IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 281 OF 2018

JOHN ZUNGUNGENI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Shinyanga District Registry at Shinyanga)

(Makani J.)

dated the 30th day of July, 2018

in

Criminal Appeal No. 94 of 2017

.....

JUDGMENT OF THE COURT

13th & 22nd July, 2022

GALEBA, J.A.:

John Zungungeni, the appellant in this appeal was arraigned before the District Court of Shinyanga in Criminal Case No. 127 of 2011 for rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). The prosecution's case was that while at Kituli Hamlet, Mhanga Village Salawe Ward in Shinyanga District within Shinyanga Region, the appellant raped a young girl of 11 years of age, whose identity we will conceal and only where necessary, refer to her as the victim. The

appellant denied the charge and the respondent had to call witnesses who adduced evidence in support of the case. The appellant defended himself, but all the same, the court believed the prosecution, found him guilty and sentenced him to thirty (30) years imprisonment for the offence charged together with payment of a fine of TZS. 10,000.00 and compensation of TZS. 50,000.00 to the victim of the crime. However, the sentence was imposed upon the appellant without convicting him first.

The appellant was aggrieved with the decision of the District Court and appealed to the High Court. At the first appellate, he raised four (4) grounds of appeal, but none of them was complaining about his being sentenced without conviction. The first appellate court determined the whole appeal but at pages 60 and 61, the court observed:

> *"I have however, noted that the trial magistrate sentenced the appellant without convicting him. The trial magistrate failed to comply with section 235 (1) of the CPA. The said section provides as follows:"*

Then, the learned first appellate Judge quoted section 235 (1) of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2022] (the CPA) and continued to state as follows:

"In the absence of a conviction entered in terms of section 235 (1) of the CPA, ***there is no valid judgment before this court.*** *Nevertheless, this irregularity is curable by remitting the record to the trial court so that conviction can be entered. And following the guidance of the Court of Appeal in the cases of Matola Kajuni (supra) and Shabani Iddi Jololo & 4 Others vs. Republic, Criminal Appeal No. 200 of 2006 (unreported), I am of a strong view that there is need for this court to remit the record to the trial court to enter conviction of the appellant to validate the sentence and judgment as a whole...*

In the strength of the foregoing, the appeal is hereby dismissed. *I order the record to be remitted to the trial court to enter a conviction in respect of the accused person (the appellant herein). After the trial magistrate has entered conviction against the appellant* ***the respective sentence*** *and commencement of the sentence* ***shall remain unaltered.***"

[Emphasis added]

It appears, the record was not remitted to the trial court so that the conviction could be entered. The appellant therefore appealed before this Court against the decision of the High Court, hopefully

because his appeal was dismissed and he continued to remain in prison despite the anomaly with his sentence which was not based on any conviction. The appeal is predicated on 7 grounds including grounds No. 1, 2 and 3. For reasons to be apparent in a moment, we will not deal with any other grounds except the said three grounds. The substance of the 1st, 2nd and 3rd grounds of appeal may be captured in the following general complaint of the appellant:

> *"That the first appellate court erred by dismissing the appellant's appeal having discovered that he was sentenced and committed to prison without conviction contrary to section 235 (1) of the CPA."*

At the hearing of this appeal, the appellant appeared in person without legal representation, and the respondent Republic had the services of Ms. Wampumbulya Shani teaming up with Mr. Nestory Mwenda and Ms. Rehema Sakafu, all learned State Attorneys.

At the outset, the appellant prayed that we adopt his grounds of appeal and determine the appeal based on those grounds. He added that the learned State Attorneys may reply on his grounds so that he would rejoin later if need would arise. So, we permitted the learned State Attorneys to reply in reacting to the grounds, also because Ms.

Shani had indicated to us that the respondent Republic was supporting the appeal based on the first three grounds.

Ms. Shani started off with the said grounds. She submitted that the learned first appellate Judge was wrong to order the matter to be remitted to the trial court for entering a conviction and at the same to dismiss the appeal. She contended that the first appellate court erred for entertaining the substance of the appeal arising from a case in which the prisoner was not convicted first before sentencing him. She submitted further that the proper course for this Court to take at the moment is to allow the appeal and remit the matter to the trial court for the latter court to enter the missing conviction.

In rejoinder, the appellant expressed similar sentiments that although he was in prison, he was there without conviction. He also complained that instead of the High Court registry remitting the matter to the trial court for conviction, he received the record of appeal from the Registrar of the High Court and he had no option but to appeal, although he knew he was not yet convicted.

The issue before us, in the context of the submission by Ms. Shani and the complaints by the appellant, is whether the High Court was

legally right to hear the substantive appeal and dismiss it then order that the matter to be remitted to the trial court for entering a conviction in order to legalize the otherwise unlawful sentence.

We will start with section 235 (1) of the CPA, which provides that:

> *"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 or discharge him under section 38 of the Penal Code."*
>
> [Emphasis added]

In this case, the absence of the order convicting the appellant, is clear from the record itself. At page 39, of the record of appeal, it is recorded thus:

> *"Therefore, coming to the third issue on whether the accused person is guilty, then no doubt that the accused person DW1 is guilty of the offence he is charged with of rape c/s 130 (1) and (2) (e) of the Penal Code Cap. 16 R.E. 2002.*
>
> *N. GASABILE*
> *RESIDENT MAGISTRATE*
> *6/12/2012*

PREVIOUS RECORDS: Nil

N. GASABILE
RESIDENT MAGISTRATE
6/12/2012

MITIGATION: I don't have anything to say.

N. GASABILE
RESIDENT MAGISTRATE
6/12/2012

SENTENCE: The accused person John Zungungeni do hereby sentence (sic) to serve 30 (thirty) years imprisonment, also he will serve four strokes, two when entering the prison and two when finished (sic) to serve his imprisonment sentence. Also, the accused person ordered (sic) to pay a fine of Tsh. 10,000/= and also a compensation of Tshs. 50,000/= (fifty thousand) to the victim for injuries he caused to her. Order accordingly.

N. GASABILE
RESIDENT MAGISTRATE
6/12/2012."

With the above record, it is abundantly clear that what is on record is a finding of guilty and a sentence only. A finding of guilty is not a

court order. It is an expression that a trial court makes regarding the status of the accused person's innocence after having considered the evidence and the law applicable. A finding of guilt is only a basis upon which an order convicting the accused should be grounded. On the other hand, a conviction is a specific order that the CPA requires that it be entered after considering the evidence of both cases, the prosecution and the defence cases. It is on the basis of an order convicting an accused person that the trial court can pronounce a lawful sentence upon the accused person.

As for the way forward, in the case **Butogwa John v. R,** Criminal Appeal No. 450 of 2017 (unreported), this Court observed that:

> *"There are more than two main options to be taken, in our view. One is to order for a retrial, and another is to set aside the decision of the High Court and remit the record to the trial court for it to enter a conviction. However, sometimes the Court has been taking neither of the first two options as in the case of Abdallah Ally vs. Republic, Criminal Appeal No. 253 of 2013 (unreported)."*

So, there are several ways on how to handle the matter of this nature and many could still evolve. It all depends on the unique

circumstances obtaining in a particular case. For instance, in **Butogwa John** (supra), the appellant was not prejudiced, therefore both the order remitting the matter to trial court to enter the missing conviction and even the order entering a conviction were quashed, but that is not necessarily the case in all cases. As for us, because the issue is raised in the grounds of appeal and the appellant was complaining bitterly before us that he is being kept in prison without conviction, we think he was very prejudiced.

As indicated above, in this case the sentence was entered despite the absence of a conviction. Further, the appeal was fully heard and dismissed and subsequent to a dismissal the High Court made an order to remit the original record to the trial court so that the latter court could enter the missing conviction. The first appellate court added also that once a conviction would have been entered, the sentence would remain unaltered. Nonetheless, the order was not complied with to date, the appellant has been in jail close to 10 years without being convicted.

With respect, we do not think that was appropriate. We wish to make the following observations in respect of the judgment of the High Court before we proceed to make appropriate orders. **First,** the absence

of the order convicting the appellant, could not and did not vitiate the judgment of the trial court as indicated by the learned High Court Judge. That judgment is sound. It is the sentence which was, and which continues to be unlawful for want of an order convicting the appellant. **Second,** hearing the appeal was a sheer waste of time, and its dismissal inconsequential, because the appellant was never convicted by any court, so no valid appeal could have proceeded from a sentence which was a nullity. In the circumstances, the appeal in the High Court was supposed to be struck out. **Third,** the High Court was supposed to make an order setting aside the sentence imposed upon the appellant by the trial court without any conviction; **Fourth;** the High Court, was supposed to make an order that a proper sentence be imposed subsequent to entering a conviction. It is only then that an appeal before the High Court could have been valid, and**; sixth** the High Court was, however, right to make an order that the original record be remitted to the trial court for entering a conviction although that order was not complied with.

In the circumstances, the 1st, 2nd and 3rd grounds of appeal have merit and they are hereby allowed. This appeal is also allowed on that basis and the judgment and all orders of the High Court except the order

remitting the original record to the trial court to enter a conviction, are quashed.

Further, under the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], the sentence imposed on the appellant by the trial court on 6th December 2012 is hereby set aside. We consequently order that the original record of the trial court be remitted to that court for entering a conviction and to sentence the appellant according to law. When entering the sentence, the trial court should take into account that the appellant might have suffered the first set of two strokes of the cane and the time stayed in prison. The conviction and sentence in the circumstances of this case, may be entered by any magistrate at the station. After that stage either party may then appeal to the High Court if aggrieved by the decision of the trial court.

For avoidance of doubt, the judgment of the trial court is a valid judgement up to the finding of guilty at page thirty-nine (39) of the record of appeal. A conviction order should be entered immediately after the finding of guilty on that page. In order to make it practical, the judgment of the trial court may be retyped so that the conviction and

the new sentence can be entered conveniently in the scheme of the judgement. Meanwhile the appellant shall continue to be held in prison pending his conviction and sentence.

Order accordingly.

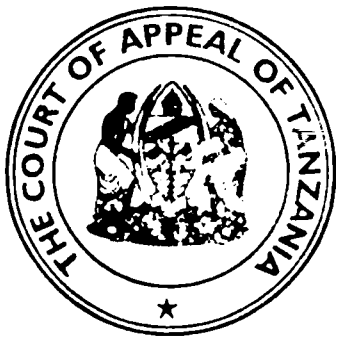
DATED at **SHINYANGA** this 21st day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of July, 2022 in the presence of Mr. John Zungungeni, the Appellant in person and Ms. Caroline Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



W. S. NG'HUMBU
For: **DEPUTY REGISTRAR**
COURT OF APPEAL