IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 42 OF 2013

(Appeal from the decision of the District Court of Nkasi in Original Criminal Case No. 5 of 2012)

CHARLES KASONI..... ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

19th March & 30th April, 2014

JUDGMENT

MWAMBEGELE, J.:

In the District Court of Nkasi at Namanyere, the appellant Charles Kasoni was charged with two counts of armed robbery c/s 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. Without being convicted, he was sentenced to serve a thirty year imprisonment. The learned trial Resident Magistrate did not mention the count in respect of which the appellant was sentenced. Dissatisfied, he has lodged an appeal in this court advancing five grounds of grievance. The five grounds are summarised by the first ground of appeal which states that the case against the appellant was not proved beyond reasonable doubt.

This appeal was argued before me on 19.03.2014 during which the Appellant appeared in person and unrepresented under surveillance of the prison officers and Mr. Mwandoloma, learned State Attorney appeared for and on behalf of the respondent Republic.

On arguing the appeal, the Appellant prayed to adopt and rely on what he stated in the five ground Memorandum of Appeal earlier filed. The learned State Attorney partly supported the appellant's appeal submitting that there was a procedural irregularity in this case that made the proceedings and judgment a nullity. The learned State Attorney submitted that the appellant was not convicted before being sentenced. He was of the view that this was a fatal ailment as it contravened the provisions of section 235 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (henceforth "the CPA") and made the judgment a nullity. To augment this proposition, he cited the decision of this court of ***Cosmas Bwire Mafuru Vs Republic***, DC Criminal Appeal No. 21 of 2011 (Sumbawanga unreported).

The learned State Attorney submitted further that even without the ailment, the evidence adduced at the trial in support of the charges against the appellant fell short of proof of the case beyond reasonable doubt. He submitted that the appellant was found guilty on mere assumptions based on the complainants' testimony to the effect that they were invaded while sailing in the lake and that the appellant was found in possession of Tshs. 2,200,000/= suspected to be part of Tshs. 6,800,000/= robbed during the robbery under reference. The learned State Attorney submitted that the

two complainants had wanted the money to be divided between the trio but the appellant refused as the monies were not stolen and were meant for his business. The learned State Attorney therefore hesitated to pray for a retrial.

I have keenly followed the arguments of the Respondent Republic during the hearing of the appeal. I have as well read between the lines the appellant's grounds of complaint. Let me, first, start with the ailment raised by the learned State Attorney to the effect that the appellant was not convicted. On several occasions, I have dealt with this issue in some of my previous judgments, one of them being the ***Cosmas Bwire Mafuru*** case cited to me by the learned State Attorney. I will reiterate my position in this judgment once again as I still hold the same view. As can be gleaned from the judgment, it is no gainsaying that the trial court found the appellant guilty and, without convicting him, proceeded to ask for previous criminal record of the appellant and mitigation and consequently sentenced him to a thirty year jail term. That was against the tenor and import of the provisions of section 235 (1) of the CPA. Subsection (1) of section 235 of the CPA 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 supplied].

A bird's eye view at this provision would immediately reveal that before passing a sentence against an accused person who has been found guilty, the court must convict the said accused person first. A sentence which is not preceded by a conviction is, in the light of mandatory provisions subsection (1) of section 235 of the CPA, illegal. This subsection is couched in mandatory terms. Noncompliance of it is incurably fatal and vitiates the judgment which purports to convict the accused. [See the decisions of the Court of Appeal of ***Omari Hassan Kipara Vs Republic***, Criminal Appeal No. 80 of 2012 ***Shaban Iddi Joiolo and three others Vs Republic***, Criminal Appeal No. 200 of 2006, ***Amani Fungabikasi Vs Republic***, Criminal Appeal No. 270 of 2008 and ***Khamis Rashid Shaban Vs Director of Public Prosecutions Zanzibar***, Criminal Appeal No, 184 of 2012, all unreported decisions of the Court of Appeal.

In the instant case, after the analysis of evidence, the trial court found the appellant guilty as charged but did not proceed to convict him. The learned trial Resident Magistrate simply stated:

"... the prosecution has proved their case beyond reasonable doubt as required by law and this court finds the accused guilty of the offence of armed robbery as he stands charged".

And thereafter the court proceeded to ask the prosecution for accused person's previous criminal record and mitigation and subsequently sentenced him to serve thirty years in jail. This was, as rightly pointed out by the learned State Attorney, in contravention of the provisions of section 235 (1) of the CPA.

I wish to reverberate, by way of emphasis, what was stated by the Court of Appeal in the ***Shaban Iddi Jololo*** and ***Omari Hassan Kipara*** cases (supra) on the mandatory nature of this provision that by the use of the word "shall", this provision, in terms of section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Laws, 2002, is couched in compulsory terms.

For the sake of clarity, subsection 2 of section 53 of the Law of Limitation provides:-

> "Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed".

It is apparent, therefore, that having found the accused person guilty of armed robbery as charged, it was incumbent upon the trial court to convict him before passing sentence. Again, as was held in the ***Shaban Iddi Jololo*** case (supra), in the absence of a conviction after finding the

accused person guilty, one of the prerequisites of a judgment in terms of section 312 (2) of the Act was, therefore, missing.

For the sake of clarity, once again, the provisions of subsection (2) of section 312 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".

In the ***Omari Hassan Kipara*** case (supra) the Court of Appeal, speaking through Mmilla, J.A., having discussed at length what was discussed on the point in ***Shaban Iddi Jololo***, instructively concluded:

> "... where in a judgment the trial court may have been satisfied that evidence established the guilty of the accused but did not proceed to convict as demanded by section 235 (1) of the Criminal Procedure Act, such judgment is a nullity..."

It follows therefore that, in the absence of a conviction entered in terms of subsection (1) of section 235 of the CPA, there is no valid judgment before me upon which this court can base its decision; this appeal has no legs on

which to stand in this court. Accordingly the judgment of the trial Court must face the wrath of being quashed and the sentence meted out to the appellant must definitely be set aside.

The learned State Attorney refrained from praying a retrial in that even without the procedural irregularity, the case against the appellant was not proved to the required standard; beyond reasonable doubt. I agree. The appellant was arrested on mere suspicion because he was found in possession of Tshs. 2,200,000/= suspected to part of Tshs. 6,800,000/= acquired during the robbery the subject of this appeal. No cogent evidence to justify the arrest of the accused except the suspicion. It is elementary criminal law that suspicion alone, however strong it might be, cannot found any conviction – see ***R. Vs Israili Epuki s/o Achietu*** (1934) EACA 166, ***R. Vs Siprian s/o Nshange*** (1947) 14 EACA 17, ***Alkadi William @ Supa Vs Republic*** Criminal Appeal No. 188 of 2005 (unreported) and ***Nathaniel Alphonce Mapunda & Another Vs Republic*** [2006] TLR 395.

There is yet another disquieting feature in the present case, but was not raised by the learned State Attorney. The appellant was charged with two counts of armed robbery but the sentence imposed upon his conviction did not mention the count in respect of which the sentence was meant. The sentence was certainly omnibus and therefore unlawful. Brian Slattery, in his **the Handbook on Sentencing**, published by the Faculty of Law of the University of Dar es Salaam, 1970, the learned author states at p. 5:

> "... a separate sentence must be imposed for each count. What has been termed as 'omnibus' sentence, that is, a single sentence designed to embrace all the convictions and reflect their gravity as a totality, has been repeatedly held to be illegal."

The learned author makes reference to ***R Vs Charles Henry Meyerowitz*** (1947) 14 EACA 130, ***Mohamed Warsama Vs R*** (1956) 23 EACA 576, ***Salumu s/o Dulu Vs R***, Law Report Supplement to Tanganyika Gazette, No. 5 of 1962, P. 4, ***R Vs Ramadhani s/o Mrisho***, (1963) Tanzania High Court Bulletin n. 188, ***Lucas Katingisha Vs R*** [1967] HCD n. 263 and ***John Ngarama Vs R*** [1967] HCD n. 264 as authorities for the statement of the law that an omnibus sentence is illegal. In the ***Mohamed Warsama*** case (supra) it was held:

> "As regards sentence, no authority is needed for the proposition that an omnibus sentence is unlawful. For every count on which a conviction is had there must be a separate sentence."

And in almost similar tone, Cross, J. restated the law in the ***John Ngarama*** case (supra) as follows:

> "Where an accused is convicted on two or more counts, the sentence given must be allocated

among the various counts, or to a particular count ..."

(See also ***Burton Mwakapesile Vs Republic*** [1965] 1 EA 407)

In the instant case, The learned trial Resident Magistrate, when sentencing the appellant, simply stated:

"The accused person is hereby sentenced to thirty (30) years imprisonment. It is so ordered. R/A explained.

Sgd

21.02.2013"

The appellant, having been charged with two counts, and the learned trial Resident Magistrate having been satisfied that there was enough material upon which to found a conviction the prosecution having proved the case beyond reasonable doubt on both counts, it was incumbent upon the learned trial Resident Magistrate to not only convict the appellant as charged as he correctly did but also allot the sentence in respect of each count. If the learned trial Resident Magistrate wished the sentences to run concurrently, he should have expressly stated so after complying with the law founded upon prudence. For the avoidance of doubt, under the provisions of section 36 of the Penal Code, the sentences are cumulative unless otherwise ordered by the court to be executed concurrently.

In the upshot, for what I have stated above, the judgment of the trial court is a nullity; it is accordingly quashed. The omnibus sentence imposed upon the appellant is unlawful; it is consequently set aside. This appeal succeeds. As even without the ailments, the evidence adduced at the trial was not enough to found a conviction, no retrial is ordered. The appellant Charles Kasoni should forthwith be released from prison unless otherwise held for some other lawful cause.

DATED at SUMBAWANGA this 30th day of April, 2014.

J. C. M. MWAMBEGELE
JUDGE