IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And JUMA,J.A.

CRIMINAL APPEAL NO. 226 OF 2014

LEONARD MWANASHOKA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Bukoba)

(Khaday, J.)

dated the 29th day of May, 2014

in

Criminal Appeal No. 7/2013

JUDGMENT OF THE COURT

19th &24th day of February,2015

RUTAKANGWA, J.A.:

The appellant was charged before the District Court of Bukoba with the offence of "Attempt Rape c/s 132 (ii) (2) (a) (sic) of the Penal Code." The particulars of the charge were as follows:-

> *"That Leonard s/o Mwanashoka charged on the 20th day of July, 2006 at about 02:00hrs at Nshambya within the Municipality of Bukoba in Kagera Region, did unlawful attempt (sic) to*

have carnal knowledge of one Salome d/o Alexander without her conset".

He denied the charge and a full trial followed.

The prosecution evidence was to the effect that the prosecutrix, PW1 Salome d/o Alexander, lived alone in her house at Nshambya. On the material day and time, someone broke into her house and on entering told her that he wanted to have sexual intercourse with her. She responded urging the intruder to be patient, but managed to slip out of the house while "screaming." In the course of her flight she fell into a "dumpster" while being pursued. Her neighbours arrived and arrested the intruder, who was allegedly identified to be the appellant, her neighbor. He was arrested and taken to a 10-cell leader, who nevertheless did not testify. The appellant was subsequently charged with attempted rape.

In his sworn evidence, the appellant denied committing the alleged offence. He claimed that he was one the neighbours who rushed to PW1 Salome's home in response to her screams. He met about 10 people who were claiming a Swahili speaking person had broken into her house. The appellant is a Mha by tribe who is popularly known as "Muskuma". Then he was arrested as a suspect, beaten and released. However, as it dawned on

the arresters that he had been "heavily wounded" they re-arrested him, took him to Bukoba Central Police station from where he was sent to hospital.

In its short judgment, the trial court convicted the appellant. It reasoned thus:-

> *"PW1, PW2 and PW3 all knew the accused before the alleged incident as Msukuma and also in regards to the issue of identification the accused was arrested at the material time when he wanted to run and therefore if there was any doubt as to identification, it was cleared when he (the accused) was arrested".*

Following his conviction, he was sentenced to a term of thirty (30) years imprisonment. Aggrieved by the conviction and sentence, he preferred an appeal to the High Court which dismissed the appeal, hence this second appeal

The appellant's material complaints before the High Court were that it was not proper to convict him as the arresting officer did not testify to

tell the trial court why he had been arrested in the first place and that no investigator testified. Further, he complained that the trial Resident Magistrate did not consider his evidence at all. The respondent Republic, through Mr.Athuman Matuma, learned State Attorney, had supported the appeal on the ground that the key prosecution witnesses contradicted each other.

The learned first appellate judge dismissed the appeal because the appellant was arrested at the scene of the crime "while on top of the victim." She further said:-

> *"In Ground 6, the appellant complained that his defence was not considered by the trial court. He had no clarification on this. Nevertheless, looking at the record of the trial Court at page 11 of the typed proceedings dated 2/1/2007 we can note evidence of the appellant at his defence. As said before, the appellant had it that he was arrested when attending and alarm raised at his neighborhood. In his judgment, the trial magistrate summarized the defence*

evidence. He discussed and considered the issue of identification and found it in the affirmative much as it was not in the defence. He found the prosecution had proved its case to the standard required by law. In brief I find nowhere the defence case was disregarded. It is only that the same was not found with merit" *[Emphasis is ours].*

We must quickly and respectfully point out here that that is where the learned first appellate Judge got it wrong. We accept that the learned trial Resident Magistrate "summarized the defence evidence", much as he/she did summarize the prosecution evidence. But that was not the complaint of the appellant. It is one thing to summarize 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 a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis. The complaint of the appellant was that in the evaluation of the evidence, his defence case was not

considered at all and this is one of his grounds of appeal before us which was conceded by Mr.Hashim Ngole, learned Senior State Attorney.

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. See, for instance,

(a) LOCKHART SMITH vs. R. [1965] EA 211,

(b) OKTH OKALE v UGANDA [1965] EA 555,

(c) ELIAS STEVEN v. R. [1982] TLR 313,

(d) HUSSEIN IDD & ANOTHER v.R. [1986] TLR 283,

(e) **LUHEMEJA BUSWELU v R., Criminal Appeal No. 164 of 212** (unreported),

(f) VENANCE NKUBA & ANOTHER v.R., Criminal Appeal No. 425 of 2013 (unreported), etc.

In **VENANCE NKUBA** (supra), this Court categorically stated that:-

> *"This, infraction alone would have sufficed to quash the conviction but, as we shall shortly demonstrate, the case for the prosecution was similarly undermined by some other disquieting factors."*

As already alluded to above, Mr. Matuma had sought for the reversal of the appellant's conviction on the ground that the prosecution witnesses had contradicted themselves. The appellant has raised the same complaint before us. Dismissing the contention of Mr. Matuma the learned first appellate judge said:

> *"Lastly, I do not agree with Mr. Matuma that there are contradictions found in the evidence of PW1 and PW2 on how PW1 and the appellant were found. The two had evidence*

that the appellant was found on top of the Victim. No contradiction was there".

With due respect to the learned first appellate judge, we were unable to glean from the record evidence going to support the above conclusion. Indeed, while it is true that PW2 Badru Hamadi claimed so, the victim herself never claimed so. In fact while responding to a question on re-examination, she stated clearly that the appellant "never approached her." If the assailant never approached her then it cannot be seriously argued that he was "on top of her." Furthermore, while PW1 Salome testified that he was "wearing a short" only, PW3 Anajoyce Renatus, who contradicted PW2 Badru on who as between the two was the first to arrive at the scene, claimed that the appellant was "wearing a short with stripes and a bed sheet". If the appellant was "found on top" of PW1 Salome as claimed by PW2 Badru and PW3 Anajoyce, then the former would not have failed to see the "bed sheet" as she was supposed to be closet to her assailant. Another disquieting factor is the inconsistency found in the evidence of the prosecution witnesses. While PW3 Anajoyce alleged that the appellant tried to escape but was arrested, PW2 Badru's evidence is to the contrary. To him, when he arrived at the scene and found the appellant "on top of" PW1

Salome who was screaming saying "Nisaidie Msukuma ananiua" (words not testified to by either PW1 or PW3), he arrested him immediately and tied him with a rope. We believe that had the two courts below considered these patent contradictions and embellishments, side by side with the appellant's defence, his evidence most likely would have been believed. After all, an accused person has no duty to prove his innocence.

The above findings notwithstanding Mr. Ngole supported this appeal from another perspective. He predicted his stance on the naked fact that the particulars of the offence did not disclose the essential ingredients of that the offence of attempted rape as introduced by the Sexual Offences Special Provisions Act (No 4 of 1998) (SOSPA). He found the charge, which was drafted identically with the ones in **MUSA MWAKUNDA v.R.,** Criminal Appeal No. 176 of 2006 and **ISIDORI PATRICE v. R,** Criminal Appeal No. 224 of 2007 (both unreported), to be incurably defective. He further contended that this patent irregularity was not cured by the proffered prosecution evidence. We are entirely in agreement with him.

Admittedly, the particulars of the charge did not disclose at all the essential ingredients of the offence of attempted rape, which is now a

special specie of attempt offences brought about by the SOSPA. As we held in both **M. MAIKUNDA** and **I. PATRICE** (supra), it is settled law "that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed, they must be included in the particulars of the offence". The Court in **I.PATRICE** specifically held:-

> *"In a charge under section 132 (1) and (2), therefore, the factual circumstances which of necessity must be stated in the charge are those specified in paragraphs (a), (b), (c), and (d) of sub- section (2) in addition to the mentioned specific "intent to procure prohibited sexual intercourse."*

In the present case this was not the case and as correctly pointed out by Mr. Ngole this deficiency was not remedied by the evidence of PW1 Salome.

In conclusion, notwithstanding the incurably defective charge, we are satisfied that the prosecution evidence was highly suspect and unreliable to

ground a conviction for attempted rape. We accordingly allow the appeal, quash the appellant's conviction and set aside the prison sentence. We order his immediate release from prison, unless he is otherwise lawfully held.

DATED at BUKOBA this 24th day of February, 2015.

E.M.K. RUTAKANGWA

JUSTICE OF APPEAL

N.P.KIMARO

JUSTICE OF APPEAL

I.H. JUMA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU

DEPUTY REGISTRAR

COURT OF APPEAL