

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 90 OF 2019

(Arising from Criminal Case No.16 of 2019 of the District Court of Meatu at Meatu)

HUSSEIN ERNEST.....1ST APPELLANT

COSMAS EDWARD.....2ND APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Date of Last Order: 20/05/2020

Date of Ruling: 29/05/2020

RULING

C. P. MKEHA, J

The appellants were arraigned, prosecuted and found guilty of an offence of gang rape before the District Court of Meatu. As a result of the said finding by the trial court, the appellants found themselves in prison, where they shall spend the rest of their lives, if the trial court's decision is to be upheld.

When the present appeal was on 20/05/2020 called for hearing, Ms. Mbughuni learned Senior State Attorney rose to draw attention of the court

to the effect that, the trial court's judgment does not indicate whether the appellants were properly convicted, leave alone being properly sentenced. In her considered view, there was neither a proper conviction nor proper sentence. She opined that, it would be in the interests of justice if the matter is remitted back to the trial court so that the law can be complied with.

The appellants, who were both unrepresented, supported the learned Senior State Attorney's view.

At page 13 of the trial court's judgment, the following was put on record by the learned Senior Resident Magistrate:

*"Truly, on the mind and eyes of this court both accused participated into the actual act of raping PW2. Therefore, this court do **incline** to convict both accused persons named above."*

The Oxford Advanced Learner's Dictionary defines the word **incline** to mean, to tend to think or behave in a particular way. The same dictionary defines the word **inclination** as a feeling that makes someone wants to do something. Therefore, whereas the trial Magistrate had a feeling/thought that the case before him had been sufficiently proved and therefore fit for conviction, he did not actually enter the said conviction as the law requires.

Further, at page 15 of the trial court's judgment, the learned trial Magistrate put the following on record:

"So, to make a lesson to other people of their type into the society, this court thing(sic) proper for both accused persons to serve life imprisonment."


Again, reading from the above quoted words, one can not easily conclude that, the appellants were actually sentenced to be imprisoned for life. The learned trial Magistrate merely expressed his thinking that, it would be proper for both accused to be jailed for the rest of their lives. He did not at last pass the said sentence.

The law provides in unambiguous terms that, 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 or **shall** dismiss the charge under section 38 of the Penal Code. If the court acquits the accused, it **shall** require him to give his permanent address for service in case there is an appeal against his acquittal and the court **shall** record or cause it to be recorded. **See:** Section 235(1) & (2) of the Criminal Procedure Act.


It has been held times without number that, non-compliance with the provisions of section 235 of the Criminal Procedure Act in so far as entering conviction and passing sentences is concerned, is fatal. **See: Khamis Rashid Shaban Vs DPP Criminal Appeal No.184 of 2012, CAT** (Unreported) and **Shaban Iddi Jololo and Others Vs Republic, Criminal Appeal No.200 of 2006, CAT** (Unreported).

For failure of the trial Magistrate to adhere to the mandatory provisions of the law, the trial court's judgment and resultant orders are set aside. The record is to be immediately sent back for the trial court to compose a fresh judgment complying with section 235(1) & (2) of the Criminal Procedure Act. Should the appellants be convicted, the period already spent in prison shall be taken into account **only if** a sentence other than life imprisonment will be imposed.

Dated at **SHINYANGA** this **29th day of May, 2020.**


C. P. MKEHA
JUDGE
29/05/2020

Court: Ruling is delivered in the presence of Ms. Mbughuni learned Senior State Attorney.



C. P. MKEHA
JUDGE
29/05/2020