IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 196 OF 2019

(From Kyela District Court Criminal Case No. 35/2018)

PAULO S/o ANYAMBELILE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Judgment

Date of last Order: 29.45.20120
Date of Judgment: 26.05.20120

Dr. A.J. Mambi, J.

In the District Court of Kyela, Kyela in Mbeya Region the appellant **PAULO S/o ANYAMBELILE** was charged with an offence rape c/s 130 (2) (e) and 131(1) of the Penal Code, Cap 16 [R.E.2002]. They were found guilty and convicted. The trial Magistrate ordered the appellants to serve thirty years imprisonment.

Aggrieved, the appellant appealed to this court basing on six grounds.

During hearing both patties agreed to argue by way of written submissions. While the appellant in this appeared under the service of the Lerned Counsel Mr. A.Kubajaa while the Republic was represented by Mr. Michal Shindai the learned State

Attorney. IN ONE of the Ground of appeal the learned Counsel for the appellant argued that the Judgment of the trial court was improper since there was no sentence made. On the other hand the learned State Attorney did not support the grounds of appeal but admitted that the judgment had no sentence and prayed the matter be remitted back for proper judgment. that the matter be remitted back for proper conviction.

I have carefully gone through the records and the relevant law. Before thoroughly looking into all grounds of appeal and submission s in detail I have noticed and observed the judgment by the trial magistrate has some errors which may render it invalid. I have gone through the judgment and found that the judgment did not contain the sentence apart from conviction only. In this regard, I am in agreement with both the appellant Counsel and the learned State Attorney that the appellant might have been sentenced but that sentence does not appear under the judgment. As required by the law that once an accused is found guilty, he must be convicted based on the charges followed by **sentence** and the sentence must appear under both the proceedings and judgment. Failure to sentence the accused is contrary to the law since the law provides for mandatory requirement for judgments to contain conviction and sentence. I wish to refer 235 (1) of the CPA [Cap 20 R.E 2002] which provides as follows-

> *"the court having heard both the complainant and the accused person and their witnesses and 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".(emphasis supplied with).*

The above provision of the law is very clear. In this regard, my mind directs me that the provision of the law mandatorily require any judgment must contain proper conviction and sentence and it must be reflected in the record. The word **"shall"** under the provision implies mandatory and not option and that is the legal position under the Interpretation of Laws Act Cap 1 [R.E.2002].

This was also observed in ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015 (unreported)***. The court of appeal in this case that is ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015*** observed that:

*"Although there was a finding that the appellant was guilty was not convicted before he was sentenced. This was itself irregular. **Sentence must** always be preceded by **conviction,** whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of the CPA (where there has been a trial)." (emphasis supplied with).*

Worth noting that the Court of Appeal of Tanzania has held in its various decisions that failure to sentence the accused after conviction renders the judgment of trial court incompetent. The court thus in ***Oroondi Juma v. Republic, Criminal Appeal No. 236 of 2012 (unreported),*** held that:

"Non-compliance with the requirement to convict the accused as directed under Sections 235 (1) and 312 (2) of the CPA rendered the judgment of the trial court incompetent ...."

See ***Amani Fungabikasi V Republic, criminal appeal No 270 of 2008*** (unreported). Reference can also be made to section 312 of CPA, Cap 20 [R.E 2002] for content of judgment as follows:

"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

(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 clear from the above observation that the judgment by the trail magistrate was not proper for non-compliance with the law. This is an obvious omission and irregularity that ought to have been observed by the trail Magistrate and even the prosecution. Having established that in this case the trial magistrate has failed to enter proper sentence in his judgment that renders the judgment incompetent, the question is, has such omission or irregularity occasioned into injustice to the accused persons/appellants?. In this regard, I will refer Section 388 (1)

of *the Criminal Procedure Act*, Cap 20 [R.E.2002] and see what would be the proper order this court can make in the interest of justice. It trait law that before any appellate court makes an order for retrial or trial de novo, the court must find out as to whether *when the original trial was illegal or defective and whether making such order (*retrial or trial de novo*) and* where the interests of justice requires to do so. I wish to refer the decision of court in ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013.*** The Court of Appeal of East Africa restated the principles upon which court should order retrial. The court observed 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 evidence or for the purpose of enabling the prosecution to 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 particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I subscribe the above position by the court which started that an order for retrial should only be made where the interests of justice require it. In my considered view, there is no any likelihood of causing an injustice to the accused person if this

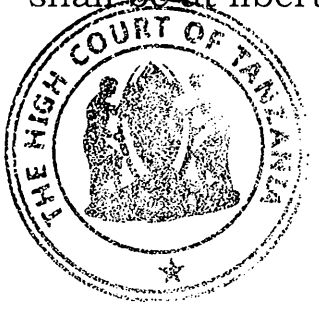
court orders retrial. The records shows that at the trial court the evidence was clear and the trial court rightly found the accused persons guilty but the court failed to enter a proper sentence.

From my finding, I am satisfied that such an error, omission or irregularity has in fact not occasioned failure of justice to the appellant for this court to order the matter be remitted back for the court compose a judgment that contain both conviction and sentence. Indeed, this court has power to make such orders. I say so because in my perusal, understanding, and appreciation of the evidence on record I am satisfied that there was cogent evidence upon which a conviction safely laid against the appellant. For that reason since the appellant was found guilty of the offence charged and he should have been convicted and sentenced under the proper provision of the law basing on the charges he was charged followed by the sentenced in terms of section 235(1) of the CPA Cap 20 [R.E.2002]. I am of the settled mind that failure to enter a proper sentence basing on the charges the appellant was charged is as good as saying there was no sentence entered by the trial court. As I alluded and observed above that, since there was no proper sentnce in terms of section 235 (1) and 312 of the Criminal Procedure Act, there was no valid judgment upon this Court to could uphold or dismiss and there is nothing this court can entertain as appeal. It is a settled law that failure to insert sentence under the judgment by any trial court, is a fatal and incurable

irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction.

In the circumstance and in view of the fact that the trial court omitted to enter a roper sentence, I declare that the judgment of the Resident Magistrate Court is to that extent fatally defective. In the circumstance, since the trial court's judgment was invalid, it could not have founded a proper appeal before the High Court. In the circumstances I therefore remit the file back to the trial court for it to enable the trial magistrate to compose and deliver a judgment which is in conformity with the law that is it has to have a proper conviction based on the charge followed by the sentence. Where it appear that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA Cap 20 [R.E.2002] another magistrate should be assigned the case to compose and deliver the judgment.

In the interest of Justice, as also observed by the court of Appeal in the above case, I order that the conviction and sentence based on the charge to be ordered by the Magistrate should take into account the time the appellant has spent in prison. Depending on the outcome of the new judgment, the appellants shall be at liberty to start afresh the process of appeal



DR. A. J. MAMBI

JUDGE

26.05. 2020

Judgment delivered in Chambers this 26th day of May , 2020 in presence of both parties.

DR. A. J. MAMBI

JUDGE

26.05. 2020

Right of Appeal Explained.

DR. A. J. MAMBI

JUDGE

26.05. 2020