IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 318 OF 2007

LUDOVICK SEBASTIAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwita, J.)

Dated the 5th day of July, 2006
in
Criminal Appeal No. 1 of 2003

JUDGMENT OF THE COURT

4 & 8 JUNE, 2010

MASSATI, J.A.:

The Appellant was charged before the District Court at Kasulu, Kigoma Region with two counts. The first count was Attempted Rape, contrary to section 132(1)(2)(a) of the Penal Code (Cap 16 – R.E. 2002). The second was, grievous harm, contrary to section 225 of the Penal Code. He was convicted of both counts and sentenced to 15 years and 1 year imprisonment respectively, together with an

order of compensation of shs.100,000/=. On appeal to the High Court, (Mwita, J.) his appeal was dismissed and the sentence on the first count, enhanced to 30 years imprisonment. He is now before us on a second appeal.

The facts of the case are that the complainant and the appellant are engaged in selling local liquor, and are both residents of Kabanga village. On the 9th December, 2001, at around 23.00 hours the appellant visited the complainants house. He met her with her friend and neighbour ELIZABETH w/o ZIBE (PW2). The prosecution alleges that in the presence of ELIZABETH, the appellant threatened to rape the complainant, who testified as PW1. The complainant then took her child to bed and went on to report the appellant's threats to her mother, who did not testify. When she was coming back, the appellant grabbed her, hit her with some object on the head, fell her down, and sat on her top with intent to rape her. She raised an alarm. Some revelers, including PW3 came to her rescue. The appellant walked away. In her evidence, PW1 tendered a PF3 as evidence that she was injured and bled from the wound

inflicted by the appellant, and her blood stained blouse as Exhibits P1 and P2 respectively. In his defence the appellant raised a defence of alibi, which was rejected by both courts below as not having cast any doubt on the prosecution case.

The appellant has preferred four grounds of appeal but they could be condensed into two main ones. **First,** that the two courts below did not properly evaluate the evidence. **Two,** the courts below erred in law in not considering his defence.

In Court, the appellant fended for himself, while Mr. Edgar Luoga learned Senior State Attorney represented the Republic/Respondent.

The appellant had nothing useful to add or elaborate on his grounds of appeal. But Mr. Luoga declined to support the conviction. He had his reasons. **First,** he agreed with the appellant that both courts below did not properly evaluate the evidence. He submitted that had the courts below done so, they would have noted that the

prosecution case was pregnant with contradictions. He cited the instance where the prosecution witnesses contradicted themselves on whether the appellant was separated/removed from the top of PW1 as testified by PW1 and PW2, or he simply left on seeing people, as testified by PW3. He said that this was a material contradiction and went to the root of the matter and put PW1's credibility on test. **Secondly,** Mr. Luoga, argued that the trial court erred in its treatment of the defence case, in that the appellant was not only denied to call all witnesses he had indicated to the trial court, but also that both courts below just perfunctorily treated his defence of alibi. In elaboration,he submitted that, although the appellant had not given notice of his intention to raise the defence of alibi, nevertheless, the trial court had a duty to consider that defence. He further argued that had the courts, below considered the appellant's defence in the light of the prosecution evidence they would have come to a different conclusion. Therefore he urged us to allow the appeal.

We are alive to the fact that the decision of the two courts below rested on credibility; and that this is a second appeal. It is trite law that a second appellate court should not easily disturb the concurred findings of fact by the lower courts unless it is shown that there has been a misapprehension of the evidence; a miscarriage of justice or violation of some principle of law or procedure (See **AMIRATLAL DAMODAR MALTASER AND ANOTHER t/a ZANZIBAR SILK STORE v A.H. JARIWALA t/a ZANZIBAR HOTEL** (1980) TLR. 31, **DPP v JAFFAR MFAUME KAWAWA** (1981) TLR. 149. In **SHABBAN DAUDI v R** (Criminal Appeal No 28 of 2001 (unreported) this Court said:

> *"...Credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways. One when assessing the coherence of the testimony of that witness, two, when the testimony of that witness is considered in relation to the evidence of other witnesses, including that of the accused person. In those two other occasions, the credibility of a*

witness can be determined even by a second appellate court when examining the findings of the first appellate court."

It was also held in **MICHAEL ELIAS v R** (Criminal Appeal No. 243 of 2007 (unreported) which followed **SHABANI DAUDI v R** (supra) that:

" *On a second appeal we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction, this court, must in the interest of justice, interfere."*

We are also aware of the principle stated in **GOODLUCK KYANDO v R** Criminal Appeal No. 118 of 2003 (unreported) that:

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

And good reasons for not believing a witness, include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **MATHIAS BUNDALA v R** Criminal Appeal No. 62 of 2004 (unreported).

In the present case, the trial court relied on the evidence of PW1, PW2 and PW3 in finding that the offence of attempted rape has been proved. According to PW1 and PW2, the appellant declared his intention to rape the complaint repeatedly in the full presence, of PW2. We find this piece of evidence highly improbable, given the circumstances. First, PW1 was a married woman and was at her home. In common experience of mankind it is, we think, highly improbable that, at that time of the night, the appellant would come to the complainant's house, and in the presence of PW2 repeatedly declare his intention to rape PW1. We think that something is amiss

here. If this was true we wonder why the appellant was not apprehended immediately, until two days later. It is equally incredible to us that the peoples' militia failed to arrest him because of his *"disturbance"*; more so when the people's militia did testify. This discrepancy, together with the contradictions between the evidence of PW1 and PW2 on the one hand; and that of PW3 on the other, as to whether the appellant was forcefully separated from PW1, or simply walked away on seing PW3, punches a deep hole in the prosecution case.

It may be true that the Appellant did not give notice of his intention to rely on the defence of alibi, but all that section 194 of the Criminal Procedure Act (Cap 20 – R.E. 2002) means, is that where such notice is not given, the court may take cognizance of such defence, or it may, in its discretion, accord no weight of any kind to the defence (See **CHARLES SAMSON v R** (1990) TLR 39). In our view if a trial court decides to take cognizance of an unnotified defence of alibi it must give reasons for rejecting it. This means, it must analyse the alibi against that of the prosecution case and come

out clearly why the alibi is not credible. In the present case having taken cognizance of the appellant's alibi, the trial court said, on p 23 of the record:

> *" The defence of alibi (to) (sic) the accused person that he did not go to PW's house does no wear the true evidence produced on prosecution side"*

And in its judgment the first appellate Court after referring to the decision of the case cited above (i.e **CHARLES SIMON v R** (supra) just quoted the same passage from the trial court's judgment and concluded:

> *"It is clear, therefore, that the trial magistrate took cognisance of the Appellant's defence of alibi and found that it does not cast doubt on the evidence marshaled by the prosecution."*

With respect, we think that was not the import of **CHARLES SIMON'S** case. We understand it to mean that when an accused

person does not give a notice of alibi, the court has two options, either to ignore it and accord no weight at all or take cognizance of the defence. If the court decides to take cognisance of the defence; it is duty bound to subject it to a critical analysis and give reasons for rejecting it. In the present case, although the trial court decided to take cognizance of the appellant's alibi it simply rejected it because it:-

> *"... does not wear the true evidence produced on prosecution side.*

The trial court reached that conclusion without any analysis of what the appellant and his witnesses, had said, and why, he did not believe them. Considering, that in this case the evidence of the appellant and his two witnesses was not seriously challenged by the prosecution, we think that the trial court reached a wrong conclusion.

Given that, in law, even if the alibi is proved to be false, or is not found to have raised doubt on the prosecution case, it does not

mean that the task of proving the accused's guilt is accomplished. There must still be convincing prosecution evidence on its own, to prove the alleged offence. (See **ALI AMSI v.R** Criminal Appeal No. 117 of 1991 (unreported). And since, as found above, in this case, the prosecution case is weak, we are constrained to find that the appellant's conviction for the offence of attempted rape is not safe and cannot be let to stand.

The conviction of the appellant for the offence of causing grievous harm rests on the evidence of the PF 3 and the blood stained blouse. As for the blood stained blouse (Exh P2), we think that once PW1's credibility is put in doubt and given that there was no medical evidence that if there was blood, it was her (PW1's) blood, this piece of evidence is of little probative value. With regard to the PF 3, (Exh P1) as rightly pointed out by Mr. Luoga, we note that this piece of evidence was introduced into the trial court without complying with section 240 (3) of the Criminal Procedure Act. That section provides:

> *(3) When any such report is received in evidence, the court may, if it thinks fit, and shall if so requested by the accused or his advocate summon and examine or make available for cross examination, the person who made the report.* ***The court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this section*** (Emphasis supplied)

In this case, the trial court did not inform the appellant of his right to call the person who made the report. This Court has, on several occasions, held that infringement of that right renders the medical report valueless. (See for instance, **ALFRED VALENTINO v R** Criminal Appeal No 92 of 1996 (unreported), **JAFARI JUMA v R** Criminal No 104 of 2006 (unreported), **ISSA HAMIS LIKAMALILA v R** Criminal Appeal No 125 of 2005, **JUMA CHOROKO v R** Criminal Appeal No 23 of 1999 (unreported). Therefore, Exh P1 in this case must be discounted. In the absence of that medical evidence, and

the doubted credibility of PW1, we are not able to accept that, that offence has also been proved beyond reasonable doubt.

It is for all the above reasons that we agree with Mr. Luoga, that this appeal must be allowed, as the convictions are not safe. We therefore quash the convictions and sentences and order of compensation imposed on the appellant. He is to be forthwith released from prison, unless otherwise lawfully held.

It is so ordered.

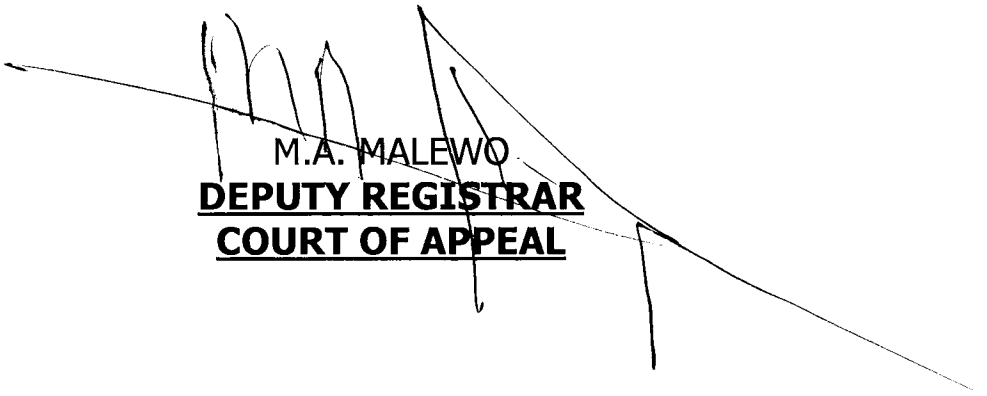
DATED at TABORA this 7th day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL