

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

(CORAM: LUANDA, J.A, MASSATI, J.A And MUGASHA, J.A)

CRIMINAL APPEAL NO 419 OF 2015

**EMMANUEL KABELELEAPPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Tabora)**

(Mruma, J)

**Dated the 28th day of August, 2015
In
Criminal Appeal No. 32 of 2014**

.....

JUDGMENT OF THE COURT

30th November, & 2nd December, 2015

MUGASHA, J.A:

In the District Court of Shinyanga, the appellant was charged with rape contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code [**CAP 16 RE. 2002**]. The appellant was sentenced to imprisonment to a term of 30 years with a total of 12 strokes. The appellant was further ordered to pay a fine of Tshs. 500,000/= to the victim for injuries caused during the alleged rape. Aggrieved, the appellant appealed to the High Court which dismissed the appeal in its entirety. Still dissatisfied, the appellant seeks to challenge the decision of the 1st appellate Court. The memorandum of Appeal basically contains two grounds namely:

- 1. That, the 1st appellate court wrongly upheld the trial court's error of sentencing without any CONVICTION and ignored the provision of law that before sentence the accused must be convicted.*
- 2. That, the 1st appellate court erred in law in believing varying prosecution evidence on the age of the victim PW1.*

The appellant appeared in person and the Respondent Republic was represented by Mr. Idelphonce Mukandara, learned State Attorney. The appellant opted to hear initially, the submission of the learned State Attorney.

Addressing the 1st ground of appeal, the learned State Attorney submitted that, the appellant was sentenced without being convicted which is contrary to the mandatory requirements of section 235(1) of the Criminal Procedure Act Cap. RE 2002. He referred us to the case **MATOLA S/O KAJUNI AND TWO OTHERS VS REPUBLIC**, Criminal Appeals No. 145,146,147 of 2011.

He added that, in the absence of conviction by the trial court the sentence was a nullity and so are subsequent proceedings in the first appeal before the High Court. Thus, he urged the Court to order a retrial. On the other hand, the appellant being a layman had nothing useful to submit on the said point of law. He only sought to be released arguing that, he did not commit the alleged offence.

On our part, it is without dispute that, the appellant was sentenced without being convicted. This is evident at page 35 of the record whereby before the sentencing of the accused the trial Magistrate made the following finding:-

"Lastly, this Court found the accused person guilty as he is charged with rape c/s 130(1) of the Penal Code Cap 16 RE 2002."

Thereafter, the record indicates the prosecution's address on the appellant being first offender and the mitigating factors of the appellant. Finally the trial Magistrate sentenced the appellant. It is apparent that, in the first appellate court, the anomaly was unnoticed and the appeal was heard relying on a wrong assumption that the appellant was convicted which was not the case. The criminal trial of the appellant ought to have been concluded by conviction before prescription of sentence. This is a mandatory requirement of the law as provided under section 235 (1) of the Criminal Procedure Act [**CAP 20 RE, 2002**] which states:

*"The Court, having heard both 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" (Emphasis supplied).*

In **AMANI FUNGABIKASI v. REPUBLIC**, Criminal Appeal No. 270 of 2008 faced with an appeal originating from a trial upon which the appellant was not convicted, 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."

The Court has in several decisions restated that, it is a mandatory statutory requirement of the law to convict before imposing a sentence and failure to do so contravenes section 235(1) of CPA. Narrating on the effect of noncompliance, in **MATOLA S/O KAJUNI AND TWO OTHERS VS REPUBLIC**, the Court restated that, failure by a trial subordinate Court to enter conviction is a fatal and incurable irregularity which will render such judgment a nullity and before the High Court no appeal can stem therefrom. In **JONATHAN MLUGUANI Vs. REPUBLIC**, Criminal Appeal no. 15 of 2011 the Court, categorically restated that, conviction precedes sentence and as such, there cannot be a sentence without conviction.

Furthermore, in **KHAMIS RASHID Vs. REPUBLIC**, Criminal Appeal No. 184 Of 2012 the Court, addressing on the legality of sentence without there being a conviction held that, an accused person cannot be lawfully sentenced to any punishment, unless and until, he or she has been duly convicted of particular

offence. In **SHABANI IDDI JOLOLO AND 3 Others Vs. REPUBLIC**, Criminal Appeal no. 200 of 2006 (unreported) the Court reiterated that a conviction is one of the pre-requisites of a judgment in terms of Section 312 (2) of Criminal Procedure Act which states:

"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".

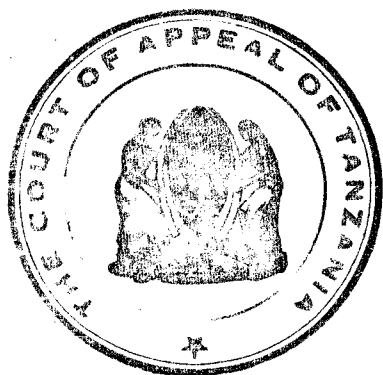
In the light of the cited authorities, conviction should not miss in the judgment. If conviction is missing, the sentence is illegal and there can be no valid judgement of the trial court against which a first appeal can be lodged in the High Court and subsequently a second appeal to the Court.

As earlier intimated, the anomaly passed unnoticed in the High Court and the appeal was yet heard before the High Court. In the case of **OMARI HASAN KIPARA Vs. REPUBLIC**, Criminal Appeal No. 80 of 2012 (unreported) the Court held that, where the lack of conviction goes unnoticed in the first appellate Court, the judgment of that court becomes defective because it is based on a fatally defective judgment of the trial Court. In our considered view, we think this position adversely impacts on not only the judgment of the first appellate court but also the entire proceedings

appeal before us stems on null proceedings and it is equally affected.

As to the way forward, we invoke revisional powers under section 4(3) of the Appellate Jurisdiction Act [**CAP 141 RE, 2002**] and quash the purported judgment of the trial Court and thirty years imprisonment. Similarly, we quash and set aside the proceedings of the High Court in the first appeal. It is ordered that, the record of trial be returned to the trial court for composition of the judgment as per mandatory requirements of sections 235(1) and 312(2) of the Criminal Procedure Act.

DATED at TABORA this 1st day of December, 2015.

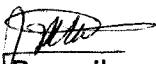


B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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


P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL