

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

(CORAM: LUANDA, J.A., MZIRAY, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 135 OF 2016

MOHAMED ATHUMAN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(An appeal against the conviction and sentence of the High Court
of Tanzania at Tanga)**

(Aboud, J.)

Dated the 2nd day of May, 2016

In

Criminal Appeal No. 45 of 2015

JUDGMENT OF THE COURT

11th & 13th July, 2017

MZIRAY, J.A.:

The appellant was arraigned in the District Court of Handeni with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, R.E. 2002. He was prosecuted after he was alleged to have committed the offence on 25th day of July, 2014 at Kwaduli area, Gombero Village, within Kilindi District in Tanga region. He was accused of having carnal knowledge of one Mboni Daudi (PW1), a girl of ten years. Upon full trial, he was found guilty and sentenced to serve life imprisonment and 10

strokes of the cane. Aggrieved, he unsuccessfully appealed to challenge the decision of the trial District Court at the High Court, hence this present appeal.

At the hearing of the appeal the appellant appeared in person, unrepresented, and adopted his memorandum of appeal, and opted to let the respondent/Republic begin, reserving his right to reply.

Ms. Jeniffer Kaaya, learned State Attorney, declined to support the sentence meted out on the major ground that the trial court did not enter a conviction against the appellant and that the same violated section 235 (1) of the Criminal Procedural Act [Cap. 20 R.E. 2002]. As to the way forward, the learned State Attorney submitted that, the effect of the omission was to vitiate all the proceedings of the courts below. In this, the learned State Attorney cited the case of **Oroondi Juma v. The Republic**, Criminal Appeal No. 236 of 2012 (unreported) as an authority.

The learned State Attorney, however, pointed out that the available evidence on record particularly the evidence of PW1 Mboni Daud and PW2 Nemhina Daud put together is sufficient to sustain conviction of the

appellant. As such, the learned State Attorney urged the Court to order a retrial making reference to the case of **Godi Kasenegala v Republic**, Criminal Appeal No. 10 of 2008 (unreported).

On his part, the appellant, a layman, did not have anything to say in reply and left the matter in hands of the Court to decide.

On our part, we entirely subscribe to the argument by the learned State Attorney. To begin with, it was wrong for the trial Court to impose sentence against the appellant without convicting him. It is settled that no sentence can be passed without a conviction even if an accused is found guilty. See for instance, the case of **Marwa Mwibahi v Republic**, Criminal Appeal No. 7 of 1995 (unreported) in which this Court among other things held:-

"...although there was a finding that the appellant was guilty he was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by conviction, whether it is under section 282 (where there is a plea of guilty)

*or whether it is under section 312 of the CPA
(where there has been a trial)."*

It should also be made clear that judgment writing in subordinate Courts is governed by sections 235 and 312 of the CPA Cap. 20 R.E. 2002. Section 235 (1) provides as follows:-

*"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."*

[Emphasis supplied.]

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."

The two provisions of the CPA require that in the case of a conviction, the conviction must be reflected in the record.

There are a number of decisions of this Court to the effect that failure to enter a conviction renders a judgment incompetent. In **Amani Fungabikasi v Republic**, 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 Republic**, Criminal Appeal No. 200 of 2006; **Hassan Mwambanga v. Republic**, Criminal Appeal No. 410 of 2013 (both unreported). In **Mwambaga'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."

From the foregoing, and in view of the fact that the trial court omitted to enter a conviction we declare that the judgment of the District Court is to that extent fatally defective. Since the trial court's judgment was invalid, it could not have founded a proper appeal before the High Court. In the circumstances therefore, we adamantly exercise our revisional jurisdiction conferred upon us under section 4(2) of the AJA to quash and set aside both the trial court's judgment and all proceedings and judgment of the High Court on first appeal. We remit the file back to the trial Court for it to enable the trial magistrate to compose and deliver a judgment

which is in conformity with the law. Should it happen that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214(1) of the CPA another magistrate should be assigned the case to compose and deliver the judgment.

With regard to the position of the appellant we order him to remain in custody pending the delivery of the new judgment. Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

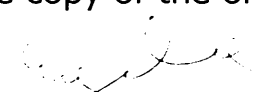
DATED at TANGA this 12th day of July, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL