IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO 90 OF 2010

YUSUPH JUMA .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mziray, J)

Dated the 18th day of May, 2006
in
(DC)Criminal Appeal No. 18 of 2006

.....

JUDGMENT OF THE COURT

30th November, & 2nd December, 2015

MUGASHA, J.A:

In the District Court of Kasulu, at Kasulu, the appellant was charged with rape c/s 130 and 131 of the Penal Code Cap. 16 of the Laws as read together with section 5 (b) and 6 of Sexual Offences Special Provisions Act. No. 4 of 1998. The particulars of the offence alleged that on 13th January, 2003 at about 13.00 hrs at Majengo area within Kasulu Township, Kasulu District in Kigoma region, the appellant had unlawful carnal knowledge of a four years old girl. The appellant was tried and found guilty and sentenced to life imprisonment and he was further ordered to pay to the victim compensation of Tshs. 500,000/=. The appellant unsuccessfully appealed to the High Court which dismissed the appeal. Still dissatisfied, the appellant

seeks to challenge the decision of the High Court. The Memorandum of Appeal contains five following grounds of appeal.

1. That, the 1st appellate Court wrongly upheld sentence of life imprisonment without the conviction of the appellant.
2. That, the 1st appellate court wrongly upheld the trial court's error of taking the testimony of PW1 **HAPPYNESS d/o GIDEON** a girl of tender age of 4 years without ***VOIRE DIRE EXAMINATION.***
3. That, the 1st appellate court wrongly upheld the trial court's decision relying on evidence of PW2 (victim's mother) and PW2 (the sister in law of PW2 without any corroboration from village leaders.
4. That, the 1st appellate Court wrongly upheld the trial court's decision relying on evidence admitted Ex. P.1 without addressing the appellant on his right to have the Doctor summoned so that he could cross examine him.
5. That the prosecution case was not proved beyond all reasonable doubt.

The appellant appeared in person and Mr. Miraji Kajiru, learned State Attorney represented the respondent/Republic. The appellant opted to initially hear the submission of the learned State attorney reserving the right of reply.

Arguing the 1st ground of appeal, the learned state attorney conceded that the appellant was sentenced without being convicted which is a fatal and incurable irregularity. As such, he urged the Court to quash the proceedings of the High Court and return the case file to the trial court with an order to compose a judgment. The appellant insisted that, he did not commit the offence and urged the Court to set him free.

Before sentencing the appellant, at page 14 of the record the trial magistrate made the following finding:-

> *"I find the accused guilty for the offence of rape c/s 130 and 131 of the Penal Code Cap. 16 as charged accordingly."*

Subsequently, the record shows that after the appellant availed mitigating factors, he was sentenced to life imprisonment.

On our part, we are satisfied that, the appellant was sentenced without being convicted. The law imposes mandatory requirements that in a criminal trial conviction precedes sentence. This is in terms of section 235 (1) of the Criminal Procedure Act **[CAP 20 RE, 2002]** which provides:

> *"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 **JONATHAN MLUGUANI Vs R.,** Criminal Appeal No. 15 of 2011, the Court categorically stated that, in terms of section 235(1) of the Criminal Procedure Act, a conviction precedes sentence and there can be no sentence without a conviction. Furthermore, the Court has in several decisions restated and emphasised on the need to comply with statutory requirement to convict before imposing the sentence. **MATOLA S/O KAJUNI AND TWO OTHERS VS REPUBLIC, CRIMINAL APPEALS No. 145,146,147 of 2011,** the Court held that, the failure by subordinate Court to enter conviction is a fatal incurable irregularity which will render such judgment a nullity as before the High Court no appeal can stem therefrom.

Addressing the important specifics to be contained in the judgment, in **SHABANI IDDI JOLOLO AND 3 OTHERS VS REPUBLIC,** Criminal Appeal No. 200 of 2006 the Court held:-

> *"In the case of conviction the judgment shall specify the offence of which, and section of the Penal Code or other law under which, the accused person is convicted and punishment to which he is sentenced."*

The Court further stated that, a conviction is one of the pre-requisites of a criminal trial in terms of section 312 (2) of the Criminal Procedure Act which categorically 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 matter under scrutiny, the record shows that it is at the sentencing stage when the trial magistrate mentioned the provisions of the Sexual Offences Special Provisions Act. However, this does not cure the irregularity because the appellant was not yet convicted and he could thus not be sentenced.

Therefore, it is a requirement of the law that conviction is one of the prerequisites of a judgment and it should not miss in the judgment. Where conviction is missing, there is no valid judgment and sentence is illegal and no appeal can lie against such judgment. It is unfortunate that, the anomaly was not spotted by the High Court when the appeal was first before it ten years ago. Notwithstanding what transpired in the High Court, the judgment of the trial court was fatally defective and in essence there was no judgment against which the first appeal could be lodged. In this regard, the High Court embarked on a nullity to entertain and determine the appeal. The said adverse effects have a bearing on the appeal before us because it stems on null proceedings.

In view of the aforesaid, the appeal has merit. We therefore allow the appeal. We quash the purported trial court judgment, the sentence of life imprisonment and compensation of Tshs. 500,000/=. Similarly, we quash and set aside the entire proceedings of the High Court in the first Appeal. We order

a proper judgment in terms of the mandatory requirements of section 235 (1) and 312(2) of the Criminal Procedure Act. As the first ground disposes of the appeal we shall not in the circumstances address the remaining grounds.

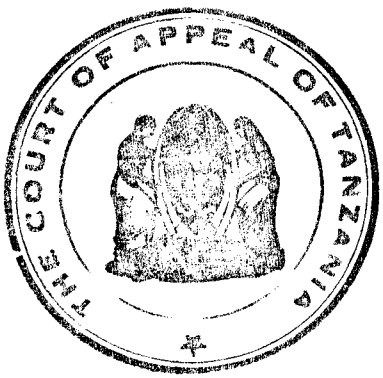
DATED at TABORA this 2nd day of December, 2015.

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