

**IN THE COURT OF APPEAL OF TANZANIA  
AT TABORA**

**(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 88 OF 2012**

**1. FREDRICK S/O GODSON }  
2. JACOB S/O DANIEL } .....APPELLANTS**

**VERSUS**

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

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

**( Songoro, J. )**

**dated the 7<sup>th</sup> day of March, 2010**

**in**

**DC. Criminal Appeal No. 97 of 193 of 2009**

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**JUDGMENT OF THE COURT**

**17<sup>th</sup> & 25<sup>th</sup> September, 2013**

**MANDIA, J.A.:**

On 3<sup>rd</sup> September, 2007 at 7.30 p.m. PW2 Bennie Kisonese sent her daughter PW1 Naomi Raphael to buy flour at the local shop. Naomi went to buy the flour as ordered by her mother. On the way back she met the second appellant who kicked PW1 Naomi Raphael in the shin and she fell down. At the same time the two other persons appeared at the scene, and

PW1 recognized these as the first appellant Fredrick s/o Godson and another person called Alex who did not feature in the case. The evidence of Naomi shows that the three boys took her to their home, where they gagged her and took turns at raping her. Jacob the second appellant started, followed by the first appellant Fredrick and lastly Alex who was not included in the case. After the ordeal of rape the first and second appellant ran away, leaving Naomi Raphael with Alex. Naomi gave evidence that she spent the night with Alex until the morning of 4<sup>th</sup> September, 2007. At 6a.m. in the morning Alex told PW1 Naomi to go away, and she refused. Alex then reportedly dragged her to the door, pushed her out and locked the door and left for school. Thereafter, Naomi Raphael went back to her home and did not find her mother at home. The mother came back at 11 a.m. of 4<sup>th</sup> September, 2007 and asked Naomi why she did not come back home after buying the flour. Naomi narrated the story of rape to her mother. Thereafter, the mother and daughter went to the home of the second appellant Jacob where Jacob admitted to have committed the rape and offered sh. 10,000/= so that the matter ends there.

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Naomi's mother PW2 Bennie Kisonene corroborates Naomi's evidence about the errand of going to buy flour, and how it ended with Naomi spending the night away from home, and how Naomi reported her ordeal on the evening of 4<sup>th</sup> September, 2007. She adds that on the morning of 4<sup>th</sup> September, 2007 she went out for shamba work and got the report of rape from Naomi on coming back from shamba at 11 a.m. She took Naomi to the second appellant Jacob's home and confronted him with the allegation of rape in the presence of a neighbor PW3 Agnes Daniel who escorted her. Jacob admitted to have committed the rape with two other persons called Fredrick and Alex. Not knowing what to do she went back home and both herself and her daughter PW1 Naomi decided to keep quiet about the whole affair. Both PW1 Naomi and her mother PW2 Bennie Kisonene testified that seventeen days after the rape, a relative called Stanley Darasa visited them. They narrated the rape story to him. He advised them to report the matter to the Police. They did, and the appellants were arrested and charged.

The appellants defended themselves on oath and alleged they were each arrested on 15<sup>th</sup> October, 2007 for an offence of rape they did not know of.

After the appellants had defended themselves the trial court adjourned the case for judgment which was pronounced on 7/12/2007. The last paragraph of the judgment of the trial court reads thus; -

*"So, I am quite convinced that the accused persons have both committed the charge offence of Rape c/s 131A of the Penal Code Cap. 16 Vol. 1 of the law Revised Edition 2002.*

*Sgd G.E. Ndeoruo  
Resident Magistrate."*

Immediately thereafter the prosecutor informed the court that the appellants have no previous record and the court allowed the appellants to address the trial court in mitigation following the prosecutor's address. The court then sentenced each one of the two appellants to thirty years imprisonment.

On the same date 7/12/2007, the appellants gave notice of intention to appeal, and on 14<sup>th</sup> December lodged their appeal against conviction in the High Court of Tanzania at Tabora. The appeal was argued on 8/6/2011 and the respondent Republic was represented by Ms Juliana Moka, learned State Attorney, who did not support **the conviction and sentence**. After hearing of the appeal, judgment was rendered in which the first appellate judge differed with the learned State Attorney, and dismissed the appellant's appeal against conviction and sentence. The hearing of the appeal at the High Court showed clearly that both the appellants and respondent Republic, as well as the first appellate court, had the impression that the trial court had entered a conviction against the appellants.

In his appeal to this Court each one of the two appellants has filed a separate memorandum of appeal each containing eight grounds of appeal. The content of each memorandum is similar word for word, with the other. The grounds of complaint raised in each one of the two memoranda can be summarized thus: -

- (1) *that the trial court improperly admitted the medical report PF3 tendered in evidence by the complaint, as it offended section 240(3) of the Criminal Procedure Act, Chapter 20 R.E. 2002 of the laws.*
  
- (2) *that the trial court and the first appellate court improperly took into record evidence of a confession purportedly made by the second appellant without taking into consideration Section 27 of the Evidence Act on the taking of confessions.*
  
- (3) *That both courts below failed to realize that PW2 had failed to realize that PW2 had failed to report to any local leader that her daughter is missing after she sent her to buy flour, which shows her evidence is a lie.*



*(4) That the two lower courts erred in believing the evidence of the two women, mother and daughter because girls and women sometimes tell entirely false stories which are easy to fabricate but very difficult to refute.*

Both appellants appeared in person, unrepresented, at the hearing of the appeal. The respondent Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney. The learned Senior State Attorney did not support the conviction and sentence, and pointed out that in fact there was no conviction in the trial court yet, at page 51 of the record, the first appellate decided to uphold "both the conviction and sentence entered by the trial court". It is obvious that the appellate High Court could not uphold a conviction which was not there. The situation here is similar to that in **AMANI FUNGABIKASI versus THE REPUBLIC**, Criminal Appeal No. 270 of 2008 (unreported) where no conviction was entered by the trial court, and this Court held that the trial court's proceedings were a nullity, a situation which also made the appellate proceedings in the High Court also a nullity. Why? The reason is simple, and it flows from the imperatives of Section 235 and Section 312 of the Criminal Procedure Act. Under Section

235(1) the trial court, having heard both the complainant and the accused person and the witnesses and the evidence must do one of four things, namely: -

- (a) convict the accused person and pass sentence upon him or her, or;*
- (b) make an order against him/her according to law, or;*
- (c) acquit the accuse person; or*
- (d) dismiss the charge under Section 38 of the Penal Code.*

How does the trial court perform four functions listed in Section 235(1) of the Criminal Procedure Act? The answer is provided by Section 312(1) of the Criminal Procedure Act, which lays it down that the respective functions enumerated in Section 235(1) shall be performed by the trial court: -

- (a) writing a judgment, or reducing the judgment to writing under the personal direction and*

*superintendence of the presiding judge or  
magistrate in the language of the court.*

*(b) Ensuring that the contains: -*

*(i) point or points for determination*

*(ii) the decision thereon*

*(iii) the reasons for the decision*

*(iv) the date*

*(v) the signature of the presiding officer as  
of the date on which it is pronounced in  
open court.*

A close reading of both Sections 235(1) and 312(1) shows that they complement each other. Section 235(1) lays it down that after the trial the court must make a decision, and Section 312(1) elaborates on how the decision should be arrived at and its components. The decision involves doing one of the three things a trial is required to do in Section 235(1) of the Criminal Procedure Act. Since one of alternative the requirements of

section 235(1) is convicting and passing sentence, passing sentence without convicting as has been done in this case goes against the grain of both Sections 235(1) and 312(1) of the Criminal Procedure Act. This Court has held in:-1. **SHABANI IDDI JOLOLO** 2. **SUFIANI RAMADHANI** 3. **IDDI BAKARI @ SEJE MEMBE** 4. **SALUMU RAJABU @ KAJENGA** **Versus THE REPUBLIC**, Criminal Appeal No. 200 of 2006 (unreported), as well as in **KHAMIS RASHAD SHABAN versus DIRECTOR OF PUBLIC PROSECUTIONS ZANZIBAR** Criminal Appeal No. 184 of 2012 (unreported) and **AMANI FUNGABIKASI v REPUBLIC**, Criminal Appeal No. 270 of 2008 (unreported) that a judgment which lacks a conviction is no judgment at all. In the **AMANI FUNGABIKASI** case (supra) this Court was minded to remit the record to the trial court for entering of a conviction after vacating the appellate proceedings in the High Court, but it desisted from doing so because it considered doing so a **wasteful exercise** on account of the fact that the trial court proceedings showed that a case was not made out against the appellant to justify remittance of the record. In the present case however, save for the lack of conviction, there is evidence showing the reverse. Acting under Section 4(2) of the Appellate Jurisdiction Act, we nullify the appellate proceedings in the High

Court and remit the record to the trial court with directions to enter a conviction. After the conviction the appellants can process their appeal in the manner provided under the law.

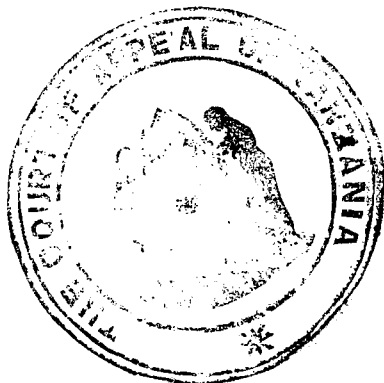
DATED at TABORA this 24<sup>th</sup> day of September, 2013.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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



  
Z. A. MARUMA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**