

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA**

AT MWANZA

CRIMINAL APPEAL NO. 7 OF 2022

(Economic Case No. 143 of 2020 of the District Court of Magu at Magu)

SEIF SHABANAPPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

12th & 22nd June, 2022

Kahyoza, J.:

The trial court convicted **Seif Shaban** (the appellant) with the offence of rape sentenced him to serve an imprisonment of 30 years. Aggrieved by both conviction and sentence, the appellant appealed to this Court raising nine ground of appeal. One of the ground of appeal was that-

8. That, the defence of the appellant was missing in the judgment of the trial court and failure of the appellant to make defence render(s) the judgment and the decision of the trial court nullity.

A brief background is that: The police arraigned **Seif Shaban**, the appellant, before the District Court of Magu at Magu with the offence of rape contrary to sections 130 (2) (e) and 131(1) of the Penal Code, [Cap

16 R.E. 2019] (the Penal Code). The prosecution alleged that the appellant, on 31st day of July, 2020 at Nyanguge street within Magu District Mwanza Region, had carnal knowledge of girl referred to as YY or the victim. The victim was fifteen (15) years old.

The appellant pleaded not guilty to the charge. The prosecution lined up five witnesses namely, the victim (**PW1**), Abel Deus Mashamba (**Pw2**), Kessy Charles (**Pw3**), Dr. Racheal Ngorosho (**Pw4**), G. 5859 DC Mohamed (**Pw5**). The appellant defended himself on affirmation on 17.3.2021. The appellant had indicated that he had a witness to call so the trial court adjourned the case to 24.3.2021 for the appellant to summon his witness. On the 24th day of March, 2021 the appellant appeared without his witness, the court adjourned the case to yet another date for defence hearing. It adjourned the defence hearing to 31.3.2021, on which date the appellant had no witness and prayed to close his defence.

After the appellant closed his defence, the trial court fixed the date of judgment. On the date of delivering the judgment the appellant was absent, hence the court delivered the judgment in his absence. Four months after the delivery of the judgment, the police arrested the appellant, presented him to the trial court, trial court gave him an

opportunity to mitigate and handed down an imprisonment sentence of thirty years.

As demonstrated above, the appellant complained that the trial court omitted to consider his defence. During the hearing, the appellant contended that the prosecution and the trial court did not afford him an opportunity to defend. He deposed that he could not hear the date fixed for defence. On the date he attended the court thinking that it was date fixed for defence, the trial court convicted him and sentenced.

Ms. Tibelengwa, the Principal State Attorney, who represented the Respondent opposed the appellant's eighth ground of appeal. She submitted that the appellant defended himself and that the trial court gave him an opportunity to call his witness Hamisi Mohamed. The appellant failed to summon his witness and closed his case. She contended that the trial court gave the judgment in the absence of the appellant on 12.4.2021. He was arrested on 17.8.2021 informed the outcome of the trial. She opposed the contention that the trial court did not consider the appellant's defence. In the alternative, she argued that should this court find that the trial court did not consider the defence, then being the first appellant court, it is entitled to review the evidence on record make its own determination.

After hearing rival arguments regarding the eighth ground of appeal, I wish to point out that the appellant's complaint is not whole true. The appellant lied to allege that he did not make his defence. To say the least, this is a false allegation. The trial court's record speaks louder than the appellant that the appellant defended himself. It is undisputed that the appellant defended himself on affirmation on 17.3.2021. After the appellant defended himself, the trial court adjourned hearing for his defence two times to give him an opportunity to call his witness in vain. The appellant was on bail so he had ample opportunity to call his witness. The appellant closed his defence after he failed to summon his witness.

As to the allegation that the trial court did not consider the appellant's defence, I find it partly proved. The trial court produced the appellant's defence but did not analyze it. I totally agree with Ms. Tibilengwa that the first appellant may, where the trial court omitted to consider the appellant defence, consider the defence. This is truly the position of the law. The first appellate court has mandate to re-appraise; re-assess and re-analyze the evidence on the record before it and arrive at its own conclusions on the matter and give reasons either way. See **Siza Patrice V. R Cr. Appeal No 19/2010** where the Court of Appeal held that-

"We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary."

Having found that the trial court did not consider the defence, this Court being the first appellate court would have considered the appellant's defence and wrote the judgment. However, upon scrutiny of the judgment I entertained doubts if there was a judgment in law. The trial magistrate did not consider and evaluate not only the defence but also, he did not consider the prosecution's evidence. He summarized the evidence of both sides and made the following conclusion:-

"To this end it is for the interest of justice that this accused cannot avail criminal liability against him. This court convicts the accused of the offence of rape c/s 130(2) (e) and 131(1) of the Penal Code, [Cap 16 R.E. 2019]"

Apart from section 312 of the Criminal Procedure Act, [Cap. 20 R.E. 2019] which provides for contents of a judgment, the Court of Appeal has provided a guidance on how to write the judgment. The Court of Appeal in **Leonard Mwanashoka v. R.**, Criminal Appeal No. 226 of 2014 (unreported), underscored useful guidelines on what is to be considered in the evaluation of evidence, stating-

"It is one thing to summarise the evidence for both sides

*separately and another thing to **subject the entire evidence to an objective evaluation in order to separate the chaff from the grain.** Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis." (emphasis added)*

The Court of Appeal took a similar position **Mkulima Mbagala v. R.**, (CAT) Criminal Appeal No. 267 of 2006, where it stated-

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain **an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent.** In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at."*

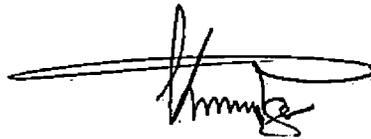
The trial magistrate after summarizing the evidence of both sides did not **subject the entire evidence to an objective evaluation in order to separate the chaff from the grain.** He was too quick to rush to a conclusion that the appellant is guilty. He did not give reasons why he trusted the prosecution witness and ignored the appellant's defence of

alibi. I find it just for the appellant to know reasons why the trial magistrate convicted him before he can appeal to this Court.

In the upshot, I set aside the purported judgment and order the trial magistrate to compose a judgement. Thus, the case file should be sent wherever he is for him to comply with the order and to do so immediately. After he has composed the judgment, he will send it to Magu District court for delivery in the presence of the appellant.

The appellant shall remain in prison, should the trial magistrate re-convicted him, time spent in prison ill be deducted.

I order.

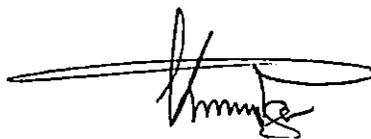


J. R. Kahyoza,

JUDGE

22/6/2022

Court: Judgment delivered in the virtual presence of the appellant and Mr. Emmanuel Lvinga S/SA for the respondent. B/C Mr. Sweetbert present.



J. R. Kahyoza, J.

22/6/2022