IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO. 143 OF 2012

RASHID MWIMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kihio, J.)

dated 16th March, 2012

in

(DC) Criminal Appeal No. 52 of 2012.

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JUDGMENT OF THE COURT

25th & 27th June, 2014

MMILLA, JA.:

Rashid s/o Mwimbe appeared before the District Court of Iringa at Iringa on a charge of armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 of the Revised Edition, 2002. After a full trial, he was convicted and sentenced to 30 years imprisonment. Aggrieved by both conviction and sentence, he unsuccessfully appealed to the High Court at Iringa, hence this second appeal to this Court.

Before the trial court, the prosecution case was founded on the evidence of 5 witnesses; PW1 Joseph s/o Kapufi **(the complainant)**, PW1 (sic: PW2) Stella d/o Kapufi **(his daughter)**, PW3 Ziada Kitosi **(their house maid)**, PW4 WP 1392 Sgt Ivona and PW5 Sadiki Ignas Mbugi **(the then VEO)**.

On 24.4.2009, PW2 and PW3 were at their home at Kibwabwa area within the Municipality of Iringa. At around 11.00 a.m, the appellant and two other young boys knocked the complainant's gate seeking to be invited in the house compound. PW3, who was then seated at the verandah with PW2, went to the gate to attend the visitors. One of the three boys who had a gallon in his hands told her that he had instructions from the owner of the house to deliver fuel at that house. He was let in and headed to the verandah at which PW2 asked him to leave the gallon. Soon thereafter, PW2 noticed that one of their two visitors at the gate had pointed a gun at PW3 and had placed her under arrest. They brought her to where she was and ordered them to lead them into the house. While one of the boys was armed with a gun as already pointed out, the other one had a panga. The boy who had the gallon armed himself with a knife he picked up at the verandah where the victim girls had been preparing vegetable. Amid threats that they were going to rape them and infect them with HIV AIDS if they dared to raise alarm or disobey their orders, they led the two ladies into

the house and commanded them to lay down on the corridor. Subsequent to that, they broke the complainant's bedroom door using the house breaking instruments they had in the bag they carried. On gaining access to that room, they ransacked it for about 30 or so minutes, only to run away on hearing an alarm from outside yelling for help.

In fact, the alarm was made by PW1 who said that on returning home at around 11.00 a.m. from Mshindo where he had been since morning, he became suspicious on realizing that nobody had responded when he knocked the gate to allow him access into the house compound. On peeping through a hole to find out what was going on, he realized that there was a boy armed with a panga trying to come out. He jumped over the gate and landed inside the fence. As he did so, that person jumped over the gate and landed outside the fence and started running away. It was then that he realized the boy was a thief and raised an alarm and gave a chase. Fortunately, several persons responded to the alarm and joined the chase. They succeeded to apprehend him not very far from that house. Some of the people who responded to the alarm informed the complainant that they saw two other persons who appeared to have also come from that house but managed to run away. While the complainant's fellow villagers handled the appellant whom they sent to the area administrative office,

he called the police who promptly went to the scene of crime. They inspected the scene of crime after which they picked the appellant from the said office and left. Subsequent to that, they charged the appellant with armed robbery as already pointed out.

In his defence before the trial court, the appellant had testified that he was wrongly implicated in this case, and that he did not commit the alleged crime. He also criticized the prosecution for tendering and relying on the cautioned statement which he regarded as having been recorded contrary to the prescribed procedure. He concluded that the prosecution side did not prove the case against him beyond reasonable doubt.

In the end, the trial court found, and the first appellate court upheld, the finding that the prosecution had proved their case against the appellant beyond reasonable doubt. The appellant felt that his conviction and sentence were not justified.

The appellant's memorandum of appeal raised 12 grounds. After carefully going through them as well as considering the submission made by Mr. Abel Mwandalama who was assisted by Ms Kasana Maziku, learned State Attorneys, who appeared for the respondent Republic, we are convinced that this appeal may conclusively be disposed of by considering ground No. 8 under which it is

complained that both, the trial and the first appellate courts did not consider his defence.

It is unfortunate that the appellant did not elaborate on that ground; this is understandably so because he is a layman as we know it. On the other hand however, Mr. Mwandalama was of great assistance to us on the point. He supported the appellant's complainant that the trial and the first appellate courts did not consider the appellant's defence. Relying on **Hussein Idd and Another v. Republic** [1986] T.L.R. 166, he submitted that such omission constituted a serious error. He urged us to consider allowing the appeal.

We desire to restate the basic principle of law in this connection that when writing a judgment and before reaching a decision, a court has to consider, and demonstrate that it has considered, all evidence received, and that it is a fatal error for a court in its judgment to consider only the evidence in support of one party in a case and completely ignore the evidence for the other party, however worthless it might appear. Where it may be found that the court(s) below did not observe this principle, there is no better option but to allow the appeal. See **Hussein Idd and Another v. Republic** (supra), **Ligwa Kusanja and others v. Republic,** Criminal Appeal No. 113 of 1999, CAT and **Stephen John**

Rutakikirwa v. Republic, Criminal Appeal No. 78 of 2008, CAT (both unreported).

In our present case, we have satisfied ourselves that neither the trial court, nor the first appellate court considered the defence case. That was indeed a serious irregularity. Given such a situation, it is obvious that justice was not done in the case. Thus, we find that the appeal has merits and we allow it. Consequently, we quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at IRINGA this 26th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL