IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: KIMARO, J.A., MUGASHA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 204 OF 2010

1. **ZACHARIA HENRY MAHUSH**
2. **RAMADHANI S/O SAID AMRI @ MAKUKA**
3. **GOODLUCK S/O ERNEST SANGAWE** ..... **APPELLANTS**
4. **ALLY S/O HAMIS NG'ENYA**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at, Dar es Salaam)

(Mlay, J.)

dated the 14th day of March, 2007
in
Criminal Session Case No. 56 of 2003

JUDGMENT OF THE COURT

29th June & 21st July, 2016

MUGASHA, J.A.:

The appellants were found guilty as charged of the offence of murdering one **ELIUTELIUS KAPINGA** on 10th June, 2002 at Mbezi Jangwani, Kinondoni, Dar es Salaam. They were sentenced to suffer death by hanging. Aggrieved, they lodged a notice of appeal to this Court against conviction and sentence which was followed by the Memoranda of appeal whereby all the appellants indicated their dissatisfaction with the decision of the High Court.

When the appeal was called on for hearing, Mr. Abdiel Kitururu, learned counsel represented the 1st appellant and Mr. Odhiambo Kobas, learned counsel represented the 2nd, 3rd and 4th appellants. The Respondent/Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Mr. Nassoro Katuga and Ms. Brenda Massawe, learned State Attorneys.

Before the parties were allowed to argue the appeal on merit, they were called upon to address the Court on the propriety of this appeal since the appellants were prior to sentence not convicted as required under sections 235 (1) and 312 (2) of the Criminal Procedure Act, [CAP 20 R.E. 2002].

Mr. Kweka, apart from acknowledging the lacking conviction of the appellants to be irregular, he proposed to the Court to step into the shoes of the High Court, enter a conviction and then proceed to determine the appeal on merits. In the alternative, he argued that, the Court can rely on the already imposed sentence and presume that, the appellants were accordingly convicted. He cited to us the case of **MUSSA MOHAMED vs REPUBLIC**, Criminal Appeal No. 216 of 2005 (unreported). Mr. Kweka submitted to be aware of recent

decisions where on account of lacking a conviction the Court remitted the record to the trial court for conviction. Besides not citing any of the recent decisions on the matter, he submitted that, the two different positions of the Court are all correct. Mr. Kitururu informed the Court that he was not aware of any other decision other than the one cited by Mr. Kweka. As such, he opted to take side with the position put forth by Republic and urged the Court to proceed with hearing of the appeal on merit.

Mr. Odhiambo, learned counsel who was seemingly cautious submitted that, in the light of his understanding of the law it is not appropriate for the appellate court to enter a conviction and then on appeal determine the very matter. Mr. Kweka repeated what he submitted earlier and urged the Court to invoke revision powers to remedy the irregularity and proceed to hear the appeal.

Appeals to the Court relating to criminal cases is a creature of section 6(1) of the Appellate Jurisdiction Act [CAP 141. 2002] which provides:

*"(1) Any person **convicted** on a trial held by the High Court or by a subordinate court exercising extended powers may appeal to the Court of Appeal–*

(a) where he has been sentenced to death, against conviction on any ground of appeal; and

(b) in any other case–

*(i) against his **conviction** on any ground of appeal; and*

*(ii) against the sentence passed on **conviction** unless the sentence is one fixed by law.*

[Emphasis supplied]

The appellants derive their right of appeal under section 6(1) of the Appellate Jurisdiction Act **[CAP 141 RE.2002]** and can validly lodge an appeal in this Court against the conviction for murder under section 235 (1) which 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]*

Furthermore, section 312 (2) among other things prescribes the content of judgment as follows:-

"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 punishment to which he is sentenced."*

[Emphasis supplied]

In **KHAMIS RASHAD SHABAN vs DIRECTOR OF PUBLIC PROSECUTIONS ZANZIBAR CRIMINAL APPEAL NO. 184 OF 2012,** the appellant was found guilty and sentenced without being convicted. The Court said:

"We wish to make it absolutely clear that..... the law strictly requires the trial High Court to specifically enter a conviction after being satisfied of the guilt of the accused... short of that both the accused and the prosecution would be greatly prejudiced by the omission to enter a conviction...."

The Court further said:

"A declaration that an accused is guilty is not sufficient to bring into play the provisions of section 128 of the Act or even section 6(1) of the AJA. An accused, for instance cannot be lawfully sentenced to any punishment, unless and until, he or she has been dully convicted of a particular offence".

In **JOHN S/O CHARLES VS REPUBLIC,** Criminal Appeal No. 190 of 2011, the Court was confronted with a purported appeal whereby the appellant was found guilty but he was not convicted. Addressing the requirements of sections 235(1) and 321(2) of the Criminal Procedure Act, the Court categorically said:

> *"It is clear that both the 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".*

In view of the cited position of the law, a right of appeal criminal under section 6(1) of AJA, arise if the appellant has been convicted as required under section 235(1) of the CPA and subsequently sentenced under section 312(2) which specifies a conviction as one of the components of a judgment. The wording of section 312(2) strictly requires sentence to follow a conviction.

However, in the instant case, at page 385 of the record the trial Judge said:

"From what has been stated at length above and for the reasons given in the judgment, I find the 5th accused not guilty of murder as charged and he is accordingly acquitted. The 5th accused shall be set at liberty with immediate effect, unless he is otherwise lawfully detained. As for the 1st, 2nd, 3rd and 4th accused, I find each accused guilty of murder as charged".

With a sole declaration that the appellants were found guilty neither can the trial court proceed to impose sentence under section 312(2) of the CPA, nor can the appellants invoke their right of appeal under section 6(1) of AJA. It is clear that the trial judge never convicted the appellants at all. We respectfully opine that this was an inadvertent omission, but it greatly prejudiced the appellants who were condemned to suffer death by hanging without being convicted. As earlier intimated, the appellants could only appeal against the sentence if they were dully convicted of murder. We do not agree with Mr. Kweka learned State Attorney and Mr. Kitururu learned counsel for the 1st appellant that, the Court can enter a conviction of murder. It is our considered view that, conviction is the domain of

the trial court which is arrived at after due consideration of the evidence and arguments canvassed at the trial.

In the circumstances, failure by the trial judge to enter a conviction is fatal and incurable irregularity. The Court has in several decisions held so in: (See **SHABANI IDDI JOLOLO AND THREE OTHERS vs REPUBLIC**, Criminal Appeal No. 200 of 2006, **AMANI FUNGABIKASI VS REPUBLIC CRIMINAL APPEAL NO 270 OF 2008, JOHN S/O CHARLES VS REPUBLIC** (supra), **JONATHAN MLUGUANI vs REPUBLIC**, Criminal Appeal No. 15 of 2011, **ELIA JOHN vs REPUBLIC**, Criminal Appeal No. 267 of 2011, **OROONDI S/O JUMA vs REPUBLIC**, Criminal Appeal No. 236 of 2012 and **MOHAMED ALLY vs REPUBLIC**, Criminal Appeal No. 356 'A' of 2014 (all unreported).

In the above cited cases, the Court nullified, quashed and set aside the judgments of the trial courts in which no convictions had been entered, as well as the proceedings and judgments of the High Court. The Court has always remitted the records to the trial courts to enable either judges or magistrates to compose judgments which were in conformity with the requirements of the law. In this regard,

the instant purported appeal cannot be spared of the already well settled rule.

We wish to address the concern raised that, in the event a conviction is lacking, the Court can enter a conviction or assume existence of a conviction on the basis of the sentence imposed. Initially, and guided by what the Court said in **JOHN S/O CHARLES VS REPUBLIC** (supra) **and KHAMIS RASHAD SHABAN vs DPP** (supra), conviction cannot be assumed as suggested by Mr. Kweka. Besides, as conviction is a mandatory statutory requirement to be complied with after making a finding of guilty, neither can a finding that the appellant is guilty nor the imposition of the sentence suffice to conclude a conviction. Secondly, when the two conflicting decisions are in existence, the Court in **ARCOPAR (O.M) SA vs HARBERY MARWA AND FAMILY INVESTMENTS CO. LTD and TWO OTHERS**, Civil Application No. 94 of 2013, invoked the Canadian jurisprudence set out in **FISKEN el al vs MEEHAN** (1876 46 VC 2. B 146), the court said:

> *"Where there are two conflicting decisions of equal weight, the court should follow the more recent decision".*

Also in another case of **CAMPBELL vs CAMPBELL (1880) 5 APP. CASE**, it was held:

> *"Where two cases cannot be reconciled, the more recent and the more consistent with general principle ought to prevail".*

Adopting the Canadian cases as good practices, the Court in **ARCOPAR (O.M) case** said:-

> *"Following the most recent decisions, in our view, makes a lot of legal common sense, because it makes the law predictable and certain and the principle is timeless....."*

It is now settled law that, where a conviction is lacking that becomes a fatal irregularity. We are constrained to invoke revision powers under section 4(2) of AJA and set aside the sentence.

We further direct that, this record to be remitted back to the trial court and since the trial judge has retired, the file be placed before another judge to enter a conviction in accordance with the law. In the meantime the appellants shall remain in custody pending the finalisation and the delivery of the judgment by the trial court.

We further direct that, this record to be remitted back to the trial court and since the trial judge has retired, the file be placed before another judge to enter a conviction in accordance with the law. In the meantime the appellants shall remain in custody pending the finalisation and the delivery of the judgment by the trial court.

DATED at **DAR-ES-SALAAM** this 5th day of July, 2016.

N. KIMARO
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

R. MZIRAY
JUSTICE OF APPEAL

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

T.K. SIMBA
DEPUTY REGISTRAR
COURT OF APPEAL