

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

CRIMINAL APPEAL NO. 120 OF 2019.

*(Originating from Criminal Case No. 312 of 2016 of the District Court of
Mbalaii, at Rujewa).*

JERO ESSAUAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

08 & 16.6.2020

UTAMWA, J:

In this appeal, Jero Essau (the appellant) was convicted by the District Court of Mbalali District at Rujewa (the trial court), of the offence of Rape Contrary to sections 130 (2) (b) and 131 (1) of the Penal Code Cap. 16 R: E 2002. He was sentenced to serve thirty years in prison and pay Tanzanian shillings 1, 000, 000/= (One Million) as compensation to the

victim of the offence. He was dissatisfied with both, the conviction and sentence hence this appeal.

In his petition of appeal, he raised eight grounds of appeal. One of the grounds was that, the trial court did not convict him in accordance with the law. That ground is numbered 6 in the petition of appeal. He therefore, prayed for the court to allow the appeal, quash the conviction and set aside the sentence and order for his release from the prison.

The appeal was heard on line by a virtual Court conference. The appellant was unrepresented while the respondent was represented by Mr. Shindai Michael, learned State Attorney. The learned State Attorney raised a preliminary objection on the point of law which in a way supported the sixth ground of appeal. He contended that, the trial court did not properly convict the appellant since it is the requirement of the law that, before any sentence is passed, the accused should be properly convicted and the trial court should mention the offence and the section of the law under which the accused is convicted. He further argued that, in this appeal the trial court did not cite the section of the law under which the conviction was based. His argument was also based on section 312 (2) of the Criminal Procedure Act Cap. 20 R: E 2019 (the CPA). He cited the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Kelvin Myovela V. Republic, Criminal Appeal No. 603 of 2015 CAT at Mbeya** (unreported) to support the contention.

Upon being probed by the court, if the said defect could not be cured by the principle of Overriding Objective, Mr. Shindai forcefully maintained

his stance that, the defect is incurable. He thus, urged this court to nullify the judgment and sentence of the trial court and remit the case to the trial court for a proper conviction.

On his part, the appellant had nothing useful to submit, but he claimed to have stayed in the prison for long time and left the matter for the court to decide.

I totally agree with learned State Attorney that, failure to mention the section under which the accused was convicted is a fatal omission. It renders the judgment and sentence a nullity; see **Kelvin Myovela case** (supra) and **Aloyce Thomas @ Mabelee v. The Republic, Criminal Appeal No. 8 of 2016 CAT at Arusha** (unreported). In this case the CAT, held *inter alia* that, failure to enter conviction is fatal and is not a mere irregularity which is curable under section 388 (1) of the CPA.

I therefore, for the reason stated above, strike out the appeal, set aside the judgment and sentence of the trial court, and order that, the case shall be remitted to the trial court for recomposing a proper judgment and consequently for the proper sentence upon a proper conviction. Currently the appellant shall stay in remand prison pending the complacence of the above order. It is so ordered.



J.H.K. UTAMWA

JUDGE

16/6/2020

16/06/2020.

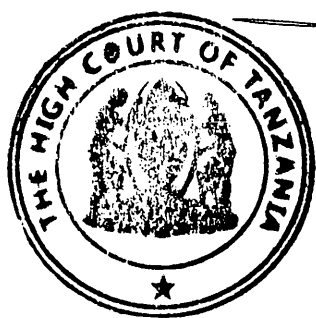
CORAM; Hon. P. R. Kahyoza, DR.

Appellant; Present in Ruanda Prison (through virtual court conference).

For Respondent; Mr. Kihaka, State Attorney (through virtual court link).

BC; Mr. Patrick Nundwe, SRMA.

Court; Ruling delivered in chambers in the presence of the parties through a virtual court link.




P. R. KAHYOZA.
DEPUTY REGISTRAR

16/06/2020.