

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
CRIMINAL APPEAL NO. 126 OF 2021

(From the decision of the District Court of Momba at Chapwa (Hon. Z. M. Mpangule, DRM) in Criminal Case No. 57 of 2017)

JOSEPH ROBERT MWAKYOSI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Hearing : 25/04/2022
Date of Ruling : 27/04/2022

MONGELLA, J.

In the district court of Momba at Chapwa, in Criminal Case No. 57 of 2017, the appellant was arraigned for the charge of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2019. He was alleged to rape a girl aged 12 years, hereinafter referred to as the victim or PW1, for purposes of concealing her identity. The incident was alleged to have occurred on 3rd March 2017 at Maporomoko area within Momba district, Songwe region.

The facts of the case as presented during the hearing are to the effect that: the appellant found the victim on her way from fetching water sometime in June 2016. He told her that he sees is big enough to carry a



big bucket of water. He therefore asked her to fetch water for him. The victim complied and fetched water for him. At his home the appellant asked her to as well wash his dishes. The victim complied. While washing the dishes, the appellant closed the gate to his house, covered the victim with a "kitenge" on her face and took her to his room whereby he raped her. He gave her T.shs. 200/- and told her not to reveal the incident to anyone. From that incident it became the habit of the victim and the appellant to meet at the appellant's house and have sexual intercourse in exchange of T.shs. 200/-, sweets, chocolates, sodas/juices, and biscuits.

PW3, a fellow child to the victim, saw the victim frequenting the appellant's house. She testified that at one point the appellant gave them T.shs. 200/- each and sodas, biscuits and chocolates. PW3 thus revealed the incidents to PW3, who is the victim's grandmother and guardian. PW3 interrogated the victim whereby she spilled the beans saying that she had been visiting the appellant's house to wash his dishes and they would have sexual intercourse. She said that the last time they had sexual intercourse was on 03rd March 2017, which is the incident the appellant stands charged with.

PW3 reported the incident to the police whereby a PF3 was issued and the victim was taken to hospital. The medical examination revealed that the victim was penetrated as her private parts were perforated to the length of two fingers. Some puss was also found in her urine whereby the medical practitioner, PW5, testified to be an infection from sexual intercourse. In consideration of the victim's age it was confirmed that she was raped.

Given the medical results and the appellant being mentioned by the victim, the police arrested him and arraigned him in court. He denied the charges, but in the end of the trial, the trial court was satisfied that the prosecution had proved the case to the required standard. It thus convicted and sentenced him to 30 years imprisonment. Aggrieved with that decision he filed the appeal at hand on 10 grounds. However, in the course of composing the judgment I noted that the accused was not convicted in accordance with the law. I therefore re-opened the proceedings to accord the parties an opportunity to address the Court on the issue.

It was only the respondent who addressed the Court on the issue. The appellant had nothing to address the Court. He stood to be guided by the Court for the issue being technical. Mr. Davis Msanga, learned state attorney, briefly addressed the Court. Mr. Msanga conceded to the issue raised by the Court to the effect that the trial court never complied with the law in entering the conviction. He submitted that no offence or law was stated in the conviction rendering to no judgment for this Court to entertain on appeal. He was of the view that the only remedy available is for the case file to be remitted back to the trial court for a proper conviction to be entered, thereafter, if he wishes, the appellant shall file a fresh appeal.

As argued by the learned state attorney, the trial court did not enter conviction as required under the law. At page 6 to 7 of the judgment the trial Magistrate stated:

"Having so said this court found that prosecution sides prove the offence of rape against Accused person beyond reasonable doubt and I hereby convict Accused person as per section 235 (1) and 312 (2) of the Criminal Procedure Act (Cap 20 RE 2002) ACCORDINGLY." (sic)

Under **Section 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2002**, the conviction entered by the court is required to include the offence in which the accused is convicted 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, I agree with Mr. Msanga that it has not adhered to the requirements of the law as provided under section 312(2) cited above and therefore improper. This position has also been set in a number of cases by the Court of Appeal. In the case of **Kelvin Myovela vs. The Republic**, Criminal Appeal No. 603 of 2015 (unreported) for example, the CAT, at page 5 stated:

"It is not sufficient to find an accused guilty as charged. 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 defect in the trial 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). 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 based on the same evidence adduced in court during trial. The judgement should comply with **sections 235(1) and 312(2) of the Criminal Procedure Act, Cap 20 R.E. 2019;**
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;
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
JUDGE
27/04/2022

Dated at Mbeya on this 27th day of April 2022.


L. M. MONGELLA
JUDGE

Court: Ruling delivered at Mbeya in Chambers on this 27th day of April 2022 in the presence of the Appellant, appearing in person, and Mr. Davis Msanga, learned State Attorney for the Respondent.


L. M. MONGELLA
JUDGE

Court: Right of Appeal to the Court of Appeal has been duly explained.


L. M. MONGELLA
JUDGE

27/04/2022

