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

**(CORAM: MBAROUK,J.A., MMILLA,J.A., And MWARIJA, J.A.)**

**CRIMINAL APPEAL NO. 141 OF 2012**

**SAMWELI SANYANGI .....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Mbeya)**

**(Mackanja, J.)**

**dated the 25th day of October, 2004**
**in**
**DC. Criminal Appeal No. 32 of 2003**

## RULING OF THE COURT

11th & 18th August, 2015

**MWARIJA, J. A.:**

The appellant was charged in the District Court of Iringa with unnatural offence. According to the charge sheet, the appellant was charged under S.154 (1)(2) of the Sexual Offences (Special Provisions) Act, No. 4 of 1998. It was alleged that on 12th February, 1999 at about 21:00 Hrs. within the Rural District and Region of Iringa, the appellant did have a carnal knowledge of one Warid s/o Abdallah against the order of nature.

After a full trial in the District Court, the learned trial Resident Magistrate found that the prosecution had proved its case beyond reasonable doubt. He then proceeded to sentence the appellant to life imprisonment. The appellant was aggrieved and thus appealed to the High Court. He was unsuccessful as his appeal was dismissed. Aggrieved further, he has appealed to this Court.

At the hearing of this appeal, the appellant appeared in person and unrepresented while Ms. Lilian Ngilangwa, learned Senior State Attorney appeared for the respondent Republic. When called upon to argue his appeal, the appellant adopted his grounds of appeal and opted to respond after the learned Senior State Attorney had made her submission.

On her part, before she made her submission on the appeal, Ms. Ngilangwa raised and addressed us on two main legal points; firstly that the charge sheet filed in the District Court against the appellant was defective and secondly, that the appellant was sentenced by the trial court without having been convicted. On the contention that the charge was defective, Ms.

Ngilangwa argued that the section of the law under which the appellant was charged does not exist. She submitted that the proper section should have been S. 154(1)(2) of the Penal Code [Cap.16 R.E. 2002] (the Penal Code) as amended by the Sexual Offences (Special Provisions) Act, No. 4 of 1998 (the SOSPA). She went on to submit that the defect in the charge sheet extended to the particulars of the offence in that the age of the child against whom the offence was alleged to have been committed, was not specified.

Ms. Ngilangwa argued further that the defects were fatal and that the appellant was prejudiced because, firstly, he could not have properly understood the nature of the charge brought against him and secondly, that failure to disclose the age of the child did in essence deny the appellant the vital information necessary for his defence.

On the point that the sentencing of the appellant was not preceded by conviction, Ms. Ngilangwa submitted that the learned trial Resident Magistrate merely indicated that he would convict the appellant but proceeded to sentence him before doing so. As a result, Ms. Ngilangwa argued, the sentence which the appellant is now serving was rendered illegal. According to the learned Senior State Attorney, this is more so because even when sentencing the appellant, the trial magistrate acted under S. 154(1)(2) of the Penal Code, the law under which the appellant was not charged. Relying on her submission on the two points, Ms. Ngilangwa urged us to exercise the revisional powers vested to this Court by S. 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E.2002 (AJA) and allow the appeal.

The appellant, who, as stated above was not represented, did not make any response. He said that he had nothing to add to what was submitted by the learned Senior State Attorney.

Having considered the submission made by the learned Senior State Attorney, we unhesitatingly agree with her that the points which she raised are substantial. To begin with the charge sheet, undoubtedly the same suffers from serious defects. An unnatural offence is created by S. 154 of the Penal Code as was amended by the SOSPA. Sub-section 1(a) of that section makes it an offence for any person to have a carnal knowledge of any person against the order of nature. Sub-section (2) provides for specific punishment where the said offence is committed to a child under the age of ten years. We are therefore inclined to the submission made by Ms. Ngilangwa that the appellant should have been charged under S. 154(1) (2) of the Penal Code, not s.154(1) (2) of the SOSPA, the section which does not even exist in that Act. Actually, the provisions of S.154 of the Penal Code as it appears now came into existence after the same section was amended by the provisions of S. 16 of the SOSPA. The SOSPA therefore merely amended the Penal Code. It did not create the section in question.

Because of the import of the provisions of S.154 (1)(2) of the Penal Code, we find further, as argued by Ms. Ngilangwa, that failure by the prosecution to state in the charge sheet the age of the child against whom the offence was alleged to have been committed, rendered the charge sheet defective. It was important for the purpose of sentencing to specify the age of the child. Failure to do so prejudiced the appellant because he was sentenced under the subsection which provides for specific punishment but he was not however made aware in the charge sheet about the age of the child. We therefore agree with the learned Senior State Attorney that the defects in the charge sheet were fatal.

With regard to the second point, that the appellant was sentenced while he had not been convicted, the record clearly depicts that fact. At page 20 of the typed judgment of the trial court, the trial magistrate stated as follows:

> " *I therefore find that the accused have proved their case beyond all reasonable doubt and* ***I will therefore convict the accused person of the***

***offence*** *carnal knowledge (sic) against the nature (sic) C/S 154(1)(2) of the Penal Code as amended by Act No. 4 of 1998." (Emphasis is ours).*

Although the trial magistrate stated that the appellant had proved his case beyond reasonable doubt, we think that reference to the appellant was a slip because when that statement is read holistically, the trial magistrate must have meant that the prosecution had proved its case beyond reasonable doubt. It is for that reason that he proceeded to sentence the appellant. The irregularity however is that although he indicated that he would convict the appellant, the trial magistrate did not do so. We thus agree with the learned Senior State Attorney that the sentencing process was rendered a nullity because it ought to have been preceded by conviction.

This is not the first time that the effect of a failure to convict an accused person before sentencing is considered by this Court. There is a series of previously decided cases on that point. They include the cases of **Shabani Iddi Jololo & 3 Others v R. Cr**. Appeal No. 200 of 2006 (CA-DOM), **Khamis Rashid Shaban v The Director of Public Prosecutions, Zanzibar,** Cr. Appeal

No. 184 of 2012 (CA-ZNZ)and **Omari Hassan Kipara v R,** Cr. Appeal No. 80 of 2012 (CA – DOM) (all unreported). In the latter case (**Omari Kipara case**), this Court held that the omission to enter conviction contravenes the provisions of s. 235(1) of the Criminal Procedure Act, [Cap.20 R.E 2002]. The section provides as follows:

*"235 –*

*(1) The Court, having heard both the complainant and the accused person and their evidence, shall convict the accused person 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."*

After having cited its previous decisions including the cases cited above, in the **Omari Kipara case** (supra), the Court stated in uncertain terms that it is mandatory in law that sentencing must be prefaced by conviction. The Court stated as follows:

*" In principle, where the trial court may have been satisfied that evidence established the guilt of the*

*accused but did not proceed to convict as demanded by section 235(1) of the Criminal Procedure Act, such judgment is a nullity; so is any other judgment on appeal based on such judgment. Both such judgments cannot escape the wrath of being quashed and the sentences thereof being set aside."*

As we have stated above therefore, in this case, the omission rendered the judgment of the trial court a nullity and therefore cannot avoid the consequence of being quashed. The end result is to leave the decision of the High Court without a leg to stand on. We accordingly hereby quash the proceedings and the judgments of both the District Court and the High Court and set aside the sentences thereof.

On the basis of the two defects which we have found to be fatal, the effect of which have resulted into our decision of quashing the proceedings and judgments of both Courts below, the immediate issue for our consideration is the appropriate order to be made as regards the next course to be taken in this case.

Ordinarily, as for omission to convict the accused person, the proper move is to remit the record to the trial court so that an accused person is convicted. See for example the case of **John s/o Charles v R,** Cr. Appeal No. 190 of 2011 (CA-TB) (unreported). In this case however, given the particular nature of irregularities, it will not be appropriate to issue such an order because, as we have found above, the charge sheet was fatally defective. The proper order when a charge sheet is found to be fatally defective is to return the record to the trial court so that the prosecution may reinstitute a charge against an accused person.

We have however, involved our minds on the issue and have come to the conclusion that from the nature of the evidence which was adduced at the trial, the order to that effect will be prejudicial to the appellant. The vital evidence which the prosecution relied on is that of Warid Abdallah (PW4), the child against who the offence was alleged to have been committed, PW1, the father of the said child and PW3, Abdallah Mlawa. The evidence of these key witnesses is regrettably weak to prove the offence against the appellant. To start with the evidence of PW4,

the trial magistrate recorded it without conducting a **voire dire.** For this reason, such evidence required corroboration (See the case of **Kimbute Otiniel v R,** Criminal Appeal No. 300 of 2011 (CA – DSM) (unreported).

Turning to the evidence of PW1 and PW3, their evidence could be used to corroborate the testimony of PW4. That evidence is however, contradictory and inconsistent. Although both PW1 and PW3 testified that they went together to the scene of crime, whereas PW3 testified that through the aid of a torch light, he saw the appellant committing the offence, on his part, when he was cross-examined, PW1 said that he was told that the appellant was seen sodomizing PW4. These contradictions raise serious doubts on the credibility of evidence of the two witnesses that they arrived at the scene of crime and saw the appellant committing the offence. It further raises doubt on whether the appellant was arrested at the scene of crime.

We thus find that with such contradictions and inconsistencies, the evidence of PW1 and PW3 is unreliable and

the firm view that it will not be in the interest of justice to order that the record be remitted to the trial court so that a retrial may take place. As a result, having quashed the proceedings and judgment of the two courts below and after having set aside the orders arising there from, we revert to this Court's revisional jurisdiction under S. 4 (2) of the AJA and hereby direct that the appellant shall be released from prison unless he is otherwise lawfully held. We accordingly, so order.

**DATED** at **IRINGA** this 17th day of August, 2015.

M.S. MBAROUK
**JUSTICE OF APPEAL**

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

A. G. MWARIJA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**