IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 42 OF 2020

(Original from District Court of Rungwe, at Tukuyu Cr. Case No43/2020)

WILIAM JOSEPH SANGA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 17th.8.2020

Date of Judgment: 17th.8.2020

Dr. A. J. Mambi, J.

In the District Court of Rungwe, at Tukuyu, Mbeya the appellant **WILIAM JOSEPH SANGA** was found guilty for an offence of house breaking c/s 294 (1) (2), section 254(1) and 265 of the Penal Code, Cap 16 [R.E.2002]. The appellant was found guilty as charges where he was convicted and sentenced to six years imprisonment. Aggrieved, the appellant appealed to this court by preferring seven grounds of appeal.

During hearing that was done electronically through virtual court the appellant in this appeared unrepresented, while the Republic was represented by Ms. Xaveriss, 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, she has observed some irregularities on the proceedings and Judgement. She argued that the records show that during admission of the appellant cautioned statement, the trial court conducted trail within trial. She averred that during the trial court conducted trail within trial the prosecution called their witnesses but when they closed their case, the appellant was not given right to defend and testify his evidence. She argued that this was very serious omission and prayed the matter be referred back for retrial.

The applicant had no objection apart from supporting the Republic.

I have carefully gone through the records and the relevant law. Before thoroughly looking into the trial court proceedings I have noticed and observed the proceeding by the trial magistrate has serious irregularities errors which may render it invalid. It is clear from the record that the trial Magistrate during the trial court conducted trail within trial did not avail the appellant with

right to testify and defend himself. This is clearly indicated under pages 8 and 9 of the proceedings. This in my view was a serious omission and fatal and observed by the court of appeal in ***Selemani ABDALLAH & TWO OTHERS VS.REPUBLIC, CRIMINAL APPEAL NO.348 of 2008.***

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. There are various decision of the court of appeal which has insisted the need for considering the evidence of both parties and failure to do is bad in law. This was underscored 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****".*

Similarly the court in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** made clear observation on the importance of considering and dealing with the evidence of both parties. In this case, the court observer and held 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].

Worth also referring the case of ***Ahmed Said vs Republic C.A-APP. No. 291 of 2015, the court at Page 16*** where the Curt 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.***

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 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.

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?.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****..."*

Having observed those irregularities that are incurable will it be justice to remit the file back for proper conviction?. In this regard I will 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. It is a settled law that failure to avail the accused to testify his evidence during trial within trial, is a fatal and incurable irregularity, which renders the purported proceedings and judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction.

In the circumstances I therefore remit the file back to the trial court for and order retrial for the trial court to determine the matter afresh. Where it appears that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with the matter. The Trial Court should consider this matter as priority on and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for trial de novo need to be dealt expeditiously within a reasonable time.

With regard to the position of the appellant I order him to remain in custody pending the matter to be immediately dealt with. Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

DR. A.J. MAMBI

JUDGE
17/08/2020

Judgment delivered electronically this 30th day of August, 2020 in presence of both parties.

DR. A.J. MAMBI
JUDGE
17/08/2020

Right of Appeal explained.

DR. A.J. MAMBI
JUDGE
17/08/2020