IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 186 OF 2015

MWITA SEBA @ MWITA..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Gwae, J.)

dated 26th day of March 2015
in
Criminal Sessions Case No. 92 of 2011

RULING OF THE COURT

22nd & 24th May 2017

NDIKA J.A.:

Mwita Seba @ Mwita, the appellant herein, stood charged before the High Court of Tanzania sitting at Tarime with the offence of manslaughter contrary to the provisions of sections 195 and 198 of the Penal Code, Cap. 16 RE 2002. It was alleged by the Prosecution that he, on or about 10th August 2010 at Nyangoto Village within Tarime District in Mara Region, unlawfully killed one Range s/o Anicetus @ Nyakimori. At the end of the trial, he was declared "guilty as charged" and sentenced to twelve years imprisonment.

Aggrieved by his being found guilty and imprisoned, the appellant has now appealed to this Court upon three grounds as follows:

> *"1. That the appellant's conviction was against the weight of the evidence on the record.*
>
> *2. That the learned Trial Judge erred in ignoring the appellant's defence.*
>
> *3. That in the circumstances of the present case the sentence imposed upon the appellant was too harsh and out of proportions."*

When the appeal came before us for hearing, the appellant appeared in person and enjoyed the services of Mr. Anthony Nasimire, learned Counsel. For the Republic, Ms. Revina Tibilengwa, learned Senior State Attorney, appeared with the assistance of Ms. Gisela Alex, learned State Attorney.

Before the scheduled hearing commenced, Mr. Nasimire rose notifying the Court that he had noted two disquieting matters in the judgment of the trial court as shown at page 48 of the record onwards. The first issue was that the trial court, having found the appellant guilty of manslaughter, did not convict him of that offence. Secondly, the trial court, then, sentenced the appellant without having convicted him. It was his view that the course taken by the learned Trial Judge was contrary to the provisions of sections 298 (3),

312 (2) and 314 of the Criminal Procedure Act, Cap. 20 RE 2002. While placing reliance upon this Court's decision in **Masalu Luponya v Republic**, Criminal Appeal No. 129 of 2015 (unreported), Mr. Nasimire argued that the infraction by the trial court was fatal because it meant that the appellant's imprisonment was illegal. He thus invited us to invoke our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 to quash and set aside the aforesaid sentence. He further submitted that although ordinarily in the circumstances of this matter the trial record would be remitted back to the trial court for it to compose a proper judgment afresh, enter a conviction and sentence the appellant according to the applicable law, he counseled that the Court order a fresh trial before another judge.

Ms. Tibilengwa's reply predominantly mirrored Mr. Nasimire's submissions. However, she opposed the option for a retrial and thus urged that the trial record be remitted to the learned Trial Judge with a clear direction that he should compose a proper judgment afresh, then enter a conviction against the appellant and sentence him according to the applicable provisions of the law. Her view was based upon her submission that all the proceedings before the trial court were proper and regular until when the court omitted to convict the appellant.

On our part, we are constrained to agree with the parties on the legal question that they have addressed us. The record of appeal bears it out that after the appellant pleaded not guilty, a full trial followed before the trial court culminating with the delivery of "judgment" on 26th March 2015. The last page of the said judgment (as shown at page 48 of the record of appeal) contains the following pronouncement by the learned Trial Judge:

> *"Having analysed as herein above, I consequently find the charge of manslaughter c/ss 195 and 198 against the accused to have been sufficiently proved, the accused is therefore found guilty as charged.*
>
> *It is so ordered."*

The above declaration was, thereafter, followed up with the sentencing process in which the appellant was handed a twelve years prison term.

We agree with the parties that the course taken by the trial court, as demonstrated above, was plainly a violation of the provisions of section 298 (3) of Cap. 20 (supra), which provides thus:

> *"If the accused person is convicted the judge shall then pass sentence on him according to law."*

We have no doubt that the above provisions are mandatory, not merely directory. In their natural and ordinary meaning, they mean to us that unless

the accused person is convicted, sentence cannot be meted out on him. In addition, we hasten to express that the said provisions must also be read together with section 312 (on the contents of judgment) and section 314 (on sentencing following conviction) of Cap. 20 (supra). For the sake of clarity, we reproduce the above section 312 thus:

> *"312(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
>
> *(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."* [Emphasis ours]

And then section 314 thus:

> *"**If the judge convicts the accused** person or if he pleads guilty, it shall be the duty of the Registrar or other officer of the court to ask him whether he has*

anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings." [Emphasis ours]

As we held in **Masalu Luponya v Republic** (supra), the above provisions manifestly enjoin the High Court to enter a conviction against an accused person once it is satisfied of his guilt in its judgment. For a conviction to be proper, section 312 (2) requires the judgment to "specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted**."** We find it instructive to extract from **Masalu Luponya v Republic** (supra) a passage that constituted our holding in **Khamis Rashid Shaban v D.P.P. Zanzibar,** Criminal Appeal No. 184 of 2012 (unreported) thus:

*"... the law strictly requires the trial High Court to specifically enter a conviction after being satisfied of the guilt of the accused. That is why even where a plea of guilty is entered, a conviction is necessary. Short of that, both the accused and the prosecution would be greatly prejudiced by the omission to enter a conviction .... **A declaration that an accused is guiity is not sufficient** ...."* [Emphasis ours]

In the two decisions above, the omission to enter a conviction was held to be a fatal and incurable irregularity. The same conclusion was reached in **Masolwa Samwel v Republic**, Criminal Appeal No. 206 of 2014; **Abdallah Kishege v Republic**, Criminal Appeal No. 190 of 2009; **Shabani Iddi Jololo and Three Others v Republic,** Criminal Appeal No. 200 of 2006, **Oroondi s/o Juma v Republic,** Criminal Appeal No. 236 of 2012 and **Zakaria Henry Mahuch and Three Others v Republic,** Criminal Appeal No. 200 of 2010 (All unreported).

It is upon the foregoing analysis that we find the trial court to have contravened the mandatory requirements under sections 298(3), 312(2) and 314 of Cap. 20 (supra) for its omission to convict the appellant after being satisfied of his guilt. Accordingly, we are obliged to invoke our revisional powers under section 4 (2) of Cap. 141 (supra) and nullify the judgment of the trial court and all subsequent proceeding. We thus quash and set aside the sentence imposed on the appellant.

As a consequence, we order the trial record to be remitted to the trial court as early as possible with the direction that the learned Trial Judge must prepare and deliver a judgment that is in conformity with the provisions of sections 298(3), 312(2) and 314 of Cap. 20 (supra) as we have

demonstrated above. Should that be impossible for whatever good and sufficient reason, the appellant should be tried afresh.

We also find it proper to direct, in the interests of justice, that after conviction is entered against the appellant, the trial court should take into account the term of imprisonment already served by the appellant from 26th March 2015 before sentencing him.

In the interim, we order that the appellant should remain in custody as a remandee.

It so ordered.

DATED at MWANZA this 23rd day of May 2017.

K.M. MUSSA
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.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL