IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 252 OF 2014

BAHATI KABUJE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Lyamuya, Ext. Jur.)

dated the 18th day of March, 2014

in

Criminal Appeal No. 10 of 2014

JUDGMENT OF THE COURT

11th & 14th August, 2015

MASSATI, J.A.:

The appellant was charged with and convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code. The District Court of Mbarali, which tried the case accordingly sentenced him to 30 years imprisonment. His appeal to the Resident Magistrates' Court (Extended Jurisdiction) was dismissed, hence this second appeal.

At the trial court, it was alleged that on the 28th day of September, 2010, at about 12:00hrs, at Igurusi Village within Mbarali District, Mbeya Region, he carnally knew one ANASTAZIA D/O GRATUS, a girl of 14 years of age. He denied the charge.

In order to prove its case, the prosecution fielded three witnesses and three documentary exhibits. PW1 ANASTAZIA GRATUS, who was found to have had sufficient intelligence and understood the duty of speaking the truth testified not on oath, that on the fateful day, her mother sent her to fetch firewood from the bush. She obliged and went there in the company of other students. While there, they were approached by the appellant who introduced himself as a forest officer. He "arrested" them for collecting firewood and sent away her friends to call their parents, while she remained behind with him. While they were alone, the appellant grabbed her, tore her gown and started to ravish her. He let her go when he saw the girls coming back with PW1's father and ran away. PW1 was taken to the police and then to the hospital. She tendered her PF3 as Exh P1 and the exercise book for treatment as Exh P2. PW2 GRASTUS MKUPASI, testified that PW1 was born on 5/6/1996. He told the trial court that on the material day at 10.00 am, while he was at the farm, two girls came to

inform him that they had left behind PW1 with the appellant who had identified himself to them as a forest officer and had placed them under arrest. He and the girls rushed to the scene only to find the appellant lying on top of PW1 and he ran away on seeing them. He took PW1 to the police and then to the hospital. But as they were going home they passed through Mwambegere local pub, where they sighted the appellant. With the aid of a justice of the peace, the appellant was arrested. He too tendered PW1's antenatal clinic card to prove her age as Exh.P3. The last witness SARA MGOBA was one of the girls who accompanied PW1 to the forest, and witnessed the appellant on top of the victim when she went back there with PW1's father.

On his part the appellant basically raised the defence of alibi. In cross examination, he not only denied knowing PW1, but specifically claimed that on that day, he had gone to his farm and came back at 14:00hrs and that he never went near the forest, but admitted that he was arrested at Mwambegere local pub.

After hearing the prosecution and the defence case, the trial court found that PW1 was a witness of truth, and her evidence was corroborated

by that of PW2 and PW3, and accordingly convicted the appellant of rape under section 130 and 131 of the Penal Code. On appeal, the learned Senior Resident Magistrate (E.J) found that the case against the appellant was proved beyond reasonable doubt and so dismissed the appeal.

The appellant has appeared in this Court in person Earlier on, he had filed a memorandum comprising six (6) grounds of appeal. Those grounds can be summarized as follows. First, the trial court failed in its duty by allowing the PF3 to be admitted without informing him of his right under section 240 (3) of the Criminal Procedure Act (the CPA). Second, the voire dire test conducted on PW1 was improperly done and so her evidence irregularly received. Third, the prosecution evidence was all from the same family members. Fourth, since none of the prosecution witnesses had testified that they knew the appellant before, it was only proper that there should have been an identification parade. Fifth, both courts below ignored the defence case. And lastly, that the prosecution case was not proved beyond reasonable doubt. With those grounds, the appellant asked us to allow the appeal.

The respondent/Republic was represented by Mr. Achiles Paul Mulisa learned Senior State Attorney. He was at first inclined to oppose the appeal but on reflection, he conceded to grounds number five and six of the appeal.

He was of the unshaken opinion that after perusing the judgments of the two lower courts, there was no place, where the defence case was considered, apart from summarizing it. This, he submitted was fatally wrong. It amounted to an unfair trial, and therefore vitiates the trial. Once the fifth ground is allowed, it was difficult to find that the prosecution case was proved beyond reasonable doubt, which constitutes the sixth ground. He therefore urged us to allow the appeal.

On his part, the appellant simply agreed with the learned State Attorney, on the last leg of his submission, and had nothing useful to add.

The position of the law is that, generally failure or improper evaluation of evidence inevitably leads to wrong or biased conclusions resulting into miscarriage of justice. From that premise, it has been held that failure to consider the defence case is fatal and usually vitiates the conviction. (See **LEONARD MWANASHOKA v R**, Criminal Appeal No.

226 of 2014 (unreported) and the cases cited therein. But what does consideration or evaluation of evidence entail? Again we find some useful guidelines from **LEONARD MWANASHOKA's** case. In short, it is not about "summarizing the evidence":

> *"It is one thing to summarise 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."*

In the present case, in its 8 page judgment, the trial court did summarise but did not evaluate, the defence case, which was that on that morning he was at his farm, and did not know any of the prosecution witnesses. After that it went on to summarise and analyse the prosecution case, and concluded that the prosecution had proved its case. On appeal the appellant raised this as his seventh ground of appeal and the State Attorney who appeared to argue against the appeal argued it as the 7th ground, but the appellate learned Senior Resident Magistrate (EJ) treated it

so casually in his judgment treating it as the fifth ground instead. Part of that judgment reads:

> *"On his fifth ground of appeal, the appeal is saying that the trial court disregarded his defence. This is baseless, as it can be seen at page five of the typed judgment, the trial court evaluated the evidence including that of the appellant".*

Perhaps, the learned Senior Resident Magistrate could be referring to the following passage from the judgment of the trial court:

> *"The accused person denied to know the victim and on the material date 28/9/2010 he went to the farm. And finally he admitted that he was arrested at Mwambegere Local Pub by the group of people. When the evidence of two sides was closed, this court then embarked on the analysis of the evidence".*

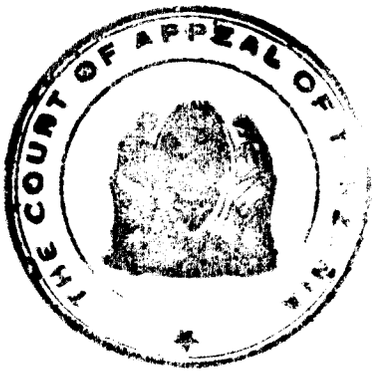
By all standards, this was only a summary and not an evaluation of the defence. What followed in what the trial court called an analysis, was in fact an evaluation of only the prosecution evidence and nothing was said about the defence case. Just as the trial court did in respect of the prosecution, in evaluating the defence case, the court was expected at this

stage to assess the probative value, credibility and weight of the evidence proferred by the defence, pitting it against that of the prosecution with a view to determining whether or not there are any reasonable doubts in the prosecution case. If this was omitted by the trial court, the first appellate court could have done so. But this was not done in the present case.

In **HUSSEIN IDD AND ANOTHER v R** (supra) (1996) TLR 166, the trial judge dealt with the prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result he rejected the alibi put forward by the accused person. This Court found that this was a serious misdirection as it deprived the accused of having his defence properly considered, and so found the conviction unsafe.

In view of the above irregularly, we are certain in our minds that the appellant did not receive a fair trial as his defence was not properly considered. Like in **HUSSEIN IDD's** case (supra) we also find that the appellant's conviction is unsafe. We thus agree with Mr. Mulisa and the appellant that there is merit in this appeal. We accordingly allow the appeal. We order the appellant's immediate release from custody, unless he is held for some other lawful cause.

DATED at **MBEYA** this 12th 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