

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ZANZIBAR**

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

**CRIMINAL APPEAL NO. 369 OF 2016**

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT**

**ABDALLAHI ABDALLA MACHICHA.....RESPONDENT**

**(Appeal from the judgment of the High Court of Zanzibar at  
Vuga)**

**(F. H. Mahmoud, J.)**

**dated 25<sup>th</sup> may, 2016  
in**

**Criminal Appeal No.10 of 2015**

.....

**JUDGMENT OF THE COURT**

2<sup>nd</sup> & 5<sup>th</sup> December, 2016

**KIMARO, J.A.:**

Abdillahi Abdalla Machicha, the respondent was charged in the Regional Court at Mfenesini with the offence of rape contrary to sections 125 (1) (2) (e) and 126(1) Penal Decree Act, No. 6 of 2004 of the Laws of Zanzibar. The record of appeal at page 54 is apparent that the appellant although found guilty, was not convicted. However, he was sentenced to seven years imprisonment and ordered to pay Fatma Ibrahim Shaweji, the victim of the offence and the complainant in the case, a compensation

amounting to Tanzania shillings 400,000/=. The complainant testified as prosecution witness number one (PW1).

Aggrieved by the conviction and the sentence, the appellant filed his first appeal in the High Court of Zanzibar at Vuga. The appeal was partly allowed. The High Court on appeal held that the appellant was a first offender and he deserved leniency. The sentence of seven years imprisonment was reduced to eighteen months and the compensation was reduced to Tanzania shillings 200,000/=.

The Director of Public Prosecutions was aggrieved and he filed this appeal complaining about the reduction of the sentence. They also complained that the learned judge on first appeal disregarded the prosecution evidence that proved the case for the Director of Public Prosecutions against the respondent beyond reasonable doubt.

The appeal was called on for the hearing today (2<sup>nd</sup> December, 2016). The appellant, Director of Public Prosecutions was represented by Mr. Mohamed Kassim Hassan, learned Senior State Attorney and was

assisted by Mr. Anuwar Khamis Saadon and Mr. Musa Kombo Mrisho both learned State Attorneys.

The respondent, the Court was informed, could not be traced for service despite the efforts made to trace him. The Court also was reliably informed that the respondent has finished serving his sentence.

At first, the learned Senior State Attorney sought for an adjournment to another date so that the respondent can be traced for hearing of the appeal. The Court however, brought to the attention of the learned State Attorney that there were irregularities in the trial of the respondent. The trial magistrate sentenced the respondent without first convicting him. At that juncture the learned Senior State Attorney prayed that the matter be remitted back to the trial court so that it can be dealt with in an appropriate way.

Indeed the record of appeal is apparent on the irregularity committed by the trial magistrate. What the learned magistrate recorded at page 54 of the record of appeal is:

*"From the above reasons, this court found that, the prosecution has proved their case against the accused.*

*Therefore this court has found the accused guilty to the offence charged with."*

He then proceeded with the sentencing procedure without first convicting the respondent. Sentencing the respondent without first convicting him was an apparent error. Section 220 of the Criminal Procedure Act No. 7 of 2004 specifically states that an accused person must be convicted before a sentence is imposed on him. The section reads:

*"The court having heard both the complainant and the accused person and their witnesses and the evidence shall either convict the accused and pass sentence upon him or make an order against him according to law, or shall dismiss the case."*

The provision of section 219 of Act No, 7 of 2004 is clear that a sentence has to be preceded by a conviction. Authorities decided on this matter by the Court are numerous. Section 219 of Act No. 7 of 2004 is "in pari materia" with section 235(1) of the Criminal Procedure Act [Cap 20 R.E 2002]. One of the cases decided on this issue is the case of **Hassani**

**Mwambunga V. Republic** Criminal Appeal No. 410 of 2013(unreported).

The Court after citing the provisions of sections 235(1) of the CPA held:

*“As is abundantly clear, from the above statutory provisions, no sentence can be passed or imposed on an accused person unless and until he or she has been dully convicted of a particular offence.”*

Other authorities on the subject matter are the cases of **Jonathan Mlunguani v. Republic** Criminal Appeal No. 15 of 2011, **Shabani Iddi Jalolo and another v Republic** Criminal Appeal No. 200 of 2006 and **Deogratias Mlowe v. Republic** Criminal Appeal No. 264 of 2014 (all unreported).

A conviction before sentence being a mandatory requirement of the law, and the same having not been complied with, we invoke our powers of revision under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E. 2002 and declare all the proceedings that followed after the respondent was found guilty to be a nullity and quash the same. As the appellant has completed serving an imprisonment term of 18 months (that was illegal),

we see no justification for remitting the file to the trial court for conviction.

We set him free.

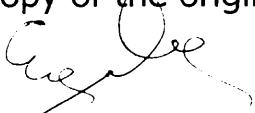
DATED at ZANZIBAR this 5<sup>th</sup> day of December, 2016

N.P.KIMARO  
**JUSTICE OF APPEAL**

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

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

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



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

