IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., WAMBALI , J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 361 OF 2016

EMMANUEL NOA.....1ST APPELLANT

SHIJA JIKALI.....2ND APPELLANT

KULWA LUHENDE.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ruhangisa, J.)

Dated the 15th day of July, 2015
in
DC Criminal Appeal No. 28 of 2015

JUDGMENT OF THE COURT

29th November & 13th December, 2019

WAMBALI, J.A.:

The three appellants, Emmanuel Noa, Shija Jikali and Kulwa Luhende appeared before the District Court of Shinyanga at Shinyanga on 7th February, 2013 as the first, second and third accused persons respectively. On that date they jointly faced a charge of Armed Robbery contrary to the provisions of section 287A of the Penal Code, Cap 16 R.E. 2002.

It was alleged in the particulars of the offence by the prosecution that, the appellant jointly on 18th January, 2013 at Ibinzamata area within Shinyanga Municipality in Shinyanga Region, stole from one Fatma Charles some of her properties, namely, TV, Subwoofer, Deck, cash money amounting to Tshs 130,00/=, 25 pieces of Viroba Konyagi all worth Tshs 885,000/=. It was further alleged that at the time of such stealing, the appellants were armed with machetes and iron bars and at the time of such stealing they threatened to use violence against the said Fatma Charles in order to retain the stolen properties.

It is in the record of appeal that after the charge was read over and explained to the appellants they respectively pleaded not guilty. As a result, the prosecution summoned three witnesses and tendered two exhibits, namely pictures and sketch map which were admitted at the trial as exhibits P1 and P2 respectively.

As the appellants were found with a case to answer, they subsequently defended themselves and tendered no exhibit.

At the conclusion of the trial, the learned trial magistrate composed her judgment in which she found them guilty of the offence they were alleged to have committed. Nonetheless, according to the record of appeal, she did not convict the appellants of the offence of armed robbery

as stipulated under section 235(1) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA).

It is noteworthy that the learned trial magistrate concluded her finding by stating as follows:

> *"... this court is satisfied that the accused persons are guilty of armed robbery c/s 287A of the Penal Code Cap 16 R: E 2002".*

However, the omission to enter conviction did not deter the learned trial magistrate to record the facts relating to the appellants' mitigation. In the end, each of the appellant was sentenced to imprisonment for thirty years.

In their joint appeal before the High Court of Tanzania at Shinyanga (Criminal Appeal No. 28 of 2015), the appellants protested their innocence against both the convictions and sentences unsuccessfully.

We wish to state that for the purpose of our judgment, we do not intend to go into the details of the evidence of the parties before the trial court for the reasons which will be apparent herein.

It is noted from the record of appeal that, during the hearing of the appeal, initially the learned State Attorney who represented the respondent Republic supported both the appellants' convictions and sentences, when submitting on the grounds of appeal. However, upon perusal of the record

of the trial court, she alerted the learned first appellate judge that the appellants were sentenced without being convicted. In the circumstances, the learned State Attorney was of the firm view that the said omission was a fatal irregularity in terms of section 235(1) of the CPA. She thus urged the first appellate court to nullify the appellants' sentences and remit the file to the trial magistrate for convicting them and pass the sentences. In addition, it is not out of place to state that her advice to the first appellate judge was in view of the fact that, in her opinion, the appeal before him had no merit as the prosecution proved the case against the appellants beyond reasonable doubt. To support her submission the learned State Attorney implored the High Court to be guided by the decisions of the Court in **Shaban Idd Jololo and 3 Others v. Republic**, Criminal Appeal No. 200 of 2006 and **Matola Kajuni and Two Others v. Republic**, Criminal Appeal Nos. 145, 146 and 147 of 2011 (both unreported).

Nevertheless, in his judgment, the learned first appellate judge, in the first instance, considered the appellant's four grounds of appeal and found them to be baseless. Essentially, he agreed with the view expressed by the learned State Attorney that the prosecution proved the case against the appellants beyond reasonable doubt. He therefore, dismissed the appeal in its entirety.

