IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 78 OF 2017

(Originating from Criminal Case No 262 of 2015 at District Magistrate Court of Temeke)

ANTONY TANGALE..... APPELLANT

VS

REPUBLIC ..... RESPONDENT

JUDGEMENT

MWENEMPAZI, J.

Antony Tangale was charged and convicted for the offence of Grave Sexual abuse contrary to section 138C (1)(a) and 2(b) of the Penal Code [Cap. 16 R.E.2002]. He was sentenced to serve a term of 20 years imprisonment and ordered to pay the victim a compensation of Tshs. 200, 000. He is appealing against the decision of the District Magistrate Court (Hon. Batulaine RM). The appellant filed three grounds of appeal to the effect that; one, that the learned trial Magistrate grossly misdirected himself in law in not writing judgement, hence

failed to comply with the mandatory provisions of Criminal Procedure Act, governing the mode of delivering judgement and the content of judgement. Two, that having regard to the circumstances of the case, it is not well known as to the *provision of the law* (words used: offence's section of the law) and evidence which was relied upon by the learned trial magistrate in convicting the appellant; and that the evidence adduced, there is no sufficient evidence upon which a conviction could be founded as PW1, PW3, and PW4 were the witnesses with their own interest to serve, the evidence which cannot effectively corroborate each other.

When this appeal was called up for hearing the appellant was represented by Robert Mkoba, learned Advocate and the Respondent was represented by Clara Charwe, learned State Attorney being assisted by Joseph Mbasha, State Attorney trainee. The counsel for the appellant commenced his submission on the grounds of the appeal by informing this court that the appeal has protracted for a long time because there was no judgement which was written. In that way even on the date the appellant was convicted and sentenced to serve a term of 20 years imprisonment the Honourable Resident Magistrate never read the judgement to the appellant. The counsel for the appellant proceeded to submit on ground 1 and 2 together that the Honourable Magistrate erred in law to decide a case without writing a judgement as provided for in section 312(1) of the Criminal Procedure Act, Cap. 20 of the laws. The judgement was supposed to have points of

determination, the decision thereon and the reasons for the decision. It mandatory that it be dated and signed by the presiding officer as of the date on which it is pronounce in the open court. This has infringed the rights of the appellant to know the basis of the decision and also it has crippled him to challenge the said decision. Again, Honourable Batulaine-RM was not the presiding magistrate during hearing of the case. The appellant was supposed to be given a chance to recall witnesses before making the decision on the case at hand.

On the third ground of appeal, the appellant submitted that the Honourable trial magistrate failed to analyse evidence tendered in court. The evidence was insufficient to prove the case to the standard required for criminal cases, beyond reasonable doubt. The key witness PW1 at page 4 of the proceedings and PW2 at page 5 state that she is six years old and studies in Standard II. She has five relatives. This she testified on 10th February,2016. Evidence testified by PW2 was to the effect that PW1 is studying at kindergarten and that she has one relative. The contradictions in the evidence show that the witness was not credible and brings in serious doubt to the evidence tendered. In the evidence it is shown that the victim was taken to the hospital for medical examination. Though the Dr. Masha was attending at court but he/she never testified. No reason is assigned on this gap. The events raise doubt than strengthening prosecution case. The rest of the evidence is hearsay which does not carry enough weight to prove the case beyond reasonable

doubt. The appellant's Counsel prayed for the court to allow this appeal, quash the conviction and set aside the sentence.

The Respondent State Attorney agreed to the submission of the appellant that there was no legally accepted judgement of the court which convicted the appellant. The law requires the court to decide on the issue as to whether an accused person committed the offence. This should be by decision as per the provisions of section 235(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002.

The provisions above lead us to the provisions of section 311(1) of the Criminal Procedure Act on the mode of delivering the judgement. The decision shall be read before parties and section 312 of the said CPA defines the ingredients of the judgement. All these provisions read together gives as a judgment; evidence from both sides, the law used and the decision convicting the accused. The proceedings do not show that the trial magistrate recorded the judgement. This is equivalent to saying that there was no judgement or the appellant has never lawfully been convicted before a court competent to do so. That being the case, the appellant is before this court unlawfully. The learned state attorney prayed that this court to exercise its revisional powers under section 388(1) of the CPA and give an order for the records of the case the trial court so that the appellant may be properly convicted, which will grant him the right to appeal properly to this court

as an appellate court. On the question of analysis of evidence, the same cannot be discussed at this stage as the court never recorded any judgement.

After the respondent had submitted the appellant asserted her right to rejoinder. In doing so, the appellant counsel insisted that there being no judgement of the court, the appeal to this court was against the decision to convict and orders of the court to imprison the appellant. The appellant was unlawfully imprisoned. Section 359(1) of the CPA provides an appeal against finding, sentence or order. This is appeal is therefore lawful and that considering the appellant has been in jail for three years, the only remedy to relieve him is to allow the appeal. To order retrial will be to increase the influx of cases

Indeed, perusal of the record of the proceedings does not reveal there being any judgement. The available record reads as follows:

22/6/2016

Coram: Hon. .Tarimo-SRM

Pp: Koini

CC: Zuber

Accused: Present

Court: For Judgement but it is not yet Written

Order: Judgement on 30/6/2016

ABE

Sgd by : Hon. Tarimo-SRM

22/6/2016

4/7/2016

Coram: Hon. Batulaine-RM

PP: Koine/Joyce

CC: Zuber

Court: For Judgement and we are ready

Accused: I am ready for judgement

Sgd by: Hon. Batulaine RM

4/7/2016

PREVIOUS CONVICTION: NIL

MITIGATION

Accused: Nil

SENTENCE

Accused person is sentenced to serve (20) Twenty years imprisonment.

Order accordingly.

Sgd by: Hon. Batulaine

4/7/2016

Order: accused to pay victim compensation of Tshs. 200,000.

Sgd by: Hon. Batulaine

4/7/2016

Court: Judgement delivered on the 04/7/2016 before the parties in chamber court

Sgd by: Hon. Batulaine

4/7/2016

Court: Right of Appeal explained

Sgd by: Hon. Batulaine

4/7/2016

The law is clear on how the court should come out with the decision. The way is shown in the provisions of section 235(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002. The same read as follows:

235. Decision

> *(1) 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 him or shall dismiss*** *the charge under section 38 of the Penal Code*

It was decided in the case of **Aloyce Thomas@Mabelee v. Republic**, Criminal Appeal No 8 of 2016, Court of Appeal at Arusha that *Section 235 (1) is couched in mandatory terms. Therefore, in terms of sub-section (1) the court must proceed to enter a conviction before proceeding to sentence an accused person.* Section 312(2) of CPA provides for the contents of the judgment, that is:

> (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.***

The Court of appeal in the case of **Amiri Mohamed v. Republic** [1994] TLR 138(CA) held that "*what vitally matters is that the essences should be there, and these include critical analysis of both the prosecution and the defence.*"

Analysis of the prosecution evidence and the defence evidence gives life to the judgement of the court and validates its existence. of course, existence of the conviction entered upon by the court. In this case, as the relevant record shows above, there was nothing like analysis. The finding of the court was just stated by

the court from air. This is doing against what is directed by the law. It is in essence unlawful

The effect of not recording a judgement according to the requirement of law was stated by the court in the case of **Shabana Iddi Jololo and Others V Republic**, Criminal Appeal No. 200 of 2006. In that case it was held that in absence of conviction in terms of section 235(1) of the Act, there was no valid judgement upon which the High Court could uphold or dismiss. Technically the 'appeal' to the High Court is in the circumstances against sentence only because there was no conviction. As a result of this fault I proceed to quash the conviction which was entered without there being a judgement and as a matter of necessity the sentence is also set aside. Naturally, the following order would be to order for the records to be taken back to the trial court for the court to compose a judgement subject to the provisions of law above, namely section 235(1) and 312(2) of the Criminal Procedure Act, Cap. 20. However, I have noted that the appellant has stayed in jail for two years since his imprisonment on the 4th July of 2016. As it was submitted by the counsel for the appellant and aversely disregarded by the Respondent, the evidence was not to the standard required of criminal cases. There are gaps to be filled in order for one to proceed without there being any doubt that the appellant did commit the offence of Grave Sexual Abuse. In the interest of justice, and the circumstance obtaining this case, by powers vested in this court

under section 388(1) of the Criminal Procedure Act, Cap. 20 RE 2002 I set aside sentence and order to pay compensation. I hereby order the appellant be released from custody forthwith unless otherwise lawfully held.

Ordered accordingly.

T. M. MWENEMPAZI

JUDGE

20 / 6 / 2018