IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 254 OF 2014

AUGUSTINO SAMSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Chocha, J.)

dated the 17th day of March, 2014
in
Criminal Appeal No. 68 of 2011

JUDGMENT OF THE COURT

1st& 3rd September, 2015

MASSATI, J.A.:

On 8/12/2010, the appellant appeared before the District Court of Rungwe, at Tukuyu, where he was charged with the offence of rape contrary to sections 130(1) (e) and 131(1) of the Penal Code. It was alleged that on the 20th November 2010, at 12.00 hours at Ilinga village, within Rungwe District, Mbeya Region, he had carnal knowledge of one SUMA d/o ANDREA, a girl of 8 years of age. He pleaded not guilty.

To prove its case, the prosecution lined up five (5) witnesses. The victim, **SUMA ANDREA** (PW1) testified that on 20/11/2010 at about 18.00 hrs she was enticed by the appellant to follow him to his room at Iponjole village. Apparently, she was residing there with her grandmother. There, he raped her, and warned her not to tell any person. Nevertheless, the victim decided to walk to Katumba in another hamlet, to tell her mother. The matter was finally reported to the local authorities and eventually to the police, where she was given a PF3, which PW2, **VICTORIA KIWIRA**, the victim's mother eventually tendered as PE1. PW2 also informed the trial court that after medical examination, PW1 was found to have contracted a venereal disease. **GWANTWA MWATULYA** (PW3), PW1's grandparent just informed the court that when PW1 came back home late at 8.00 (20.00 hrs) he asked her where she was coming from, and PW1 said that she was coming from the appellant's home. He did not know who the appellant was. This was followed by PW2's chastisement on PW1, before the matter was reported to the local chairperson. PW4 **RICHARD ANDREW**, was PW1's elder brother. He told the trial court that on 5/12/2010, he witnessed the appellant, (whom he knew, as he lived in the neighbourhood), call PW1 with intent to punish her for naming him as the one who raped her. That was where he was arrested and taken to the

police. He also witnessed the evening when PW1 came back home late, and explained to their mother how she was raped by the appellant. PW5 **F.3620 D/C GERALD** investigated the case, arrested the appellant and drew up the sketch map which he tendered as Exh. PE2, and charged the appellant.

The appellant gave his evidence on oath. Basically, he raised the defence of alibi. He said that on the day in question which was a Thursday, he was not at Iponjole village, but at his home at Ushirika. He also denied to have ever run away to Iringa as alleged by PW4.He then went on to point out several inconsistencies in the prosecution evidence, and challenged the prosecution for not taking him to hospital for him to be examined if he had a venereal disease, which he allegedly passed over to PW1. At the end, he denied to have ever raped the victim.

Both the trial and the first appellate courts were satisfied that the prosecution case was proved beyond reasonable doubt. The appellant was accordingly awarded with the sentence of 30 years imprisonment. The appellant now seeks to impugn the findings of the two courts below.

The appellant has filed a memorandum consisting of nine (9) grounds of appeal altogether, some of which however, are interrelated. In the first

ground, the complaint is that, the *voire dire* tests on PW1 and PW4 were not well conducted. The complaint in the second ground, is that, there is a variance between the charge and the evidence as to the time of the commission of the offence. The third, fifth and seventh grounds of appeal relate to the admissibility and weight of the PF3 (PE1), in that, it is not in itself, conclusive evidence that there was penetration and that it was the appellant who raped the victim. In the fourth and sixth grounds, the appellant'sgrievance is that the evidence of PW1 was not corroborated. In the eighth ground, the complaint is that the victim's age was not proved. And lastly, in the nineth ground, the appellant is not happy with the finding that the prosecution case was proved beyond reasonable doubt. He therefore prayed that his appeal be allowed.

The respondent/Republic was represented by Ms. Catherine Paul, learned State Attorney. She submitted that,but for the fact, that the lower courts did not consider the appellant's defence which occasioned a miscarriage of justice,she would not support the appeal on the grounds raised by the appellant. She argued for example, that, the issue of half-cooked *voire dire* examinations on PW1 and PW4 was taken care of by the decision of the Court of Appeal in **KIMBUTE OTINIEL v R** Criminal Appeal No. 300 of 2011 (unreported). The variance between the charge

and the evidence as to the time of the commission of the offence was not material, in accordance with the dictates of section 234(3) of the Criminal Procedure Act (the CPA). The PF3 was properly admitted and properly considered after the trial court had informed the appellant of his rights under section 240(3) of the CPA. She went on to submit that it was true that PW1's friend, and the appellant's landlord were not called to testify, because their evidence was not material and would not amount to corroboration, and that there was no law which prohibited members from the same family from testifying provided that their testimony was relevant and credible. However, the learned counsel conceded that the victim's age was not proved, and that could affect the sentence.

But, the learned counsel went on, she was seriously perturbed by the lack of evaluation of the appellant's defence. As this was a point of law, she asked us to allow her address the Court on the point, although it was not raised by the appellant in his grounds of appeal.

Given the leave, Ms Paul, submitted that although the appellant had given the defence of alibi, none of the courts below gave it the weight it deserved. This amounted to an unfair trial, rendering the conviction unsafe. She cited to us the decision of **LEONARD MWANASHOKA v R** Criminal Appeal No. 226 of 2014 (unreported). With those remarks, the

learned counsel prayed that we exercise our revisional powers and quash the conviction and set aside the sentence, and set the appellant free.

When asked to respond, the appellant, understandably had nothing useful to add. He left it to the Court.

This is a second appeal. Normally, under section 6(7) (a) of the Appellate Jurisdiction Act, (Cap. 141 R.E. 2002) our role is to deal with matters of law. But this rests on the assumption that the lower courts below have properly directed themselves on matters of facts. If there are any misdirections, or non-directions or misapprehension on matters of evidence which lead to a miscarriage of justice, this Court would be forced to interfere in the interests of justice. (See **DPP v JAFFARI MFAUME KAWAWA** (1981) TLR 143. **SALUM MHANDO v R** (1993) TLR 170).

In this appeal, the appellant's grounds of appeal comprises of both points of law and fact. The effect of half - cooked *voire dire* tests on PW1 and PW4, and variance between the charge and the evidence are points of law. Whether or not the prosecution case was proved beyond reasonable doubt is one of mixed fact and law. The rest of the grounds of appeal are purely on questions of fact. However the point raised by the learned State Attorney, of failure to consider the defence, is one of law, and even if it

was not raised in the grounds of appeal, as a Court of justice, we cannot ignore it.

We wish to begin by examining the few points of law raised in the appellant's grounds of appeal. The first point is on the complaint on the testimonies of PW1 and PW4. It is true that both these witnesses were children of tender years for the purposes of section 127(5) of the Evidence Act (Cap. 6 R.E. 2002). Therefore their evidence had to be screened under section 127(2) of the Act to ascertain if they were competent to testify. This is what is now popularly referred to as *voire dire* test. In this case the tests were conducted on both. On PW1, the trial court found:

> *"PW1 knows the meaning of telling the truth and therefore her evidence is subject to oath."*

This was a misdirection. Under section 127(2) for such a witness to qualify to give evidence on oath, she must have passed the test of understanding the nature of an oath,not merely "the meaning of telling the truth". It was thus wrong for the trial court to have taken her evidence on oath as it did. But as rightly submitted by Ms Paul, according to **KIMBUTE OTINIEL v R** (supra) her evidence would still remain on board, and be accorded such weight as it deserves. But the case is different with PW4. Here, after the test, the trial court found: -

"... the child knows the meaning of taking oath and therefore had sworn..."

Clearly, this means that PW4 understood the meaning of an oath. So his evidence was taken on oath. We see nothing wrong with his evidence. In the end, we find little substance in this ground of appeal.

The second point of law raised by the appellant is on the variance between the charge and the evidence. The appellant alleges in this ground that the charge sheet shows that the event occurred at 12.00 hrs but PW1 contended that it occurred at 18.00 hrs. That is true. However, we agree with Ms Paul that this variance is curable and is immaterial in terms of section 234(3) of the CPA. The section provides: -

"234(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."

So this ground too is devoid of merit.

Having considered and disposed of the points of law raised by the appellant, we now turn to the point raised by the learned State Attorney.

The duty to consider both the prosecution and the defence cases in the judgment is imposed by law. In a criminal trial, in a subordinate court, this is set out in section 312(1) of the CPA. The section provides: -

> *"312(1) 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 such presiding officer as of the date on which it is pronounced in open court."*

This Court and the High Court in their numerous decisions have taken this provision to require the trial court to evaluate all the evidence on record and make findings of fact thereon. (See **JEREMIAH SHEMWETA v R**(1985) TLR 228 (HC), **IZENGA v R** (1982) TLR 237, and **MISANGO v R** (1969) I EA 538 (HCT). In the latter case, the Court cited a decision of the East African Court of Appeal in Criminal Appeal No. 198 of 1965 in **THOMAS MAKURU v R** where it was held that a judgment based only on the prosecution evidence was so irregular and incurable as to involve a failure of justice. In **MISANGO v R** (above) the Court was consisting the

provisions of sections 170 and 171 of the Criminal Procedure Code (new sections 311 and 312 of the CPA). In **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 166, this Court held that it was a serious misdirection 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. And, in **AMIR MOHAMED v R** (1994) TLR 134 this Court also directed that every judgment must include a critical analysis of both the prosecution and the defence.

In the present case, the summary of the appellant's defence can be seen at page 25 and 26 of the record of appeal. After analyzing the prosecution evidence the trial court concludes: -

> *"The accused person supported that evidence and prayed the Court to consider it. In such kind of evidence what any reasonable person will keep in mind is that if the accused did not commit the alleged offence why should he run from his place of work and after he returned he tried to bit (sic) the victim for the allegation which by then he don't know? (sic).*

We think that this was the continuation of the evaluation of the prosecution case and not that of the defence.

It would be recalled that the appellant's defence was that of alibi. This is what he told the trial court: -

> *"The matter of rape occurred in Thursday while I was not in that village."*

In evaluating that defence, the trial court was expected to make specific findings of fact whether or not the appellant was at the scene of crime at the time of the commission of the offence by reference to the evidence on record. This was not done. Under the principles set out in **CHARLES SAMSON v R** (1990) TLR 39, the trial court should have taken cognizance of the alibi; and then decide on the appropriate weight to give to it. In **SAMSON's** case it was held that the omission occasioned a mistrial and a consequential miscarriage of justice. As directed in **LEONARD MWANASHOKA v R** (supra) at this stage, the trial court should have considered the defence evidence, and then decide to regard or disregard it. Failure to do so was fatal, especially considering that while the charge alleges that the offence was committed at Ilinga village, PW1 said that this took place at Iponjole, and there is no evidence on record whether the two names refer to the same place.

But if the first appellate court was minded about it, it would have done what the trial court had omitted to do. Although the omission

although it properly directed itself on its role as a first appellate court, the learned judge dismissively said at p. 57 of his judgment:

> *"Before convicting the appellant, the trial magistrate discarded his defence referring to it as baseless. The same was therefore closely considered..."*

With respect, we do not think that the first appellate court treated the appellant's complaint fairly. Once there was such a complaint, it was the duty of that court, to reevaluate the said defence, and conclude whether the trial court justly discarded it. What he did in the above sentence was just to shy away from the issue before him. And this was wrong.

So, the point raised by the learned State Attorney is well taken. It is true that the appellant's defence was not considered by the courts below. As a result, the appellant did not get a fair trial, which led to a miscarriage of justice. The conviction is therefore not safe.

The above ground is sufficient to dispose of this matter. In exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act,we quash the judgments and convictions of the two courts below and

set aside the sentence. We order his immediate release from custody unless he is held there for some other lawful cause.

Order accordingly.

DATED at **MBEYA** this 2nd day of September, 2015.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL