IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., WAMBALI, J.A., And., SEHEL, J.A.)

CRIMINAL APPEAL NO. 506 OF 2016

MICHAEL s/o JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Tabora)

(Mgonya, J.)

Dated the 5th day of October, 2016

in

DC Criminal Appeal No. 89 of 2015

JUDGMENT OF THE COURT

4th December & 12th December, 2019

SEHEL, J.A

This is a second appeal by the appellant, Michael Joseph who was convicted by the District Court of Igunga at Igunga (the trial court) with an unnatural offence contrary to section 154 (1) (a) of the Penal Code and he was sentenced to 30 years imprisonment. Aggrieved with the decision of the trial court, he unsuccessfully appealed to the High Court of Tanzania at Tabora. Still aggrieved, the appellant has brought this second appeal to this Court.

Before embarking on the merits of the appeal we deemed appropriate to give a brief background of the case that led to the appellant's conviction.

It was alleged by the prosecution that on the 27th day of January, 2012 during night time at Mwaomba-Igurubi within Igunga District in Tabora Region the appellant did have carnal knowledge with EM (name withheld as he was a minor) against the order of nature. The appellant denied the allegation. Thus, the prosecution paraded a total of four witnesses namely; EM, the victim (PW1), Samson Kidole (PW2), Dr. Julius Boniface (PW3), and Shinga Charles (PW4). The prosecution also tendered one exhibit, to wit medical examination report of the victim (Exhibit P1).

It was the testimony of PW4 that the appellant was his co-worker at the mining site. One day, when they were returning home during night time the appellant asked him for a place to sleep. Since, he did not have a space, PW4 requested PW2 to accommodate the appellant. PW2 discussed the matter with his wife who agreed to house the appellant. It was the evidence of PW2 that the appellant was allowed to share the bed with PW1. It seems that the appellant took that advantage and had carnal knowledge with PW1 on three consecutive days, that is, on the 25th, 26th and 27th days of January, 2012. But

on the 27th day of January, 2012 PW1 had enough. He decided to shift to the sitting room where he slept there till the next morning. On the following day he opened up to his sister who then reported the matter to PW2, the brother-in-law of PW1. At that time, the appellant had already left for work and he never returned on that day. PW2 decided to inform his friend, PW4 and together they went to search for the appellant. The appellant was apprehended at the mine site and he was sent to Igurubi Police Post. On the 31st day of January, 2012 PW1 was sent to Igurubi Health Centre where he was received by PW3. PW3 examined him and concluded that PW1's anus was penetrated by a hard material. PW3 tendered a medical examination report and it was admitted as Exhibit P1, without objection from the appellant.

In his sworn testimony, the appellant denied the entire accusation. He said it was a fabrication by PW4. He told the trial court that PW4 asked him for TZS 50,000.00 but he replied him that he did not have it. As he did not give him the money, PW4 teamed up with his friends, on that same night, and robbed from him his money and thereafter framed this case.

The trial magistrate, in his brief judgment and after summarizing the evidence of the prosecution side alone with no mention at all of the defence case arrived to the following conclusion:

> *"Thus according to the evidence of PW2 and PW4 it shows that the accused is not a stranger in the eyes of PW2 and PW2 who also confirmed that one day the accused did sleep with the victim (PW1). PW2 and PW4 did not mention the exact date when the instance took place. It is the evidence of the victim (PW1) which point out the date and time of the alleged instance. So according to the prosecution evidence it is PW1 who witnessed the instance as himself is the victim in the case. Briefly the evidence of PW1 is supported by the observation of the doctor (PW3) who said that the anus of PW1 was penetrated by a hard object. PF3 which was marked as exhibit P1 also supports the evidence of PW1. The evidence of PW2 and PW4 have been corroborated with the evidence of PW1 and PW3 particularly that which show and prove that one day the accused slept with the victim. The court has seen the age of the victim being very young compared with the accused.* ***Also the court has observed the demeanor of the accused and noted that he is self convicted before law and tracing the kind of the job he is doing, being a***

> ***mine boy, the appearance and language shows that he grew up without discipline and care.*** *In fact I am satisfied with the prosecution evidence and found it beyond reasonable doubts. I find the accused liable of the offence charged hence he is hereby convicted.* [Emphasis is added]

With that observation, the appellant was accordingly convicted and sentenced to serve a jail term of thirty years. We will address in due course on the bolded part.

The appellant was aggrieved. He, thus, appealed to the High Court at Tabora (the first appellate court). In the process of hearing the appeal, the first appellate court confined itself and directed its mind to the grounds of appeal only and it did not critically re-evaluate the entire evidence. In doing so, it concurred with the trial court's findings that the best evidence in rape cases comes from the victim. Like the trial court, the first appellate court was satisfied with the prosecution case and thus dismissed the appellant's appeal in its entirety and proceeded to uphold the appellant's conviction and sentence.

Still aggrieved the appellant filed this second appeal advancing four main grounds since the fifth ground was simply a prayer for his appeal to be allowed.

First, the trial court erred in law and fact by isolating and dealing with the prosecution evidence alone without taking into consideration the defence case. **Second**, PW1 was not a reliable witness as it was inconceivable for him to remain silent from 25th day of January, 2012 while there was no threat. **Third**, the evidence of PW3 was not conclusive enough to prove the offence since the hard object mentioned by him could as well have been the finger which he used to examine PW1. **Fourth**, the prosecution side failed to bring evidence to prove the exact date of the commission of the crime.

At the hearing of the appeal, the appellant appeared in person fending for himself whereas Ms. Mercy Ngowi, learned State Attorney represented the respondent Republic.

The appellant adopted his memorandum of appeal and had nothing to add. He, thus, let the learned State Attorney to reply to his grounds of appeal but reserved his right to rejoin, if need would arise to do so.

Arguing in support of the appeal, Ms. Ngowi candidly faulted the trial court's judgment that appears at pages 24 to 25 of the record of appeal that it did not only fail to deal but also it never considered and or reproduced the evidence adduced by the appellant. She contended that the judgment fell short

to be a judgment because it contravened section 312 (1) of the the Criminal Procedure Act Cap 20 Revised Edition of 2002 (the CPA). She pointed out that the trial court only dealt with the prosecution evidence and its decision was arrived basing on that prosecution evidence alone in isolation of the appellant's defence. It was her further submission that failure to consider and evaluate the evidence of the defence occasioned a miscarriage of justice to the appellant thus vitiated the conviction of the appellant. She, therefore, urged us to allow the appeal, by quashing and setting aside the judgment, conviction and sentence and make an order for the trial court to compose a fresh judgment in accordance with the law and that since the decision of the High Court emanated from the nullity judgment then that decision and its proceedings should also be quashed and set aside. Given the fact that the first ground of appeal suffices to dispose the whole appeal, she sought leave of the Court not to proceed with other grounds which prayer was granted as we agree with her that the first ground is dispositive of the present appeal.

The appellant in his rejoinder appreciated very much the positive submission made by the learned State Attorney but he added that we should also consider the time he has spent in jail, that is, eight years.

Having considered the submissions of the parties and examined the record of appeal, the critical issue for our determination is whether the trial court ought to have considered the defence case in its judgment as per the provisions of section 312 of the CPA. The said provision of the law provides:

> *"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."*

It follows then that the law requires for the judgment to contain the point(s) for determination, the decision and the reasons for that decision. In the case of **Hamisi Rajabu Dibagula v Republic** [2004] T.L.R 181 we had an occasion to interpret the tenor and import of section 312 (1) of the CPA. In that appeal we were invited to consider whether the judgment of the trial magistrate was in law a judgment since the trial magistrate dealt only with one issue out of two issues that she framed for determination and the one which was

considered was dealt with perfunctorily. It was also complained that the judgment scarcely contained any reason justifying the final conclusion arrived at on that case. We found and held:

> *"... the said judgment did not sufficiently meet the requirements of the subsection we have just quoted. We wish to draw attention to what this Court said in the case of* ***Lutter Symphorian Nelson v Attorney General and Ibrahim Said Msabaha****, Civil Appeal No. 24 of 1999 (unreported) on what a judgment should contain:*
>
> *" ... A judgment must convey some indication the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In* ***Amirali Ismail v Regina*** *1 T.L.R 370, Abernethy, J. made observations on the requirements of judgment, he said:*
>
> *A good judgment is clear, systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the*

finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how."

In the appeal before us, it is evident from the excerpt of the trial court judgment we quoted herein that it was very brief, which we do not have a problem. The problem that it has, is that, it ignored the material portion of the evidence laid before it by the accused person, now the appellant herein. The trial magistrate totally ignored the evidence of the appellant and worst still he did not even consider that defence in his analysis. In his analysis which we have reproduced, the trial magistrate failed to direct his mind to the defence case adduced by the appellant that he was framed by PW4. He also failed to put into balance and weigh that evidence of the appellant in order to be fully satisfied that the prosecution case discharged its duty of proving the case beyond reasonable doubt. He, instead, weighted the evidence of one prosecution witness against the other prosecution witness when he said that PW2 and PW4 did not mention the date but PW1 did state the date. This is a total misapprehension of evidence and violation of the law.

In the case of **Hussein Iddi and Another v Republic** [1986] TLR 166 (CAT) it was held:

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."

The importance for considering the defence case was well put by Weston, J in the case of **Lockhart – Smith v United Republic** [1965] 1 EA 211 (HCT) at page 217 which we fully adopt that:

"Speaking generally .... It is for the prosecution to prove its case beyond reasonable doubt. It cannot do this unless the evidence given by or on behalf of the accused is put into the balance and weighted against that adduced by the prosecution. The question is whether anything the accused has said or which has been said on his behalf introduces that reasonable doubt which entitles him to his acquittal.

The principle is elementary, but fundamental nonetheless, and authority be needed for the proposition that failure to take into account any defence put up by the accused will vitiate conviction, is not hard to find....The learned magistrate in this case, in my view, did not, as he would have done, take into consideration

the evidence in defence, and for this reason the conviction ...cannot be allowed."

See also: **James s/o Bulolo and Another v Republic** [1981] TLR 283; **Malando Bad and 3 Others v The Republic**, Criminal Appeal No. 64 of 1993; **Gabriel Mwambene v The Republic**, Criminal Appeal No. 197 of 2009; and **Siza Patrice v The Republic**, Criminal Appeal No. 19 of 2010 (All CAT unreported).

In this appeal, as already alluded, the trial magistrate did not, as he would have done, reproduce the evidence of the appellant. He also did not take into account, at all, the evidence of the appellant before arriving to the finding of guilty. It was as if the appellant was absent during the trial while he was in court and he gave his sworn testimony. The failure by the trial magistrate to consider the defence case is fatal and vitiates the conviction.

It is disturbing to see that even the first appellate court that has a duty to subject the entire evidence on record to a fresh re-evaluation did not do so. With all due respect to the first appellate court, it erred in not holding that the trial court's judgment fell short of meeting the requirements of section 312 (1) of the CPA. We expected for the first appellate court to have discovered and

corrected this error but instead it fell into an error of confining itself to the grounds of appeal that were before it; whereas it had a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. It seems to us that the first appellate court did not passionately read the entire evidence. Had it done so, it would not have missed this obvious error committed by the trial magistrate.

In the case of **Siza Patrice v The Republic** (supra) we underscored the duty of the first appellate court to re-evaluate the evidence as a whole. In that appeal, the first appellate court, that is the High Court when dealing with an appeal before it from the trial court held that "*the trial court rightly gave no weight to the defence of alibi*" while the defence case was not considered at all by the trial court. We thus, said:

> *"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. We respectfully hold that this was not done .... We have already shown in this judgment that the trial court's judgment was patently lacking in analysis. We have also shown that the trial*

magistrate did not consider the appellant's evidence at all before determining whether or not PW1, Ninga was raped by the appellant. Since that was the case, we respectfully think that it could not be correctly held that "the trial court rightly gave no weight to the appellant's defence of alibi." The trial magistrate could not give any weight to something which was not at the back of his mind. The naked truth is that the trial magistrate did not consider the defence case at all. ***The learned judge fell into an error of upholding what was not decided.*** *It is trite law that failure to consider the defence case is fatal and usually leads to a conviction being vitiated."*

In this appeal, we hold the same position that the first appellate court fell into an error of upholding a conviction which could not have been allowed to stand for failure to consider the defence case. The conviction of the appellant ought to have been vitiated by the first appellate court. Unfortunately, the first

appellate court did not do so. It confirmed the trial court's findings, conviction and sentence which in law was non-existent.

Indeed, we are mindful with the settled principle that it is very rare for a second appellate court to interfere with concurrent findings of fact by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. See:- **Mussa Mwaikunda v Republic,** [2006] TLR 387.

In the appeal before us, we have shown that the trial magistrate ignored in total the defence case and he did not put into balance and weighted that defence evidence with the prosecution case in order to be fully satisfied that the prosecution proved its case beyond reasonable doubt. We have demonstrated that omission is in violation of section 321 (1) of the CPA hence it is fatal and vitiates the conviction. We have also shown that the first appellate court should not have confirmed the trial court's conviction as in law there was no judgment for the first appellate court to confirm it. As such there was no proper appeal before the first appellate court for it to consider and determine. Therefore, we are inclined to the prayer made by the learned State Attorney that the judgments of two courts below, proceedings of the High Court,

conviction, and sentence cannot be allowed to stand as they are blemished with procedural irregularity. They ought to be quashed and set aside.

But before we do that, we wish to point out one more irregularity evident in the judgment of the trial magistrate. We have bolded part of the extract of the judgment to show that the trial magistrate, for the first time, introduced and made a remark of the appellant's demeanour which remark is no-where to be found in the proceedings. This is contrary to the dictates of section 212 of the CPA that requires for the trial magistrate to record the demeanour of a witness at the time when he was recording the evidence of that witness whilst still under examination. Since the remark was made during the composition of the judgment then it was a complete misapprehension and violation of the dictates of the law and it leads to the miscarriage of justice to the appellant.

All said, we find merit in the appellant's appeal. We therefore nullify the two judgments of the lower courts, the entire proceedings of the High Court and proceed to quash and set them aside together with the conviction and sentence meted out on the appellant.

It is hereby ordered that the case file be returned to the District Court of Igunga at Igunga and the trial magistrate is directed to compose and deliver

the judgment that complies with the dictates of the law, as soon as possible. If for any cogent reason he cannot compose and deliver the judgment, the successor magistrate must have due regard to section 214 (1) of the CPA. In the meantime, the appellant shall remain in custody.

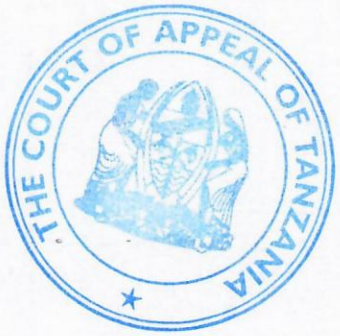
DATED at **TABORA** this 12th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2019 in the presence of the appellant in person unrepresented and Mr. Tumaini Pius, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL