IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A. AND MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 17 OF 2018

FRED JOHN..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Dyansobera, J.)

dated the 18th day of July, 2017
in
(DC) Criminal Appeal No. 76 of 2016

JUDGMENT OF THE COURT

17th & 28 July, 2020

KWARIKO, J.A.:

Fred John, the appellant herein, was charged before the District Court of Morogoro with unnatural offence contrary to section 154 (1) (a) of the Penal Code [CAP 16 R.E. 2002] (now R.E. 2019). For the purpose of hiding the identity of the victim of sexual offence, we shall only refer him as **'FL'** or simply PW1. The prosecution alleged that on 23rd May, 2015 at SUA Farm, Rungemba area within Chamwino Ward in the District and Region of Morogoro, the appellant had carnal knowledge of **'FL'** against the order of nature.

Having denied the charge, the appellant was fully tried. At the end of the trial, he was convicted and sentenced to thirty years' imprisonment. The appellant's appeal before the High Court of Tanzania was unsuccessful. He is now before this Court on a second appeal.

We find it appropriate at this point to summarize the facts of the case which led to the appellant's conviction and ultimately this appeal as follows. On 23rd May, 2015 PW1 was playing outside a barber shop. Whilst there, the appellant appeared and took him to SUA Farm where the prosecution claimed that he sodomized him. PW1 is said to have raised an alarm and people rescued him. One of those people was Juma Hamisi Athuman (PW2). PW2 said that he saw PW1 and another person entering SUA Farm. He became suspicious and kept watching. The two came out of the farm after about four minutes. Curiously, he went to see what they were up to where he claimed that he found PW1 being sodomized by the other person who was later identified as the appellant who was naked. PW2 and other people apprehended the appellant and took him to the Ward Executive Officer one Daud Ismail Urasa (PW4). PW4 called the police who came to take the appellant to Police Station. At the Police Station, the appellant was interrogated by No. J 1557 DC Bakari (PW6) where he denied the allegations. PW6 also visited the

scene of crime and drew a sketch map of the same which was admitted in the trial court as exhibit PH.

On the other hand, PW1 was taken to the hospital and examined by Dr. Abel Peter Kikula (PW5) who testified that he found PW1's underwear wet with spermatozoa and had bruises out and inside the anus. PW5's conclusion was that, PW1 had been sodomized. He then recorded his findings in the PF3 which was admitted in court as exhibit P1.

In his defence, the appellant denied the allegations and complained that the case against him was framed – up because he was claiming wages from the complainant's father; Laurian Adrian Nguzo (PW3). According to the appellant, when PW3 refused to pay his wages for selling chips for him, he stole TZS 150,000.00 from his business. He added that, upon his arrest for theft, he was instead accused of sodomy. He denied to have been arrested at SUA Farm but was found at his Mafiga home.

At the conclusion of the trial, the appellant was convicted and sentenced as indicated above. The first appellate court concurred with the trial court that the case against the appellant had been proved beyond reasonable doubt. It accordingly dismissed his appeal and hence this second appeal.

In his memorandum of appeal before this Court, the appellant advanced six grounds of appeal which raise four areas of complaint which we have paraphrased as follows. **One;** that the prosecution evidence did not comply with the mandatory provision of the Criminal Procedure Act [CAP 20 R.E. 2002]. **Two;** that, PW1, PW2, PW3 and PW4 were not led to identify the appellant during the trial. **Three;** that the PF3 was improperly admitted in evidence. **Four;** that the prosecution case was not proved beyond reasonable doubt against the appellant.

At the hearing of the appeal, the appellant appeared through video link from prison, unrepresented. On the other hand, the respondent Republic was represented by Ms. Joyce Andrew Nyumayo, learned State Attorney assisted by Ms. Rachel Balilemwa, also learned State Attorney.

When the appellant was called upon to argue his appeal, he opted for the State Attorney to begin her address and reserved his rejoinder, if need could arise.

On her part, Ms. Nyumayo made her stance not supporting the appeal. She also argued that the first and second grounds of appeal are new grounds which were not raised before the first appellate court. She thus urged us not to consider them. To support her contention, Ms.

Nyumayo cited the case of **George Maili Kemboge v. R,** Criminal Appeal No. 327 of 2013 (unreported).

Ms. Nyumayo conceded to the third ground of appeal that the PF3 (exhibit P1) was improperly admitted in evidence because its contents were not read over after it was cleared for admission. To fortify her position, she referred us to our earlier decision in **Saganda Saganda Kasanzu v. R**, Criminal Appeal No. 53 of 2019 (unreported). She thus urged us to expunge the PF3 from the record of appeal. However, even after expunging the said PF3, she argued that the remaining evidence is adequate to sustain the appellant's conviction.

As regards the fourth ground of appeal, Ms. Nyumayo submitted that the prosecution witnesses proved its case beyond reasonable doubt through PW1 as the victim of the offence and supported by PW2 who was an eye witness. She added that, PW5 proved that PW1 was sexually assaulted as he found bruises and semen in his anus.

Upon being probed, the learned State Attorney argued that although there was no evidence to prove the age of the victim, the prosecutor had laid foundation that PW1 was of tender age and that is why a *voire dire* examination was conducted. Ms. Nyumayo submitted further that because the victim was below ten years, a sentence of thirty years meted out against the appellant was illegal. She said, upon

conviction of unnatural offence committed on the victim aged below ten years, the appropriate sentence would have been life imprisonment. She thus urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E 2019] (the AJA) to quash and set aside the sentence of thirty years imprisonment and substitute it with life imprisonment.

Before the State Attorney wound up her submissions, the Court asked her to address it on whether the trial court considered the appellant's defence. In response, the State Attorney submitted that the trial court as well as the High Court did not consider the defence evidence. However, she offered no assistance as to the consequences of that omission.

In his rejoinder, the appellant stood firm on his grounds of appeal and denied to have committed the offence. He insisted that the case was framed-up by PW3 when he was claiming for his rights. As to the anomaly in the sentence, the appellant submitted that he was ready to serve any punishment should his conviction be upheld.

We have considered the grounds of appeal and the submissions for and against the appeal. The issue to be decided here is whether the appeal has merit. However, we find it convenient to begin with the issue

we raised *suo moto* in relation to the failure to consider the defence evidence.

The law is settled that, failure to consider the defence evidence is a fatal irregularity which vitiates the conviction. This has been the position of the Court in various decisions including, **Hussein Idd and Another v. R** [1986] T.L.R 166, **Jonas Bulai v. R,** Criminal Appeal No. 49 of 2006, **Stephen Silomon Mollel v. R,** Criminal Appeal No. 248 of 2016, **Ally Patrick Sanga v. R,** Criminal Appeal No. 341 of 2017 and **John Mghandi @ Ndovo v. R,** Criminal Appeal No. 352 of 2018 (all unreported).

In the case of **Hussein Idd and Another** (supra), 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".*

Likewise, in **Jonas Bulai** (supra), the Court observed that:

> *"It is settled law that failure to consider the evidence of the defence is fatal to the trial or proceedings: see for example, **James Bulow & Others v. Republic** [1981] T.L.R 283. It is an imperative duty of a trial judge to evaluate the*

entire evidence as a whole before reaching at a verdict of guilty or not guilty. In this particular case the learned trial judge, unfortunately, did not do so". (At page 10).

In the case at hand, the trial magistrate summarized the evidence from both sides but only analysed the evidence from the prosecution side and found it to be sufficient to convict the appellant. That court did not consider the appellant's defence which was to the effect that the case was framed-up by PW3, the complainant's father after the appellant stole TZS 150,000.00 because he refused to pay his wages. The appellant's contention was that he was arrested at his home area in Mafiga and not at SUA Farm.

The High Court also fell into the same trap when it failed to say anything concerning the defence evidence. Underscoring the importance of a first appellate court to re-evaluate the evidence as a whole, this Court in the case of **Ally Patrick Sanga** (supra) stated thus:

> *"It is therefore our conviction that the first appellate court's failure to re-evaluate the evidence of the defence constituted an error of law and by affirming a conviction based on evidence which had not been duly reviewed was also another error which renders the conviction unsafe".*

We find it apt to add that failure to consider the defence evidence before arriving at the decision amounts to a breach of the rules of natural justice of the right to be heard before a verdict is given. The said right is enshrined under Article of 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977 as amended. See also **Stephen Silomon Mollel** (supra).

Being satisfied that the appellant's defence evidence was not considered before he was convicted, we are constrained to invoke the Court's revisional powers under section 4 (2) of the AJA and nullify the judgment of the trial court and the High Court, quash the conviction and set aside the sentence.

Ordinarily, having nullified the judgments of the two courts below, quashed the conviction and set aside the sentence, we could have ordered the release of the appellant from prison in the light of the authorities referred to shortly. However, having considered the serious nature of the offence involved and the period the appellant has been in custody, we have asked ourselves whether it will be proper to order a retrial. We have taken that position considering the settled law in relation to ordering a retrial. A retrial would only be ordered if it is in the best interest of justice. In the famous case of **Fatehali Manji v. R** [1966] E.A 343 it was held thus;

"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

[See also our decisions in **Shaban Said v. R,** Criminal Appeal No. 267 of 2009 and **Kanisilo Lutenganija v. R,** Criminal Appeal No. 25 of 2010 and **Mussa Abdallah Mwiba and Two Others v. R,** Criminal Appeal No. 200 Of 2016 (all unreported)].

Now, the question which follows is whether an order of retrial in this case will be in the best interest of justice. We have considered this case and we are settled that an order for a retrial will only help the prosecution to fill in gaps which will not be in the interest of justice. This is so because the prosecution case is riddled with several shortcomings some of which are explained hereinbelow.

One, there was no proof of the age of the victim which is an essential factor in sentencing. Section 154 (2) of the Penal Code as amended by the Law of the Child Act [CAP 13 R.E. 2019] provides that:

"(2) Where the offence under subsection (1) of this section is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment".

Thus, if the age of the victim is the determinant factor in sentencing, the same ought to be proved by evidence. In the instant appeal, the age of the victim was not mentioned in the charge and neither proved in evidence by PW1, PW3 or any other witness.

Two, upon evaluation of PW2's evidence, we have found that his evidence creates doubt. For easy reference we let it speak for itself:

"I remember 23/5/2015 I was at the bus stand, there were many at that place later we saw the accused person coming with the victim....... Later they entered on those farms but after four minutes they came out. I had some doubt, so we decided to enter inside those farms it was when 1we met the accused sodomizing the victim..."

It is clear from the excerpt above that, if the victim and the appellant entered SUA Farm and came out after four minutes, it is not indicated when again they went back in the farm and were found by PW2 in the sexual act. Unfortunately, PW2 was not clear on that and there was no any among the many people who were said to be at the bus stand summoned to adduce evidence to support his version. For

these shortcomings, we find that an order of retrial will not be the best option. In the circumstances, we do not see the need to consider the appellant's grounds of appeal.

For the above reasons, we order the release of the appellant from prison forthwith unless his continued incarceration is in relation to any other lawful cause.

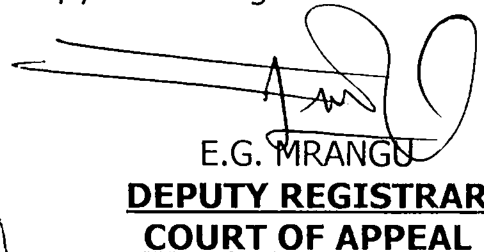
DATED at **DAR ES SALAAM** this 27th day of July, 2020.

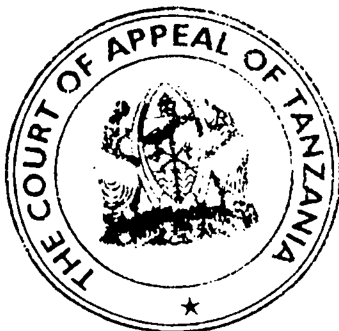
S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Judgment delivered this 28th day of July, 2020 in the presence of appellant in person-linked via video conference and Mr. Benson Mwaitenda learned State Attorney for respondent/Republic, is hereby certified as a true copy of the original.





E.G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL