THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 55/2019

(Originating from Criminal Case No. 35/2014 from the District Court of Rungwe at Tukuyu)

ANYITIKISYE MWAMBISA @ MWAMAKULA..... APPELLANT

VERSUS

THE DPP..... RESPONDENT

JUDGMENT

Date of last Order: 6th .3.2020

Date of Judgment: 19th.3.2020

Dr. A.J. Mambi, J.

In the District Court of Mbeya, the appellant **ANYITIKISYE MWAMBISA @ MWAMAKULA** was found guilty for an offence of unnatural offence c/s 154 of the ***Penal Code, Cap 16*** Cap 16 [R.E.2002]. The appellant was alleged to have committed an offence on 08 of February 2014 at Lufilyo village within Mbeya District, Mbeya by having carnal knowledge with an old woman. Having found that he convicted the appellant, the trial Magistrate just ordered the appellant to serve thirty years

imprisonment. Aggrieved, the appellant appealed to this court by preferring six grounds of appeal as follows:-

1. That the trial magistrate erred in point of law and fact when convicted the appellant on relying to the evidence of PW1 (a victim) while such evidence of PW1 was not corroborated by an independent witness.
2. That the trial magistrate erred in point of law and fact when convicted the appellant by believing the evidence of PW3 a medical attendant and the PF3 (exh. P1)
3. That the trial magistrate erred in point of law and fact when convicted the appellant by believing that PW1 identified clearly the appellant at the scene of crime while no evidence indicated if he was identified.
4. That the trial magistrate erred in point of law and fact when convicted the appellant by believing the evidence of PW1 that she identified well the appellant at the scene of crime.
5. That the trial magistrate erred in point of law and fact when convicted the appellant by disregarding his defense.
6. That the charge against the appellant was not proved by the prosecution side beyond reasonable doubt.

During hearing the appellant in this appeared unrepresented, while the Republic was represented by Mr. Mtenga and Xaveria, the learned State Attorney. During hearing, the appellant adopted all his grounds of appeal and said he had nothing to add. Before responding to the grounds of appeal, the learned State Attorney submitted that, they don't agree

with all grounds of appeal. He argued that With regard to ground three, we are saying the victim (PW1) identified the appellant since they faced each other in the afternoon. He was of the view that, even if the trial court did not properly evaluate the evidence as claimed by the appellant, this court has mandate to evaluate the evidence

The appellant in is rejoinder briefly stated that his matter has taken a very long time.

I have carefully gone through the records and the relevant law. Before thoroughly looking into the grounds of appeal. Before discussing the grounds of appeal, I have noticed and observed the proceedings and judgment by the trial magistrate have some errors which may render it invalid. It is clear from the record that the trial Magistrate neither properly entered the conviction nor sentenced the appellant. In his final words (The Trial District Magistrate) under the last paragraph at page 7the judgment reads:

> ***""Having said so, and in respect to the discussion made above, I hereby convict the accused as he was charged as per section 235 (1) CPA R.E.2002]"***

Reading between the lines on the above quoted paragraph can it be said that the Magistrate convicted the accused persons/appellants?.The answer is clearly NO since the above wordings were the last statement of the judgment and nothing else and there is any sentence on the conviction. As required by the law that once an accused is found guilty one would have expected the conviction and he must state the words

that: ***"I convict the accused person under section.... (Provision under which the accused was charged) as charged".*** The Trial Magistrate having convicted the accused under the section which creates an offence he stand charged shall sentence him under the proper provision of the law. It appears that the trial Magistrate assumed that the accused was charged under section 235 of Criminal Procedure Act, Cap 20. However, this section does not create an offence of rape but it rather provides for procedure to be followed where the accused is found guilty that is he must be convicted. The law is clear that where the accused is found guilty the magistrate must convict him under the section charged and he must mention the offence and that section. Failure to convict the accused is contrary to the law (sections 235 and 312 of the CPA Cap 20) since the law provides for mandatory requirement for judgments to contain conviction and sentence. My perusal from the records has also revealed that the accused was not properly sentenced. I have keenly gone through the proceedings and judgment and I didn't find anywhere indicating the trial Magistrate properly sentenced the appellant after conviction. From my reading of the trial court judgment at page 9 this is what the magistrate stated:

> *"Since the accused person had declared to have nothing to mitigate this court and by considering nature of offence he committed by him,* ***I convict him to serve thirty (30) years imprisonment".***

Reading between the lines on the above quoted paragraph can it be said that the Magistrate sentenced the accused person/appellant. The answer is clearly NO since the above wordings were the last statement of the judgment and nothing else and there is no any sentence on the conviction. There even know the word "sentence" apart from wrongly using the word "convict". One might ask the question as to how an accused can be convicted for ***thirty (30) years imprisonment***?. This in my view is as good as saying apart from being improperly convicted, the accused was never sentenced. As required by the law that once an accused is convicted one would have expected the sentence to follow thereafter and must be indicated under the judgment. In other words, it is trait law that once the accused is found guilty, sentence must always be preceded by conviction and relevant provisions of the law and should be indicated under the judgment. Failure to sentence the accused is contrary to the law since the law provides for mandatory requirement for judgments to contain conviction and sentence

I wish to refer section 235 (1) of the CPA [Cap 20 R.E 2002] which provides as follows:-

> *"the court having heard both the complainant and the accused person and their witnesses and 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 supplied with).*

The above provision of the law is very clear. In this regard, my mind directs me that the provision of the law mandatorily requires any judgment must contain sentence after an accused is convicted and it must be reflected in the record. This was also observed in ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015 (unreported)***. The court of appeal in this case that is ***MOHAMED ATHUMAN vs THE REPUBLIC, Crim App.No.45 of 2015*** observed that:

> *"Although there was a finding that the appellant was guilty was not convicted before he was sentenced. This was itself irregular.* ***Sentence*** *must always be preceded by* ***conviction,*** *whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of the CPA (where there has been a trial)."(emphasis supplied with).*

Reference can further be made to the court in **Amani Fungabikasi V Republic,** criminal appeal No 270 of 2008 (unreported) where the court made similar observation. In this case the court said that;-

> *"It was imperative upon the trial District Court to comply with the provision of* ***section 235 (1)*** *of the Act by convicting the appellant after the Magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt.* ***In the absence of a conviction it follows that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act was missing****. So, since there was no conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon the High Court could uphold or dismiss."(emphasis added).*

Reference can also be made to section 312of CPA, Cap 20 [R.E 2002] for content of judgment as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
> *(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****"."(emphasis added).*

The word "shall" under both sections 235 (1) and 312 (2) is clear that convicting and sentencing the accused who was found guilty is mandatory. For that reason the appellant if found guilty of the offence charged he should have been convicted and sentenced in terms of sections 235(1) and section 312 the CPA, Cap 20 by citing the provisions that create offence and sentence. Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2002] which empowers this court to exercise its revision powers to examine the record of any criminal

proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. The Court is also empowered in the case of any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2002] as follows:

> ***"372.*** *The High Court may call for and* ***examine*** *the record of any criminal proceedings before any subordinate court for* ***the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,*** *and as to the regularity of any proceedings of any subordinate court.*
>
> Furthermore, section 373 of the same Act provides that:
>
> ***"****(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise* ***comes to its knowledge****, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may* enhance the sentence*; or*

*(b) in the case of any other order other than an order of acquittal, **alter or reverse such order**, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law, the Act empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2002] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney. The law is clear it is proper to for this court to invoke provisional powers instead of appeal save in exception cases.

Additional, the trial Magistrate failed to consider and analyze the defence evidence apart from just saying it was not proper to consider defence evidence. I wish to quote the words of the magistrate extracted from the judgment at page 8 which reads as follows:

"But I find it not proper to relay (consider) such evidence as it is to be afterthought".

The Trial Magistrate in his Judgment neither properly considered nor addressed himself to the defence raised by the appellants before making his decision. It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This according to the law is fatal as it can occasioned to injustice to the other party that is the defence or the appellant in our case. Reading between the lines on the above paragraph it appears that the trial Magistrate did not consider the defence evidence and he was shifting the burden of prove from the prosecution to the defence which is contrary to the principles of the law. This means he convicted the appellant on the defence weakness contrary to the law. The Court in ***CHRISTIAN S/O KALE AND RWEKAZA S/O BENARD v REPUBLIC (1992) TLR 302*** as correctly cited by the appellant counsel observed that:

> *"an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution"*

I wish to refer the decision of the court in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on it's own*** *and arrive*

at the conclusion that it was true and credible ***without considering the defence evidence****".*

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering the defence evidence. It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in***YASINI S/O MWAKAPALA VERSUS THE REPUBLIC Criminal Appeal No.13 of 2012***where the Court warned that considering the defence was not about summarising it because:

> *"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. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The Court in Leonard Mwanashoka (supra) went on by holding that:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken.* ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which*** *we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice.* ***It is unfortunate that the first appellate judge fell into the***

same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. *It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."*[Emphasis added]

The appellants in their ground of appeal also raised the issue of evaluation of evidence. The other question is, did the trial court evaluate the defence of both parties?. These are some of the key questions that need to be answered. It is clear from the records that the trial court did not subject the defence evidence to any evaluation to determine its credibility and cogency. The position of the law is clear that that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgment.

The importance of clearly analyzing and determining whether the evidence is acceptable as true or correct, was clearly discussed by the court in the case of ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** where it was held:-

"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".

I also wish to borrow a leaf from other common law countries. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) Pg 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

Having established that in this case the trial magistrate has failed to comply with the requirements of proceedings and judgment writing that renders both the proceedings and judgment invalid, the question is, has such omission or irregularity occasioned into injustice to the accused appellants. The question at this juncture would now be, having observed such irregularities, would it proper for this court to remit the file back, order retrial or *trial de novo?*. There are various authorities that have underlined the principles and circumstance to guide court in determining as to whether it is proper to order retrial or *trial de novo* or not.
In this regard I will first refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2002] and see what would be the proper order this court can make in the interest of justice. From my finding, I am satisfied that such an error, omission or irregularity that I observed have in fact occasioned failure of justice to the appellant. There are various authorities that have underlined the principles and circumstance to guide

court in determining as to whether it is proper to order retrial or *trial de novo* or not.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I have no reason to depart from the above authorities and my hands are tied up since an order for retrial can only be made where the interests of justice requires it and should not be ordered where it is likely to cause an injustice to the accused person. In my considered and firm view, in our case at hand the irregularities are immense that does not favour this court to order for retrial and the interests of justice does not require to dos so, since doing so will in my view create more likelihood

of causing an injustice to the accused person taking into account the time he spent in prison and I hold so.

Indeed the circumstance of the case shows that making an order for *trial de novo (retrial)* will create more delays that may cause injustice to the appellant. As I alluded and observed above that, since there was neither conviction nor sentence entered in terms of Section 235 (1) and 312 of the CPA, there was no valid judgment and proceedings. It is a settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders both the proceeding and purported judgment invalid.

Basing on my above reasons, I am of the settled view that the guilt of the appellant was not properly found at the trial court due the fact that the trail court failed to observe some legal principles on the detriment of the appellant.

In the circumstances, the conviction is quashed and the sentence is set aside and order that the appellant be free from the charges he was facing unless he is otherwise charged with other charges.

DR. A. J. MAMBI
JUDGE
19.03. 2020

Date: 20/03/2020

Coram: N. Mwakatobe, DR.

Appellant: Present

For the Republic: Sarah Anesius, State Attorney

B/C: Sarah A. Mungure

State Attorney: For Judgment I am ready

Appellant: I am ready as well.

Court: Judgment is delivered today the 20th day of March, 2020 in the presence of both parties including the appellant.

N. W. Mwakatobe
Deputy Registrar
20.03. 2020

Court: Right of Appeal is explained.

N. W. Mwakatobe
Deputy Registrar
20.03. 2020