IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO 255 OF 2014

YUSUPH AMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Mbeya at Mbeya)

(Lyamuya, SRM –Extended Jurisdiction)

dated the 13TH day of March, 2014

in

Criminal Appeal No. 26 of 2013

JUDGMENT OF THE COURT

1st & 3rd September, 2015

MUGASHA, J.A.:

In the District Court of Mbeya, the appellant, Yusuph Amani was charged with Incest by Male contrary to section 158 (1) (a) of the Penal Code [CAP 16 RE: 2002]. It was alleged that, in different dates of 2008 and May 2012,at Isanga area within the City of Mbeya, he had prohibited sexual intercourse with one Hadija Yusuph who was to his knowledge his daughter. He did not plead guilty.

The prosecution evidence was to the effect that, way back in 1997 the appellant married **REGINA SIMON** (PW2) and they were blessed with four children including the victim **HADIJA YUSUPH** who testified as PW1. Following separation of the couple in 2008, the appellant remained with the siblings and that is when the appellant on several occasions raped his elder daughter (PW1).PW1 was warned by the appellant not to tell any person or else she would be killed. In early May, 2012 PW1 discovered she is pregnant and on 11th May, 2012,informed her mother (PW2) who called **ANTHONY MANDAWA** (PW3) the ten cell leader. The matter was reported to the Police, PW1 was given PF3 and upon examination, she was found to be four months pregnant. However, the PF3 was not tendered in evidence as an exhibit.

On 21st September, 2012, PW1 delivered a baby girl (Eva Yusuph). On 04/03/2013, after the close of both the prosecution and defence case the trial court ordered DNA test which established the appellant to be the father to the child Eva Yusuph. This was according to evidence of Government Chemist **HADIJA SAID MWEMA** who concluded that the appellant is the father to Eva having conducted fifteen comparisons of blood samples of the appellant and Eva.

In his affirmed evidence, the appellant denied the charge. Basically he claimed that, the charge was fabricated by his wife PW2, with whom he had a dispute for deserting the matrimonial home and being impregnated by another man. This was followed by a dispute between the appellant and PW2's father who complained to have been insulted by the appellant who accused his in-law of impregnating PW2. The matter was reported to the ten cell leader where the appellant denied the allegations but was ordered to pay fine of Tshs. 25,000 and paid Tshs. 5,000/= and was ordered to pay the remainder as soon as practicable. A few days later, PW2 disembarked from the matrimonial home and started to live in her parent's house and started to take PW1 from morning to evening and later PW1 disappeared and that is when he heard gossips spread by PW2 that he is responsible for the pregnancy of PW1. The matter was referred to the chairman who promised to call them but appellant was charged in court. In addition, the appellant told the trial court about PW2's sexual relationship with PW3 who was paraded as a witness to ensure that the appellant is jailed and enable PW2 and PW3 to be together.

Both the trial and first appellate court were convinced that the prosecution case was proved beyond reasonable doubt. The conviction of the appellant was mainly based on the DNA report exhibit CE 1. The

appellant was accordingly awarded a jail term of thirty years. Still dissatisfied the appellant seeks to challenge the findings of the two courts below.

The appellant has raised eleven grounds in the Memorandum of appeal which can be summarized as follows:**One** failure by the trial court to consider defence evidence; **Two, t**he trial court wrongly relied on DNA report which was irregular for non compliance of the statutory requirements and **three,** that the prosecution case was not proved beyond reasonable doubt. With those grounds the appellant asked us to allow the appeal.

The appellant was unrepresented and Ms Catherine Paul, learned State Attorney appeared for the respondent Republic. She supported the appeal.

The learned State Attorney submitted that, the trial and first appellate courts did not consider the defence case which amounts to unfair trial occasioning miscarriage of justice rendering the conviction unsafe. The learned State Attorney also submitted that, the procedure of drawing specimen samples contravened section 26 of the Human DNA Regulation Act 8 OF 2009. In addition she urged us to expunge DNA evidence which

was improperly received after the close of the prosecution and defence cases. Regarding evidence of PW1 the victim, she argued the same not reliable because its credibility was not assessed by the two lower courts. She urged us to allow the appeal, and set aside conviction and sentence.

On his part the appellant agreed with the submission of the learned State Attorney.

It is the position of the law that, generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction. The case of **LEONARD MWANASHOKA VR** CRIMINAL APPEAL NO.226 OF 2014(Unreported) availes useful guidelines on what is to be considered in the evaluation of 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 proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis"*

In the case at hand, the conviction of the appellant was based on what appears at pages 51 to 52 of the record:

> "From *the above discussion it is axiomatic for this court to say, that the case against the accused person was proven to the required standard. So I hereby convict the accused person under section 235 of the Criminal Procedure Act[Cap 20 R.E 2002] relying on testimony of PW1, hadijaYusuph which was likewise corroborated by testimony of PW2 and PW3, Secondly, by relying on the Evidence and testimony presented by the government Chemist, HadijaMwema(CW2) that the analysis of the samples established that Mr. Amani Yusuph is the father of Eva by ninety nine (99%) which is final straw that Mr, Amani had prohibited sexual relationship with his daughter. So the accused is guilty of an offence of incest by males c/s 158 (1) (a) of the Penal Code as charged.*

However, the defence evidence was treated as follows:

> "*In his defence testimony which he gave before DNA test results, Mr. Yusuph Amani at the end of his testimony alleges that this case was a cooked one by his wife because she had sexual relationship with PW3 and PW3 came to testify so that he can end up in prison and left (sic) the two wallowing in the luxuries of Mbeya City. What I can simply say is that the allegations raised by the accused were just a sheer concoction*

as drowning man will always clutch any straw. It didn't help him to mingle out of the clutches of allegations laid against him as the evidence produce, as much as I can say is water tight."

Subsequently the trial court concluded that the prosecution case has proved its case after evaluating only the prosecution case and not the defence case. The trial court was expected to assess the probative value, credibility and weight of evidence adduced by the defence as against that of the prosecution so as to determine whether there are any reasonable doubts in the prosecution case. We are of considered view that the appellant's defence was disregarded in the evaluation stage which is crucial. Failure to evaluate or an improper evaluation of evidence inevitably leads to wrong and/ or biased conclusions and inferences resulting into miscarriages of justice. (See **LEONARD MWANASHOKA VS R** CRIMINAL APPEAL NO 226 OF 2014 (supra).

On first appeal, the appellant raised this complaint as the eighth ground of appeal and the learned State Attorney who argued against the appeal, watered down the same as baseless because the appellant was given chance to defend himself and call witnesses and his evidence was evaluated. At page 70 of the record the first appellate court treated the appellant's complaint as follows:

"In ground eight, the appellant is impeaching the trial court decision for not considering his defence. This ground is baseless. As it can be appreciated at page 50 of the trial court judgment, the trial court properly evaluated the appellant's defence"

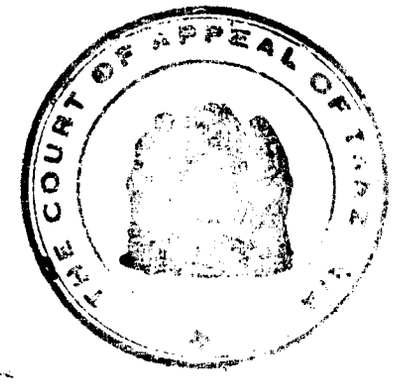
This was indeed not a fair treatment to the appellant who has in this appeal maintained that his defence was not considered. Thus, the omission was not remedied by the first appellate court which was duty bound to re-evaluate the entire evidence and an opportunity to have defence evidence considered. It is universally established jurisprudence that, failure to consider defence case is fatal and usually vitiates the conviction.In **HUSSEIN IDD AND ANOTHER VS R** (1986) TLR 166, the trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. This Court found that to be a serious misdirection as it deprived the accused of having his defence properly considered.

We are satisfied that, both the trial and first appellate courts did not treat the appellant fairly who was all the same not availed a fair trial which occasioned a miscarriage of justice as his evidence was not considered. Thus the conviction was not safe and it cannot be sustained.

This ground is sufficient to dispose the appeal. So we allow the appeal, quash the judgments and convictions of the two courts below and set aside sentence. We order the immediate release of the appellant from custody unless he is held for some other lawful cause.

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