IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: JUMA, CJ., MJASIRI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 137 OF 2016

MASOTA S/O JUMANNE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaduri, J.)

dated the 24th day of November, 2008
in
DC. Criminal Appeal NO. 157 of 2007

JUDGMENT OF THE COURT

13th & 19th February, 2018

MUGASHA, J.A.:

The appellant was found guilty as charged of the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, in the District Court of Tabora. He was sentenced to a jail term of thirty (30) years with twelve (12) strokes of the cane. Aggrieved, the appellant unsuccessfully appealed to the High Court where the appeal was dismissed in its entirety.

Still dissatisfied, the appellant lodged notice of appeal against the conviction and the sentence which was followed by the Memorandum of Appeal whereby the appellant indicated his grievance with the decision of the High Court.

At the trial, in order to establish its case the prosecution paraded five witnesses and one documentary exhibit P.1 (PF3). A brief account of the evidence at the trial was as follows: - On the fateful day, at night time at 20.30 pm, PW1 having purchased some items from Itaga village, disembarked riding a bicycle back to his home village of Misha. While on the way, he saw and greeted the appellant but in return, five other persons joined the appellant, struck PW1 using a club and a bush knife. He sustained injuries on the fore head, left knee and the rear side of the head. Then, the bandits robbed his bicycle; make Phoenix, 4 kilogrammes of sugar, 7 kilogrammes of rice, 2 bars of soap and a small radio. PW1 stated to have identified the appellant aided by bright moonlight and that; he was the one who paddled away the stolen bicycle. Besides, being a former councillor he knew the appellant as a habitual offender who was once arrested by the police. Following the said attack by the bandits, PW1 raised an alarm which was heeded to by PW2,

PW3 and PW4 who all rushed at the scene of crime to rescue him. Relying on what they were told by PW1 on what was robbed from him by the appellant each had his own version: PW2 recalled to have been told by PW1 that the bandits had stolen his bicycle only. PW3's account was to the effect that the stolen items included a bicycle, soap and sugar. PW4 recalled that items robbed from PW1 were: a bicycle, sugar, rice, soap and a radio. Thereafter, PW1 reported the matter to the police, was issued with a PF3 and went to Kitete Hospital for treatment. The respective PF3 was tendered at the trial as exhibit P1. On 25/9/2009 the bicycle was recovered by village leaders after it was retrieved from the forest by women who had gone to fetch firewood. This was followed by the arrest of the appellant on 27/9/2002.

The appellant denied the accusations and raised a defence of alibi stating that, on the fateful day and time he was at Ifambilo village and returned home at 9.00 p.m.

The trial Magistrate was satisfied that the appellant was properly identified at the scene of crime because there was bright moonlight, he knew him before the incident and the appellant was the one who struck PW1 with the bush knife and paddled away with

the bicycle in question. At the first appellate court, apart from concurring with the trial court, the Judge concluded that, PW1 mentioned the appellant at the earliest opportunity to those who responded to the raised alarm.

At the hearing of the appeal, the appellant appeared in person whereas the Respondent Republic was represented by Ms. Upendo Malulu, learned State Attorney.

The appellant opted to initially hear the submission of the learned State Attorney. At the outset, the learned State Attorney informed the Court that she was not opposing the appeal because of the trial court's failure to convict the appellant. She as well added that, the evidence paraded by the prosecution at the trial is at variance with the charge sheet.

Regarding the failure to convict the appellant, Ms. Malulu submitted that, the trial court erred to sentence the appellant upon finding him guilty without initially convicting him. She contended that, failure to convict the appellant was contrary to sections 235(1) and 312 of the Criminal Procedure Act, which mandatorily requires the trial court to convict before imposing the sentence. In this regard, Ms. Malulu argued, both the judgments of the trial court and

first appellate courts are a nullity, making this appeal incompetent before this Court. To support her proposition, she cited to us the case of **MATOLA KAJUNI AND 2 OTHERS VS REPUBLIC**, Criminal Appeal No 145,146 and 147 of 2011, (unreported).

On the way forward, the learned State Attorney further submitted that under normal circumstances, she would have urged the Court to order a retrial. However, she has realised that, the prosecution evidence as a whole was very weak and cannot sustain the conviction of the appellant. She elaborated that, while the charge sheet stated that, the appellant did steal one bicycle make Phoenix valued at Tshs. 70,000/= and cash money Tshs. 15,000/= the prosecution evidence as to what was stolen from PW1 is at variance with the charge sheet in following respects: -

PW1 stated to have been robbed of a bicycle, 4 kilogrammes of sugar, 7 kilogrammes of rice, 2 bars of soap and a small radio. PW2's account was that PW1 informed him to have been robbed a bicycle. As for PW3, he was informed by PW1 that the stolen items were a bicycle, soap and sugar. Lastly, PW4 stated that, according to what PW1 told him the stolen items were his bicycle, sugar, rice and a radio plus soaps. The learned State Attorney submitted that,

such contradictory prosecution's account adversely impacted on the prosecution case rendering the charge against the appellant not proved beyond reasonable doubt. To support her proposition, she referred us to the case of **PAUL JACOB Vs. REPUBLIC**, Criminal Appeal No. 213 of 2010 (unreported).

Reiterating her earlier prayer on the unworthiness of the retrial, the learned State Attorney urged us to set the appellant free considering that the appellant has stayed behind bars for almost 16 years.

On the other hand, the appellant had nothing to add apart from supporting the submission of the learned State Attorney.

After a careful perusal of the record of trial, we think there is a problem on the trial court's failure to convict the appellant before sentencing him which has adverse consequences on the first appeal to the High Court and the present appeal before us.

We begin with the conclusion of the judgment of the trial court at page 41 of the record whereby the trial magistrate recorded:

"Up to that totality of these facts pursued (sic) me to hold that accused was well identified by PW1 and that he committed the offence and I find him guilty".

Thereafter, the trial Magistrate proceeded to record the appellant's previous record, mitigations and subsequently, he passed the sentence. The sentence did not follow the conviction as envisaged under section 235(1) of the CPA which provides:

> *"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"*

The underlined expression is coached in mandatory terms indicating that, the directions therein must be complied with. In the case of **JOHN S/O CHARLES VS. REPUBLIC**, Criminal Appeal No. 190 of 2011, the Court was confronted with the purported appeal whereby the appellant was found guilty but he was not convicted. The Court emphasized on the essence of compliance with the

mandatory requirements of sections 235(1) and 312 (2) the Criminal Procedure Act, having said:

> *"It is clear that both the provisions of the CPA require that in the case of conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged; because the term guilty as is not in the statute; and the legislature may have a reason for not using that term, but instead, decided to use the word "Convict"."*

In the case of **OMARI HASSAN KIPARA VS. REPUBLIC,** Criminal Appeal No. 80 of 2012 (unreported), apart from restating the adherence with the mandatory requirement that sentence must be preceded by conviction, the Court stated consequences for the non compliance. Thus, the Court said:

> *"In principle, where the trial court may have been satisfied that evidence established 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."*

See also the case of **MATOLA KAJUNI & 2 OTHERS VS REPUBLIC** (supra).

It is crucial to point out as well that, in the absence of the conviction, one of the essential components of a judgment in terms of section 312 (1) of the CPA. Thus, subsection 2 provides:

> *"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 view of the settled position of the law, in the absence of conviction, there can be no valid judgment upon which the High Court could uphold or dismiss. Therefore, failure to enter conviction is a fatal and incurable irregularity. As such, in the matter under scrutiny, the missing conviction renders the purported trial judgment and sentence imposed a nullity. Therefore, against such null decision, no appeal could stem before the High Court and the Court in the exercise of appellate jurisdiction. (See the cases of **JONATHAN MLUGUANI VS REPUBLIC**, Criminal Appeal No. 15 of 2011, **RUZIBUKYA TIBABYEKOMYA VS REPUBLIC**, Criminal Appeal No

218 of 2011 and **JUMA JACKSON @ SHIDA VS REPUBLIC**, Criminal Appeal No 254 of 2011, (all unreported).

Given the circumstances, ordinarily we would have remitted the record of trial court for it to compose a proper judgment by accordingly entering the conviction and the sentence of the appellant. However, in the interest of justice and in the light of reasons advanced by the learned State Attorney, we think it is undesirable to order a retrial and we shall state why.

While the particulars of the charge sheet indicated that the properties stolen from the complainant comprised of a bicycle make Phoenix and Tshs. 15,000/=, the evidential account of PW1, the victim reveals that, he was robbed of a bicycle, 4 kgs of sugar, 7 kgs of rice, 2 bars of soap and a small radio. Furthermore, PW2-PW4 who went to rescue PW1 and informed them on what was robbed, each had his own account on items robbed from PW1. PW2 testified about a bicycle. He never testified on the cash money and items mentioned by PW1. As for PW3, he mentioned the bicycle, soaps and sugar; he stated nothing on the rice. PW4 testified that PW1 was robbed of a bicycle, sugar, rice, soaps and a radio.

Apparently PW2 – PW4 all went at the scene at the same time and the source of information on what was stolen is PW1. However, apart from a contradictory account on the stolen items, none of the prosecution witnesses testified about the make of the bicycle and the sum of Tshs. 15,000/=. Besides, items such as sugar, rice, soap and radio featuring in the prosecution evidence are not stated in the charge sheet at all.

In a nutshell the prosecution evidence was riddled with contradictions on what was actually stolen from PW1. Such circumstances do not only imply that there was a variance between the particulars in the charge and the evidence as submitted by the learned State Attorney. This also goes to the weight of evidence which is not in support of the charge.

Moreover, the conclusion of both the trial and the first appellate courts that the appellant was properly identified at the scene of crime leaves a lot to be desired. It is settled law that evidence of visual identification is of the weakest kind and courts should always approach it with great caution. (See **WAZIRI AMANI VS REPUBLIC, [1980] TLR** 250, **MATESO VS REPUBLIC** 2013 1EA 187.). In **ISSA S/O MGARA @ SHUKA VS REPUBLIC,** Criminal Appeal

No. 37 of 2005 (unreported), the Court said that it is not sufficient for the witnesses to make bare assertions that "there was light". Moreover, we are also aware that "recognition evidence could not be trouble free as even mistakes in recognition of close relatives and friends are often made. (See **ISSA S/O MGARA @ SHUKA VS REPUBLIC** (supra).

In the present matter PW1 who claims to have identified the appellant, fell short of stating a detailed description of the appellant such as the attire and the like at the scene of crime. It was not enough for PW1 to merely say that, he knew the appellant as a habitual criminal who was once arrested by the police without stating how he managed to identify the appellants at the scene of the crime. In our considered view, the case against the appellant was based on suspicion which cannot be a substitute of proof in court. Suspicion, however grave, is not a basis for conviction in a criminal trial. (See the case of **MT 60330 PTE NASSORO MOHAMED ALLY VS REPUBLIC,** Criminal Appeal No. 73 of 2002 (unreported).

With the said discrepancies in the prosecution evidence, we agree with the learned State Attorney that, an order for the retrial is not worthy or else it could be an opportunity by the prosecution to

fill in the evidential gaps. Apart from that not being the intended purpose of a retrial, it is not in the interests of justice and we accordingly decline to so order.

In view of the aforesaid and in the exercise of our revisional powers under section 4(2) of AJA, we quash the judgments of the courts below and set aside the sentence. We allow the appeal and order the immediate release of the appellant unless held for some other lawful cause.

DATED at **TABORA** this 15th day of February, 2018.

I.H. JUMA
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL