

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

CORAM: MBAROUK, J.A., MZIRAY J.A., And MKUYE J.A.

CRIMINAL APPEAL NO. 508 OF 2016

EMMANUEL MATHIAS NEWA..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Feleshi, J.)

dated 31st May, 2016

in

Criminal Case No. 36 of 2016

JUDGMENT OF THE COURT

14th February, & 1st March, 2018

MBAROUK, J.A:

In the District Court of Kinondoni at Kinondoni, the appellant, Emmanuel Mathias Newa and another not subject to this appeal were charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 of R.E. 2002] as amended by Act No. 3 of 2011. The trial magistrate (Lihamwiko, R.M.) found the appellant guilty as charged and proceeded to impose a sentence of thirty (30)

years imprisonment term. His appeal before the High Court (Feleshi, J.) was dismissed in its entirety, hence has now preferred this second appeal.

When the appeal was called on for hearing the Court wanted to satisfy itself as to whether the appeal before it has been properly filed. This was because, looking at page 87 and 88 of the record of appeal, the trial magistrate failed to comply with the requirement under section 235 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) for having failed to convict the appellant. To appreciate what transpired at the trial court, we have found it proper to reproduce the relevant part of the judgment which led to that anomaly:-

"It is therefore the decision of this Court as according to section 110 of the Evidence Act the Prosecution side proved their case beyond reasonable doubts were left. And this the 2nd accused person is found guilty of the offence of

armed robbery contrary to section 287A of the Penal Code (Cap 16 R.E. 2002)."

In this appeal, the appellant appeared in person, unrepresented, whereas as the respondent/Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Ms. Janetreza Kitali, learned Senior State Attorney.

We allowed Ms. Kitali to start the ball rolling. On her part, she agreed with the concern raised by the Court. In support of argument raised by the Court, Ms. Kitali cited the decisions of this Court in **Josephat Batiku v. Republic**, Criminal Appeal No. 439 of 2007 and **Sam Sempembwa** and **Herman Francis Sarua**, Criminal Appeal No. 169 of 2010 (both unreported). Those two cited authorities, she said arrived to a conclusion that the defect of non-compliance with section 235 (1) of the CPA for failure to enter conviction before passing a sentence is a fatal irregularity. She, therefore, urged us to invoke section 4 (2) of the Appellate

Jurisdiction Act, Cap. 141 R.E. 2002 to nullify and quash the judgment of the trial court, proceedings of the High Court and its judgment, and set aside the sentence. Then she prayed for the record of these proceedings to be returned at the trial court to enter a conviction.

On his part, the appellant knowingly being a lay person not conversant with legal issues, he simply agreed with the submissions made by the learned Senior State Attorney in response to the issue raised by the Court.

According to section 235 (1) of the CPA, it is a mandatory requirement that a trial court after having heard both sides in criminal trials, it shall first **convict** an accused person after being found guilty and thereafter proceed to pass sentence. The provision (s.235 (1) of the CPA) reads as follows:

"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 added].

Whereas according to section 312 (2) of the CPA which prescribes the contents of judgment, reads as follows:-

*"In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or the other law under which, **the accused person is convicted** and punishment to which he is sentenced.”*

[Emphasis added].

What we have gathered from those two provisions is the importance of the trial court that, before the pronouncement of sentence to an accused person who has been found guilty, to convict him first and that is why those provisions are couched with mandatory terms.

This Court has repeatedly emphasized the required for a trial court to convict an accused person before imposing a sentence to him in compliance with sections 235(1) and 312(2) of the CPA. For instance, in the case of **John s/o Charles v. Republic**, Criminal Appeal No. 190 of 2011, this Court emphatically stated:-

"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'."

As pointed out earlier, a plethora of authorities of this Court have shown the importance of strict compliance with the requirement stated in sections 235 (1) and 312 (2) of the CPA. For example, see **Shaabani Iddi Jololo and Three**

Others v. Republic, Criminal Appeal No. 200 of 2006,
Khamis Rashid Shaabani v. Director of Public Prosecutions, Zanzibar, Criminal Appeal No. 184 of 2012 (both unreported) **Sam Sempembwa and Herman Francis Sarua and Josephat Batiku** (both supra) to name a few.

As shown herein above, the trial magistrate in the instant case has failed to comply with his duty and mandatory requirement of the provisions of section 235 (1) of the CPA to enter a conviction before imposing sentence, hence for such failure, we find the irregularity fatal.

For that reason, we invoke our powers of revision under section 4(2) of the Appellate Jurisdiction Act to quash the judgment of the trial court, proceedings and judgment of the High Court. We also set aside the sentence imposed by the trial court which was upheld by the first appellate court. We thereafter, order the case to be remitted back to the District Court of Kinondoni for it to enter a conviction against the

appellant as per the requirement of section 235 (1) the CPA. We further order that, if the appellant will so wish to appeal against his conviction and sentence, his appeal should be heard and concluded expeditiously. Also, the term he has already served in prison should be taken into account in serving his imprisonment term. It is so ordered.

DATED at **DAR ES SALAAM** this 19th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL