IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 391 OF 2019

KAIMU SAID..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mtwara)

(Dyansobera, J.)

Dated the 19th day of August, 2019
in
Criminal Appeal No. 09 of 2019

JUDGMENT OF THE COURT

28th May & 7th June, 2021

LILA, J.A.:

The appellant, Kaimu Said, was charged and convicted of the offence of rape. While hiding the identity of the victim by referring to her as ZS or simply the victim or PW2, the charge was couched thus:-

" ***OFFENCE SECTION AND LAW***

RAPE C/S 130(1)(2) and 131(1) of the Penal Code Cap. 16 of the Revised Law, 2002.

PARTICULARS OF AN OFFENCE

That KAIMU S/O SAID charged on 4th day of December, 2017 at or about 20:00hrs at Ngalole Village within Masasi District in Mtwara Region did

have carnal knowledge with ZS woman of 55 yrs without her consent."

To prove that charge, the prosecution paraded six (6) witnesses and tendered one documentary exhibit, a medical examination report (PF3), which was admitted as exhibit PE1. The appellant stood himself as the only defence witness.

The gist of the prosecution evidence was that; ZS and one Misitu Said (PW3) were heading to their home place known as Ndebwede at around 21:00hrs. On the way they saw two young men running after them. One of the young men got hold of PW3 whereas the other one held and pulled ZS into the bush and had sex with her. However, the record is silent on whether or not she consented and how that young man disappeared. Later, the one who held PW3 took his turn to have sex with ZS. ZS claimed that she did not consent to have sex with the later young man consequent upon which, in resisting the forced sex, she firmly got hold of him while screaming for help. Having witnessed the ordeal that had faced ZS, PW3 ran away calling for help too. Among those who responded to the call was Phintan Albeno Daimon (PW4). According to him, while at his home he heard a voice of a person shouting *"jamani eti njooni tumuokoe mama huyu"* literally meaning "come and rescue this woman". Together with

other neighbours, they traced where the voice came from and alas they found an old woman and a young man holding each other tightly but also naked. The young man turned out to be the appellant. The two were taken to the office of the village chairman one Noel Hamisi Millanzi (PW5) who happened not to be there. He was called and he found ZS helplessly lying on the floor in his office and, on asking her, she said she was raped by a person who was also in that office, that is the appellant. But, the appellant denied committing the offence. ZS was medically examined on 4/12/2017 at Mkomaindo Hospital by Hans Fred Kabt Minja (PW1), a Medical Doctor, who observed bruises on her vagina and was of the opinion that she was raped. He posted his observation in a PF3 which he tendered and was admitted as exhibit PE1. WP 10276 DC Levina (PW6) investigated the case and on completion, she charged the appellant.

The appellant flatly denied the accusation claiming that what was told of him by the prosecution witnesses was nothing but a concocted story against him. He said he decided to have a rest at his sister's place at Mdebwede following the bicycle he used to travel from Chimbo to Mbonde experiencing a mechanical defect thereat Mdebwede. That, nearby his

sister's house there was a ceremony whereat he met PW3 who he knew to be from Chimbo. Thereafter he was arrested.

Convinced that the prosecution had proved the charge, the trial court convicted and sentenced the appellant to serve thirty (30) years imprisonment. The appellant was aggrieved by both the conviction and sentence. He sought to challenge the trial court's decision in the High Court through a petition of appeal premised on not only a relatively long but also detailed twelve (12) grounds of grievances. He was unsuccessful. The High Court saw no good cause to fault the decision of the trial court hence dismissed the appeal.

Still believing that he is innocent and undeservingly incarcerated in prison, the appellant has preferred the present appeal. He initially lodged in Court a four point memorandum of appeal and added, with leave of the Court, one ground at the hearing of the appeal. They substantially bring forth five issues for our deliberations; **one**, exhibit PE1 was un-procedurally admitted into evidence because PW1 did not identify it before tendering it and also that it was not read out after admission. Hence the evidence by PW1 did not find support from it, **two**, the charge sheet was incurably defective, **three**, the trial court judgment did not comply with the

requirements of the provisions of section 312(2) of the Criminal Procedure Act [Cap. 20 R.E 2002] (the CPA), **four**, the defence evidence was not considered during judgment and; **five**, PW1, PW2, PW3, PW5 and PW6 affirmed or did swear themselves while PW4 did not completely take oath or affirm.

The appellant appeared in person and unrepresented before us at the hearing of this appeal and he adopted his grounds of appeal and urged the Court to consider them and allow the appeal. Mr. Kauli George Makasi, learned Senior State Attorney, appeared on behalf of the respondent, Republic.

Responding to the appellant's complaints, Mr. Makasi, initially, resisted the appeal. But when time came to submit in respect of ground four (4) of appeal which faults the learned trial magistrate and the first appellate judge for not considering the defence evidence, he retreated and supported the appeal. In justifying his change of position, he referred the Court to pages 21 and 23 of the record of appeal wherein, he argued, the learned trial magistrate simply summarized the appellant's defence evidence without analyzing it in relation with the prosecution evidence and come out with a finding whether or not it was able to shake the

prosecution evidence. For not doing so, he submitted, the appellant did not receive a fair trial. Without mincing words, he made it clear that the infraction vitiated the trial and he was inclined to have the appeal allowed.

The position taken by Mr. Makasi, preempted the appellant hence, in his rejoinder submission, he just reiterated his earlier prayer that his appeal be allowed.

After our serious examination of the judgments of both courts below, we, on our part, are of the view that this appeal can sufficiently be disposed of within a narrow circumference argued by the learned Senior State Attorney. That renders narration of the arguments of the learned Senior State Attorney in respect of other grounds of appeal of no relevance.

Here, we are guided by the stipulations of sections 231 and 235 of the CPA. While the former provision provides for the right of an accused person, upon a case to answer being established by the prosecution, to enter defence, the latter provision enjoins the trial court to compose a judgment after hearing both the complainant and the accused and their witnesses and either convict and pass a sentence or acquit and make an order dismissing the charge. For clarity, section 235(1) provides:-

"The court, having heard both the complainant and the accused and their witnesses, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."

From this provision of the law, it is clear to us that in composing the judgment (decision) a trial magistrate is obligated to consider the evidence of both sides as presented to it so as to arrive at a finding of guilty or not. The analysis and evaluation of the evidence as well as the findings should be apparent in the record.

In the event a trial court fails to perform its duty under the law to consider the defence evidence, a High Court, being a first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact. There is a litany of this Court's decisions consistently emphasizing on that, but just to mention one on which our hands and eyes could easily lay on and in which we articulated that stance is in **Siza Patrice vs. Republic**, Criminal Appeal No. 19 of 2010 (unreported) where we categorically stated that:-

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the

first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary".

Guided by the above legal position, the issue before us in the instant appeal is whether the trial court duly considered the defence evidence and whether on its failure so to do, the High Court performed its above stated legal duty.

In the first place, we agree with the Mr. Makasi that neither of the courts below considered the defence evidence. To start with, the record of appeal bears out at pages 21 and 23 as to how the defence evidence was dealt with by the trial court in its judgment. Beginning with page 21 of the record, the learned trial magistrate summed up the defence evidence thus:-

"That the accused person in defending his case he had no other witness no exhibit. That the accused person, Kaimu said testified as DW1 and stated that, he don't know the whole story. He was coming from Chimbo to Mbonde, when he reached at Mdebwede, he decided to rest as his bicycle had mechanical problem, at his uncles place nearby there was a ceremony where he met Misitu whom he knows from Chimbo then Misitu told him to go to

various places then he found himself arrested, and that he was sane and he knew where he were (sic) going but he had drunk wanzuki and that the accused closed his case."

After he had summed up the defence evidence, at page 23 of the record, the learned trial magistrate, stated:-

"That the accused person herein denied to have committed the offence charged with and raised a defence that the whole story against him is not true at all. Coming to the prosecution side through PW2 testified that during that day she was going back home and while they walked on the road two young men came and raided them, the man who was with the complainant managed to run but the complainant were (sic) forced to the bush and raped by the accused person herein thereafter people from the village went to the scene of crime and found the complainant and the accused naked they took them to the chairperson of Ngalole Village..."

Thereafter, the learned trial magistrate cited section 62(1)(a) of the Evidence Act, Cap. 6 R. E. 2002 (now R.E. 2019) which defines what entails direct evidence and came up with the following conclusion:-

"That said, in the matter at hand there is direct evidence which shows the accused person raped the complainant as PW4 testified that he with his fellow villagers were going at the scene of the crime and they found the complainant and the accused both naked after the completion of the offence..."

From the above extracts, it is clear that the learned trial magistrate was not minded that even the appellant's evidence was a direct one. Nothing was said of the quality of the defence evidence and whether he dismissed the same and the reasons thereof. In brief, the prosecution evidence was not weighed against that of the appellant. He ought to have done so mindful of the legal position that the onus to prove the charge beyond reasonable doubt lied on the prosecution and not on the appellant who was only required to lead evidence that would cast doubt on the prosecution evidence. As we shall demonstrate later in this judgment, this is what is legally said to be an objective analysis or evaluation of the evidence.

The first appellate court, it is apparent, started with the appreciation of this Court's pronouncement in the case of **Goodluck Kyando vs. R** [2006] T.L.R 363 that every witness is entitled to credence unless there are cogent reasons for not believing the witness. In addition it made reference to the

case of **Ibrahim Ahmed vs. Halima Guleti** [1968] HCD n. 76 which observed that determination of credibility based on demeanour is the exclusive domain of the trial court unless it is shown that that court had misinterpreted the evidence. Guided by the above principles, he said:-

> *"A close scrutiny of the evidence and the trial court's decision does not warrant this court to interfere with the trial court's finding of fact.*
>
> *As rightly pointed out by the learned State Attorney the prosecution evidence was cogent and compelling.* ***The appellant was caught in flagrante delicto by PW3 and PW4 with the victim stark naked. All these witnesses maintained that the appellant carnally knew the victim. The appellant did not attempt to impeach this strong evidence against him.*** *The identification was watertight and the possibility of mistaken identity was rules out."* (Emphasis added).

It is plain that the trial court's finding was arrived at without subjecting the evidence by both sides to an objective analysis and evaluation. To be particular, there is nowhere in the judgment the appellant's defence was analyzed and evaluated *viz a avis* that of the prosecution side. Instead, it seems clear to us that his evidence was simply

and arbitrarily brushed off that it was unable to impeach the prosecution evidence. Without an analysis we find ourselves unable to agree that the finding arrived at was evidence-based. The duty of a first appellate court to evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just finding has been an area of repeated insistence by the Court. One such instance is in the case of **Charles Thys vs. Hermanus P. Steyn,** Civil Appeal No. 45 of 2007 wherein we cited the case of **Damson Ndaweka vs. Ally Saidi Mtera,** Civil Appeal No. 5 of 1999 (unreported) in which we observed that:-

> *"...On the other hand, as regards the first appellate High Court, the extract above reveals a different picture. From it we are respectively in agreement with Mr. D'Souza, that the learned judge on first appeal scantly addressed, analyzed and weighed the evidence for both sides and tested the finding of the trial court against such evidence. As a matter of fact, the learned judge hardly analyzed the evidence of Michael Kifai Msaki (PW4), a village chairman... the High Court, as the first appellate court was bound to analyse the evidence for both sides with a view to satisfy itself that the finding of the trial court was justified on the evidence. As happened in this case, we think as correctly*

submitted by Mr. D'Souza, it was an error on the part of the learned judge on first appeal in not considering and weighing the evidence for both sides."

Despite the above pronouncement being made in a civil case, we think the principle is equally applicable in criminal cases. As a way of reminding the courts below on what to do with the evidence at the conclusion of giving evidence, the Court took pain to expound the difference between summarizing the evidence and evaluation of the evidence in our decision in the case of **Leonard Mwanashoka vs. Republic**, Criminal appeal No. 226 of 2014 (unreported) where, while discussing the appellant's complaint that his defence was not considered and after reciting an extract from learned judge's judgment showing how he dealt with the defence evidence, we stated that:-

"We must quickly and respectively point out here that that is where the learned first appellate judge got wrong. We accept that the learned trial Resident Magistrate "summarized the defence evidence", much as he/she did summarize the prosecution evidence. But that was not the complaint of the appellant. ***It is one thing to summarize the evidence for both sides***

separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis. *The complaint of the appellant was that in the evaluation of the evidence, his defence case was not considered at all...."* (Emphasis added).

The Court then went further to expound the obtaining consequences in these unambiguous words:-

"...The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriage of justice. It is unfortunate that the first appellate court judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally

established jurisprudence that failure to consider defence is fatal and usually vitiates the conviction..."

Admittedly, the record of appeal, in the instant case, does not reflect compliance with above requirements. Based on the above cited cases discussing situations akin to the one obtaining in the present case, we entirely agree with the learned Senior State Attorney that both courts below did not pay homage to the settled law that a trial magistrate and a first appellate judge are imperatively required to consider and evaluate the entire evidence so as to arrive at a balanced conclusion. An omission to do so is a serious misdirection and a clear indication that there was no fair trial. In such situations a trial is rendered a nullity. Apart from the above cited case, that is the stance we also took in **Hussein Idd and Another vs. Republic**, [1986] TLR 166 where the Court said:-

"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."

The trial was therefore a nullity. And, as this finding conclusively disposes of the appeal, we see no compelling reasons to consider the other grounds of appeal.

In the event, we allow the appeal, quash the conviction and set aside the sentence. However, bearing in mind the peculiar circumstances of this case, we find it to be a fit case to order, as we hereby do, a trial *de novo* before another magistrate of competent jurisdiction. We accordingly direct the trial court's record be remitted back for the trial to be recommenced which we also direct it should be expedited.

DATED at **MTWARA** this 4th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 7th day of June, 2021 in the presence of the Appellant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL