IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 87 OF 2019

(Original from District Court of Kyela at Kyela Cr. Case No.70/2014)

THE REPUBLIC
VERSUS
ALPHONCE JACKSON

JUDGMENT

Date of last Order: 20th.2.2020
Date of Judgment: 24th.2.2020

Dr. A.J. Mambi, J.

In the District Court of Kyela, the appellant **ALPHONCE JACKSON** was found guilty for an offence of stealing by agent C/s 273 (b) of the Penal Code, Cap 16 [R.E.2002] .The trial Magistrate just ordered the appellant to serve seven years imprisonment without convicting him. Aggrieved, the appellant appealed to this court by preferring 6 grounds of appeal.

During hearing the appellant in this appeared unrepresented, while the Republic was represented by Mr. Baraka Mgaya, the learned State Attorney. During hearing, the appellant adopted

all his grounds of appeal and said he had nothing to add. Before responding to the grounds of appeal, the learned State Attorney submitted that, he has observed some irregularities on the proceedings and Judgement. He argued that the records does not show if the appellant was convicted. He submitted that it appears the Judgment by the trial Court was not properly composed as the record does not show with which offence the accused was convicted contrary to section 312. He also argued that the magistrate just ended summarizing the prosecution evidence and he did not consider the defence evidence and there is no reasons. He was of the view that there was there is no proper appeal in this court and the court should consider striking it or make other orders.

I have carefully gone through the records and the relevant law. Before thoroughly looking into the grounds of appeal I have noticed and observed the judgment by the trial magistrate has some errors which may render it invalid. It is clear from the record that the trial Magistrate did not properly enter the conviction though he sentenced the appellant. In his final words (The Trial District Magistrate) under the last paragraph at page 18 the judgment reads:

> ***"COURT: The Court has considered the accused to be the 1st offender. The accused has mitigated to be a person with a pregnant wife. On what has stated above, it is just for a sentence to fit a crime. Having said that, the accused is safe to serve into jail imprisonment for the period of seven years. It is so ordered".***

Reading between the lines on the above quoted paragraph can it be said that the Magistrate convicted the accused persons/appellants?. The answer is clearly NO since the above wordings were the last statement of the judgment and nothing else and there is any sentence on the conviction. As required by the law that once an accused is found guilty one would have expected the conviction and he must state the words that: "***I convict the accused person under section....as charged".*** The Trial Magistrate having convicted the accused under the section which creates an offence he stand charged shall sentence him under the proper provision of the law. Failure to convict the accused is contrary to the law (sections 235 and 312 of the CPA Cap 20) since the law provides for mandatory requirement for judgments to contain conviction and sentence. I wish to refer section 235 (1) of the CPA [Cap 20 R.E 2002]which provides as follows:-

> *"the court having heard both the complainant and the accused person and their witnesses and 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 supplied with).*

The above provision of the law is very clear. In this regard, my mind directs me that the provision of the law mandatorily require any judgment must contain sentence after an accused is convicted and it must be reflected in the record. This was also observed in ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim***

App.No.45 of 2015 (unreported). The court of appeal in this case that is ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015***observed that:

> *"Although there was a finding that the appellant was guilty was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by* ***conviction,*** *whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of the CPA (where there has been a trial)."(emphasis supplied with).*

Reference can further be made to the court in **Amani Fungabikasi V Republic,** criminal appeal No 270 of 2008 (unreported) where the court made similar observation. In this case the court said that;-

> *"It was imperative upon the trial District Court to comply with the provision 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 the High Court could uphold or dismiss."(emphasis added).*

Reference can also be made to section 312 of CPA, Cap 20 [R.E 2002] for content of judgment as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and*

superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.

(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).*

The prosecution also raised the concern that the trial magistrate did not consider the defence evidence. The records show that the appellant raised the dfence but the magistrate simply ignored and just put unfinished sentence. I wish to reproduce the wards of the magistrate in his judgment at page 7 as follows:

"With what I have told, the defence evidence can be summarized as follow:"

Having written the above sentence in his judgment, the trial magistrate didn't proceed with any word and the paragraph ended unfinished. Reading between the lines on the above paragraph it appears that the trial Magistrate neither summarized nor considered the defence evidence and he was shifting the burden of prove from the prosecution to the defence which is contrary to the principles of the law. The trial court ought to have properly considered the appellant's evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. The law is clear that and it has occasionally held so

by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment and proceedings it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This is bad in law is as it can lead to injustice to the other party that is the appellants in our case. Such omission had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court f Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence**.**

As correctly submitted by the learned State Attorney, failure to consider defence evidence denied the appellant their legal rights. Worth also referring the decision of the court that in ***Leonard Mwanashoka vs Republic Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned

that considering the defence was not about summarising it because:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in ***Leonard Mwanashoka vs Republic*** (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too****. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."* [Emphasis added].

The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the

judgment. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trait law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the ***point or points for determination, the decision thereon and the reasons for the decision*** , dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This can be reflected from section 312 of CAP 20 [R.E.2002] on the mode and content of the judgment which provides as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination,*** *the decision thereon and the* ***reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
>
> *(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.*
>
> *(3) .....*
>
> *(4) ...."*

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgmentI am of

the settled view that the trial court did not subject the defence evidence to any evaluation to determine its credibility and cogency. The court in ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** observed and held that:-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) at page 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

Having observed those irregularities that are incurable will it be justice to order retrial or trial de novo?. This indeed depends on the circumstance of the case. There is now doubt that the accused has stayed in prisons for six years now (one year before completing his term of imprisonment).It is also on the record that there is no likelihood of curing those irregularities. In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2002] and see what would be the proper order this

court can make in the interest of justice. From my finding, I am satisfied that such an error, omission or irregularity has in fact not occasioned failure of justice to the appellant for this court to order *trial de novo* apart from ordering the trial magistrate to convict and sentence the appellant in line with the relevant laws. There are various authorities that have underlined the principles and circumstance to guide court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I have no reason to depart from the above authorities and my hands are tied up since an order for retrial can only be made where the interests of justice requires it and should not be

ordered where it is likely to cause an injustice to the accused person. In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to dos so, since doing so will in my view create more likelihood of causing an injustice to the accused person and I hold so.

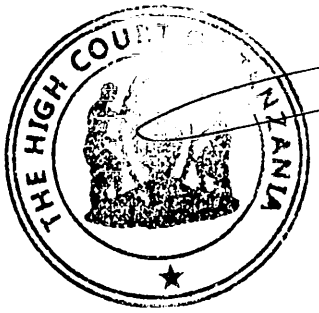
Indeed the circumstance of the case shows that making an order for *trial de novo (retrial)* will create more delays that may cause injustice to the appellant. For that reason the appellant if found guilty of the offence charged he should have been convicted and sentenced in terms of section 235(1) of the CPA. As I alluded and observed above that, since there was no conviction entered in terms of Section 235 (1) of the Act, there was no valid judgment and proceedings. It is a settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the both the proceeding and purported judgment invalid.

Even if the court could have ordered retrial, there in my view is no valuable evidence that can be relied by the prosecution to prove the charges against the appellant beyond reasonable doubt. I don't see any need of discussing other grounds of appeal.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court

due the fact that the trail court failed to observe some legal principles on the detriment of the appellant.

In the circumstances, the conviction is quashed and the sentence is set aside and order that the appellant be free from the charges he was facing unless he is otherwise charged with other charges.



DR. A. J. MAMBI
JUDGE
24.02. 2020

Judgment delivered in Chambers this 24th day of February, 2019nin presence of both parties.

DR. A. J. MAMBI
JUDGE
24.02. 2020

Right of Appeal fully explained

DR. A. J. MAMBI
JUDGE
24.02. 2020