The Court of Appeal of Tanzania at Dodoma CORAM: MSOFFE, J.A, RUTAKANGWA, J.A, BWANA, J.A) CRIMINAL APPEAL NO 200 OF 2006	1. SHABANI IDDI JOLOLO 2.SUFIANI RAMADHANI 3. IDDI BAKARI @ SEJE MAEMBE 4.SALUMU RAJABU @ KAJENGA…. APPELLANT VERSUS THE REPUBLIC …. RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dodoma (DC) Criminal Appeal No 36 of 2004	Failure by a trial court to enter a conviction of the accused person is fatal. See section 235(1) of CPA [CAP 20 R.E 2002] which states that the Court having heard …"shall" convict the accused… is mandatory". The Court also discussed the prerequisites of the evidence visual identification as discussed in the celebrated case of Waziri Amani V.R [1980] TLR 250 favourable conditions for identification.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 200 OF 2006

1. **SHABANI IDDI JOLOLO**
2. **SUFIANI RAMADHANI**
3. **IDDI BAKARI @ SEJE MAEMBE**
4. **SALUMU RAJABU @ KAJENGA**

…… APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 17th day of May, 2006
in
(DC) Criminal Appeal No. 36 of 2004

JUDGMENT OF THE COURT

13 & 16 October, 2009

MSOFFE, J.A.

The complainant, PW1, SHABANI RAJABU KIULA, testified and told the District Court of Kondoa that on 7/1/2002 at around 11.45 p.m. bandits broke into his shop shortly after he had come in from attending to a call of nature outside. In an attempt at stopping the bandits from entering into the shop he put up some resistance. He pushed the door to close from inside while the bandits were pushing and forcing it to open from outside. He was, however, overpowered and the bandits finally gained access into the shop. One of them had a torch. In the shop there was a wick lamp which was not put off. So, with the aid of the wick lamp he managed to identify the first appellant SHABANI IDDI @ JOLOLO who had a *"sime"*, the second

appellant SUFIANI RAMADHANI who had an iron bar, and SWALEHE ABDI @ HIJA whose appeal to the High Court at Dodoma (Masanche, J.) was allowed and he was accordingly released from prison. In the course of the above encounter, PW1 was critically injured. According to the PF3 which was produced and admitted in evidence at the trial he sustained "multiple cut wounds".

In the meantime, as an alarm was being raised, PW2 FARIDA SHABANI, the complainant's daughter, came in from a neighbouring house. She had a torch with the aid of which, she said, she identified the fourth appellant SALUM RAJABU @ KAJENGA.

In the course of investigations, a number of items were recovered from some of the accused persons. For purposes of this appeal, only the fourth appellant was found with an item – a "muslim" cap to be specific.

The District Court of Kondoa, (Mtuiy, PDM) opined and held that the prosecution case against the appellants was proved beyond reasonable doubt. He accordingly found them guilty of the offence of armed robbery. He did not, however, convict them! We wish to

observe here in passing that we will come back to this point later in the course of this judgment. Dissatisfied, the appellants preferred a first appeal to the High Court at Dodoma where Masanche, J. dismissed it, hence this second appeal. Before us, they appeared in person(s) while the respondent Republic was represented by Mr. Justus Mulokozi, learned Principal State Attorney, who argued in support of the appeal.

The first point that falls for consideration arises from that portion of the judgment of the District Court where the learned Principal District Magistrate said in conclusion as follows:-

> *This court is of the settled view the prosecution has listed the balance of the scale of justice on its side, thus enable me enter all 6 accused persons found guilty under Armed Robbery c/s 285 and 286 of the Penal Code, as amended by Act 10 of 1989.*

It will be noticed at once that having concluded so, the magistrate did not proceed further and convict the accused persons

before passing sentence. The crucial question is whether or not having found the accused persons guilty he was not entitled in law to convict them. Admittedly, this point was not canvassed in the first appeal to the High Court. However, this being a point of law we are duty bound to address it on this second appeal.

Without hesitation, Mr. Mulokozi was of the affirmative view that the failure by the magistrate to enter a conviction was fatal. With respect, we agree with him.

Section 235 (1) of the **Criminal Procedure Act** (CAP 20 R.E. 2002), hereinafter the **Act**, provides:-

> *(1) 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.)

We wish to observe here that the above **sub-section** is couched in mandatory terms. This is evidenced by the use of the word "shall" in the **sub-section**. In this context, **Section 53 (2)** of the **Interpretation of Laws Act** (CAP 1 R.E. 2002) is important. It provides:-

> *(2) 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 follows, therefore, that having found the accused persons guilty of the offence charged, it was imperative upon the magistrate to **convict** them before passing sentence. In the absence of **a conviction**, one of the prerequisites of a judgment in terms of **section 312 (2)** of the **Act** was, therefore, missing. The **sub-section** reads:-

> *(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.*
> (Emphasis supplied.)

Hence, in the absence of a conviction entered in terms of **section 235 (1)** of the **Act**, there was no valid judgment upon which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no leg to stand on. In fact, technically the "appeal" to the High Court was in the circumstances against sentence only because there was no conviction. In similar vein, this appeal is also incompetent for being based on an invalid judgment of the High Court. It follows that we could have determined the appeal on this point alone.

In the interests of justice, however, we have deemed it fit and just to proceed further and make a number of points as shall be demonstrated hereunder.

As it is, we could have easily nullified the judgment of the High Court and then remit the record to the District Court with directions

to enter a conviction. We have, however, refrained from doing so because, we think, that would be a time wasting exercise. We say so because in our perusal, understanding, and appreciation of the evidence on record we are satisfied that there was no strong or cogent evidence upon which a conviction could safely lie against the appellants. In saying so, we are aware that in a second appeal this Court is slow, or rather cautious, in interfering with findings of fact by the courts below. The Court normally interferes where there are misdirections or non-directions on the evidence or a misapprehension of the evidence.

As correctly submitted by Mr. Mulokozi, the determination of the case depended on identification. Indeed, the courts below were alive to this important aspect of the case, and the High Court in particular cited the celebrated case of **Waziri Amani v R** (1980) TLR 250, on the evidence of visual identification.

Admittedly, the incident took place at night. The question is whether or not the prevailing conditions were favourable for correct identification of the appellants.

As already observed, PW1 testified and stated that he identified the first and second appellants and SWALEHE ABDI. Apparently he said nothing about the third appellant IDDI BAKARI @ SEJE MAEMBE and the fourth appellant. Nonetheless, we ask ourselves this question. Can it be safely said and concluded that he adequately and correctly identified the first and second appellants on the fateful night and time in question? With respect, we think he did not. We say so for the following reasons. **One**, he was seeing the appellants for the first time. If so, we would have expected him to have, at the very least, said **how** he identified them. It was not enough for him to say that he identified them because one was holding a *"sime"* and the other an iron bar, without more. For instance, we would have expected him to adduce evidence of their descriptions, whether they had any distinctive clothing etc. **Two**, a word or two about the wick lamp. No evidence was forthcoming from PW1 to show whether it was placed on a vantage point from where he could easily identify the appellants, whether the light coming therefrom was bright enough to allow for correct identification etc.

As already stated, PW2 said that she identified the fourth appellant with the aid of a torch. Yet again, we are not told whether its light was bright enough to enable her identify this appellant properly. We think that PW2 ought to have said more on **how** she identified this appellant, more so because she was seeing him for the first time.

It will be recalled that besides the fourth appellant there was no evidence that any of the other appellants was found with the recovered items. It was alleged that the fourth appellant was found with a "muslim" cap belonging to PW1. It should be pointed out here that a "muslim" cap is a common apparel which can be put on by anybody. If so, we would have expected evidence from PW1 describing the cap in question. For instance, he could have stated whether it had any distinct marks, colour etc. In the absence of such evidence, it could not be safely held that the cap was one of the items stolen from PW1 on the fateful night.

In the upshot, we are of the settled view that the prosecution case against the appellants was not proved beyond reasonable

doubt. We accordingly allow the "appeal" and set aside the sentence. The appellants are to be released from prison unless they are lawfully held.

DATED at DODOMA this 16th day of October, 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(Z. A. MARUMA)
DEPUTY REGISTRAR