IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MASSATI, J.A., ORIYO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 24 OF 2015

ABEL MASIKITI...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

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

(Lyamuya, SRM, Ext. Jur.)

dated the 23rd day of October, 2014
in
Criminal Appeal No. 27 of 2014

JUDGMENT OF THE COURT

20th & 24th August, 2015

MASSATI, J.A.:

The appellant was arraigned before the Resident Magistrate's Court at Mbeya where he was charged and convicted of the offence of rape contrary to sections 130(2) (e) and 131(1) of the Penal Code. He was sentenced to life imprisonment and 10 strokes of the cane. His first appeal was dismissed in its entirety. This is now his second appeal.

It was alleged before the trial court that on the 3rd day of June, 2013 at Ilomba village in Mbeya District, Mbeya Region, the appellant had carnal

knowledge of one GRACE d/o AZARI a girl of 7 years of age. The appellant pleaded not guilty.

Five witnesses testified for the prosecution. PW1 **GRACE AZARI** told the trial court, how one day in June 2013, she and a friend called Rose went to the appellant's kiosk to buy biscuits from the money given to her by her grandmother. On reaching the appellant's kiosk, the latter sent Rose away on an errand and asked PW1 to accompany him to the banana plantation nearby. There the appellant laid her down and raped her. He then gave her shs. 50, and a baobab fruit. PW1 told Rose, about the pains she felt. PW2, **REHEMA MKINGA**, the victim's mother testified that she was informed of PW1's rape by Rose. She then went to see the victim at her grandmother's place where she was staying. She examined her and found semen coming out of her vagina. She took her to a dispensary where she was treated, and the matter was reported to the Ward Executive Officer, Ilomba. Eventually, the appellant was arrested on 6/6/2013. PW3 **AMONI MUYOLA**, the Ilomba Village Executive Officer just confirmed how the appellant was arrested on 6/6/2013 and handed over to the police PW4 **E. 6402 D/CPL IVAN** investigated the case and charged the appellant. PW5 **DR. PETER s/o MSAFIRI** confirmed that on 7/6/2013, he attended PW1, and opined

that upon his examination of her vagina it must have been penetrated by a blunt object. He then tendered the PF3 as Exhibit P1.

On his part, the appellant told the trial court about his movements on the 6/6/2013, and his arrest, detention, and eventually charged for the offence which he knew nothing about.

Both courts below found that the prosecution case was proved beyond reasonable doubt, hence the conviction. The appellant is therefore here to challenge those concurrent findings of the lower courts.

The appellant, who, at the hearing of the appeal appeared in person, had earlier on filed a memorandum of appeal comprising 12 grounds, which could be grouped into five major groups: **First**, that there was contradictory evidence as to the date of the commission of the offence, **Second**, that, the voire dire test on PW1, was not well done; **Thirdly**, there was no identification parade to confirm the identity of the appellant. **Fourth**, the appellant's case was not considered and; **Fifth**, the prosecution case was not proved beyond reasonable doubt. In sum, the appellant's case, was that in view of the discrepancies in the evidence of the prosecution as to the date the offence was committed, and the lower court's failure to consider his

defence, it could not be said that the prosecution case was proved beyond reasonable doubt. Thus, he prayed that his appeal be allowed.

The respondent/Republic was represented by Ms Catherine Paul, learned State Attorney. At first, she was inclined to resist the appeal, as in her opinion the prosecution case was overwhelming. But when we asked her to show us where in the record it is indicated that the lower courts had considered the defence case, the learned counsel conceded that this was conspicuously missing. She went on to submit that this was a serious misdirection which was not curable. So, she asked us to allow the appeal, quash the proceedings of the lower courts and the conviction, set aside the sentence, and set the appellant free.

The jurisdiction of this Court in a second appeal derives from section 6(7) (a) of the Appellate Jurisdiction Act (Cap. 141 – R-E. 2002). Under that paragraph an appeal can lie to this Court on a matter of law, but not on a pure matter of fact. But notwithstanding that provision, this Court has constantly formulated that this approach rests on the premise that the findings of fact are based on a correct apprehension of the evidence. If there is any misapprehension of the substance, nature and quality of the

evidence resulting in an unfair conviction, this Court has to interfere, in the interests of justice. (See **SALUM MHANDO v R** (1993) TLR. 174. **DPP v JAFFARI MFAUME KAWAWA** (1981) TLR. 143).

In the present case, and from the memorandum of appeal and the submissions of Ms Paul, both issues of fact and issues of law have arisen. Whether or not PW1 was a credible witness, was within the domain of, particularly the trial court. But whether the trial court considered the defence case is a question of law. Whether the prosecution case was proved beyond reasonable doubt is a question of mixed fact and law.

Considering both the prosecution and the defence cases is an implied essential ingredient of a judgment in a criminal case under section 312(1) of the Criminal Procedure Act (Cap. 20 – R.E. 2002) (the CPA)

Section 312(1) of the CPA 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."

Commenting on this provision, the Court said in **AMIRI MOHAMED v R** (1994) TLR 138 that:

> *"Every magistrate or judge has got his or her own style of comprising a judgment, and what vitally matters is that the essential ingredients shall be there, and these include critical analysis of both the prosecution and the defence."*

In **LEONARD MWANASHOKA v R**, Criminal Appeal No. 226 of 2014 (unreported). The Court directed that considering the defence, was not all about summarizing it because:

> *"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. 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."*

We have carefully scrutinized the trial court's judgment. The appellant's case is summarized on page 32 of the record. When it came to analysis and evaluation, which followed the said summary the trial court devotes only one paragraph on page 34.

> *"The testimony of DW1 Abel s/o Masikiti, he gave his defence, mentioning the dates of his arrest on 6/6/2013 when he was returning in the village from Mbalizi, where he went for visit. He did not mention the date of 3rd 6. 2013, where was he, the date which he was suspected to commit the offence of rape."*

On the face of it, the paragraph appears to be an evaluation of the defence evidence, but on a closer examination, it is not. This is where a critical analysis of both the prosecution and the defence cases is required. Had the trial court taken a critical review of the whole of the prosecution evidence, it would have noted that, apart from the allegation in the charge sheet, none of the prosecution witnesses specifically and directly testified that the offence was committed on 3/6/2013. We shall illustrate.

According to PW1, it was just in "June 2013". PW2 was *informed by Rose on 3/6/2013* that the accused had raped. Rose did not testify. So,

that was hearsay evidence. In any case, the testimony itself is vague as to whether that was the date PW2 got the information; or it was the date which Rose told her the rape happened? PW3 just said that *he received information about the rape on 6/6/2013*. PW4, the investigator shows that *PW1 informed him it was on 3/6/2013* when she was raped: but if that was so, why was PW1 not led to testify so? Lastly, PW5, the doctor who examined PW1 on 7/6/2013 testified *that 7 days had passed since the incident, according to his interview of the patient and history of treatment*. When all this evidence is put together the conclusion is that the date of the commission of the offence is uncertain. And that could explain why the appellant in his defence could not account for the date in question, a question posed by the trial court; which, in the circumstances, amounted to shifting the burden of proof to the appellant to exonerate himself, when no prima facie case had not been established against him. This was no doubt a serious misdirection.

In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the

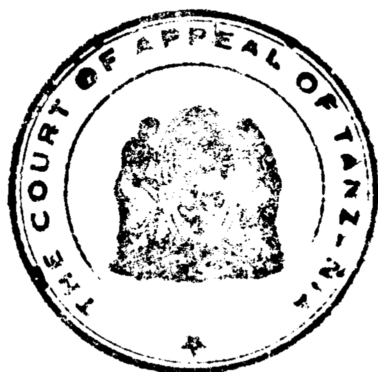
CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur. (See **RYOBA MARIBA @ MUNGARE v R** Criminal Appeal No. 74 of 2003, **CHRISTOPHER RAFAEL MAINGU v R** Criminal Appeal No. 222 of 2004, **ANANIA TURIAN v R** Criminal Appeal No. 195 of 2009 (all unreported).

It is also now trite law that failure to consider the defence is fatal and vitiates the conviction. This is what we held in **HUSSEIN IDD & ANOTHER v R** (1986) TLR 283. (See also **JEREMIAH JOHN & FOUR OTHERS v R** Criminal Appeal No. 416 of 2013 (unreported). As found above, in the present case, the trial court failed to critically consider the defence case. The first appellate Court just brushed aside, this which was also a ground of appeal there, after finding that the trial court evaluated the defence case, in the paragraph that we quoted above. The appellate court fell into the same error by assuming that there was any cogent prosecution evidence as to the date of the commission of the offence.

In view of the aforementioned glaring misdirections, and misapprehensions of the evidence on record, we are forced to interfere and

reverse those findings of the lower courts. Since the prosecution evidence is discrepant, such that, it was not sufficient to put the appellant on defence, and since both the prosecution and the defence cases were not given a deserving critical analysis, the conviction of the appellant is not safe. We therefore allow the appeal. We quash the conviction and set aside the sentence, and order that he be set free unless he is held for some other lawful cause.

DATED at **MBEYA** this 21st day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL