

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 23 OF 2021

(Originating from Simanjiro District Court, Criminal Case No. 76 of 2021)

WAZIRI JUMANNE SWALEHE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

6th & 13th June, 2023

Kahyoza, J.:

Waziri Jumanne Swalehe, the appellant was charged with an offence of unlawful possession of government trophy before Simanjiro District Court. He pleaded not guilty. After full trial, the trial court found him guilty and sentenced to pay fine of 5, 382,000/= or serve a custodial term of twenty (20) years in default.

Aggrieved, the appellant appealed to this court. Before this Court heard the appeal, Ms. Rose Kayumbo, State Attorney for the respondent, raised a point of law, that trial court sentenced the appellant without first

convicting him. She prayed for this Court to dismiss the appeal and order for retrial, citing **John Zungungi v. R.**, Criminal Appeal No. 281 of 2018.

The appellant had nothing substantive to reply as the issue was technical and he had legal representation.

My cursory view of the record of the trial court proved the respondent's state attorney's complaint that the trial court sentenced the appellant without conviction. For clarity's sake, I produce the record of the trial court as follows-

*"Therefore in responding to the issue raised earlier, this court finds the accused WAZIRI S/O JUMANNE SWALEHE guilty of the offence of UNLAWFULL POSSESSION OF GOVERNMENT TROPHY C/S 86(1) and (2) (c)(iii) OF **THE WILDLIFE CONSERVATION ACT NO. 5 OF 2009**. As amended by section 59(a)(b) of the Written Laws (Miscellaneous Amendments)(No.2) Act 2016 read together with paragraph 14 of the first schedule to and section 57(1) and 60(2) of **the Economic and Organised Crime Control Act [Cap 200 R.E 2019]**.*

It is so ordered.

*Sgd. By M.J Massao – RM
25/11/2022."*

It is obvious from the above, excerpt that the trial court did not convict appellant. To enter conviction is a procedural statutory requirement under

section(s) 235(1) and 312 (2) of **the Criminal Procedure Act**, Cap 20 R.E 2022 provides: -

"235. Decision

*(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 or discharge him under section 38 of the Penal Code.*

(2) N/A

312. Content of judgement

(1) N/A

*(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. (Emphasis added)*

(3) N/A"

The cited provisions of the incumbent criminal regime are couched in mandatory terms and they demand that the trial subordinate court to enter conviction before imposing a sentence. The Court of Appeal in **Amani Fungabikasi V R**, Criminal Appeal No. 270 of 2008 (unreported) emphasized the need to enter conviction before imposing a sentencing. It stated-

"It was imperative upon the trial district court to comply with the provisions of Section 235(1) of the Act by convicting the appellant after the magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt."

In addition, the Court of Appeal in **Khamis Rashid Shaban v. R.**, Criminal Appeal No. 184 of 2012 (unreported) and **John Zunguneni v. R.**, (supra) reaffirmed its position in earlier cases. In the former case, the Court of Appeal held that-

"An accused for instance, cannot be lawfully sentenced to any punishment unless and until he or she has been duly convicted of a particular offence."

While affirming its position, the Court of Appeal held in **John Zunguneni v. R.**, (supra) that-

"It is on the basis of an order convicting an accused person that the trial court can pronounce a lawful sentence upon the accused person."

I find without hesitation from the law quoted and the decisions of the Court of Appeal, that the sentence imposed to the appellant was nullity as

the trial court convicted him without first convicting him. I set aside the sentence as it is nullity.

The next issue is, **what is the legal remedy for failure to enter conviction?** On the outset, I decline to order for retrial, as suggested by Ms. Kayumbo, the respondent's state attorney for reasons I will unveil. The Court of Appeal had in its previous judgment taken a position that *failure to enter conviction is a fatal and incurable irregularity which will render such judgment a nullity*. See the case of **Matola Kajuni Others v. Republic**, (Criminal Appeal No 145 of 2011) published in www.tanzlii.org website as [2013] TZCA 413.

Later, in the recent case of **John Zungungi v. R.**, (supra), I fully subscribe to, observed from page 9 to 10 that: -

*"With respect, we do not think that was appropriate. We wish to make the following observations in respect of the judgment of the High Court before we proceed to make appropriate orders. First, **the absence of the order convicting the appellant, could not and did not vitiate the judgment of the trial court** as indicated by the learned High Court Judge. That judgment is sound. **It is the sentence which was, and which continues to be unlawful for want of an order convicting the appellant.** Second, hearing the*

appeal was a sheer waste of time, and its dismissal inconsequential, because the appellant was never convicted by any court, so no valid appeal could have proceeded from a sentence which was a nullity. In the circumstances, the appeal in the High Court was supposed to be struck out. Third, the High Court was supposed to make an order setting aside the sentence imposed upon the appellant by the trial court without any conviction; Fourth; the High Court, was supposed to make an order that a proper sentence be imposed subsequent to entering a conviction. It is only then that an appeal before the High Court could have been valid, and; sixth the High Court was, however, right to make an order that the original record be remitted to the trial court for entering a conviction although that order was not complied with.

Given the current position of the Court of Appeal, I am of the view that non-conviction of the appellant did not vitiate the judgment and proceedings. That reason, I will not quash the judgment and proceedings and order a retrial. I set aside the sentence and quash part of the judgment from the word "Therefore" appearing on page six of the judgment and order the trial magistrate to properly enter conviction from that stage. I am fortified in my findings by the part of the holding of the Court of Appeal in of **John Zunguneni v. R.**, (supra) as follows-

"In the circumstances, the 1st, 2nd and 3rd grounds of appeal have merit and they are hereby allowed. This appeal is also allowed on that basis and the judgment and all orders of the High Court except the order 10 remitting the original record to the trial court to enter a conviction are quashed. Further, under the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], the sentence imposed on the appellant by the trial court on 6th December 2012 is hereby set aside. We consequently order that the original record of the trial court be remitted to that court for entering a conviction and to sentence the appellant according to law. When entering the sentence, the trial court should take into account that the appellant might have suffered the first set of two strokes of the cane and the time stayed in prison. ... In order to make it practical, the judgment of the trial court may be retyped so that the conviction and the new sentence can be entered conveniently in the scheme of the judgement. Meanwhile the appellant shall continue to be held in prison pending his conviction and sentence. Order accordingly."

I find that sentence of the trial court emanated from non-conviction, it is a nullity. Non-conviction is fatal, but curable. A criminal trial is normally brought to its finality on merit by either conviction or acquittal. I quash part of the judgment from the word "Therefore"["] to the end and order the trial magistrate to properly convict the appellant. The trial court shall take into consideration the time the appellant has for far spent in custody while

serving the sentence. The appellant shall remain in custody while waiting for his conviction. He will be at liberty to appeal to this Court after he is convicted and sentence as per law.

It is ordered accordingly.

Dated at Babati this 13th day of June, 2023.



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John R. Kahyoza,
Judge

Court: Ruling delivered in the presence of the appellant and Ms. Rose Kayumbo, state attorney for the Respondent. B/C Ms Fatina (RMA) is present.



A handwritten signature in black ink, consisting of a long horizontal stroke followed by a stylized name.

John R. Kahyoza,
Judge