IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 603 OF 2015

KELVIN MYOVELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(A. M. Lyamuya , SRM- with Extended Jurisdiction .)

dated the 2nd day of July , 2015
in
Criminal Appeal No. 8 of 2015

JUDGMENT OF THE COURT

18th & 21st September, 2017

MZIRAY, J.A.:

The appellant along with another person, Akimu Mwakalinga, not before the Court, were charged in the Resident Magistrate Court at Mbeya with two counts for being in unlawful possession of fire arms and ammunition contrary to section 4(1) and 34(1) (2) of the Arms and Ammunitions Act, Cap 223. It was alleged that, on 31st day of May, 2011 at Uyole area within the City and Region of Mbeya, jointly and together were found in possession of fire arm to wit, a sub machine gun (SMG) with No. 786474 and 37 rounds of ammunition without a licence.

Upon these arraignments, the appellant pleaded guilty to both counts. He was then sentenced to pay a fine at the tune of Tshs. 3,000,000/= or ten (10) years imprisonment in default for the first count and in the second count he was fined Tshs. 3,000,000/= or ten (10) years imprisonment in default.

On first appeal, the High Court [Hon. A. M. Lyamuya, Senior Resident Magistrate- with Extended Jurisdiction] found that the purported conviction of the appellant by the trial court was proper and hence dismissed the appeal for lack of merit. Aggrieved, the appellant has filed this present appeal advancing four grounds of appeal.

When the appeal was called on for hearing, the Court *suo motu* raised the issue as to whether there was conviction in the trial court. This was after revisiting the record of appeal at page 23 where the trial court found the appellant "guilty as charged" without entering a conviction.

Mr. Joseph Pande, the learned Principal State Attorney who appeared for the respondent Republic submitted that it is true that the appellant was not convicted by the trial Court in terms of section 312

and 235 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). He pointed out that the omission is a fatal irregularity. To support his argument he referred this Court to the unreported case **of Kimangi Tlaa V. R, Criminal appeal No. 22 of 2013** in which the Court exercised its power under section 4(2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) by quashing and setting aside the appellate proceedings including the judgment and remitted back the record for the trial court to enter conviction in accordance with the law.

On his part, the appellant who appeared in person, unrepresented and being a lay man, had nothing useful to assist the Court. He only proposed to withdrawal his appeal.

We have considered the arguments on the issue. With great respect, the effect of an omission to enter a conviction has been the subject of discussion in this Court before; but what is settled is that, no sentence can be passed without a conviction even if an accused is found guilty. Thus, in **MARWA MWIBAHI v R**, Criminal Appeal No. 7 of 1995 (unreported) it was 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 CPA (where there has been a trial)."

However, it should be also noted from the outset that Judgment writing in subordinate Courts is governed by sections 235 and 312 of the CPA

Section 235(1) provides:-

"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."

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."

Now then, basing on the preceding provisions of law cited herein above, which are couched in a mandatory language, we are in agreement with Mr. Pande, the learned Principal State Attorney that the appellant ought to have been convicted first before he was sentenced in terms of section 312 and 235 of the CPA.

We are fortified in that view because both these provisions of the CPA require that in case of a conviction, the conviction must be entered. It is not sufficient to find an accused guilty as charged. Failure to enter a conviction renders a judgment invalid. Infact, there is no valid judgment without a conviction having been entered, as it is one of the prerequisites of a valid judgment. See for instance, **AMANI FUNGABIKASI V R.**, Criminal Appeal No. 270 of 2008 (unreported) in which this 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 R.**, Criminal Appeal No. 200 of 2006; **HASSAN MWAMBANGA V R.**, Criminal Appeal No. 410 of 2013 (both unreported). In **MWAMBANGA'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."

Since in the instant case, the trial court did not enter a conviction, the judgment and the subsequent sentence were a nullity. Since they were a nullity there was nothing which the High Court could have upheld. Infact, the trial Magistrate with Extended Jurisdiction in the first appellate court was supposed to detect this omission before entertaining the appeal. Under the circumstances, and the fact that the appellant pleaded guilty to the offence, it would therefore be in the interest of justice to remit the case file to the trial court for it to enter a conviction according to law before a sentence is imposed on him.

We therefore, in the exercise of our powers under section 4(2) of the AJA quash the judgment of the High Court and set aside the sentence imposed by the trial court. We order that the appellant in the meantime should remain in custody pending finalisation and delivery of the judgment by the trial Court. In the interest of justice, we further direct that when conviction is entered, the prison sentence should start

to run from the date the appellant was first sentenced, that is, on 30/8/2012.

Upon conviction, the appellant will be at liberty, if he finds it appropriate, to process his appeal in the manner provided under the law.

Order accordingly.

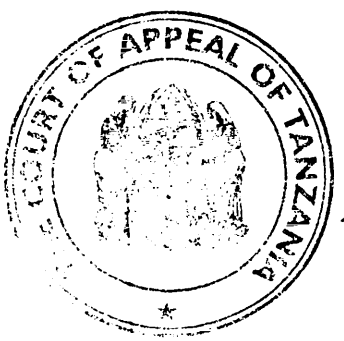
DATED at **MBEYA** this 21st day of September, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL