

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

CRIMINAL APPEAL NO. 31 OF 2020

(Originating from Criminal Case No. 65 of 2020 of Mbinga District Court)

MODESTUS SAMWEL KAWONGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Hearing: 15/03/2021

Date of Judgment: 24/03/2021

JUDGMENT

I. ARUFANI, J.

The appellant, Modestus Samwel Kawonga was charged in Criminal Case No. 65 of 2020 of the District Court of Mbinga at Mbinga with the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002. It was stated in the particulars of the offence that, on 3rd day of May, 2019 at Luwaita Village within Mbinga District in Ruvuma Region the appellant did have carnal knowledge of one AN (not her real name) a girl aged 14 years.

The appellant pleaded not guilty to the indictment and in proving it the prosecution called four witnesses and the accused person defended himself without calling any witness. After full hearing of the evidence from both sides the appellant was found guilty, convicted and sentenced to serve thirty years imprisonment. The appellant was aggrieved by the decision of the trial court and lodged in this court the petition of appeal comprising two grounds to challenge both conviction and sentence imposed to him. When the appeal came for hearing the appellant appeared in court in person and the respondent was represented by Mr. Frank Chonja, learned State Attorney.

In arguing the appeal the appellant prayed the court to receive his grounds of appeal and set him free. He denied to have committed the offence leveled against him and said the prosecution witnesses failed to prove the offence leveled against him. He also said that, while it was alleged he impregnated the victim but he was charged with the offence of raping the victim. When the learned State Attorney was about to make his reply to the appeal filed in this court by the appellant the court required him to address it about whether the appellant was properly convicted as required by the law.

The learned State Attorney told the court that, after going through the judgment of the trial court he has found that, as appearing at page 6 of the judgment of the trial court the appellant was not properly convicted as required by the law. He argued that, he has found in convicting the appellant the trial court failed to comply with the requirement provided under section 312 (2) of the Criminal Procedure Act, Cap 20 R.E 2019. He stated that, the cited provision of the law requires when a person is convicted the trial court is required to state he was convicted in which offence and that offence is provided under which section of which law.

He submitted that, the Court of Appeal has stated in several cases that, where there is violation of the requirements provided under the above cited section of the law the remedy available is for the court to remit the file to the trial court so that the trial court can comply with the requirements provided under that provision of the law. He told the court that, as the trial court failed to comply with the requirements provided in the stated provision of the law he is praying the court to remit the file of the trial court to the trial court so that the appellant can properly be convicted as required by the law.

After considering the submission made to the court by the learned State Attorney in respect of the observation raised to him by the court, the court has found it is proper and for clarity purpose to reproduce the provisions of section 235 (1) of the Criminal Procedure Act upon which the appellant was convicted of and section 312 (2) of the Criminal Procedure Act which the learned State Attorney stated was not complied with by the trial court. The said provisions of the law states as follows:-

"Section 235 (1);

*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*

Section 312 (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.”

(Emphasize supplied).

My understanding of what is provided in the above quoted provisions of the law is that, after the court having heard the evidence from both sides, if is satisfied the charge laid against the accused person has been proved to the standard required by the law is required to convict the accused person as provided under section 235 (1) of the CPA. If the charge is not proved the court is required to acquit the accused person or dismiss the charge under section 38 of the Penal Code.

The court has also found that, section 312 (2) quoted hereinabove requires the trial court where the accused person is convicted, to specify in the judgment of the trial court the accused person is convicted in which offence and state the said offence is provided in which section of which law. That being the requirements of the two provisions of the law the court has gone through the typed judgment of the trial court and find that, as rightly argued by the learned State Attorney the appellant was not properly convicted.

The court has found that, while the appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code but he was convicted under section 235 (1) of the CPA while he was not charged under that provision of the law. To the view of this court and as stated hereinabove section 235 (1) of the CPA is not requiring trial court to convict accused person under that provision of the law but is putting a requirement for a person found guilty of an offence to be convicted. After the accused person being convicted the trial court is required by section 312 (2) of the Criminal Procedure Act to specify the accused person is convicted under which offence and that offence is provided under which section of the law upon which the accused person has been convicted.

Since the appellant was convicted under section 235 (1) of the CPA and not under section 130 (1) (2) (e) and 131 (1) of the Penal Code upon which his charge was grounded the court has found as rightly argued by the learned State Attorney the appellant was not convicted properly as required by the law. The court has arrived to the above finding after seeing that compliance with the requirements provided under section 312 (2) of the CPA is mandatory as that provisions of the law is couched with the word "shall"

which when used on a provision of law to confer a function makes it mandatory to be comply with.

Failure to comply with the requirements provided under the referred provisions of the law renders the judgment incompetent. This was stated so in the case of **Elia John V. R**, Criminal Appeal No. 269 of 2011, CAT at Arusha (unreported) where the Court of Appeal of Tanzania held inter alia that:-

"The failure by the trial court to comply with the mandatory provisions of sections 235 (1) and 312 (2) of the Criminal Procedure Act, renders its judgment incompetent which could neither be upheld nor dismissed by the first appellate court."

The similar position of the law was stated in the case of **Abdallah Ally V. R**, Criminal Appeal No. 253 of 2013, CAT at DSM (unreported) where conviction entered without complying with the requirements of section 235 (1) and 312 (2) of the Criminal Procedure Act was declared to be null and void. It was stated further in the cases of **Amani Fungabikasi V. R**, Criminal Appeal No. 270 of 2018 and **Shabani Iddi Yololo & 3 Others V. R**, Criminal Appeal No. 200 of 2016 (All unreported) that, failure to enter

conviction as required by the above referred provisions of the law is fatal and is not curable under section 388 of the Criminal Procedure Act.

Since conviction entered against the appellant by the trial court was not in compliance with the requirements of the law it is crystal clear that the conviction entered against the appellant is incompetent. That being the position it is also crystal clear that, even the sentence of thirty years imprisonment imposed to the appellant by the trial court which is also appealing against was not lawfully imposed to him as it was based on an incompetent conviction. The above finding of this court is being bolstered by the holding made by the Court of Appeal of Tanzania in the case of **Joseph Mahona V. R**, Criminal Appeal No. 541 of 2015, CAT at Tabora (unreported) where it was stated that, any lawful sentence must be preceded by a proper conviction.

Having found the appellant was not properly convicted as required by the law and as stated in the case of **Elia John** (supra) a judgment which do not comply with the mandatory provisions of sections 235 (1) and 312 (2) of the CPA is incompetent and it can neither be upheld nor dismissed, the court has found it cannot go to the merit of the appeal filed in this court by the appellant as it will be a futile exercise. Basing on the above stated

circumstances the court has found as from when the appellant was convicted to date is about only nine months which have passed then as correctly urged by the learned State Attorney the appropriate order to make in this matter is to quash the judgment of the trial court and set aside the sentence imposed to him and remit the case file to the trial court so that the appellant can be convicted properly as required by the law.

In the upshot the conviction entered against the appellant by the trial court is hereby quashed and the sentence of thirty years imprisonment imposed to him is set aside. The court is ordering the file of the case of the trial court to be remitted to the trial court with directions that, a proper judgment that complies with the dictates of section 235 (1) and 312 (2) of the Criminal Procedure Act be prepared and delivered to the appellant as soon as possible.

For the interest of justice the date of sentence to be served by the appellant will remain the date he was sentenced when he was convicted in the judgment which has been quashed and if he may wish to lodge a fresh appeal the time to appeal will start to accrue from the date of delivery of the judgment which will be prepared in accordance with the law. While awaiting

preparation and delivery of the proper judgment the appellant will be kept in custody. It is so ordered.

Dated at Songea this 24th day of March, 2021



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. ARUFANI

JUDGE

24/03/2021

Court:

Judgment delivered today 24th day of March, 2021 in the presence of the appellant in person and in the presence of Mr. Shabani Mwegole, Senior State Attorney for the respondent. Right of appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. ARUFANI

JUDGE

24/03/2021