Despite that stance, the learned first appellate judge acknowledged the fact that, the failure of the trial court to convict the appellants was not one of the grounds of appeal, but was dutifully raised by the learned State Attorney. However, he took note of the mandatory requirements of section 235(1) of the CPA and reproduced it in full. Thereafter, he made reference to the decisions of the Court in **Shabani Idd Jololo and Matola Kajuni and Two Others** (supra) and observed that, in the absence of conviction, there is no valid judgment upon which the High Court could uphold or dismiss.

That notwithstanding, the learned first appellate judge reasoned that upon carefully reading the said judgments of the Court, he was of the strong view that, there was need for him to remit the record to the trial court to enter convictions of the appellants in order to validate the sentences and judgment as a whole.

As a result, although he dismissed the appellants' appeal, he ordered for the record to be remitted to the trial court to enter conviction in respect of each of the appellants. He further ordered that after the trial magistrate had entered conviction against the appellants, their respective sentences and their commencement shall remain unaltered.

The said judgment of the first appellate court which was delivered on 15th July, 2016 did not please the appellants, hence the present appeal.

For purpose of clarity, we wish to note that, although the appellants lodged their respective notices of appeal on 26th July, 2016 to challenge the whole judgment and order of the High Court, according to the record of appeal, the learned trial magistrate complied with the order to convict them on 8th September, 2016. It therefore means that, despite the fact that the present appeal had been lodged before this Court, the trial court complied with the order of the High Court after a month and some few days.

To appreciate the substance of the requisite trial court's order, we better reproduce part of the same in full hereunder:

> *"**Court**: - The case is here for conviction as ordered by the High Court on 15/7/2016 and this Court is hereby convict the 1st, 2nd and 3rd accused persons forthwith with the offence of Armed Robbery C/S 287A of the Penal Code Cap. 16 R.E. 2002 as they charged with."*
>
> *N. Gasabiie – RM*
>
> *08/09/2016*
>
> ***Order**: The sentence shall run from 21/01/2014.*
>
> *N. Gasabile – RM*
>
> *08/09/2016."*

We will revert to consider the propriety of the above order later in the course of deliberating one of grounds of appeal.

In the present appeal, each of appellant lodged a separate memorandum of appeal. The said memoranda contain identical and distinct grounds of appeal. However, our perusal of the second appellant's memorandum of appeal indicates that, in his second ground of appeal, the complaint is to the effect that:

> *"The first appellate judge erred in law to proceed hearing the appeal and dismissed it while it was apparent that the appellants were not convicted by the trial court."*

At the hearing of the appeal, the appellants appeared in persons, unrepresented, while Mr. Tito Ambangile Mwakalinga, learned State Attorney entered appearance for the respondent Republic.

Before considering the complaints in respect of other grounds of appeal of the appellants, we invited the learned State Attorney and the appellants to submit in respect of the second ground reproduced above, concerning the propriety of the procedure adopted by the learned first appellate judge in determining the appellants' appeal before him.

At the outset, the appellants opted to let the learned State Attorney respond first.

In his response, without hesitation, Mr. Mwakalinga conceded that the record of appeal leaves no doubt that the learned trial court magistrate

did not convict the appellants after she made a finding that they were guilty as required under section 235(1) of the CPA. In the circumstances, he submitted that the irregularity was fatal as it went to the root of the trial and therefore, the appeal of the appellants which was before the High Court was incompetent, since it was preferred under a nullity judgment. He thus argued that the learned first appellate judge could not have heard and determined the said appeal on merits. In his view, the learned first appellate judge could have struck it out and direct the trial court to compose a proper judgment and convict the appellants as required by law.

To this end, the learned State Attorney urged us to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E 2002 (the AJA) to revise and nullify the proceedings and judgment of the High Court and the judgment of the trial court with a direction that, the trial magistrate should compose a proper judgment in accordance with the law. He further urged us to nullify and quash the order of the trial court dated 8th September, 2016 which was meant to comply with the order of the High Court in Criminal Appeal No. 28 of 2015.

In the end, Mr. Mwakalinga was of the strong view that, in the circumstances of the case at hand, there is no need to consider the other grounds of appeal as the complaint on procedure adopted the first

appellate judge to deal with the failure of the trial court to enter convictions against the appellants, suffices to dispose of the appeal.

On their part, all appellants agreed with the submission and the prayer of the learned State Attorney. They essentially urged the Court to determine the requisite complaint in accordance with the law.

