

TANZANIA / JUDGMENT

miraji kassim kaburanya vs republic

2018 tzhc 2377 21 march 2018

COURT
TZHCDECIDED
21 March 2018

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT PAR ES SALAAM
PC CRIMINAL APPEAL NO 6 OF 2017 (Original Criminal Case No 5 of 2017, Kimamba Primary
Court and Appeal No. 10 of 2017 at Kilosa District Court) MIRAJI KASSIM
KABURANYA.....APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 13/12/2017 Date of Judgment: 21/3/2018 MunisiJ. This appeal originates from Criminal Appeal No 10 of 2017 of Kilosa District Court which confirmed the decision of Kimamba Primary Court in Criminal Case No 5 of 2017. Originally, Appellant was arraigned before the Kimamba Primary Court for the offence of stealing by public servant contrary to section 265 and 270 of the Penal Code where he was convicted and sentenced to 12 (twelve) months imprisonment. Dissatisfied by the conviction, he unsuccessfully appealed to Kilosa District Court. Undeterred, he has preferred an appeal to this court. According to the charge sheet, on 3/11/2016, at Madoto Village in Kilosa District, being a public servant, appellant stole cash TShs 200,000/= (two hundred thousand shillings) the money entrusted to him for the purposes of constructing a toilet for Madoto Primary School. The trial Primary Court and the District Court were satisfied that the evidence against him was more than enough supporting- a conviction hence the present appeal. - Appellant has preferred five grounds of appeal challenging the conviction grounded by the trial court and upheld by the district court. Having scrutinized the record, I have however noted that the trial primary court omitted to enter a conviction against the appellant, what it did was only to find him guilty of the offence. Thus before venturing into the merits of the appellant's appeal, I have to rule on the consequence of this omission. The last page of the court's judgment is speaking for itself as follows: " kwa sababu hizo hapo juu, Mahakama hii imejiridhisha vya kutosha kwamba mshtakiwa anavo hatia ya kosa aliloshfokiwa nalo kwa kuzingatia pia tafsiri ya utumishi wake katika KF5 cha sheria ya kanuni ya Adhabu, na kifungu cha 270 cha sheria ya K.A" (loosely meaning "...for those reasons, the court is satisfied that the accused is guilty of the offence he is charged with in terms with the provisions of section 5 and section 270 of the Penal code") From the above extract of the judgment, it is clear that the trial court did not enter a conviction against the appellant, instead it just declared him guilty of

the offence. I have no doubt this offended the provisions of section 235 which require a court to enter a 2 conviction whenever it finds an accused guilty of an offence. The said provision states: 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. From the wording of the above provision, it is apparent that the requirement to enter conviction is mandatory and not optional. The Court of Appeal in a number of its decisions observed that the anomaly is a serious omission which necessitates the record to be remitted back to the trial court to rectify the anomaly and enter a conviction and if the appellant will still be aggrieved after such rectification, may then prefer an appeal, (see the cases of Shabani Iddi Jololo and 3 Others V Republic, Criminal Appeal No 200 of 2006, Ally Rashid @Masika V the Republic, Criminal Appeal No. 219 of 2006, Josephat Butika V the Republic, Criminal Appeal No. 439 of 2007, and Sam Sempembwa and Herman Francis Sarua V R, Criminal Appeal No 169 of 2010 (all unreported)). In the case of Shabani Iddi Jololo, the Court of Appeal observed that: "...in the absence of a conviction entered in terms of section 235(1) of the Act there was no valid judgment upon which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no legs to stand on.... As it is, we could have easily nullified the judgment of the High Court and then remit the record to the District Court with directions to enter a conviction...." 3 The Court of Appeal observed in the case of Sam Sempembwa that failure to enter conviction before passing sentence is a fatal irregularity. As evidenced by the record, the District court failed to note the anomaly in the Primary Court's judgment, as a result it proceeded to hear the appellant's appeal on merit, I have no doubt from the above authoritative finding of the Court of Appeal in the above cited decisions, it was wrong to entertain the appeal as the same was based on an invalid judgment. In that regard, I have no option but to nullify the district Court's proceedings and the judgment thereof which I hereby do. The issue is whether having nullified the District court's decision the recourse available is to send back the record for the trial primary court to enter a conviction. I have learnt from the appellant that despite the order by the Primary Court that his sentence should be confirmed by the District Court, he was taken to prison the same day the Primary Court delivered its judgment and he served his sentence in full. Under the circumstances, I do not think it will be in the interest of justice to send the file back to Kimamba Primary Court to require it to enter conviction against the appellant for an offence whose sentence he has already served. Similarly, the order for the payment of Shs. 210,000/= is tainted because it was issued based on an invalid judgment. I am thus inclined to the view that from the what has gone under the bridge as highlighted above, whereby appellant has served an illegal sentence, causing him to appear again before the primary court will just amount to harassment. It is best that the loss be left to lie where it had fallen. 4 For the foregoing reasons, I allow this appeal, quash the judgment of Kimamba Primary Court and set aside the order for the refund of Shs. 210,000/= imposed on the appellant. In the event, the appeal succeeds to the extent explained. Appellant who has served his sentence in full is accordingly discharged, U , / Judgment delivered in Chambers in the presence of the appellant in person and in the presence of Miss Jenipher Masue, learned State Attorney for the respondent/Republic, this 21/3/2018.

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/miraji-kassim-kaburanya-v-the-republic-stealingbypublicservant-tzhc-2018

Prepared on 14 October 2026 · Esheria