**IN THE COURT OF APPEAL OF TANZANIA**
**AT DODOMA**

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

**CRIMINAL APPEAL NO. 352 OF 2018**

**JOHN MGHANDI @ NDOVO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

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

**(Mansoor, J.)**

**dated the 28th day of February, 2018**
**in**
**(DC.) Criminal Appeal No. 163 of 2016**

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## JUDGMENT OF THE COURT

17th & 30th September, 2019

**MUSSA, J.A.:**

In the Resident Magistrate's court of Singida, the appellant was arraigned for an unnatural offence, contrary to section 154(1)(a) of the Penal Code, Chapter 16 of the Laws. The appellant refuted the accusation, whereupon the prosecution lined up six witnesses and one documentary exhibit (PF3) in support of its charge. On his part, the appellant gave sworn evidence and rested his case without featuring any witness.

In a nutshell, the case for the prosecution was to the effect that on the 18th day of February, 2016 at Nkhoiree Village, Iseke Ward, Ihanja Division, within Ikungi District in Singida Region, the appellant had carnal knowledge of an old man aged 83 against the order of nature. To protect the true identity of the old man, we shall henceforth refer to him as "the victim of the sexual assault" or simply "PW1".

At the commencement of the trial, the alleged victim of the sexual assault was featured as prosecution witness No. 1 (PW1). In his testimonial account, PW1 told the trial court that on the alleged date and place, around 4:00 p.m. or so, he was at his residence when the appellant entered the house and, soon after, he pounced on him as he pulled up his legs and viciously attacked him. Next, the appellant undressed PW1 and penetrated his manhood into his anus. Having sodomized him, the appellant took PW1 outdoors at a sunflower farm close to his (PW1's) house where he continued assaulting him whilst holding him tightly by the neck to prevent him from raising an alarm. At that particular moment, PW1's wife, namely, Fatuma Kijanga (PW2) coincidentally emerged at the scene and, seeing the besetting of her husband, she immediately wailed

about to attract assistance. Just as PW2 was shouting, the appellant disappeared from the scene but, speaking of his identity, PW2 claimed he was none other person than the appellant whom was previously well known to her as he is the son of her sister-in-law and, for that matter, the alleged victim's nephew. In response to the alarm, several persons attended the scene and took PW1 to the Ikungi Police Station onwards to hospital where he was medically attended.

Further particulars on the alleged despicable incident were told by Jumanne Mahaja (PW4) and Abel Omari (PW5). The two witnesses were, respectively, the Chairperson and ten cell leader of the locality. They both attended the scene in response to PW2's alarm where they found PW1 in a pathetic state. The latter disclosed to them that he was beaten and sodomised by the appellant whom they also knew quite well as their villagemate. The two local leaders took responsibility whereupon, with the assistance of fellow villagers, they immediately mounted a manhunt for the culprit. The search party could not locate the appellant at his fixed abode or elsewhere within Nkhoiree Village till when they saw and apprehended

him at Muhintiri village, some 15 to 20 kilometres away, on the morrow of the occurrence.

Further prosecution evidence came from Dr. Frank Kiowi (PW3), the medical officer who attended PW1 at Ihanja Health Centre. Upon medical examination, PW3 posted his findings on a PF3 which was adduced into evidence without demur from the appellant and marked as exhibit P1. The irony is, however, in the fact that upon admission, the contents of exhibit P1 were not read over and explained in court for the benefit of the appellant. We shall, in due course, make a remark or two on the consequences tied to this mishap.

The last prosecution witness, namely, WP7575, detective corporal Dalahile (PW6) testified to routine stuff relating to investigating the case, recording the witnesses' and the appellant's statements and formally arraigning the appellant in court. And, thus, with this detail, so much for the prosecution version as unfolded before the trial court.

In response to the foregoing prosecution's condemnation, the appellant completely disassociated himself from the alleged occurrence and

protested his innocence. But he did so in his own peculiar style, as it were, by painstakingly reciting, in summary, the respective testimonies of all prosecution witnesses and thereby refuting each and every detail. More particularly, the appellant told the trial court that, on the fateful day, he went to "Mnadani" in Muhintiri village up until 8:00 p.m. when he arrived back home. In short, the appellant raised an *alibi* as his defence.

On the whole of the evidence, the presiding learned Senior Resident Magistrate summarized the evidence as presented by both sides, whereupon she formulated two issues for consideration of the trial court: **First**, whether or not the alleged offence was committed and, if so, **second**, whether or not it was the appellant who perpetrated the offence. Addressing the two issues, the learned trial Magistrate took into account and accepted the testimonies of PW1, PW2, PW4 and PW5 from whose evidence she made the following finding: -

> *"Hence I conclude the prosecution side to have proved charges against accused person beyond all reasonable doubt. He is accordingly convicted with the offence of unnatural offence contrary to section*

*154(1)(a) of the Penal Code, Cap. 16, Vol. 1 of the Laws R.E 2002."*

It is noteworthy that, quite unfortunately, in arriving at the foregoing finding, aside from making a cursory summary of what the appellant stated in defence, the trial Magistrate did not, at all, consider the appellant's defence. We shall find time, at a later stage, to reflect on the consequences tied to this disquieting aspect of the trial.

To resume the factual setting, upon conviction, the appellant was handed down the minimum custodial sentence of thirty years which is prescribed for the offence. He was dissatisfied but his appeal to the High Court was dismissed in its entirety (Mansoor, J.). A remark is, however, well worth that in dismissing the appeal, the first appellate court just as well made a fleeting summary of the appellants' defence without more.

Still aggrieved, the appellant presently seeks to impugn the decision of the High Court upon four points of grievances which he raises in the memorandum of appeal. We need only recite the fourth ground of appeal which complains thus: -

*"That, your honour Justice of Appeal, the trial court and the 1st appellate court erred in law and fact when ignored (sic) my defense and relied upon the prosecution case only."*

When the appeal was placed before us for hearing, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Mr. Harry Mbogoro, learned State Attorney. When we called upon him to address us in support of the appeal, the appellant fully adopted his memorandum of appeal but opted to let the learned State Attorney address us first whilst he reserved his right to make a rejoinder, if need be.

On his part, Mr. Mbogoro resisted the appeal and fully supported the conviction and the sentence which was meted out against the appellant. To buttress his stance, the learned State Attorney submitted that the appellant was found guilty and convicted upon well constituted prosecution evidence which was unassailed. Mr. Mbogoro, however, deplored the omission, by the trial court, of not reading the contents of the PF3 upon its admission into evidence. On account of the mishap, he said, the PF3 was vitiated and should be expunged from the record of the evidence. The

learned State Attorney was, however, quick to rejoin that, even without the PF3, the conviction against the appellant is sustainable.

When we asked Mr. Mbogoro to reflect on the question whether or not the two courts below considered the appellant's defense, the learned State Attorney readily acknowledged that both the trial and first appellate courts just made a cursory summary of the appellant's defence but did not, at all, consider it. Mr. Mbogoro sought to explain away the omission by submitting that, after all, the appellant did not disclose his defence of *alibi* by giving notice, as he was imperatively required, under the provisions of section 194(4) of the Criminal Procedure Act, Chapter 20 of the Laws (CPA).

In response, the appellant reiterated his reliance on the memorandum of appeal and did not wish to particularly assail the submissions of the learned State Attorney. He, instead, left the matter to be considered and decided by the Court in the interests of justice.

On our part, we propose, for a start, to share the sentiments of the learned State Attorney on the omission, by the trial court, to read and

explain the contents of the PF3 after being admitted into evidence. We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence.

We now move to determine the appellant's complaint on the non-consideration of his defence. True, although both courts below summarized the appellant's defence, the trial and first appellate courts did not go so far as to make an objective consideration of the defence of *alibi* which was presented by the appellant. Granted that the appellant did not disclose the details of the defence ahead of the closure of the case for the prosecution; but, with respect to the learned State Attorney, as was held in the case of **Charles Samson V Republic** [1990] TLR 39, the court is not exempt from the requirement to take into account the defence even where such defence has not been disclosed.

If we may now cull from the extracted conclusion of the trial Magistrate at the time of conviction, 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, she seemingly 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 the whole of the 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 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 – M**oses 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: -*

*(a)* ***Lockhart – Smith VR*** *[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, allow the appeal, quash the conviction, set aside the sentence and nullify the proceedings of the first appellate court 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 **DODOMA** this 27th 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 30th day of September, 2019 in the presence of the appellant in person, unrepresented, whereas, the respondent, Republic was represented by Mr. Harry Mbogolo, learned State Attorney is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**