On our part, it is apparent from the record of appeal and the submissions of the parties that, the learned trial magistrate did not convict the appellants before she passed the respective sentences of imprisonment. That was contrary to the requirements of section 235(1) of the CPA which provides as follows:

> *"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]

On the other hand, there is no doubt that the first appellate court took into consideration the fact that failure of the trial court to enter conviction was fatal in terms of section 235(1) of the CPA. The issue for our consideration therefore is whether the procedure adopted by the

learned first appellate judge in determining the appeal before him was proper.

At this juncture, we wish to state that in view of the clear position of the law in this area, we are compelled to comment, with profound respect, that the procedure adopted by the learned first appellate judge to dismiss the appellants' appeal for lacking merit and thereafter remit the file in Criminal Case No. 15 of 2013 with a direction to the trial magistrate to enter conviction was improper. This is so because upon a finding that there were no convictions entered against the appellants, the trial court's judgment was rendered a nullity, hence no appeal could stand before the High Court [see **Jonathan Mlunguani v. Republic** Criminal Appeal No. 15 of 2011 (unreported)]. Most importantly, it has to be observed that since there were no valid sentences without convictions, the order of the High Court to the effect that after proper convictions of the appellants, the respective sentences remained intact was equally improper. It must be emphasized that a proper sentence must be imposed after a valid conviction is entered. Thus the sentence imposed by a trial court must be based on a valid conviction. It follows that, the order which was made by the trial magistrate in compliance of the order of the first appellate court was of no effect in view of the reason we have stated above. Besides, even if the learned first appellate judge could have properly remitted the record

to the trial court for it to enter the convictions, the learned trial court magistrate was supposed to compose a judgment and convict the appellants and not to simply enter conviction as she did.

In this regard, considering the import of section 235(1) of the CPA, the Court in **Amani Fungabikasi v. Republic**, Criminal Appeal No. 270 of 2008 (unreported) stated that:

> " *It was imperative upon the trial 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."*

From the foregoing deliberations, we are satisfied that the procedure adopted by the learned first appellate judge in determining the appeal and the order issued thereof are improper. The proper cause the judge was obligated to take was to strike the appeal for being incompetent. We therefore, allow this ground of appeal.

In the event, since this ground disposes of the appeal without considering other grounds of appeal as correctly submitted by the learned State Attorney, consequently, we invoke the provisions of section 4(2) of the AJA to revise, nullify and set aside the judgment of the trial court. We also set aside the sentences of imprisonment imposed on the appellants by

the trial court. In the result, as the proceedings and the judgment of the High Court emanated from nullity judgment of the trial court, we quash and set the same aside. Similarly, we quash and set aside the order of the trial court which was made on 8th September, 2016 in compliance of the High Court order, which we have equally quashed.

In the end, in view of the circumstances of this case, and in the interests of justice, we have no other option than to order that, the file in respect of Criminal Case No. 15 of 2015 containing the remaining proceedings be remitted to the trial court with direction to the trial magistrate to compose a proper judgment in compliance with the provisions of sections 235(1) and 312(2) of the CPA. The course we have taken finds support from our decision in the case of **Ramadhani Athumani Mohamed v. Republic**, Criminal Appeal No 456 of 2015 (unreported) on the way forward that:

> *"Failure to enter conviction is fatal and incurable irregularity which renders such judgment a nullity.* ***Therefore, record should be remitted to the trial court for it to enter conviction and deliver a judgment in accordance with sections 235(1) and 312 of the CPA".*** (Emphasis added)

This order should be implemented as soon as practicable. For avoidance of doubt, the right of appeal to the High Court from the decision of the trial court will accrue to either party from the date of delivery of the composed judgment of that court.

Meanwhile, the appellants should remain in custody pending the compliance by the District Court of Shinyanga with the order of the Court. It is so ordered.

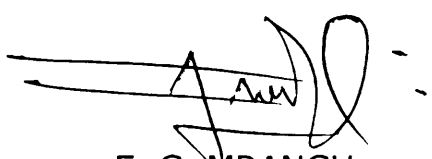
DATED at **TABORA** this 12th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2019 in the presence of the appellants in person and Mr. Tumaini Pius, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL