IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 190 OF 2011

JOHN S/O CHARLES ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Wambali, J.)

dated the 11th day of May, 2011

in

Criminal Case No. 74 of 2010

RULING OF THE COURT

12th & 16th June, 2014

MASSATI, J.A.:

The appellant was charged with and "found guilty" of two counts of arson, and causing grievous harm. He was sentenced to 15 years and 2 years imprisonment for the respective counts and ordered to pay Shs. 1,000,000 as compensation. His appeal to the High Court was unsuccessful. He has now come to this Court on a second appeal.

In this Court, the appellant had filed a five ground_memorandum of appeal, to challenge both conviction and sentence. He appeared in person

to argue the appeal. The respondent was represented by Mr. Edward Mokiwa, learned State Attorney. Both were ready for the hearing of the appeal.

However, before they embarked on hearing the appeal, we invited Mr. Mokiwa to address us, on whether there was any conviction in the trial court's judgment which could be challenged both in the High Court and in this Court. He admitted that there was none, and that this was contrary to section 312(2) of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA). As a consequence, the judgment was a nullity. He therefore invited this Court to exercise is revisional powers under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E. 2002, and quash the proceedings and judgment of the High Court and the judgment of the trial court, and remit the file back to the trial court for it to compose a judgment according to law. On his part, the appellant said that if the Court was going to remit the trial Court's record, it should also order it to take into consideration the period he has already spent in prison so far, in sentencing.

It is true that in its judgment the trial court said:-

"I have carefully and judiciously considered the prosecution evidence and found the defence evidence has not properly raised a reasonable doubt hence I am satisfied to find the prosecution has properly proved their case beyond reasonable (sic) and therefore the accused person John s/o Charles is guilty as charged with both counts first Arson c/s 319(a) and 2nd count Grievous harm c/s 225 both of the penal code Cap 16 R.E. 2002."

He then started the sentencing process.

Judgment writing in subordinate courts is governed by sections 235 and 312 of the CPA Cap 20 R.E. 2002.

Section 235(1) provides:-

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

And section 312(2) of the Act, provides:-

"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."

It is clear that both provisions of the CPA require that in the case of a conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged; because the term "guilty as charged" 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".

There are a number of decisions of this Court to the effect that failure to enter a convictions, renders a judgment incompetent. In **AMANI FUNGABIKASI V R.**, Criminal Appeal No. 270 of 2008 (unreported) the Court said:-

> *"It was imperative upon the trial District 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. In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312(2) of the Act was missing. So, since there was no 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."*

(See also **SHABANI IDDI JOLOLO AND THREE OTHERS V R.**, Criminal Appeal No. 200 of 2006; **HASSAN MWAMBANGA V R.**, Criminal Appeal No. 410 of 2013 (both unreported). In **MWAMBANGA'S case** (Supra) the Court formulated the law thus:-

> *"it is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction."*

Since in the present case, the trial court did not enter a conviction, the judgment and the subsequent sentence were a nullity. Since they were a nullity there was nothing which the High Court could have upheld. In the circumstances, we invoke our revisionary powers under section 4(2) of the Appellate Jurisdiction Act to quash and set aside the alleged judgment and sentence of the trial court. As a matter of course, we also quash and set aside the proceedings in the judgment on appeal of the High Court. We

order that the record be remitted to the trial court for it to compose a proper judgment by entering a conviction and sentence on the appellant according to law. As prayed by the appellant, and in the interests of justice we direct that the prison sentence should begin to run from the day of the initial incarceration. Meanwhile, we order that the appellant remain in custody, and be produced before the trial court on the day the judgment is read and the sentence passed.

It is so ordered.

DATED at TABORA this 13th day of June, 2014.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL