

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

(CORAM: KILEO, J.A., ORIYO, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 267 OF 2011

ELIA JOHNAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Arusha)**

(Sambo, J.)

Dated the 2nd day of June, 2011

in

Criminal Appeal No. 72 of 2009

JUDGMENT OF THE COURT

2nd & 5th September, 2014

ORIYO, J.A.:

The appellant, Elia John, is challenging the concurrent findings of the courts below that in the early morning hours on the 6th day of February, 2008, at Orkesment town in Simanjiro District, Manyara Region, he unlawfully had carnal knowledge against the order of nature of one Jackson Abel, a boy aged twelve (12) years, contrary to section 154 (1) of the Penal Code. The District Court of Kiteto at Kibaya sentenced him to

serve a prison term of thirty (30) years. He unsuccessfully appealed to the High Court, hence the second appeal.

Before us, the appellant appeared in person, while the respondent Republic, was represented by Ms. Elizabeth Swai, learned State Attorney. The Court inquired the appellant whether he would wish to make submissions in support of the four (4) grounds of appeal shown in his memorandum of appeal or let the learned State Attorney submit first and then make his submissions in reply thereafter. He prayed that the learned State Attorney submits for the Republic first and he would thereafter reply thereon.

However, before hearing the parties, the Court **suo motu** drew their attention to an omission in the trial court's proceedings in that the appellant was found guilty of the offence as charged but was not convicted in terms of **section 235 (1)**, of the Criminal Procedure Act, Cap. 20. The trial magistrate merely proceeded to sentence the appellant (then an accused person).

This being a legal issue, understandably, the appellant, an unrepresented layman, had nothing to say in response thereto. On the other hand, the learned State Attorney was quick to react. She stated that she had noted the omission by the trial court to enter a conviction against the appellant before sentencing him, which was contrary to the clear provisions of sections 235 (1) and 312 of the Criminal Procedure Act. As for the remedy available in such circumstances, M/s Swai submitted that in the absence of a conviction before sentencing; the appeal is rendered incompetent. Relying on the decision of the Court in the case of **Zainab Nassoro vs Republic**, Criminal Appeal No. 296 of 2013, (unreported), she prayed that the Court exercises its powers under Section 4 (2) of the Appellate Jurisdiction Act, Cap. 141, to quash and set aside the proceedings and the decision of the first appellate court as there was no competent appeal before it.

Section 235 (1) of the Criminal Procedure Act, provides:

*"The Court having heard both the complainant
and the accused person and their witnesses and*

*the evidence, **shall convict the accused person** and pass sentence 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).*

Therefore, in the absence of a conviction, in law, there was no competent judgment which the High Court could uphold or dismiss, in terms of **section 312 (2) of the Criminal Procedure Act which states:**

*"312 (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).

The failure by the trial court to comply with the mandatory provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act, rendered its

judgment incompetent which could neither be upheld nor dismissed by the first appellate court.

When seized with the determination of the appeal, the first appellate court, (Sambo, J.), apparently, did not take note of the trial court's omission to convict the appellant. In upholding the trial court judgment, it stated:

*"For all these reasons, the appellant was rightly
convicted...In the result, I do dismiss this appeal
in its entirety." (Emphasis ours).*

On our part, we agree with the learned State Attorney that in the absence of a conviction before sentencing in the trial court, there was no competent appeal before the first appellate court and consequently there is no competent appeal before us. And as this Court had occasion to observe in the case of **Amani Fungabikasi vs Republic**, Criminal Appeal No. 270 of 2008, (unreported), that a judgment which lacks a conviction is no judgment at all. See also the Court's decisions in **Shabani Iddi Jololo and Others vs Republic**, Criminal Appeal No. 200 of 2006, **Frederick**

s/o Godson vs Republic, Criminal Appeal No. 88 of 2012, **Juma Slackson @ Shija vs Republic**, Criminal Appeal No. 254 of 2011, **Zainab Nassoro vs Republic** (supra), **Joseph Kanankira vs Republic**, Criminal Appeal No. 387 of 2013, among others.

In the event, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act to quash and set aside the proceedings and judgment of the first appeal to the High Court. We remit the record of the trial to the District Court of **Kiteto** at **Kibaya** for it to compose a proper judgment by entering a conviction and sentence the appellant in compliance with the mandatory provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act, (supra).

In the meanwhile, we order that the appellant shall remain in custody pending finalization and delivery of the judgment by the District Court. We further direct, in the interests of justice, that the prison sentence should start to run from the day the appellant was initially incarcerated on 9th June 2008.

Thereafter the appellant may, if he deems it fit, process his appeal in accordance with the relevant laws.

DATED at **ARUSHA** this 4th day of September, 2014.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL