IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 247 OF 2013

MARTIN SWAI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Manento, J.)

dated 13th November, 2002

in

(DC) Criminal Appeal No. 53 of 2000.

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JUDGMENT OF THE COURT

30th June, 2014 & 2nd July, 2014

MMILLA, JA.:

The appellant, Martin Swai was convicted for rape by the District Court of Songea in Songea District in the Region of Ruvuma and was sentenced to serve a term of 30 years in prison. His first appeal to the High Court at Songea was unsuccessful, hence this second appeal to this Court.

At the hearing of the appeal the appellant appeared in person, unrepresented and the respondent Republic was represented by Mr. Shaban

Mwegole, learned State Attorney who was quick to inform the Court that he was supporting conviction and sentence.

We desire to give a summary of the case which led to the appellant being convicted of the said offence before embarking on deliberating the grounds raised and rival submissions thereof.

On 25.3.2000, PW2 Sinfrosa d/o Komba **(the complainant)** was travelling from Peramiho to Nakahagwa village. On arrival at the junction of the road heading to Morogoro village at around 2.00 pm, she met her friend one Mariam d/o Mbele. As the two were talking, the appellant who had a bicycle, appeared and they greeted him. It appears he overhead their conversation. After introducing himself to them that he was a police officer stationed at Peramiho, he offered to carry the complainant on his bicycle. Believing that he was a good person, she accepted the offer, boarded the appellant's bicycle after which he rode away. On arrival at a certain point, she realized that the appellant was diverging into a road heading in the farms instead of following the road to Nakahagwa village. In protest, she jumped off the bicycle. The appellant stopped, talked to her and assured her that she was in safe hands. After the appellant had reverted to the road heading

to Nakahagwa village, she once again boarded the appellant's bicycle and they proceeded with the journey.

After crossing Lundunsi River, the appellant stopped and told her that he had reached his destination and asked her to pay shs 1000/= being the charge for the service he rendered to her. She told him that she had no money, but that the appellant asked her to surrender her shoes with instructions to redeem them at police station on getting the money he was demanding. After a protracted discussion thereafter, the appellant parked and locked his bicycle, kept it on the road side, held her hand and led her into the forest where he kicked and fell her down and allegedly raped her. He thereafter abandoned her there and rode away. She rose, albeit with difficulties, and decided to continue with the journey.

As she was thoughtfully proceeding with the journey, she met a boy by the name of Lisius to whom she told her ordeal and described how her assailant looked like. She described the clothes that man had won and the bicycle he had. On parting with that boy, and while crying, she met another person known as Corinalia Chale to whom again she narrated her story. The latter took her to her home at Morogoro village.

The appellant was arrested by PW3 Ally Show, a member of the Village Security Council of Morogoro village together with his group of militia men. It was after he had met one Lisius who informed him that there was a certain girl who was raped by a man whose description he gave relying on what he was told by the complainant. PW3 and the militia men started to trace the suspect. On seeing a person come fitting the description given, they stopped him. On informing him that he was a suspect for having committed a certain crime, that man attempted to run away but they apprehended him. They took him to the village offices at which PW2 later on identified him. He was taken to police, subsequent to which he was charged with that offence.

In his defence before the trial court, the appellant protested his innocence. He denied to have met the complainant on the claimed date. He branded PW2 as a liar, and that after all PW1 Dr. Gaudence Komba said that on examining her he found no sperms on her private parts. He stressed that there was no reason why the prosecution did not call Mariam Mbele as a witness, so also the other persons she claimed to have told them her story, including her father. He also said that after all, the prosecution evidence was tainted with serious contradictions; therefore that the prosecution evidence against him was very weak. He went to the extent of saying that after all he

did not go to Lundunsi River on that day. He asked the trial court to acquit him.

After a full trial, the trial court found that PW2 had properly identified him as the culprit behind that crime, and that her evidence was corroborated by that of PW1 and PW3. It found him guilty, convicted him and sentenced him, as it were. The first appellate court upheld conviction and sentence, which is why he appealed to this Court.

The appellant's memorandum of appeal raised 12 grounds which when properly construed boil down to only 2 of them; **firstly** that he was not sufficiently identified as the person who raped the complainant; **secondly** that both the trial and first appellate courts erred in failing to consider the defence case. We are of the settled view that this appeal may conclusively be determined by considering the rephrased second ground of appeal indicated above.

The appellant's elaboration on the point was briefly that his evidence was not considered by both courts below such that it caused injustice on his part. He said that had those courts considered his defence, they could have

found that he was innocent. He requested this Court to intervene and allow this ground.

In rebuttal, Mr. Mwegole strenuously submitted that both courts below considered the appellant's defence but rejected it for being implausible. He requested us to dismiss this ground of appeal.

After cautiously going through the judgments of both courts below, we have found out that the appellant's contention carries weight.

Beginning with the treatment of the appellant's defence by the trial court, we have noted that in its entire judgment that court did not analyze the defence evidence, save for a two sentence remark appearing on page 12 of the court record where it said that ***"Accused in his sworn statement denied having intercourse with the complainant. He has withdrawn witnesses intended to call."*** That is all what there is in this regard. It never said anything about his query on why the prosecution did not call Mariam Mbele as a witness, so also the other persons the complainant had claimed to have told them her story, including her father. Similarly, the trial court did not say anything about the contradictions he

alleged to exist and also about his defence of alibi that he did not go to Lundunsi River on that day.

The same error was done by the first appellate court. Before that court, the appellant had complained in ground No 6, among other things, that the trial court did not deeply consider his "account in defence." Unfortunately, that court did not address that complaint, but ended up discussing the prosecution evidence which it held to be strong without looking at what the appellant said in his defence before the trial court.

In our view, that was improper. We believe that had both courts below ought to have analyzed and considered the appellant's defence in order to satisfy themselves on whether or not his defence raised a reasonable doubt which is all what he was required to do. To have not done so constituted a miscarriage of justice in the case and it was a serious error.

We wish to restate the principle of law in this regard that when a defence, however weak, foolish, unfounded or improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial court in order to vouch a miscarriage of justice on the accused. 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, **Stephen John Rutakikirwa v. Republic,** Criminal Appeal No. 78 of 2008, CAT and **Rashid Mwimbe v. Republic**, Criminal Appeal No. 143 of 2012, CAT (all unreported).

In a nutshell, we find and hold that for the reason we have given above, 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 1st day of July, 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