

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 117 OF 2019

*(Appeal from the judgment of the District Court of Momba at Chapwa, Z.
A. Mpangule, RM in Criminal Case No. 148 of 2018)*

GODFREY S/O WILSON MAHENGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing: 09/03/2020

Date of Ruling : 23/03/2020

MONGELLA, J.

Dissatisfied with the decision of the District Court of Momba at Chapwa, the Appellant appealed to this Court on five grounds. However, during the hearing the Applicant's Advocate, Mr. Emily Mwamboneke abandoned the rest of the grounds and argued on ground number 4 only. This ground is to the effect that "*the trial court erred in law and fact for convicting the appellant with the offence of stealing while he was charged with the offence of rape and impregnating a school girl.*"

Mr. Mwamboneke argued that the accused/Appellant was charged of rape and the evidence was on that offence, however at conviction stage, the court convicted the Appellant on stealing contrary to section 258 (1) (2) (a) and section 265 of the Penal Code, Cap 16 R.E. 2002. He argued that on those bases the offence he was convicted of and the evidence given are two different things. That the proceedings and judgment thereof becomes a nullity as the evidence and the sentence are different. He concluded that the Appellant was not subjected to fair trial and therefore the proceedings and judgment should be nullified.

The Respondent was represented by Mr. Ofmedi Mtenga, learned State Attorney. In reply, Mr. Mtenga supported the Appellant's ground of appeal. He argued that section 312 (2) of the Criminal Procedure Act, Cap 20 R. E. 2002 requires the Magistrate to state the offence and law when convicting an accused person. He contended that the proceedings were disrupted from the conviction, but the rest of the proceedings are correct. He referred to page 6 of the trial Court judgment whereby the Hon. Magistrate stated the provision and offence which the Appellant was not charged with. He stated that this is as good as there is no conviction and the remedy thereof is to remit the matter back to the trial court for the accused to be properly convicted.

In composing this judgment I had to go through the record of the District Court. The charge sheet contains two counts. The first is Rape contrary to section 130 (1) (2) (e) (3) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002. The second count is Impregnating a school girl contrary to section 60 A (3) of the Education Act, Cap 353 as amended by the Written Laws

(Miscellaneous Amendment) Act No. 2 of 2016. The proceedings, as argued by Mr. Mtenga are connected to the charged offence of rape and impregnating a school girl. The preceding parts of the judgment are also talking of the offence of rape and impregnating a school girl and the sentence is on these two offences. However, the conviction in the judgment is on the offence of stealing. For ease of reference, the trial Magistrate at page 6 of the judgment wrote:

"That since the offence of stealing has been established against him beyond reasonable doubt hence I convict accused person C/S 235 (1) and 112 (2) of CPA [CAP 20 R.E. 2002] for the offence of stealing which is C/S 258 (1) (2) (a) and 265 of the Penal Code [CAP 16 R.E. 2002]"

With such conviction, I agree with Mr. Mtenga's submission that it is as good as there is no conviction at all. **Section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2002**, provides that the conviction entered by the court is required to include the offence in which the accused is convicted with (of course which the accused is charged with) and the specific provision of the law in which the offence convicted upon is provided. The Section specifically provides:

"In case of a 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."

Considering the conviction entered by the trial magistrate in the case at hand whereby it was not based on the offence charged, I agree with both counsels that it has not adhered to the requirements of the law as

provided under section 312(2) cited above and therefore a nullity. This position has also been set in a number of cases by the CAT. In the case of **Kelvin Myovela vs. The Republic, Criminal Appeal no. 603 of 2015**, for example, 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 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."

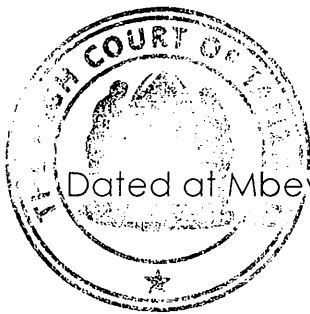
Apart from the decision of **Kelvin Myovela** (*supra*), there a number of other decisions from the Court of Appeal which have stressed on this point. These include: **Aman Fungabikasi vs. Republic, Criminal Appeal no. 270 of 2008**; **Shabani Iddi Jololo and three others vs. Republic, Criminal Appeal 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)).

Following such defects in the trial Court's judgement, the only remedy available is to remit the case file to the trial Court for it to enter a conviction in accordance with the law before passing a sentence (See, **Kelvin Myovela** (*supra*) at page 7) as required under Section 312(1) of the Criminal Procedure Act. 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 offence charged basing on the same evidence adduced in court during trial. The judgement should comply with sections 235(1) and 312(1) & (2) of the Criminal Procedure Act, Cap 20 R.E. 2002;
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 by the trial magistrate or another magistrate in case the trial magistrate is no longer at the trial court; and upon compliance with the above instructions, the Appellant may wish to lodge his appeal afresh in accordance with the law.
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
L.M. MONGELLA
JUDGE
23/03/2020

Dated at Mbeya on this 23rd day of March 2020

L.M. Mongella
L.M. MONGELLA
JUDGE
23/03/2020

Court: Ruling delivered at Mbeya in Chambers on this 23rd day of March 2020 in the presence of the Appellant, and his Advocate Mr. Emily Mwamboneke, and Mr. Kihaka, learned State Attorney for the Respondent.

L.M. Mongella
L. M. MONGELLA
JUDGE
23/03/2020