IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPEAL NO. 483 OF 2016

(CORAM: MUSSA, J.A.,LILA, J.A., And WAMBALI, J.A.)

SADICK KITIME ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sameji, J.)

Dated the 24nd day of June, 2016

in

Criminal Appeal No. 13 of 2016

JUDGMENT OF THE COURT

14th & 16th May, 2019

MUSSA, JA.:

In the District court of Iringa, the appellant was arraigned and convicted for rape, contrary to sections 130(1)(2)(e) and 131(1) of the Penal code, Chapter 16 of the Laws. Upon conviction, he was handed down a sentence of life imprisonment. Aggrieved, the appellant preferred on appeal but the High Court (Sameji, J., as she then was) found no cause to vary the trial court's decision and the appeal was, accordingly, dismissed in its entirety.

Still discontented, the appellant presently seeks to impugn the decision of the High Court upon a lengthy memorandum of appeal which is comprised of 11 points of grievance and which we shall reproduce at a later stage of our judgment. In the meantime, we deem it apposite to explore, albeit briefly, the factual background giving rise to this appeal.

As we have hinted upon, the case for the prosecution was built around an accusation of rape which was allegedly perpetrated by the appellant on the 31st October 2014, at Makatapora village, within Iringa Rural District. It is noteworthy that the alleged victim of the rape was aged six, at the material time and, to disguise her identity we shall henceforth refer to her by the prefix letters: "**ABC**" or by the assumed identity: "**PW3**" which was accorded to her by the trial court.

From the testimonies of four (4) prosecution witnesses, it is not disputed that PW3 used to reside at Makatapora Village with her mother, namely, Sara Msigwa (PW2). PW2, who used to operate for gain, as a fish vendor, also lived with her two other children, namely, Monika Kyando (11) and Baraka Kyando (4). According to PW2, the appellant is well known to her, much as he used to live in the neighbourhood.

The evidence was to the effect that, on the fateful day, around 7:00 a.m. or so, PW2 left her residence to attend her fish business. She left behind her three children, PW3, Baraka and Monica who were playing outside the residence. They were joined there by another neighbor kid aged 4, namely, Geshon Njaho (PW1). According to PW3 whilst playing outside their residence, the appellant suddenly emerged and called her. She obliged but, upon reaching him, the appellant grabbed her, pushed her inside his (appellant's) residence and locked the entrance door. Soon after, the appellant laid PW2 on a bed and undressed her. Next, he drew out his male organ and inserted it into PW3's female organ. PW3 recollected to have felt untold pains following which she cried loudly. In response, some people tried to knock and push the door from outside but the appellant did not open it. When he was done, the appellant warned PW3 not to disclose the occurrence to her mother and, soon after, he released her. According to PW3, thereafter she returned home in the company of Baraka and Monica who had throughout been outside the appellant's residence.

The foregoing account by the alleged victim, to great extent, dovetails with that which was unveiled by PW1. But, in a rather dramatic

irony, PW1 who was outside the appellant's residence, claimed that he could see the appellant undressing and ravishing PW3 as he peeped through a window. The others who also allegedly participated in the peeping exercising, were, namely, Shaibu and Baraka but, it is common ground that the undermentioned were not featured as witnesses.

There was some further prosecution evidence from Dr. Melkior Mtei Ndomba (PW4) who medically examined PW3 and posted the results in a PF3 which was produced as exhibit P1. Unfortunately, upon admission, the contents of the PF3 were not read out in court and in the result, we are constrained to discount the document at once and expunge it from the record of the evidence. With this detail, so much for the version which was unfolded by the prosecution witnesses during the trial.

In response to the prosecution version, the appellant refuted the prosecution accusation and protested his innocence. He faulted the peeping claim by PW1 which, he said, was not accompanied by details of the height of the window from where he was peeping. On the whole, he concluded, the entire prosecution evidence fell short of the required proof.

As we have already intimated, the two courts below were of the view that the case for the prosecution was established to the hilt, hence his conviction and sentence. As we have, again, intimated, his appeal before the court is upon 11 grounds, namely:-

"1. *That the High Court wrongly relied on the evidence of PW1 as corroborative evidence without taking into account that voile dire (sic) was not "duly conducted" by the trial Court.*

2. *That the High Court wrongly upheld the decision of the trial Court without considering that PW1 was not mentioned by the victim (PW3) to (sic) among the eye witness (who were in the crime scene).*

3. *that the High Court wrongly upheld decision (sic) of the trial Court without taking into account that the prosecution was duty bound to prove the height of the window through which PW1 managed to saw the act of rape.*

4. *That the High Court contradicted itself for heavily reliance on evidence of PW3 as credible once without taking consideration her testimony was contradictory as she paid that their were*

Monica and Baraka at the crime scene but sometimes there were her friends hence not credible to form the basis of conviction.

5. *That the High Court erred in law to upheld (sic) the decision of the trial Court which was purely contradictory regarding to the age of the victim as it was said to be six (6) years of age on the ph and on the hearing it was said to be of about 8 years of age by witnesses hence it was not proved beyond reasonable doubt.*

6. *That the High Court erred in law failure to consider that PW3 mentioned Monica and Baraka to be the eye witnesses surprisingly none of the above mentioned witnesses were called by the prosecution side to corroborate the evidence of PW3 in order to form basis of conviction. (Since Monica was elder than PW3).*

7. *That the High Court wrongly gave weight the evidence of PW4 as corroborative without taking into Account that it contradict with that of PW2 who did that after receiving unmentioned after receiving the PF3 from unmentioned police station she went direct to Iringa town Hospital but PW4 told the Court*

that he received the victim (PW3) with a referral letter from Mgory.

8. *That the Judge of High Court erred in law to accept the PF3 as exhibit corroborating the evidence of PW3 without taking into Account that the same was not read over before the Court of law after its admission.*

9. *That the High Court wrongly upheld the decision of the trial Court without directing its mind as to why the prosecution side failed to loosing (sic) Monica to testify since she was mentioned by PW2 to be elder than PW3 and she was present at the place event.*

10. *That the High Court erred in law for failure to address its mind properly that the prosecution failed totally to prove this case beyond the reasonable doubt.*

11. *That the High Court miss (sic) directed itself that the evidence of PW2 corroborated that of PW3 without taking into account that mere words only that the victim private parts has bad smell are not sufficient in rape offence."*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Mwita, learned State Attorney. The appellant fully adopted the memorandum of appeal but, when we asked him to expound on it, he deferred the exercise to a later stage, if need be, and he, instead impressed on us to permit the learned State Attorney to address us first.

On his part, Mr. Mwita painstakingly discounted each and every ground in the lengthy memorandum and in the upshot, he urged us to dismiss the appeal in its entirety. Unfortunately, for a reason which will shortly become apparent, we need not glean from the memorandum of appeal and neither do we have to address to Mr. Mwita's submissions to counter the memorandum of appeal.

As it were, soon after the learned State Attorney rested his submissions, we required him to comment on whether or not the two courts below took into consideration the appellant's defence. Having gleaned from the respective judgments of the two courts below, Mr. Mwita readily conceded that both the trial court and the first appellate court did not consider the appellant's defence. All the same, he attempted to

persuade us to order a retrial on account of the omission. He contended that there is authority to support his stance. The learned State Attorney availed to us the unreported Criminal Appeal No. 365 of 2008 – **Godfrey Richard v. The Repuclic**. Ironically though, that case does not support Mr. Mwita's stance for at page 12 of its judgment, the Court clearly stated thus:-

> *"... we are satisfied that the failure to consider the defence case is as good as not hearing the accused and is fatal (See **HUSSEIN IDDI AND ANOTHER V. R** (1986) TLR 166)."*

What is more, in that case, the Court did not order a retrial, rather, it quashed the conviction and set aside the sentence ordering the forthwith release of the appellant from prison custody unless he was otherwise lawfully held.

On his part, the appellant echoed our raised concern and contended that, indeed, the two courts below did not consider his defence and that on account of the omission we should quash the conviction and the sentence imposed and set him at liberty.

Having heard the parties from either side on the issue which we raised *suo motu*, we are minded to reflect on how the two courts below dealt with the appellant's defence. If we may begin, for a start, with the trial court, having briefly summarised the appellant's account in defence, the presiding Magistrate drew the following conclusion:-

> *"The prosecution case is very straight forward that there was penetration as established by PW3 and corroborated by PW4. The act amounts to rape as defined by the law. The defence case has created no doubts to the prosecution case."*

The first appellate court simply recited and adopted the foregoing observation of the trial court without more.

If we may cull from the extracted observation of the trial Magistrate, it seems clear to us that the Magistrate dealt with the prosecution evidence on its own and arrived at the conclusion that the same comprised proof of the case and, as a result, he rejected the defence case without analysis. In our view, the proper approach should have been for the Magistrate to deal with the prosecution and defence evidence and after analyzing such evidence, the Magistrate should have then reached the conclusion. In the

case of **Hussein Idd and Another v. The Republic** [1986] TLR 166, this Court held:-

> *"It was a serious misdirection on the part of the trial judge 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."*

As regards the consequences of such a misdirection, in the unreported Criminal Appeal No. 56 of 2009 – **Moses Mayanja @ Msoke v. The Republic,** this court made the following observation:-

> *"... it is now trite law that failure to consider the defence case is fatal and usually vitiates the conviction. See, for instance:-*
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> *(a)* ***Lockhart – Smith V.R*** *[1965] EA 211 (TZ),*
>
> *(b)* ***Okoth Okale v. Uganda*** *[1965] EA 555,*
>
> *(c)* ***Hussein Iddi Another v. R*** *[1986] TLR 166,*
>
> *(d)* ***Malonda Badi & Others v. R*** *Criminal Appeal No. 69 of 1993 (unreported), among others."*

In the referred **Lockhart – Smith** case, the appellant, an advocate, was convicted in the District Court of Dar es Salaam on three counts of

contempt of court. The offence arose from certain remarks made by the appellant when representing his client in the District Court. The trial Magistrate found the words spoken by, and the conduct of the appellant were discourteous and disrespectful to the court and amounted to contempt of court. As he was convicting the appellant, the trial Magistrate remarked:-

> *"In the instant case, I believe the evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement. In the result, I find the accused guilty as charged. I hereby convict the accused on each of the three counts of the charge."*

On appeal, the High Court (Weston, J.) faulted the trial Magistrate for rejecting the appellant's evidence solely because he believed that of the witnesses for the prosecution. In the upshot, the court Held:-

> *"The trial magistrate did not, as he should have done take into consideration the evidence in defence, his reasoning underlying the rejection of*

the appellants statement was incurably wrong and no conviction based on it could be sustained."

Likewise, in the appeal under our consideration, the appellant was deprived of having his defence properly considered. In the circumstances, the conviction and sentence imposed upon the appellant cannot be allowed to stand. We, accordingly, quash the conviction and set aside the sentence in the exercise of the court's powers of revision under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws. As a consequence, the appellant should be released from prison custody forthwith unless if he is held there for some other lawful cause.

DATED at **IRINGA** this 16th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL