IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 308 OF 2021

JOHN NAOYO.....1ST APPELLANT
NANGOLE LEPORUO.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Court of the Resident Magistrate of Arusha with Extended Jurisdiction at Arusha)

(Ngoka, SRM-Ext. Jur.)

Dated the 19th day of April, 2021

in

Criminal Appeal No. 56 of 2020

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JUDGMENT OF THE COURT

13th & 23rd February, 2024

WAMBALI, J.A.:

The appellants, John Naoyo and Nangole Leporuo together with Saitoti Kadiri, not a party to this appeal, appeared before the District Court of Monduli at Monduli where they were jointly and together charged with three counts; armed robbery, cattle theft and grievous harm contrary to sections 287A, 268 (1) (3) and 225 of the Penal Code, Cap 16 (the Penal Code), respectively

It was alleged in the charge in respect of those counts that on 9th November, 2018 at Ndoroboni Makunyani area within Monduli District in Arusha Region, the appellants and Saitoti Kadiri robbed 38 herds of cattle

valued TZS. 28, 918, 800.00 the property of Juma Leiti. It was further alleged that in the process of the robbery and in order to retain the said property they threatened, injured and unlawfully caused grievous harm on the forehead of Haruna Juma using machetes and sticks.

The allegations leveled by the prosecution in respect of all counts were strongly disputed by the trio, hence, a trial was conducted and both sides adduced evidence for and against the case.

At the trial, the prosecution summoned six witnesses; namely, Haruna Juma (PW1), Baba Lekisango (PW2), E.4193 D/CPL Benedict (PW3), Juma Leiti (PW4), SP Leah Nicolaus (PW5) and Dr. Nickson Ibrahim (PW6) to support its case. In addition, the certificate of seizure, cautioned statement of the first appellant, 38 herds of cattle, Identification Parade Register and Medical Examination Report were tendered and admitted as exhibits, P1, P2, P3, P4 and P5 respectively. It was the substance of the prosecution case that the appellants and Saitoti Kadiri committed the offence with which they were charged on the particular date and place and therefore, the case against them was proved beyond reasonable doubt.

The appellants and Saitoti Kadiri defended themselves and summoned one witness, John Nyamaitai. They put up a spirited defence to disassociate themselves from the allegation levelled against them by the prosecution.

For the purpose of this judgment and the reason to be apparent shortly, we do not intend to narrate the factual background of the case and the evidence of the parties at the trial.

Nonetheless, it is apparent in the record of appeal that at the height of the trial, the trial Resident Magistrate was convinced that the prosecution case was proved to the required standard, and ultimately, he found the appellants and Saitoti Kadiri guilty, convicted and proceeded to sentence each to imprisonment for thirty (30) years for the first count and two years in respect of the second and third counts respectively.

Dissatisfied, the appellants and Saitoti Kadiri appealed to the High Court in Criminal Appeal No. 77 of 2020. However, the respective appeal was transferred to the Court of Resident Magistrate of Arusha and registered as Criminal Appeal No. 56 of 2020 where it was presided over and determined by Ngoka, Senior Resident Magistrate (SRM with Extended Jurisdiction). The decision in the said appeal was not pleasant to the appellants as it was dismissed in its entirety, hence this second appeal to the Court.

The memorandum of appeal placed before the Court by the appellants contains thirteen (13) grounds of appeal. For the reason to come to light herein, we do not deem it appropriate to reproduce the respective grounds.

At the hearing of the appeal, the appellants appeared in person without legal representation. On the adversary side, Ms. Janeth Sekule and Ms. Lilian Kowero, learned Senior State Attorneys represented the respondent Republic.

Before we embarked on considering the grounds of appeal, an issue arose as to whether in view of the judgment of the trial court, the appellants were convicted before being sentenced in respect of all counts. We thus requested parties to comment and clarify on the matter.

Admittedly, after a brief dialogue between the Court and the appellants, they conceded that though they were sentenced by the trial court in respect of all counts, according to its judgment, they were not legally convicted as required by law. Nonetheless, they submitted that since the omission to convict them is associated with lack of seriousness on the part of the trial magistrate, the Court should nullify the entire proceedings of the trial and the first appellate courts and proceed to set them free as a retrial will occasion injustice to them.

Responding, Ms. Sekule conceded that the judgment of the trial court leaves no doubt that the appellants were not convicted as required by section 235 (1) of the Criminal Procedure Act, Cap 20 (the CPA). She added that though there is indication that a finding was made to the effect that the appellant committed the offences in respect of armed robbery and causing grievous harm, no convictions were entered and nothing was

stated by the trial Resident Magistrate with regard to the finding and convictions on the offence of cattle theft. In her submission, the failure by the trial court to convict the appellants before they were sentenced is a fatal irregularity that tainted the decision which was the subject of appeal to the first appellate court, and ultimately to this Court.

In this regard, the learned Senior State Attorney argued that the way forward is to nullify part of the judgment of the trial court from the stage of mitigation and the entire proceedings of the first appellate court. She categorically differed with the suggestion and prayer by the appellants that the entire proceedings of the trial and the first appellate courts be nullified leading to their being set free. She was content that the tainted proceedings in the circumstances of the case, is part of the judgment of the trial court as intimated above which equally affected the proceedings of the first appellate court because of the failure to enter convictions in respect of all counts.

In the end, she urged the Court, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) to nullify part of the trial court's judgment from the stage of mitigation together with the proceedings of the first appellate court. On the way forward, she prayed that an order returning the file to the trial magistrate to compose a fresh judgment which will contain the finding and convictions as required by law be made by the court.

We have thoroughly perused the judgment of the trial court. It is apparent from the record of appeal that the trial Resident Magistrate summarized the evidence for both sides, listed points for determination, briefly reasoned and concluded as follows:

> *"Of this evidence herein even though the weapons that ... accused were armed with at the time of commission of an offence were not produced in this court as the exhibits (in the simple reason that they were not arrested on the spot), still in my view, there is no doubt that the injury PW1 had on his forehead as held by PW6 was caused by sharp object (machete). Therefore, the said machete was used in the furtherance of an offence of stealing the said 38 herds of cows* ***see exhibit PE3****. At that stance, this salvation denotes that the accused persons on the fateful day were armed and used actual force to PW1 at and during the time of stealing of the said 38 herds of cows hence contravenes the provisions of section 287A of the Penal Code (supra).*
>
> *Assuredly, since PW1 said was also injured by the accused person prior to stealing, this sentimental evidence was as well buttressed by PW6 through exhibit PE5. It follows affirmative therefore that an accused persons also committed an offence of grievous harm to PW1 contrary to the provisions of section 225 of the Penal Code (supra).*

It is so ordered.

Sgd: A. A. MKAMA -RM

13th September, 2019".

It is further apparent in the record of appeal that after that conclusion, the trial Resident Magistrate recorded the mitigation of the appellants and Saitoti Kadiri and the response of the prosecution with regard to the previous record. Ultimately, he proceeded to sentence the appellants on all three counts as intimated above.

From the reproduced concluding part of the trial court's judgment, firstly, it is apparent that though it seems that the trial magistrate made a finding that the appellants committed the offences in respect of the first and third counts in the charge, he did not convict them for the said offences as required by law. Secondly, there is no indication that he discussed and made finding with regard to the second count of cattle theft, though in the end, he sentenced them in connection with the said offence.

Considering the nature of the judgment of the trial court, we have no hesitation to state that, the omission by the trial Resident Magistrate to make a finding on the second count followed by the failure to convict the appellants and Saitoti Kadiri in respect of all three counts is a fatal irregularity which occasioned a failure of justice. Basically, the appellants could not have been legally sentenced in respect of all counts without

being convicted as required by the law. For clarity, section 235 (1) of the Criminal Procedure Act, Cap 20 (the CPA) states:

> *"235 (1) The Court, having heard both the complaint and the accused person and their witnesses and the evidence, shall convict the accused person and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penai Code".*

In this regard, gauging from the judgment of the trial court, it is not clear why there is no discussion and the finding which was made with regard to the second count and the convictions in respect of all counts.

We must emphasize that clarity and compliance with the law in composing a judgment of the court is of paramount importance. It is in this regard that section 312 of the CPA provide as follows:

> *"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.

(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.

(3) In case of an acquittal, the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.

(4) N/A".

In the case at hand, the absence of the finding in respect of the second count and convictions in all counts rendered the judgment of the trial court a nullity. Indeed, no appeal to the first appellate court and this Court can be valid against a nullity judgment. For this stance, see **Jonathan Mluguani v. The Republic**, Criminal Appeal No. 15 of 2011, **Rwazibukya Tibabyekomya v. The Republic**, Criminal Appeal No. 218 of 2011 and **Juma Jackson @ Shida v. The Republic**, (Criminal Appeal No. 254 of 2011 (all unreported), **John Zungungeni v. The Republic**, (Criminal Appeal No. 281 of 2018) [2022] TZCA 464 (22nd July 2022, TANZLII) and **Ramadhani Athumani Mohamed v. Republic**, (Criminal Appeal No. 456 of 2015) [2016] TZCA 722 (29 June 2016, TANZLII).

In **John s/o Charles v. The Republic**, Criminal Appeal No. 190 of 2011 (unreported), the Court emphasized the importance of compliance with the mandatory provisions of sections 235 (1) and 312 (2) of the CPA thus:

> *"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 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'."*

Moreover, in **Omari Hassan Kipara v. The Republic**, Criminal Appeal No. 80 of 2012 (unreported), the Court reiterated the stance that the sentence imposed by the trial court must be preceded by conviction of the accused in the following terms:

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

Indeed, in **Aman Fungabikasi v. The Republic**, Criminal Appeal No. 270 of 2008 (unreported), the Court 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".*

It is acknowledged that a conviction is one of the fundamentals of a judgment in terms of section 312 (2) of the CPA (see **Shabani Iddi Jololo and 3 Others v. The Republic**, Criminal Appeal No. 200 of 2006 (unreported). It follows that failure by the trial court to enter conviction is an incurable illegality which will render such a judgment and the sentence passed a nullity.

We are mindful of the prayer by the appellants that as convictions were not entered, we should nullify the entire proceedings of both courts below and set them free. We are equally alive to the submission and prayer of the learned Senior State Attorney that we only nullify part of the judgment of the trial court from the stage of mitigation and set aside the sentences imposed on the appellants. We also take note of her prayer that we should nullify the proceedings of the first appellate court and remit the file to the trial court for it to enter convictions as required by the law.

Indeed, we are aware that in our several decisions, the Court remits the record to the trial court for entering a conviction after vacating the judgment and sentence as well as the proceedings of the first appellate court (see **Ramadhani Athuman Mohamed v. The Republic** (supra). However, in the circumstances of this case, we respectful decline to follow that route. This is because, the omission by the trial court is not only on the failure to enter convictions against the appellants but also its omission to discuss and make a finding on the second count in the charge though it heard evidence of the parties on the same. This is contrary to the provisions of section 312 (1) of the CPA on the essential contents of the judgment.

At this juncture, we subscribe to the observation of the Supreme Court of Zambia in **Mohamed Aretha v. Habasouder** [2007] Z.R. 100 where it was stated:

> *"By failing to make specific finding of fact, the court had in effect failed to render a judgment. The trial judge in this case failed to make some specific findings of facts and law in her judgment. Consequently, we find in effect, he failed to render a judgment. It is also our finding that there is a miscarriage of justice where a trial judge convicts an accused person without rendering a judgment".*

Therefore, the judgment of the trial court falls short of what a judgment is supposed to contain as provided for by sections 235 (1) and 312 of the CPA. To this end, the trial court failed to render a judgment and as a result miscarriage of justice was occasioned.

In the event, considering the nature of the anomaly in the judgment of the trial court exposed above, we are of the view that this is not a fit case in which we can proceed to nullify the entire proceedings and set the appellants free on the contention that the omission is attributed to the lack of seriousness by the trial magistrate. Equally important, we are of the view that this is not a case in which we have to nullify only part of the judgment of the trial court from the stage of mitigation and order it to enter convictions as urged by the learned Senior State Attorney.

On the contrary, we hold that it is in the interest of justice to nullify the trial court's judgment and the entire proceedings of the first appellate court followed by and order remitting the file for the trial Resident Magistrate to compose a fresh judgment in accordance with the law.

Consequently, we invoke the provisions of section 4 (2) of the AJA, to nullify the judgment of the trial court and the proceedings of the first appellate court in Criminal Case No. 204 of 2018 and Criminal Appeal No. 56 of 2021 respectively and set aside the sentences imposed on the appellants. In the result, we order that the file in Criminal Case No. 204 of 2018 be remitted to the trial court for the trial Resident Magistrate to

compose a fresh judgment in accordance with the law as soon as practicable. We further order that the appellants should remain in custody pending composition and delivery of the judgment by the trial court. It so ordered.

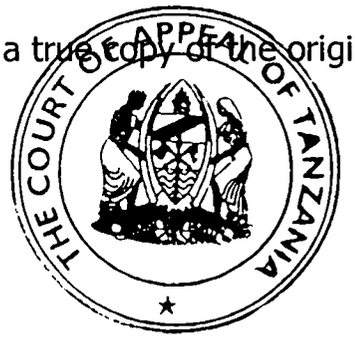
DATED at **ARUSHA** this 22nd day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 23rd day of February, 2024 in the presence of the 1st and 2nd appellants in person and Mr. Godfrey C. Nugu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL