

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL No. 07 OF 2018

*(Appeal from the judgment of the District Court of Mbeya at Mbeya, Hon.  
Z. D. Laizer, RM in Criminal Case No. 177 of 2016)*

**SALUM s/o ATHUMAN MALEND**.....**APPELLANT**

**VERSUS**

**THE REPUBLIC**.....**RESPONDENT**

**JUDGEMENT**

*Hearing date: 06/05/2019*

*Ruling date: 21/05/2019*

**MONGELLA, J.**

Salum son of Athuman Malenda, the appellant herein, was charged and convicted on two counts. The first count was on armed robbery contrary to section 287A of the Penal Code, Cap 16, R.E. 2002 and the second count was on gang rape contrary to section 130(1)(2)(a) and 131A(1) and (2) of the Penal Code, Cap 16 R.E. 2002. *Angela*

On the first count, the prosecution alleged that on 14<sup>th</sup> October 2016 at lyunga area within the city and Region of Mbeya the appellant did steal T.shs. 10,000/-(Ten thousand), one TV Set make Samsung worth T.shs. 1,400,000/-, one Techno phone worth T.shs. 300,000/-, one DVD DECK worth T.shs. 150,000/-, one gold chain worth T.shs. 200,000/- thereby making a total of T.shs. 2,600,000/-(Two million sixty thousand), property of one Victoria Nswima. It was also alleged that immediately before and after such stealing the appellant used dangerous and offensive instrument to wit, a machete, to threaten one Victoria daughter of Nswima in order to obtain and retain the said properties.

On the second count, the prosecution alleged that on 14<sup>th</sup> October 2016 at lyunga area within the City and Region of Mbeya the appellant together with another person who was never arrested did have carnal knowledge of one Getruda daughter of Jonas without her consent. Getruda was living with her sister Victoria in the house invaded by the appellant.

In his petition of appeal, the appellant raised ten grounds of appeal which were opposed by the respondent who was represented by Ms. Zena James, learned State Attorney. However, in the course of composing this judgment, I found out that the trial court entered

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conviction on the first count and omitted to convict the appellant on the second count. The trial court however, passed a sentence on both counts. The two offences were committed in one transaction and were a subject of the same charge in the trial court. Thus they cannot be dealt with separately at this appellate level. The omission to enter conviction on the second count makes the judgement defective. Section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2002 provides:

*"In the case of conviction, the judgement 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 effect of this provision is that the judgment must specify the offence. Therefore where there happens to be more than one offence facing the accused in a charge and the court has found the accused person guilty on both offences, then the judgement must specify each offence in which the accused person is found guilty and convicted thereof.

In the case of ***Kelvin Myovela vs. The Republic, Criminal Appeal no. 603 of 2015***, the CAT, at page 5 stated:

*"...Failure to enter a conviction renders a judgement invalid. In fact, there is no valid judgement without a conviction having*

*Byell*

been entered, as it is one of the prerequisites of a valid judgement."

At page 7 the CAT also stated:

"Since in the instant case, the trial court did not enter a conviction, the judgement and the subsequent sentence were a nullity. Since they were a nullity there was nothing which the High Court could have upheld."

Apart from the decision of **Kelvin Myovela (supra)**, there a number of other decisions from the Court of Appeal which have stressed on the issue of conviction. These include: **Aman Fungabikasi vs. Republic, Criminal Appeal no. 270 of 2008; Shabani Iddi Jololo and three others vs. Republic, Criminal Appeal no. 200 of 2006; and Hassan Mwambanga vs. Republic, Criminal Appeal no. 410 of 2013** (all unreported). In all these cases the Court stated that the failure of the trial court to enter a conviction is a fatal and incurable irregularity. It renders the purported judgment and imposed sentence a nullity and thus the same cannot be upheld by the High Court in the exercise of its appellate jurisdiction. (See also, **George Patrick Mawe & 4 others vs. Republic, Criminal Appeal no. 203 of 2011 and John s/o Charles vs. Republic, Criminal Appeal no. 190 of 2011** (unreported)).

In the case at hand, the judgement is defective for not convicting the appellant on the second count and at the same time passing a sentence on the said count. This Court cannot therefore entertain the appeal under such circumstances. Following such a defect in the trial judgement, the only remedy available is to remit the case file to the trial court for it to enter a conviction on the second count in accordance with the law before passing a sentence thereof. I therefore hereby order for the case file to be remitted to the trial court for a proper judgement to be composed. I as well hereby instruct the trial court the following:

1. The trial court should compose a legally acceptable judgement by including a proper conviction on the second count based on the same evidence adduced in court during trial.
2. The trial court file should be returned to the trial court to comply with the above instructions;
3. The appellant shall remain in custody and should be returned to the trial court for proper conviction before the same trial magistrate or another magistrate in case the trial magistrate has been transferred and upon compliance with the above instructions, the appellant may wish to lodge his appeal afresh;

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4. The time to appeal shall commence from the date when a proper judgement of the trial court is pronounced to the accused person/appellant;
5. For the interest of justice, the date of sentence of the accused shall remain the same date as he was put under confinement on the first time;
6. The new judgement shall be completed within thirty (30) days from the date of this ruling.

Order accordingly.

  
**L.M. MONGELLA**  
**JUDGE**  
**21/05/2019**

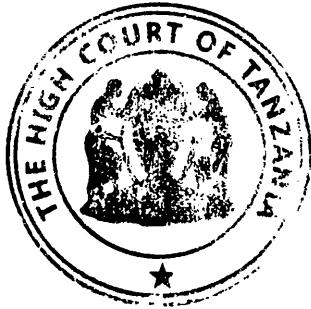
Dated at Mbeya this 21<sup>st</sup> day of May 2019



  
**L.M. MONGELLA**  
**JUDGE**  
**21/05/2019**

**Court:** Ruling delivered at Mbeya in Chambers on this 21<sup>st</sup> day of May 2019 in the presence of the Appellant appearing in person and Mr. Ofmedi Mtenga, learned State Attorney for the Respondent.

Right of Appeal to the Court of Appeal has been explained.



*L. M. Mongella*

**L. M. MONGELLA**

**JUDGE**

**21/05/2019**