

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: KILEO,J.A., ORIYO,J.A.,And MMILLA,J.A.)**

**CRIMINAL APPEAL NO.22 OF 2013**

**KIMANGI TLA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania  
at Arusha)**

**(Massengi,J.)**

**Dated the 28<sup>th</sup> day of December, 2012**

**in**

**Criminal Appeal No. 1 of 2012**

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**JUDGMENT OF THE COURT**

**11<sup>th</sup> & 23<sup>rd</sup> September**

**KILEO,J.A.:**

This is a second appeal by Kimangi Tlaa. He was charged in the District Court of Kiteto at Kibaya, on two counts. On the first count he was charged with unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap 16 R. E. 2002 and on the second count he was charged with assault contrary to section 243 (a) also under the Penal Code. He was acquitted on the second count. It was alleged in the particulars of the offence that on 8<sup>th</sup> day of December, 2009 at about 18:45 hrs at Magungu Chapakazi village within Kiteto District and

Manyara Region the appellant did have carnal knowledge with one Selina d/o Deemu against the order of nature. The appellant appeared before us in person. On the other hand the respondent Republic was represented by Ms Ellen Rwijage, learned State Attorney.

Because of the kind of decision that we are shortly going to give we do not find it necessary to give a summary of the facts pertaining to this case. We also do not find it necessary to list down the grounds of appeal as filed by the appellant.

Before we proceeded to the hearing of the appeal on merit, having realized that there was no conviction entered as required under the provisions of sections 235 and 312 (2) of the Criminal Procedure Act, Cap 20 R. E. 2002 (CPA) we invited both parties to give us their comments on that aspect.

Addressing us Ms Rwijage stated that indeed there was no conviction entered after the trial court had found that the appellant had committed the offence. The learned state attorney said the failure by the learned trial magistrate to enter a conviction flouted the provisions of section 235 and section 312 (2) of the CPA. She requested the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act

(AJA) and order a remittance of the case file back to trial court for preparing a judgment in compliance with section 312 of the CPA and entering a conviction under section 235 of the CPA.

The appellant, understandably being a layman, merely asked that the law takes its course.

On our part, we completely agree with the learned state Attorney that the omission by the trial court to enter conviction was a fundamental irregularity which also ought to have attracted the attention of the learned appellate Judge. The record of appeal at page 28 of the judgment of the District Court shows that the learned trial magistrate in concluding her judgment said:

*"After a thorough scrutiny of the above evidence the accused is acquitted of assaults c/s 235 of the C.P.A, 1985 and **found guilty** of unnatural offence c/s 154 (1) (a) of the Penal Code Cap. 16 Vol 1. R.E.2002"*

Section 235 of the CPA provides as hereunder:

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.”**

In terms of the above provision the entering of a conviction by the trial court is mandatory where a charge has been established.

Further, under subsection 2 of section 312, the presiding judge or magistrate must show the offence the accused is convicted of. In the absence of a conviction, one of the prerequisites of a judgment in terms of the above subsection was missing. The subsection section states:

**“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.”**

This Court has held in a number of cases that failure to enter a conviction is fatal. See the cases of **Shabani Iddi Jololo and four others v. The Republic**, Criminal Appeal No. 200 of 2006, and **Amani Fungabikasi v Republic**, Criminal Appeal No. 270 of 2008, **Elia John**

**v. Republic-** Criminal Appeal No. 267 of 2011, **Joseph Kanankira v. Republic-** Criminal Appeal No.387 of 2013 (all unreported).

The learned State Attorney rightly pointed out that since there was no conviction entered, then neither the appeal before the High Court nor the appeal before us is competent. She, as aforesaid asked the Court to exercise its powers of revision under section 4 (2) of the AJA and remit the matter to the trial court for it to prepare and deliver a judgment that complies with sections 235 and 312 (2) of the CPA. We are at one with the learned State Attorney. Her suggestion is the only course available to us in the circumstances.

Consequently, under Section 4(2) of the AJA we quash and set aside all the appellate proceedings including the judgment in the High Court. The purported judgment of the trial court is also quashed and set aside. We order that the record be sent back to the trial court with directions to prepare and deliver a judgment that complies with the dictates of section 235 and 312 (2) of the CPA.

In the meantime, the appellant shall remain in custody pending finalization and delivery of the judgment by the trial court. We further direct, in the interests of justice, that eventually when a conviction is

entered, the prison sentence should start to run from the time that the appellant was first sentenced on 31/08/2010.

After a conviction has been entered the appellant is at liberty, if he deems it fit, to process his appeal in the manner provided under the law.

We order accordingly.


**DATED** at **ARUSHA** this 18<sup>th</sup> Day of September, 2014.

E. A. KILEO  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**