

TANZANIA / JUDGMENT

mchana mohamed vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: MMILLA. J.A.. MZIRAY. J.A..
And MWANGESI, J.A.^ CRIMINAL APPEAL NO. 301 OF 2016 MCHANA
MOHAMED.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT (Appeal from the Judgment of the
High Court of Tanzania at Arusha) (Maahimbi, J.) dated the 22nd day of March, 2016 in Criminal
Appeal No. 50 of 2015 JUDGMENT OF THE COURT 9th & 12th October, 2018 MMILLA, J.A.: This is
a second appeal by Mchana s/o Mohamed (the appellant). He was formerly charged in the District
Court of Kiteto at Kibaya in Manyara Region with unnatural offence contrary to section 154 (1) (a)
and (2) of the Penal Code Cap. 16 of the Revised Edition, 2002. He was alleged to have carnally
known a child aged 3 years (name withheld), against the order of nature. After a full trial, the
appellant was convicted and sentenced to a term of life imprisonment. His appeal to the High
Court failed, hence this second appeal to the Court. i The facts of the case were briefly that the
appellant and PW1 Hussein Mohamed, were living together at the homestead of the victim child's
parents at Chekanao village within Kiteto District in the Region of Manyara. The appellant was an
employee of that family. On 22.5.2014 around 12:00 hours, PW1 went to an unnamed place within
their locality to buy vegetables. On arrival back home from that errand, he found the main door
of the house in which he and the appellant were staying locked from inside. He flipped the
stopper using a knife and entered into the house. At that point in time, he found the victim child
crying and embedded in a mess of feces mixed with blood. Also present in the room was the
appellant who was adjusting himself by pulling up his trousers which had seemingly been
lowered. PW1 asked the appellant what he had done, but he remained quiet. PW1 went outside,
closed the door behind him and raised alarm. Several people rushed to the scene in answer to the
alarm and apprehended the appellant. The latter was sent to the village offices together with the
child. The matter was subsequently reported to Matui Police Post whereat the appellant was
formally arrested and remanded in custody. Also, the police issued a PF3 to the victim's 2 mother,
one Rukaya Athmani (PW3), with instructions to go to hospital for medical examination and
treatment. The appellant was eventually charged before the court of law with unnatural offence
as it were. In his defence, the appellant told the trial court that on 22.5.2014 around 12:00 hours,
he was in the said house with the victim child. He related that at a certain stage, bad thoughts
crept up into his head and suddenly felt the urge to, and had sex with that child. He said however,

that he was very regretful. At the end of the trial, the appellant was found guilty and sentenced to a term of life imprisonment. He unsuccessfully appealed to the High Court, Arusha Registry, hence this second appeal to the Court. Before us, the appellant appeared in person and was not represented. After asking the Court to adopt his grounds of appeal and the written submissions, he elected for the Republic to submit first, but reserved his right for a rejoinder, if need would arise. 3 On the other hand, the respondent/Republic enjoyed the services of Ms Elizabeth Swai, learned Senior State Attorney, who was assisted by Ms Naomi Mol lei, learned State Attorney. The appellant filed a three point memorandum of appeal. However, Ms Swai chose to address the second ground on account that it was sufficient to dispose of the entire appeal. That ground queries that the trial court erred in its failure to enter conviction before it passed the sentence against him, an aspect which was wrongly upheld by the first appellate court. Given the surrounding circumstances, we agreed with her proposition. In her submission, Ms Swai hurried to admit the fact that after finding the appellant guilty of the charged offence, the trial court did not proceed to convict him before passing the sentence, an omission which offended the provisions of section 235 (1) of the Criminal Procedure Act (the CPA). She added that when this ground was raised before the first appellate court, the first appellate judge erred when she purported to enter into the shoes of the trial court by entering conviction before she proceeded to determine the appeal. Ms Swai maintained that the proper procedure was for the first 4 appellate judge to quash the judgment of the trial court, set aside the sentence, and remit the record to that court with instructions to compose a judgment in compliance with the law. In the circumstances, relying on the case of Jofrey Leiboo v. Republic, Criminal Appeal No. 24 of 2013, CAT (unreported), she urged the Court to cloth itself with the powers under section 4 (2) of the Appellate Jurisdiction Act cap. 141 of the Revised Edition, 2002 (the ADA), quash the proceeding and judgment of the first appellate court for having been based on erroneous judgment of the trial court, also to vacate the judgment of the trial court, set aside the sentence, and remit the record to that court with instructions to compose a proper judgment in compliance with the law. On his part, the appellant requested the Court to favourably consider his grounds of appeal and the written submissions he filed and release him from prison. On our part, we have carefully gone through the Record of Appeal, including the proceedings and judgments of both the trial and the first appellate courts, the grounds of appeal, and the submissions of both sides. One thing is glaringly obvious that the trial court did not enter conviction as 5 directed by law before it proceeded to pass the sentence. We also note that the first appellate court addressed the third ground of appeal as was quipped in the memorandum of appeal before it which cited the defect in the trial court's judgment which omitted to convict the appellant. The first appellate court took it lightly and purported to enter into the shoes of the trial court and entered conviction, after which it proceeded to deal with the appeal on merit. We think that was wrong. Our starting point is section 235 (1) of the CPA under which, where an accused person is found guilty in respect of the charged offence, the trial court is mandatorily instructed to enter conviction before proceeding to pass a sentence. That section provides that:- "5. 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 or discharge him under section 38 of the Penal Code." [Emphasis added]. 6 This section is

couched in mandatory terms, a fact which connotes that failure by the trial court to enter conviction before imposing a sentence, contravenes this section, and is a fatal omission. It should also be pointed out that omission to convict offends as well the provisions of section 312 (2) of the CPA which requires the presiding judge or magistrate to indicate the nature of offence the accused is convicted of. In the absence of a conviction therefore, one of the prerequisites of a judgment in terms of subsection (2) of the said Act will be missing. Section 312 (2) of the CPA states that: "S. 312 (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. "[The emphasis is added] The Court had the occasion to address this point in a range of cases, including those of Jofrey Leiboo v. Republic (supra), Shabani Iddi Jololo and four others v. The Republic, Criminal Appeal No. 200 of 2006, Amani Fungabikasi v. Republic, Criminal Appeal No. 270 of 2008, 7 and Kimangi Tlaa v. Republic, Criminal Appeal No. 22 of 2013 CAT (all unreported). It was commonly stated by the Court in those cases that failure by a trial court to enter conviction before proceeding to pass a sentence is a fatal and incurable irregularity which will render such judgment a nullity; and no appeal from such judgment can be heard on first appeal by the High Court. This is indeed, the position of the law. As already pointed out, the first appellate court purported to enter into the shoes of the trial court, whereof it entered conviction and proceeded to determine the appeal on merit. We hold firm that, that was a serious misdirection on the part of the first appellate court because prima facie, there was no valid appeal before it for consideration. That means, the first appellate judge had no better option than to remit the record of that case to the trial court with instructions to compose a judgment according to the demands of law, and subsequently impose the appropriate sentence. For reasons we have assigned, we resort to the provisions of section 4

- (2) of the ADA under which we quash the proceedings and the judgment in the High Court, as well as the judgment of the trial court, and set aside the sentence thereof. In its stead, we order for the record of the trial court to be remitted to that court with instructions to compose and deliver a judgment that complies with the dictates of section 235 (1) and 312 (2) of the CPA. We have also found it necessary to direct that the appellant will remain in custody pending the finalization and delivery of the judgment by the trial court. We further direct that after entering a conviction, the prison sentence to be meted out against him should be ordered to run from the date when he was first sentenced on 5.8.2014. We order accordingly. DATED at ARUSHA this 11th day of October, 2018. B. M. MMILLA JUSTICE OF APPEAL R. E. S. MZIRAY JUSTICE OF APPEAL S. S. MWANGESI JUSTICE OF APPEAL I certify that this is a true copy of the original. B.A.1MPEPO DEPUTY REGISTRAR COURT OF APPEAL
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