IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: JUMA, C.J., MBAROUK, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO 308 OF 2017

HAJI MAKAME SHAALI.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..... RESPONDENT

(Appeal against the Judgment and Sentence of the High Court of Zanzibar held at Vuga - Zanzibar)

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

dated the 06th September, 2016
in
Criminal Case No. 11 of 2015

RULING OF THE COURT

4th & 6th December, 2017

JUMA, C.J.:

The appellant Haji Makame Shaali was charged with two counts of carnally knowing of boys contrary to section 132 (1) (i) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. The particulars of the first count were that at around 9 p.m. of the 28th day of December, 2010 at Mahonda Starling area of the Northern "B" District, within the

Northern Region of Unguja, he had carnal knowledge of a 12 year old boy, Haruna Haji Haji. In the second count, the particulars were that on the same place, day and time, he had carnal knowledge of another 12 year old boy, Aboud Makame Nyange.

The trial proceeded before Mr. Nassor A. Salim-RM of the Regional Court for Zanzibar at Mfenesini. The learned trial magistrate found the appellant guilty on second count alone, and imposed a sentence of fifteen years (15) to be served at the Offenders' Educational Centre (*Chuo Cha Mafunzo*).

Dissatisfied, the appellant filed an appeal in the High Court for Zanzibar. On 6th September, 2016, Hon. Fatma Hamid Mahmoud, J. not only dismissed the appellant's appeal; she also set aside the sentence of fifteen years imprisonment and ordered the appellant to serve a sentence of twenty-five (25) years imprisonment. The appellant suffered additional punishment when the first appellate Judge ordered the appellant to either pay compensation of Tshs. 3,000,000/= or in default, to serve an additional term of five years at the Offenders' Educational Centre. Being aggrieved with the dismissal

of his first appeal and the enhancement of sentence, the appellant has come up with this second appeal.

The appellant prefaced his memorandum of appeal with general complaints. He blamed the members of the local community where he lived, for routinely fabricating accusations of rape and sodomy of boys in order to settling private disputes or misunderstandings. The appellant gave an example of evidence of PW1, who testified how he found the two boys crying because someone had taken their bicycle. He was surprised that at the police station, the two boys who are well known petty thieves fabricated a story that he had sodomized them. This, he complained, was in order to cover their theft of the cell phone from the appellant's shop.

The appellant also blamed the first appellate Judge for ignoring the evidence of the Secretary of *Sheha* (DW1). This witness had testified on how the appellant handed over to him a bicycle and a cell phone, which the appellant had recovered from the two petty thieves. The appellant blames the Judge for placing much more reliance in prosecution evidence, without considering defence evidence. He also

questioned why, not a single police officer came over to testify who actually reported the incident to the police.

The appellant questioned the probity of the medical evidence of PW5 who admitted that he did not use scientific instruments to medically examine the victims of the alleged sodomy, but instead trusted his eyes and foul smell from one of the two boys. Further, he complained the way the trial Judge failed to take into account the evidence of the medical officer who after observing the bruises which one of the victims suffered, declared that these bruises were not fresh.

When this appeal came up for hearing on 4/12/2017, Ms. Rashida Ahmed Suleiman learned Senior State Attorney, who was assisted by Mr. Mohamed Saleh Iddi and Mr. Suleiman Mohamed Maulid, both learned State Attorneys representing the respondent/Director of Public Prosecutions, raised a preliminary issue of law which she prayed for our determination. She submitted that while going through the record in readiness for the hearing of this appeal, she noted an error which affects the competence of this appeal.

The learned Senior State Attorney referred us to pages 33 and 34 of the record where the learned trial Magistrate (Nassor A. Salim—RM) who, after finding the appellant guilty of the offence of carnally knowing one of the two boys, proceeded to impose the sentence without first entering a conviction on the second count. This, she submitted further, infringes the mandatory requirements of section 219 of the Criminal Procedure Act, Act No. 7 of 2004 of the Laws of Zanzibar which provides:

> *"219.-The court having heard both the complainant and the accused person and their witnesses and evidence* ***shall either convict the accused and pass sentence upon*** *or make an order against him according to the law, or shall dismiss the case."* [Emphasis added].

With regard to what we should do when a criminal appeal to the Court is based on a judgment without a conviction, Ms. Suleiman referred us to decision of the Court in **Omar Issa Moh'd V. R.,** Criminal Appeal No. 128 of 2016 (unreported) which had the occasion to deal with section 219 of the Criminal Procedure Act, Act No. 7 of

2004 of the Laws of Zanzibar in an appeal from the High Court of Zanzibar.

In that decision, after finding the appellant therein guilty, the trial Resident Magistrate went ahead to impose a sentence without entering a conviction. The Court reiterated its position that the omission to enter a conviction before imposing a sentence to the accused person rendered the judgment of the trial court invalid. The Court noted that the remedy in the circumstances was to remit the record back to the trial court for that trial court to convict the appellant.

With a finding that the appellant was not convicted by the trial court, the learned Senior State Attorney, urged us to do what we did in **Omar Issa Moh'd V. R.** (supra), that is, apart from remitting the record back to the trial court, we should invoke our power of revision under Section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (**"the AJA"**) to quash the proceedings of the High Court in Criminal Appeal No. 11 of 2015 which led to this purported appeal because it was

based on an invalid judgment of the Regional Court for Zanzibar at Mfenesini.

The appellant appeared in person without learned Counsel. When he was asked to react to the suggestion that the record should be remitted back to the trial court because it lacks conviction, he urged us to set him free because he has been without his liberty for seven years at the Offenders' Educational Centre. He blamed the way evidence was fabricated against him.

Upon our perusal of pages 33 and 34 of the record of the proceedings before the trial court, we can confirm that indeed the learned trial Resident Magistrate did not convict the appellant when he stated:

> *"From the above evidence, this court has found that, prosecution has proved their case against the 2nd count alone and this court has found accused guilty, as for the 1st count this court has found that prosecution has failed to prove their offence. Therefore this court has find (sic) accused guilty on one offence only among the two.*
>
> *Previous Conviction*

We have no previous conviction record of accused.

Mitigation: .....

Court: ... I think there is a need of issuing sentences according to the law.

Sentence: Accused to serve 15 years imprisonment term.

Sgd: Nassor A. Salim—RM II

17/3/2014."

The mandatory duty placed on subordinate trial courts in Zanzibar to convict or acquit after hearing the evidence from the complainant, accused persons and their witnesses is clearly provided for by section 219 of the Criminal Procedure Act No. 7 of 2004 which the learned Senior State Attorney cited to us. This provision is in *pari materia* with section 235 (1) of the Criminal Procedure Act, Cap. 20 (CPA) of Tanzania which underscores the duty which trial courts have, to first convict accused persons before imposing appropriate sentences:

"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.* [Emphasis added].

Both section 235 (1) of the CPA and section 219 of the Criminal Procedure Act of Zanzibar have repeatedly been subject of strict interpretation by the Court, restating that trial magistrates must first convict an accused who is found guilty of an offence before proceeding to sentence that accused. The decision of the Court in **Jonathan Mluguani vs. The Republic,** Criminal Appeal No. 15 of 2011 (unreported) is a ready example here. The Court reiterated that failure on the part of the trial court to enter a conviction is a fatal irregularity which renders the subsequent proceedings and the judgment of the first appellate court defective as well.

In the upshot of the foregoing, we are minded to exercise our revisional jurisdiction under section 4(2) of the AJA. We declare a

nullity and quash the sentence of the trial court which was not preceded by a conviction.

Similarly, we declare a nullity and quash all the proceedings in the High Court of Zanzibar and Judgment of the High Court both of which flowed from an invalid Judgment of the trial court. The record is hereby remitted back to the Regional Court for Zanzibar at Mfenesini for that court to convict the appellant and impose appropriate sentence which shall take into account the period the appellant has so far served in prison.

DATED at **ZANZIBAR** this 5th day of December, 2017

I. H. JUMA
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL