IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 25 OF 2015

ELIAS MWANGOKA @ KINGLOLI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 24th day of October, 2015

in

Criminal Appeal No. 33 OF 2013

JUDGMENT OF THE COURT

20th & 22nd September, 2017

MWANGESI, J.A.:

The appellant herein was arraigned at the Resident Magistrate's court of Mbeya with the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002. It was the case for the prosecution that, on the 30th day of April, 2006 during morning hours, at Muhwela village within the district of Mbarali in Mbeya region, the appellant did rape one Lilian

Christopher a girl, aged four (4) years. The appellant did protest his innocence, when the charge was read over to him.

Upon trial of the case, whereby eight witnesses did testify for the prosecution, and two witnesses did testify for the defense (appellant's) case, the learned resident magistrate, who presided over the case, was satisfied beyond reasonable doubt that, the prosecution had managed to establish its case. As a result, a finding of guilty was entered against the appellant, who was sentenced to serve the mandatory term of life imprisonment. Aggrieved by the findings of the trial court as well as the sentence meted, the appellant did unsuccessfully challenge it in the High Court and hence, this second appeal wherein, he has raised about seven grounds of appeal. His appeal has however, been strenuously resisted by the respondent/Republic in the reply to the memorandum of appeal.

When the appeal was called on for hearing on the 20th September, 2017, the appellant did enter appearance in person fending for himself, whereas, the respondent/Republic had the services of learned State Attorney Ms Catherine Paul. Before we

proceeded to hear the merits of the appeal, after having discovered that, the trial court did sentence the appellant without entering conviction first, we did *suo motu* invite the parties to this appeal, to address us as regards the competence of the judgment that was handed down by the learned trial resident magistrate on the 04th June 2012.

On the obvious reasons that, the appellant was a lay prisoner, who had no any elementary knowledge in legal matters, there was no substantial input extracted from him. He only complained to the effect that, he was arrested, charged and convicted of the alleged offence of rape without any founded reasons, an explanation which had no any bearing to what we asked them to do.

On her part, the learned State Attorney did submit to the effect that, much as the records of the trial court could reveal, after the trial resident magistrate had found that the case against the appellant had been established to the hilt, she did proceed to sentence him without entering conviction. In so doing, the learned State Attorney did submit that, the provisions of section 235 (1) and 312 (2) of the Criminal

Procedure Act, Cap 20 R.E 2002 (CPA), were flouted, rendering all the subsequent proceedings thereafter, to be null and void. To back up her averment, she did refer us to the holding of this Court in the case of **Kimangi Tlaa Vs Republic**, Criminal Appeal No. 22 of 2013 (unreported). In the circumstance, the learned State Attorney has implored us to invoke our powers of revision under the provision of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (AJA), to quash and set aside all the appellate proceedings plus the judgment, and remit the record back to the trial court with direction to comply with the requirement of section 235 (1) and 312 (2) of the CPA.

What stands for our deliberation and determination in the light of what was submitted by the learned State Attorney above, is whether the decision handed down by the learned trial resident magistrate on the 04th day of June 2012 was proper. To appreciate the situation, we hereby reproduce the extract of the concluding part of the judgment by the trial learned resident magistrate, after being

satisfied that, the case against the appellant had sufficiently been established. The same did read thus:

> *"This Court is therefore satisfied that, the prosecution has proved the case beyond reasonable doubt and the accused is hereby found guilty."*

Thereafter, the learned trial resident magistrate did invite the learned State Attorney on behalf of the prosecution, to give out the previous records of the appellant if any, and then after hearing the mitigating factors from the appellant, she did proceed to sentence him to life imprisonment. As correctly submitted by the learned State Attorney, a submission which we subscribe to, there was no compliance with the stipulation under the provision of section 235 (1) of the CPA, which reads:

> *"(1) The court, having heard both the complainant and the 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 under section 38 of the Penal Code."

Nor was there compliance with the provision of section 312 (2) of the CPA, which bears the following wording:

"(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 mere statement by the learned trial resident magistrate in her judgment that, "the accused is hereby found guilty," does not amount to conviction as envisaged under the afore-named provisions of law. This Court had an occasion of commenting on a similar situation as the one at hand, in the case of **Marwa Mwibahi Vs Republic,** Criminal Appeal No. 7 of 1997 (unreported), when it stated that:

"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 be under section 282 of the Criminal Procedure Act, where there is a plea of guilty or under section 312 of the same Act, where there has been full trial."

In yet another case of **Amani Fungabikasi Vs Republic,** Criminal Appeal No. 270 of 2008 (unreported), the Court had another occasion of stating the position that ought to have been taken by the trial court after having been convinced that, the case against the appellant had been established, when it stated thus:

"It was imperative upon the trial district court to comply with the provision of section 235 (1) of the Criminal Procedure Act, Cap 20 (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 the provision of section 312 (2) of the Act was missing. So, since there was no conviction that was entered in terms of the provision of section 235 (1) of the Act, there was no valid judgment upon which the High Court could uphold or dismiss."

The stance taken by the Court in the above decisions has been reiterated in a number of cases that include; **Shabani Iddi Jololo and Three Others Vs Republic,** Criminal Appeal No. 200 of 2006, **Jonathan Mluguani Vs Republic,** Criminal Appeal No. 15 of 2011, **Joseph Kanankira Vs Republic,** Criminal Appeal No. 387 of 2013 and **Hassan Mwambanga Vs Republic**, Criminal Appeal No. 410 of 2013 (all unreported). In the last case, the Court did move further by explicitly stating the position of law that:

"It is now settled law that, failure to enter conviction by any trial court is 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."

It is therefore evident in line with what was held in the decisions traversed above that, the sentence that was meted to the appellant in the instant case was invalid for want of compliance with the requirement of law. We are thus constrained to accede to what was submitted by the learned State Attorney that, the appellate proceedings in the High Court in the matter at hand were a nullity and cannot be left to stand. In the same vein, the sentence of life imprisonment which was meted to the appellant by the trial court without being preceded by conviction was as well as nullity. The subsequent question is as to what should be the way forward.

The holding of this Court in the case of **Kimangi Tlaa Vs Republic** *(supra)*, is instructive on what should follow that is, the only course available under the circumstances, is for the Court to invoke its revisionary powers under the provision of section 4 (2) of AJA, to quash the proceedings of the first Appellate Court as well as the judgment thereof, on the reason that they were founded on nullity proceedings, as well as quashing and setting aside the sentence that was imposed by the trial court. We simply do that. In lieu thereof, it is directed that, the records of this case be remitted to the trial court to accomplish its task in accordance to the stipulation under the provisions of section 235 (1) and 312 (1) of the CPA.

Meanwhile, we direct the appellant to remain in custody to wait for the trial court to accomplish its task, after which, the way will have been paved for him to proceed with his process of appeal if he still so wishes to pursue. For avoidance of doubt, in keeping with the demand of interests of justice, we also direct that, the computation of the sentence to be imposed to the appellant by the trial court after entering conviction in compliance with the requirement of law, must

include the period which has already been served by the appellant in the illegal sentence which we have quashed and set aside.

We accordingly order so.

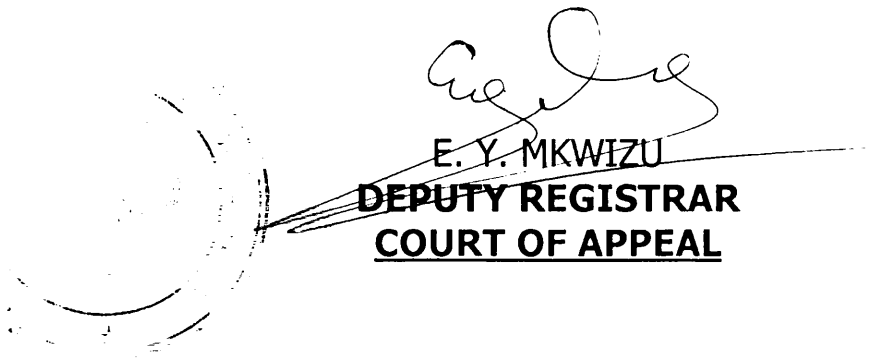
DATED at **MBEYA** this 21st day of September, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
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