analysis of evidence not borne by the trial proceedings. The learned Senior State Attorney specifically referred to pages 152 and 153 of the record indicating that the High Court considered and reviewed the evidence of PW1 Joyce Swai as well as PW1's husband (David Swai) and son who featured as PW2 and PW3 respectively. She said that none of the said witnesses testified at the trial and that their testimonies should not have been the basis for determining the appeal before the High Court. We interpose here to note

that this alleged defect features in the joint memorandum of appeal as the ninth ground of appeal.

Ms Kitali went further to argue that since the High Court did not consider the evidence adduced at the trial but based the dismissal of the appeal on evidence not on the record, the appellants' appeal before the High Court must be deemed to have not been dealt with and that the purported decision of the High Court was a nullity as it was inevitably not compliant with section 312 of the Criminal Procedure Act, Cap. 20 RE 2002. She thus beseeched the Court to nullify the proceedings and decision of the High Court. She also prayed that an order be made for the remittance of the record to the High Court for the appellants' appeal to be heard afresh.

On the part of the first and second appellants, they urged that the decision of the High Court be considered valid. It seems they were not contented with their appeal being remitted to the High Court for a re-hearing. The third and fourth appellants, however, acknowledged the anomaly raised by Ms Kitali, which they admitted to be a part of their ninth ground of appeal. That stance, however, did not dissuade them from pressing that they be released forthwith.

We examined the entire record of appeal before us in the light of the submissions of the parties. Indeed, it is evident that while the impugned judgment of the High Court (running from pages 149 to 156 of the record) is prefaced with a correct summary of the charge against the appellants as well as a recapitulation of the submissions of the parties on the appeal, rather oddly, it contains an analysis of evidence completely not borne by the trial record. As correctly submitted by Ms Kitali, the learned appellate Judge considered and analysed the evidence of PW1 Joyce Swai as well as PW1's husband (David Swai) and son who featured as PW2 and PW3 respectively. None of them testified at the trial as witnesses. We noted further that the High Court also reviewed the evidence of an investigator named D/SSgt. Abdallah (PW4) along with the testimonies of PW5 Cpl. Bimu, PW8 D/Cpl. Misinita and PW9 Inspector Vernant. Again, none of them appeared as witnesses at the trial. For the trial record is loud and clear that the eight witnesses that testified at the trial were: PW1 Said Rashidi, PW2 D/SSgt. Abdullah, PW3 D.6816 D/Cpl. Primy, PW4 D.7780 D/Cpl. Joseph, PW5 F.8819 DC Hamisi, PW6 E.4128 D/SSgt. Gaston Ndege, PW7 F.1225 D/Sgt. William and PW8 Inspector Venon. It is beyond dispute that the evidence of all these witnesses does not feature anywhere in the impugned judgment of the High Court.

It is obviously perplexing how this act of inadvertence and confusion came about. In our quest to dig up the source of that mess, we noted from another appeal before this Court (i.e., Criminal Appeal No. 443 of 2015) that the appellants had appealed to the High Court in Criminal Appeals No. 39 and 40 of 2014 from Criminal Case 95 of 2012 before the same trial court in which they were charged with the similar offence of armed robbery. It is highly probable that there was, at some point, a mix up of the records in respect of the two appeals before the High Court. Be that as it may, we have no doubt that the judgment appearing on the record at pages 149 and 156 represents the true record of the pronouncement made by the High Court (Kaduri, J) on the appellants' appeal and that the said decision is wanting for being entirely based on evidence not on the trial record.

At this point we are enjoined to determine the effect of the flaw in the impugned judgment of the High Court. We recall that Ms Kitali was of the view that since the High Court did not consider the evidence on the trial record but based the dismissal of the appeal entirely on the evidence not on the record, the appellants' appeal before the High Court must be deemed to have not been dealt with and that the purported decision of the High Court was no judgment in the eyes of the law as it was, without doubt, not

compliant with section 312 of Cap. 20 (supra). The appellants, on their part, pressed to be released partly on account of the apparent invalidity of the impugned judgment.

The contents of a judgment in a criminal trial or matter are stipulated by section 312 (1) of Cap. 20 (supra) thus:

*"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and **shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on** which it is pronounced in open court."*[Emphasis added]

The above provisions, couched in mandatory terms, require that every judgment under section 311 must contain, *inter alia*, the point or points for determination, the decision thereon and the reasons for the decision. We hasten to observe that although section 311 expressly governs judgments in criminal trials, we think the requirement under subsection (1) of section 312

on the contents of a judgment would be equally applicable to a judgment by the High Court determining a criminal appeal.

In determining the import of subsection (1) of section 312 of Cap. 20 (supra) on what a judgment should contain, this Court in **Hamisi Rajabu Dibagula v. The Republic** [2004] TLR 181 referred to its earlier holding in **Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Saidi Msabaha**, Civil Appeal No. 24 of 1999 that:

*"A judgment must convey some indication that the judge or magistrate has applied **his mind to the evidence on the record**. Though it may be reduced to a minimum, it must show that **no material portion of the evidence laid before the court has been ignored**. In Amirali Ismail v. Regina, 1 T.L.R. 370, Abernethy, J., made some observations on the requirements of judgment. He said:*

*'A good judgment is clear, systematic and straightforward. Every judgment **should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported**; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of*

*Appeal to know **what facts are found and how.***'''

[Emphasis added]

In the instant case the learned appellate Judge did not just fail to apply his mind to the evidence on the record; rather, he inadvertently decided the appeal entirely on the evidence not borne by the trial record thereby ending up paying no attention to the entire evidence on the trial record. Whatever findings he made in affirming the convictions and sentences against the appellants such findings cannot be justified by any reference to the evidence on the record. Given the circumstances, we hold, without doubt, that the impugned judgment failed to comply with the mandatory statutory provisions cited earlier and that this omission was fatal as it surely must have occasioned miscarriage of justice. We, therefore, are inclined to agree with Ms Kitali that the appellants' appeal before the High Court was, in effect, not dealt with and that the purported decision of the High Court was a nullity. Consequently, we find no need to deal with the other grounds of complaint raised by the appellant before us because all of them are, in effect, yet to be considered by the High Court.

For the reasons we have given, we nullify the proceedings and judgment of the High Court. Accordingly, we remit the record to the High

Court and that it be placed before another Judge to re-hear and determine the appellants' appeal in accordance with the law. We further direct that in view of the peculiar circumstances of this case, the appeal before the High Court should be fast-tracked and disposed of expeditiously.

It is so ordered.


DATED at DAR ES SALAAM this 16th day of March, 2018

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL