IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. CRIMINAL REVISION NO. 3 OF 2003

(ORIGINATING FROM SUMBAWANGA DC. TRAFFIC CASE NO. 11 OF 2002)

THE REPUBLIC..... APPLICANT

VERSUS

SINGO NZINYANGWA..... RESPONDENT

(Revision from Traffic case No. 11 of 2002 in the District Court of Sumbawanga)

(Dated: 31.08.2005

And

Dated: 30.09.2005)

in

High court Misc. Criminal Revision No. 3 of 2003

JUDGMENT.

The respondent in this case one Singo Nzinyangwa, was charged with the offence of causing death through careless driving c/ss 40, 63 (2) (a) and section 27 (1) (a) all of the Road Traffic Act No. 30 of 1973 as amended by section 13 of the Road Traffic Amendment Act No 16 of 1996. The respondent pleaded guilty to the charge, upon which the court purportedly meted a sentence of a fine of T.shs 20,000/= or a custodial term of three years in default.

My learned brother judge Hon. Justice Mrema came across this matter in the course of inspection. Having not been happy with some features of the case, he admitted it to revision. In particular, he posed the issue whether the sentence of T.shs 20,000/=

fine was properly meted out under the rigorous provisions of sections 40, 63(2) (a) and 27 (1) (a) of the Road Traffic Act No 30 of 1973 as amended. The respondent was notified of the matter, upon which he detailed learned counsel Mr. Materu to represent him, while Mr. Malata, learned state attorney, represented the respondent Republic.

Learned state attorney Mr. Malata stated at the outset that the Republic was not supporting the sentence meted on the respondent by the trial court. He assigned two reasons for that; first that the trial court wrongly proceeded to pronounce a sentence against the respondent after pleading guilty to the charge without first recording a conviction, a fact which he said, contravened the provisions of section 228 of the Criminal Procedure Act, No. 9 of 1985. Secondly, that the trial court failed to specify the offence of which and the section under which the respondent was convicted as contemplated by section 312(2) of the Criminal Procedure act, 1985, a fact which he said, is reflected on the disparity between the sentence awarded in this case and the provision on which the charge was founded.

When his turn came, learned counsel Mr. Materu for the respondent submitted that he was supporting the submission of his learned friend Mr. Malata on the ground that it was incontrovertible that the convicting court failed to comply with the provisions of both, sections 228 and 312 of the Criminal Procedure Act, 1985. He added one more aspect that the lower court failed to comply with the provision of section 27 (1) (a) of the Road Traffic Act, 1973.

Surely, what is complained of above is apparent on the face of the trial court's record. In view of this, the issue, as suggested by the learned state attorney Mr. Malata, is whether these irregularities were fatal to the proceedings. Both counsel for parties are of the firm view that they are.

In the first place, they share the view that failure to record a conviction is an incurable irregularity, therefore fatal to the proceedings. Reliance here has been placed on the case of Rep. v. Suna (1971) HCD 208. Similarly, both counsel for the parties are of the view that failure to specify the offence of which and the section under which the respondent was convicted is fatal to the proceedings. On this point, they have found support on the case of George Mhando. v. Republic (1983) T.L.R 118. I hasten to say that I share their views.

To begin with, it is apparent from the proceedings of the trial court that upon the respondent's plea of guilty, that court did not record conviction as required by section 228 (2) of the Criminal Procedure Act. That section provides that:-

> "S.228(2): If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses, and the magistrate shall convict him and pass sentence upon or make an order against him, unless there shall appear to be sufficient cause to the contrary."

Under lining is supplied for purposes of emphasis.

This provision is couched in mandatory terms. It is clear from its wording that an admission in respect of the charged offence must, after it will have been recorded, be preceded over by a conviction before the magistrate passes the sentence. For this reason, where this has not been complied with, the irregularity is fundamental which cannot be cured by section 388 of the Criminal Procedure Act, 1985.

The view held above has been expressed in a number of cases in our jurisdiction, including that of R.v.Suna (1971) HCD n.208 cited to me by learned counsel Malata, and that of Ramadhani Masha v. Republic (1985) LRT 172, just to mention some. In the former case, the accused was charged with unlawful possession of

uncut diamonds c/s 3(1) of Cap. 129 of the laws. He was purportedly convicted and sentenced to a fine of shs. 300/= or three (3) months imprisonment. The learned district magistrate neither wrote a judgment nor did he record a conviction before he imposed a sentence. That curt stated that where the court decides that the accused is guilty, the basic elements of the judgment were the conviction and sentence. The issue which was before that court was whether these irregularities were fatal to the proceedings. It held that failure to write a judgment was clearly an incurable irregularity.

Again, in the case of Ramadhani Masha (supra), a charge of being in possession of property suspected of having been stolen was preferred against the appellant. After hearing the evidence of both the prosecution and the defence, the trial court magistrate proceeded to sentence the appellant to imprisonment for a term of six months without first convicting him. It was held that:-

> "In a criminal trial, where it is decided that the accused person is guilty, the basic elements of the decision of the court are conviction and sentence, with the former being a prerequisite of the latter; as there was no conviction when the appellant was sentenced, there was no decision of the court and, the error being incurable under s. 346 of the Criminal Procedure Code [now s. 388 of the Criminal Procedure Act, 1985], the sentence passed in this case was unlawful."

Underlining has been supplied for purposes of emphasis.

With great respect, I fully agree with the propositions made in these two cases, and hold the same view that because the lower court did not record a conviction in the present case that was an incurable irregularity, therefore fatal to the proceedings of the case.

Also, both counsel submitted that the trial court contravened the provisions of section 312(2) of the Criminal Procedure Act in that it did not specify the offence of which and the section under which the respondent was convicted, the omission which they said, is reflected on the disparity between the sentence which was awarded and the provision on which the charge was founded. Mr. Malata cited the case of George Mhando (supra) which he said lends support on the point. I share the view that the trial court was duty bound to comply with the provisions of section 312(2) of Act No.9 of 1985 by specifying the offence of which and the section under which the respondent was convicted. As correctly submitted by Mr. Malata that could have instilled harmony between the sentence which was meted and the provision under which it was founded. It is apparent that such harmony is lacking in the present case.

On the other hand however, I am of the opinion that the case he cited is distinguishable to the present one. I have the view that George Mhando's case addressed the provisions of section 171 (1) of the Criminal Procedure Code Cap. 20 which is a replica of section 312(1) of the Criminal Procedure Act No.9 of 1985, the latter having repealed and replaced Cap.20; instead of subsection (2) of the said Cap. 20 which has been re-enacted under subsection (2) of Act No. 9 of 1985.That case decided that a judgment must contain points for determination and reasons for the decision and that a conviction must be recorded, failure of which occasions failure of justice. It decided further that failure to complete a judgment is the same as failure to write a judgment because in both instances the points for determination and reasons for decision are not known. It seems to me that this is more relevant to the previous situation covered in respect of the first arm of their submission for which I respectfully share the view expressed in this latter case that it is a failure of justice to pronounce a sentence without writing a judgment and without recording a conviction. This, I have said, is an incurable irregularity. In my firm opinion therefore,

that case covered a different situation to that contemplated under subsection (2) of section 312 of the said Act.

There is also this other complaint based on the provisions of section 27 (1) (a) of the Road Traffic Act, 1973.The gist of the complaint is that the trial court wrongly made an order desisting to cancel the respondent's driving licence without requiring him to advance special reasons, if he had any. In my opinion, this again cannot be said is insubstantial.

It is unmistakably clear from the record that the trial court did not call upon the respondent to advance any special reasons on which to base its deliberations on whether or not to cancel his driving licence. Section 27 (1) (a) of the Road Traffic Act, 1973 provides that:-

> "S.27 (1) Any court before which a person is convicted of -
>
> (a) a first offence under section 40,41,42,or 44 or paragraph (c) of section 52 shall cancel such person's driving licence for a period of not less than three years and shall declare that person to be disqualified from obtaining a driving licence of any type during such period;
>
> unless the court for special reasons thinks fit to order a shorter period of cancellation or suspension of that person's driving licence and to order him to be disqualified from obtaining a driving licence for a shorter period or not to order him to be disqualified."

In my opinion, had the trial court properly construed the provisions of that section, it would have realized that it was a prerequisite condition that special reasons must be advanced by the accused and the court must make a finding on the same. In that

this was not done in the present case that was another irregularity, though not fatal to the proceedings like in the previous ones in that the instant would be curable under section 388 of the Criminal Procedure Act, 1985.

For these reasons the conviction cannot be allowed to stand. The same is hereby quashed and the sentence passed thereon is, accordingly, set aside. The fine of Shs.20,000/= which was paid should now be refunded to the respondent.

Having concluded that the proceedings were tainted with incurable irregularities, the next question is; what follows? Both counsel asked the court to exercise its discretion on whether or not to order retrial.

The principles upon which retrial should be ordered were clearly restated by the Court of Appeal for East Africa in the case of Manji v. Republic (1966) EA 343. It was stated in that case that:-

> "... in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person"

The catch phrase here is that such an order should be made where the interest of justice so demand.

Proceedings in the present case were completed on 23.8.2002. That is the date on which the respondent's plea of guilty was recorded, following which he was sentenced to pay a fine of shs.20, 000/=. It is therefore almost three years since. The question becomes; is it in the interest of justice to start the case afresh three years after delivery of the decision being contested? In my opinion it is not on the ground that the matter is almost stale. In view of that fact, I feel not disposed of to make an order for retrial. However, because death was involved, I leave it to the Republic to make their mind whether or not to proceed with the matter on the guidance of this court's view on the point in the case of Republic v. Karimu Taibale (1985) TLR 196.

Order accordingly.

THE HIGH COURT OF TANZANIA

B.M.MMILLA

JUDGE.

30.09.2005.

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

W.P.Dyansobera

District Registrar

30.09.05