

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 32 OF 2018**

(Originating from Kinondoni District Court Criminal Case No. 171 of 2017)

**JACKSON MATHIAS @ WHITE.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

**MURUKE, J.**

The appellant, **Jackson Mathias @ White** was charged and convicted with the offence of Armed Robbery contrary to section 287A of the Penal Code, [Cap 16, R.E. 2002], and he was sentenced for thirty (30) years imprisonment. Being dissatisfied with the decision of the district court, hence appealed to this court advancing five (5) grounds as listed in the petition of appeal.

During hearing, the appellant requested the court to adopt his seven grounds of appeal as his submission in support of the appeal. The Learned State Attorney, Sabrina Joshi by way of

preliminary remarks alerted the court that; there is anomaly in the judgment. Appellant was not convicted by the trial court. That is contrary to section 235 (1) of the Criminal Procedure Act Cap 20 R.E. 2002. The section requires that, accused must be convicted before sentenced. According to the judgment at page five judgment reads, **I am satisfied that accused is guilty of an offence which has been charged with. Then sentenced the accused.** State Attorney cited the case of **Shabani Idd Sololo & 3 others, Criminal appeal No 200 of 2006** Court of Appeal at Dodoma unreported at page (7) where the Court of Appeal said:

***Failure to convict, there is no valid judgment upon which the high court could upheld or dismissed.***

So, in the case at hand, there is no appeal before you because there is no proper judgment.

As submitted by the learned State Attorney, Sabrina Joshi, the trial magistrate failed to convict the accused. The law as per section 235(1) of the Criminal Procedure Act (supra) requires accused to be convicted before sentenced. Section 235 (1) of the Criminal procedure act read 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 ....."*

There are several cases of court of appeal on this matter, namely; **Matola Kajuni & 2 Others v. Republic**, Consolidated Criminal Appeals No. 145, 146 and 147 of 2011, CAT (unreported), **Julius Mathias and Another v. Republic** Criminal Appeal No. 546 of 2015, CAT (unreported) **Omari Hassan Kipara v. Republic**, Criminal Appeal No. 80 of 2012, CAT (unreported), **Sam Sempemba and Another vs. Republic**, criminal Appeal No 169 of 2010 CAT (unreported). In the case of **Omari Hassan Kipara v. Republic** (supra) it was held that;

*" In principle, where the trial court may have been satisfied that evidence established the guilt 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; so is any other judgment on appeal based on such judgment. Both such judgments cannot escape the wrath of being quashed and the sentences thereof being set aside."*

According to the records it appears that the appellant has not been convicted. Normally one has to be convicted before being

sentenced. Absence of conviction is fatal and incurable irregularity as underscored by the Court of Appeal of Tanzania in the case of **OMARI HASSAN KIPARA vs REPUBLIC**, Criminal Appeal No 80 of 2012 (Dodoma registry) unreported) that:-

**"The court had the occasion of interpreting the import of this provision in the case of among others, Shaban Iddi Jololo and three others v. Republic, Criminal Appeal No. 200 of 2006, CAT, Dodoma Registry (unreported), Amani Fungabikasi v. Republic, Criminal Appeal No. 270 of 2008, CAT, Tabora Registry (unreported) and Khamis Rashid Shaban v. Director of Public Prosecutions Zanzibar, Criminal Appeal No. 184 of 2012, CAT, Zanzibar Registry (unreported).**

In particular case of Shaban Iddi Jololo and three others v. Republic and Amani Fungabikasi v. Republic (supra) the court said in common that:-

**It was imperative upon the trial court to comply with the provision 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. A similar view was given in**

**Khamis Rashid Shaban v. Direct of Public Prosecutions Zanzibar supra) in which though considering the provision of section 187 K of the Criminal procedure Act, No. 7 of 2004 of the Laws of Zanzibar but whose effect is similar to our section 235 (1) of the Criminal Procedure Act, the court stated that failure to record a conviction was a fatal and incurable irregularity.**

It was further cemented in case of **Shaban Iddi Jololo and three others v. Republic (supra)** the court observed further that;

**“the absence of a conviction entailed that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act would be missing. The subsection provides that:**

***“(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”.***

I concur with the learned State Attorney that, since there is no conviction, there is also no judgment before this court because conviction is an important aspect of the judgment.

It is essential to point out as well, that in the absence of conviction, one of the essential components of a judgment in terms of section 312 (2) of the CPA is missing. Subsection (2) of that section provides that:-

***"(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."***

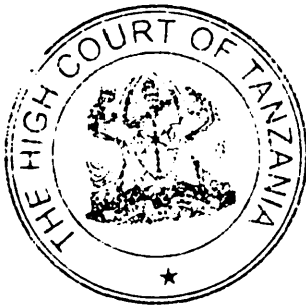
failure to enter a conviction by any trial court is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction the Court was firm that it is mandatory in law that sentence must be prefaced by conviction."

In the premises; the remedy lies in a retrial subject to existence of sufficient evidence. This was also held in the case of **Omari Hassan Kipara v. Republic** (supra) as I hereby quote:-

***It is true that the appellants were not convicted. The Remedy would have been to return the file to the trial court, to convict the accused persons. However, in the strength of the evidence available, it will be improper to***

***return the file because, the evidence is not enough to convict the accused, on the three major reasons.***

Review of evidence of the trial court, proves that, evidence is not enough to ground conviction. Evidence of PW1 Selemani Salim Seif defers with PW2 to the great extent. Thus create doubts on the evidence of prosecution. Accordingly appeal allowed, conviction quashed, part of an served sentence set aside. Appellant to be set at liberty unless lawful held with other offences.



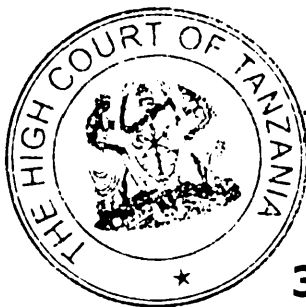
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Z. G. Muruke

**JUDGE**

**31/05/2018**

Judgment delivered in the presence of the appellant in person and Mkunde Mshanga, State Attorney for the respondent.



A handwritten signature in black ink, appearing to read "Z. G. Muruke".

Z. G. Muruke

**JUDGE**

**31/05/2018**