

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: LUANDA, J.A., LILA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 235 OF 2016

JOSEPH S/O MWINGIRA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa.)

(Sameji, J.)

Dated the 13th day of May, 2016

in

DC Criminal Appeal No. 33 of 2015

RULING OF THE COURT

5th & 7th June, 2018

MKUYE, J.A.:

In Njombe District Court Criminal Case No. 179 of 2013 the appellant one Joseph Mwingira, was charged with the offence of grave sexual abuse contrary to section 138 C (1) (a) and (2) (a) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). It was alleged by the prosecution that on the 14th day of July, 2013 at Mjimwema area within the District and Region of Njombe, for sexual gratification, the appellant did touch breasts, meting tongue and insert finger in the private part of one Agness d/o Matimbwi a girl of fifteen (15) years old by the use of his finger, mouth and hand being the act which sexually abused

the said Agness d/o Matimbwi. After a full trial, the appellant was **found guilty** and sentenced to twenty (20) years imprisonment.

Aggrieved by the decision of the trial court, he appealed to the High Court where the appeal was dismissed. Still protesting for his innocence he has brought this second appeal to this Court.

The brief background of the case is as follows:

On 14/7/2013, the appellant approached Agness Matimbwi (PW3) and asked her to look for some vegetables for him. PW3 agreed. After picking such vegetables she took it to the appellant's home. Upon her arrival at the appellant's home, the appellant told her to get in and soon after she got in he locked the door, caught her and started touching her breasts and inserting his fingers into her private parts. PW3 later, managed to escape after the appellant had gone outside to find out if there were people outside who could have seen her entering in his house or peeping or listening to what was going on inside. Next, she narrated the whole story to her relatives who in turn went to appellant's house and arrested him. The matter was reported to the Police Station at Njombe where she was issued with a PF3 for treatment. Then she was taken to the hospital where she was admitted for one day.

In his defence the appellant admitted to have approached PW3 for vegetables which she sold to him for Tshs. 200/=. He, however, denied to have committed the offence.

In this Court, the appellant has filed a memorandum of appeal consisting five (5) grounds of appeal. However, for a reason to be revealed shortly we do not wish to reproduce them.

At the hearing of the appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic enjoyed the services of Mr. Adolf Maganda, learned Senior State Attorney assisted by Ms. Penzia Nichombe, learned State Attorney. Both parties were ready to proceed with the hearing.

Before embarking on the hearing of the appeal on merits we invited the learned Senior State Attorney to address us on whether there was any conviction against the appellant in the trial court's decision as shown at page 25 of the record of appeal which could be capable of being challenged in the High Court and this Court.

Mr. Maganda readily admitted that there was no conviction. He said, the trial court only found the appellant guilty of the offence but did not convict him. For that reason he urged the Court to exercise its revisional powers under

section 4 (2) of the Appellant Jurisdiction Act, Cap 141 RE 2002 (the AJA) and nullify the proceedings and judgment of the High Court and the judgment of the trial court and remit the matter back to the trial court with a direction to compose a judgment in accordance with the provisions of sections 235 and 312 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA).

When the appellant was required to respond he did not have anything substantial to contribute and understandably so, he being a layperson, but he lamented that he has been behind the bars for about five (5) years now.

Indeed, in its judgment as shown at page 25, the trial court said:

*"... I have no any reason either to believe that PW3 told lies before this court. Her evidence was straight forward and is, I have to say, a credible witness. From the foregoing reasoning I hold that the case has been proved beyond reasonable doubt, **and the accused is found guilty of the offence charged**". [Emphasis added]*

From there the trial court went on with sentencing proceedings.

Sections 235 (1) and 312 (2) of the CPA govern the manner judgments are to be written or composed. Section 235 (1), for example, states as follows:

*"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".*

[Emphasis added]

But again, section 312 (2) of the CPA provides as follows:

"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]

From the above cited provisions of the law, it is mandatorily required that when the court finds the accused guilty of the offence charged it must enter a conviction in that respect and state the offence and the section of the law under which the accused is convicted.

In the case of **John Charles Vs The Republic**, Criminal Appeal No. 190 of 2011 (unreported) while quoting with approval the case of **Amani Fungabikasi Vs The Republic**, Criminal Appeal No. 270 of 2008 (unreported) the Court said:

*"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 the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act was missing. So, since there was no conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon which the High Court could uphold or dismiss".*

[Emphasis added]

Also in the case of **Hassan Mwambanga Vs The Republic**, Criminal Appeal No. 410 of 2013 the Court expounded the same rule as follows:

"It is now settled law that, failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".

In this case, as we have hinted earlier on, the trial court failed to enter a conviction against the appellant. Since the trial court failed to do so, the judgment and the sentence imposed to the appellant by that court was a nullity. Hence, by being a nullity the High Court had nothing before it to uphold.

Apart from the issue of lack of conviction we have also noted another equally crucial shortcoming relating to the sentence imposed against the appellant. The appellant was charged with an offence of grave sexual abuse contrary to section 138 C (1) (a) and (2) (a) of the Penal Code. He was sentenced to imprisonment for a term of twenty (20) years. Apparently, section 138 C (1) (a) (b) and (c) of the Penal Code creates an offence of grave sexual abuse with its different categories. On the other hand subsection (2) (a) and (b) of that section provide for sentences for a person who is found guilty and convicted of the offence under subsection (1). In particular subsection (2) of section 138 C provides as follows:

"Any person who -

(a) commits grave sexual abuse is liable, on conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years, with corporal punishment, and shall also be ordered to pay compensation of an amount determined by the court to the person in respect of whom the offence was committed for the injuries caused to that person.

(b) commits grave sexual abuse on any **person under fifteen years of age**, is liable on conviction to imprisonment for a term of not **less than twenty years** and not exceeding thirty years, and shall also be ordered to pay compensation of an amount determined by the court to any person in respect of whom the offence was

committed for injuries caused to that person".

[Emphasis added]

As it is, it appears to us that the trial court imposed the sentence against the appellant under subsection (2) (b) of the Penal Code and, we think, under the impression that the victim was below 15 years old. However, the provisions of that paragraph are very clear in that they apply to a person who has committed the offence of grave sexual abuse to "**any person who is below the age of fifteen years**" as shown by the use of words "under fifteen years of age". In the charge sheet under consideration the victim, Agness Matimbwi, was indicated to have been a girl of fifteen years old. In such a situation, we are of a settled view that it was not proper to sentence the appellant to 20 years imprisonment since the victim was not under the age of fifteen years at the time when the offence was committed to her. To the contrary, the proper sentence ought to be 15 years imprisonment under subsection (2) (a) which was rightly cited in the charge sheet.

Given the circumstances, we invoke our revisional powers under section 4 (2) of the AJA and quash and set aside the judgment and sentence of the trial court; quash and set aside the proceedings and the judgment of the High Court and order that the record be remitted to the trial court in order to

compose a proper judgment in accordance with the provisions of sections 235 (1) and 312 (2) of the CPA. In sentencing, we remind the trial magistrate to impose the appropriate sentence as provided by the law and direct that in the event of conviction, in the new composed judgment it should be clearly indicated that the sentence begins to run from the day the appellant was initially imprisoned. We further order that until the date when the new judgment would be pronounced, the appellant should remain in custody.

Order accordingly.

DATED at **IRINGA** this 6th day of June, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


P. W. BAMPPIYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL