IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 349 OF 2018

MUSSA JUMANNE MTANDIKA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mohamed, J.)

dated the 18th day of July, 2018
in
(DC) Criminal Appeal No. 14 of 2018

JUDGMENT OF THE COURT

23rd & 27th September, 2019

KWARIKO, J.A.:

Mussa Jumanne Mtandika, the appellant, was arraigned before the District Court of Bahi at Bahi with the unnatural offence contrary to section 154 (1) (a) of the Penal Code [CAP 16 R.E. 2002]. For the purpose of hiding the identity of the victim of the sexual offence we shall only refer to her as 'XY' or PW3. The appellant was accused of having carnal knowledge of 'XY' a girl aged six (6) years against the order of nature on 29/1/2017.

Having denied the charge, the case went on full trial. At the end, the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment. The appellant was aggrieved by that decision hence appealed before the High Court but his appeal was dismissed. Still protesting his innocence, the appellant is thus before this Court on a second appeal.

The evidence upon which the prosecution case was built can be recapitulated as follows. On 29/1/2017 at about 15:00 hours Hadija Lusian Sabaya (PW1) sent 'XY' (PW3) together with one Idris to fetch water where 'XY' left ahead of Idris. Before Idris left, 'XY' returned crying and unable to walk properly, her legs apart. Upon inspection PW1 found the girl smelling faeces which was found in her underwear and her anus was also damaged. According to PW1, the girl mentioned Mussa as the one who had inserted his penis into her anus. The incident was reported to the village authority and then to the police station where a PF3 was issued for PW3 to go to the hospital. At the hospital PW3 was attended by Dr. Erasto Mbiche (PW4) who found her anus with bruises and faecal matters coming out uncontrollably. The PF3 was tendered in court and was admitted as exhibit P1. Upon interrogation by No. WP 4392 D/CPL Nelli (PW5) the appellant

denied the accusations and said he was beaten by villagers following this incident.

In his defence, the appellant testified on his own behalf and called no any witness. He denied the allegations and complained that, this case was just fabricated against him by the complainant's family as it happened again in 2004 where they framed another charge against him but failed to prosecute the case. He added that, he was beaten by the victim's brother while he was at his sister's place.

As alluded to earlier, the trial court convicted the appellant and sentenced him as such.

In his memorandum of appeal before this Court, the appellant raised five grounds of appeal which we have conveniently paraphrased as follows:

1. *That, section 127(2) of the Evidence Act [CAP 6 R.E 2002] was not complied with.*
2. *That, the evidence of identification against the appellant was not sufficient.*
3. *That, the evidence by the doctor was not properly analysed.*
4. *That, the prosecution case did not prove the offence against the appellant.*

5. That, the defence evidence was not considered by the two courts below.

During the hearing of the appeal, the appellant appeared in person, without legal representation, whilst on the other hand the respondent Republic was represented by Ms Catherine Gwaltu, learned Senior State Attorney.

When he was called upon to argue his appeal, the appellant adopted his grounds of appeal and left to the State Attorney to respond first. He also complained that as he has been suffering from mental illness, he could not properly cross- examine the witnesses during the trial.

On her part, Ms Gwaltu first responded to the appellant's complaint regarding his mental status. She argued that, after the appellant had exhibited unusual behaviour, the trial court issued an order directing that, the appellant be sent to a mental hospital for examination of his mental status. She said, after the said examination, the Medical Report indicated that the appellant was not suffering from any mental illness, thus was sane and could stand trial.

Regarding the appellant's appeal, Ms Gwaltu opted to argue only the fifth ground of appeal which raises a point of law which she said, if decided in the affirmative could dispose of the appeal.

The learned State Attorney argued that, upon going through the trial court's judgment, it is glaringly clear that the appellant's defence evidence was not considered alongside the prosecution case. This, she contended, amounted to unfair trial occasioning injustice to the appellant. To fortify her contention, Ms Gwaltu referred us to the Court's decision in **Yasin Mwakapala v R,** Criminal Appeal No. 604 of 2015 (unreported). She added that even the High Court did not consider the appellant's defence and thus the omission vitiated the conviction. The learned State Attorney urged us to quash the conviction, set aside the sentence and order the release of the appellant from the prison forthwith.

In rejoinder the appellant concurred with the learned State Attorney's submission and urged us to order for his release from the prison.

We have considered the submissions by both parties. Regarding the appellant's complaint in respect of his mental status, we are in agreement with Ms Gwaltu that on the day the appellant appeared for plea before the

trial court on 01/2/2017, he exhibited unusual behavior and that court issued an order for him to be sent to a mental hospital for medical examination of his mental status. The Medical Officer's Report dated 22/6/2017 concluded thus:

> *"Mr. Musa Jumanne Mtandika is not suffering from* ***any mental disorder.*** *He is mentally stable as he can understand whatever is happening. Therefore, Mr. Musa Jumanne Mtandika is able to stand his trial."*

After receipt of the said report, the trial court fully tried the appellant. On our part, by the above quoted conclusion by the medical officer, we don't find any cause to re-open the matter, we leave it at that.

In relation to the grounds of appeal, we agree with the learned Senior State Attorney that the fifth ground which raises a point of law is sufficient to dispose of this appeal. Upon perusal of the trial court's judgment we have found that the trial court did not at all consider the appellant's defence evidence. In his defence the appellant complained that this case is a frame-up matter by the complainant's family as it also happened in another case of similar nature in 2004. In its two pages

judgment, the trial court summarised the prosecution as well as the defence evidence. Then, it found the charge as proved beyond reasonable doubt against the appellant basing on the prosecution evidence only. This was a serious misdirection by the trial court. In the case of **Hussein Idd and Another v. R** [1986] T.L.R 166, the Court held thus:

> *"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."*

In the instant case, the High Court fell into the same trap of not considering the defence evidence. As a first appellate court, the High Court had mandate to re-evaluate the whole evidence adduced at the trial and make its own conclusion. The case of **Yasin Mwakapala** (supra) cited with approval the Court's case of **Prince Charles Junior v. R,** Criminal Appeal No. 250 of 2014 (unreported). In the latter case it was said thus;

> *"With due respect, this is not how, a first appellate Court should have dealt with such a complaint. As directed in **PANDYA**'s case (supra) in a first appeal, the first appellate court should have treated the*

evidence as a whole to a fresh and exhaustive scrutiny which the appellant was entitled to expect. ***It was therefore expected of the first appellate Court, not to only summarise but also to objectively evaluate the gist and value of the defence evidence, and weigh it against the prosecution case. This is what evaluation is all about.*** *(See* ***Leonard Mwanashoka v. REPUBLIC*** *Criminal Appeal No. 226 of 2014* (unreported)." (Emphasis ours).

We are also alive that non-consideration of the appellant's defence evidence amounted to a violation of one of the principles of natural justice which says that no one should be condemned unheard; hence the latin maxim *'audi alteram partem'.*

In the cited cases of **Hussein Idd and Another** (supra), **Prince Charles Junior** (supra), **Leonard Mwanashoka** (supra) and **Yasin Mwakapala** (supra), having held that the lower courts did not consider the defence evidence, the Court found the convictions unsafe and proceeded to allow the appeal. Likewise, since in the appellant's case we have found that the appellant's defence evidence was not considered, we

are therefore satisfied that the appellant's conviction was vitiated and we find that the fifth ground of appeal has merit.

Consequently, we allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. As such, we order for the release of the appellant from prison forthwith unless he is continually held for some other lawful cause.

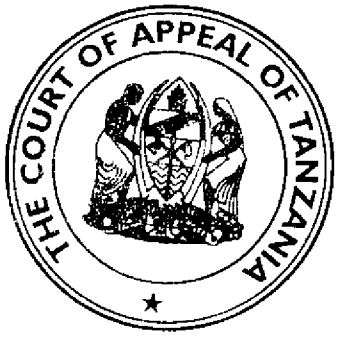
DATED at **DODOMA** this 26th day of September, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 27th day of September, 2019 in the presence of the appellant in person and Ms Janeth Mgoma, learned State Attorney is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEA