

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

CRIMINAL APPEAL NO. 247 OF 2017

**MUSTAPHA HASSANI NKUSSA.....APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

JUDGMENT

MURUKE, J.

The appellant was charged and convicted with the offence of breaking and stealing contrary to section 296 of the Penal Code Cap 16, R.E. 2002 and he was sentenced for ten (10) years imprisonment. Being dissatisfied with the decision of the district court, hence appealed to this court advancing seven (7) grounds as listed in the petition of appeal.

During hearing, the appellant requested the court to adopt his seven grounds of appeal as his submission in support of the appeal. Learned State Attorney, Sabrina Joshi by way of preliminary remarks alerted the court that. The trial magistrate did not convict the appellant as per section 235 of the Criminal Procedure Act, Cap 20, R.E. 2002 together with section 312 of the

same Act. The learned State Attorney referred this court to the case of **Sam Sempemba and Another vs. Republic**, criminal Appeal No 169 of 2010 CAT (unreported) where it was held that judgment carries no conviction is an invalid judgment. The remedy of this defect is to return it to the trial court to record the conviction. However, this cannot be done because there is contradiction of witnesses therefore no enough evidence for conviction.

Learned state attorney, added that the sentence pronounced by the trial magistrate was illegal as it is contrary to section 170(1)(a) of the Criminal Procedure Act (supra) which provide that;

"A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences—

*(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;"*

The appellant was charged with the offence whose sentence is not specified in the Minimum Sentencing Act. Therefore, he was

supposed to be sentenced to five (5) years instead of ten (10) years.

In cause of hearing, two magistrates were involved at different times. Pendekezi SRM took the evidence of prosecution witnesses and the defence case up to judgment was recorded by Mchome. The second magistrate (Mchome) did not comply with section 214(1) and (2) of the Criminal Procedure Act and the effect to that, renders the proceedings nullity and the case ought to be retried. However as said earlier the evidence are not enough to convict the appellant. In rejoinder the appellant insisted that, the evidence against him was not enough to ground his conviction. Hence he prays this court to allow the appeal and set aside the sentence.

Having considered the respective submissions by the appellant and the learned State Attorney in hand with the court record, the following are the deliberations of this court in disposal. As submitted by the learned State Attorney, Sabrina Joshi, the trial magistrate failed to convict the accused. Section 235(1) of the Criminal Procedure Act, requires that, I hereby quote;

*"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"

There are several cases of court of appeal on this matter, namely; **Matola Kajuni & 2 Others v. Republic**, Consolidated Criminal Appeals No. 145, 146 and 147 of 2011, CAT (unreported), **Julius Mathias and Another v. Republic** Criminal Appeal No. 546 of 2015, CAT (unreported), **Omari Hassan Kipara v. Republic**, Criminal Appeal No. 80 of 2012, CAT (unreported), **Sam Sempemba and Another vs. Republic**, criminal Appeal No 169 of 2010 CAT (unreported). In the case of **Omari Hassan Kipara v. Republic** (supra) it was held that;

" In principle, where the trial court may have been satisfied that evidence established the guilt of the accused but did not proceed to convict as demanded by section 235 (1) of the Criminal Procedure Act, such judgment is a nullity; so is any other judgment on appeal based on such judgment. Both such judgments cannot escape the wrath of being quashed and the sentences thereof being set aside."

I concur with the learned State Attorney that, since there is no conviction, there is also no judgment before this court as conviction is an important aspect of the judgment. It is essential to point out as well, that in the absence of conviction, one of the essential components of a judgment in terms of section 312 (2)

of the CPA is missing. Subsection (2) of that section provides that:-

"(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 added].

it is essential, to emphasize here that if the conviction is missed out, there can be **no valid judgment** of a trial court against which a first appeal can be filed in the High Court, and subsequent second appeal to this Court. We desire to underscore that failure to enter a conviction by any trial court is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction the Court was firm that it is mandatory in law that sentence must be prefaced by conviction."

On the sentence imposed by the trial magistrate I wish to differ with the learned state Attorney because section 170(1) does not bind the Senior Resident Magistrate as provided under the proviso as I hereby quote;

"Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank."

In this case, it is a Senior Resident Magistrate, A.L. Mchome who pronounced the sentence. Therefore, under this aspect there is no any irregularity occurred.

On the issue of noncompliance with section 214(1) of the Criminal Procedure Act, which require that, in case the trial magistrate failed to proceed with the trial for some reasons another magistrate may take over and continue the trial. As submitted by the learned state Attorney, the law requires that, the successor magistrate must state and record the reasons as to why the predecessor failed with the trial. At pages 14-15 A.L. Mchome took over but did not state the reasons for failure of his predecessor to proceed with trial. In the case of **Priscus Kimaro, vs. Republic**, Criminal Appeal No. 301 of 2013 CAT (unreported) it was held that:-

"... where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal

with it to the detriment of justice. This must not be allowed."

Also the same issue was discussed by the Court of appeal in the case of **Abdi Masoud @ Iboma and 3 Others vs. Republic**, Criminal Appeal No. 116 of 2015 CAT (unreported) where the Court said:-

"In our view, under s. 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrate. It is a requirement of the law and has to be complied with. It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with the successor magistrate would have no authority or jurisdiction to try the case. Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity."

From above explained irregularities therefore, I hereby nullify the entire proceedings and judgment of the trial court. I further quash the conviction and set aside the sentence meted out against the appellant. Appellant is set at liberty unless lawfully held.



A handwritten signature in blue ink, appearing to be "Z. G. Muruke".

Z. G. Muruke

JUDGE

24/04/2018

Judgment delivered in the presence of Christine Joas, State Attorney for the respondent and appellant in person.



A handwritten signature in blue ink, appearing to be "Z. G. Muruke".

Z. G. Muruke

JUDGE

24/04/2018