THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 171/2019

(From the Resident Magistrate's Court of Mbeya at Mbeya, Criminal Case No. 175/2017)

ANORD ADAM ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 12.05.2020

Date of Judgment: 20/5/2020

Before: *Mambi, J.*

This Judgment emanates from an appeal filed by one **ANORD ADAM** (the appellant). In the Resident Magistrate's Court of Mbeya at Mbeya, the appellant was charged with the offence of rape c/s 130 (2) (e) and 131(1) of the Penal Code, Cap 16 [R.E.2002]. It was alleged

that on the 21st day of September 2017 at Mshewe area within the City of Mbeya, Mbeya Region the accused/appelant did have canal knowledge to one woman aged 45 years old. The Trial Court found the accused guilty as charged. He was convicted and sentenced to thirty imprisonment.

Aggrieved, the accused appealed to this court challenging the decision of the trial Resident Magistrate's Court. In his appeal the appellant preferred five grounds of appeal as follows;

1. That the trial magistrate faulted both in point of law and fact when he convicted an appellant by relying on the hearsay evidence
2. That the trial magistrate erred both in point of law and facts when he convicted the appellant basing on the absence of strong evidence with doubts
3. That the trial magistrate erred both in point of law and facts when he convicted appellant by basing on contradictory evidence.
4. That the trial magistrate erred both in point of law and facts when he convicted an appellant by believing that he confessed to commit an offence while no any extra judicial statement or any other exhibit that was tendered before the court to prove such confession.
5. That the trial magistrate erred both in point of law and facts when he convicted the appellant without making critical analysis and evaluation of defence evidence

6. That the trial magistrate erred both in point of law and facts when he convicted an appellant by believing mere words that the victim failed to raise an alarm because she was threatened by the appellant but no any weapon or tools were tendered to prove if the appellant used force.
7. That the trial magistrate erred both in point of law and facts when he convicted an appellant without considering circumstantial evidence.

Due to pandemic disease (Covid-19) and in an effort to reduce costs and speedy dispensation of justice the matter was determined online through video conference. All parties were connected electronically with virtual court using computer technologies at their offices and prisons. During hearing, the appellant appeared unrepresented while the Republic was represented by Mr. Mgaya, the learned State Attorney.

The appellant adopted his grounds of appeal and had nothing to add.

Responding to the grounds of appeal, the learned State Attorney Mr.Mgaya, for the Republic, submitted that, they don't support all grounds of appeal. He argued that the evidence by the victim was clear that appellant went to the scene at midnight and raped the victim without her consent. The learned State Attorney State Attorney averred that since the victim knew the appellant as her neighbour it was easy for her to identify him. He argued that in rape cases the best evidence comes from the victim. He thus referred the decision of

the court in Selman ***Makumba vs. Republic.*** He argued that the trial court proceeding is clear at page 3 on the evidence of prosecution.

In his rejoinder, the appellant briefly argued that he wonder why the victim reported to the doctor after three days. He argued that the case was fabricated due to land conflict.

Having summarised submission from both the defence and prosecution, I now revert to the appeal at hand. I will first start with the issue as to whether the trial magistrate considered, analysed and evaluated the evidence of both parties. The appeal in his grounds of appeal has complained that the trial court did consider his evidence.Indeed, my perusal from the records have also revealed that the trial court neither considered the evidence of the appellant nor evaluated the evidence in its entirety. Indeed the judgment of the trial court at pages 3,4,5,6 and 7 shows that the Magistrate mainly focused on summarizing and narrating the evidence of the prosecution and citing cases without proper analysis and evaluation. On top of that the judgment at page 8 show that the Magistrate just summarized the evidence of the appellant without analyzing and considering his evidence. This is bad in law is as it can lead to injustice to the other party that is the appellant in our case. Such omission of failure to consider the defence had in many occasion been found fatal by the court of appeal as seen in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania observed and held that:

"It was a serious misdirection on the part of the trial Judge ***to deal with the prosecution evidence on it's own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

Reference can also be made to the decision of the Court f Appeal in ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015,*** the court at Page 16 which highlighted on the importance of the court to consider the defence evidence**.** It is also imperative to refer the decision of the court that in ***Leonard Mwanashoka Criminal Appeal No. 226 of 2014 (unreported),*** cited in ***YASINI S/O MWAKAPALA Versus THE REPUBLIC Criminal Appeal No. 13 of 2012*** where the Court warned that considering the defence was not about summarising it because:

"It is one thing to summarise 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. 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 Court in Leonard Mwanashoka (supra) went on by holding that:

"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. ***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 miscarriages of justice.* ***It is unfortunate that the first appellate 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 the defence is fatal and usually vitiates the conviction."* [Emphasis added]

It is trait law that very judgment must be written and must contain the **point or points for determination, the decision thereon and the reasons for the decision,** having taken into consideration the evidence of both parties. It doesn't matter whether defence evidence was weak or not but such defence must be considered in the judgment. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. See ***Jeremiah Shemweta versus Republic [1985] TLR 228***

It is trait law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See ***Christina s/o Kale and Rwekaza s/o Benard vs Republic, TLR [1992***] at p.302 and ***MarwaWangitiMwita and another vs Republic 2002 TLR Page 39.***

Looking at the other grounds of appeal, in my view since my findings has revealed that the trial court did not analyze and evaluated evidence of both parties, which in my view renders the judgment fatally defective. I don't see any need of discussing other grounds of appeal. It is a settled law that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case.

I am of the settled view that there is a doubt if the guilt of the appellant was really established and proved beyond reasonable doubt given the omissions I have observed. It is clear from the above observation that the judgment by the trail magistrate was not proper for non-compliance with the law. This is an obvious omission and irregularity that ought to have been observed by the trail Magistrate. Taking into account that the offence involved rape, the trial magistrate was required to fully scrutinize, analyses and evaluate the evidence to satisfy himself that all elements of such offence were made and there was actually rape made by the accused. It also on the records that the appellant was alleged to have invaded the woman at night. The evidence does not show if the conditions were favourable for proper identification taking into account that victim just mentioned the appellant by one name. I also wish to borrow a leaf from other common law countries. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) Pg 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

There is no doubt that this is a case where a determination was wholly depended on the evidence on the identity of the accused persons at night. In this regard the legal requirement of proving the charges against the accused beyond reasonable doubt must be established. The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a

duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case.

Worth also considering the decision of the court in **Raymond Francis v R [1994] TLR 100**. The court in this case at page 103 stated that:-

> *"...It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance."*

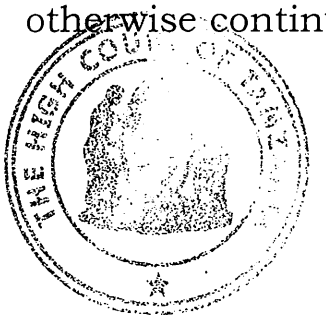
Having established that in this case the trial magistrate has failed to comply with the requirements of judgment writing that renders the judgment incompetent, the question is, has such omission or irregularity occasioned into injustice to the accused appellants?. In this regard, I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2002] and see what would be the proper order this court can make in the interest of justice. It is trait law that before any appellate court makes an order for retrial or trial de novo, the court must find out as to whether the original trial order was illegal or defective and whether making such order (retrial or trial de novo) and will create more injustice to the accused person. I wish to refer the decision of court in ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013.*** The Court of Appeal of East Africa restated the principles upon which court should order retrial. The court observed that:-

> *"...in general a retrial will be ordered only when 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 the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

I have no reason to depart from the above observation by the court rather than subscribing it basing on my own findings and observation. It should be noted that an order for retrial should only be made where the interests of justice require. Since my analysis of evidence and perusal of trial court records have indicated that the prosecution failed to prove beyond reasonable doubt the charges against the appellants, I don't see any rationale for making any order for retrial or *trial de novo* since doing so will create more likelihood of causing an injustice to the appellant.

In the circumstances, I find it more prudent to quash conviction and set aside any sentence made by the trail court resulting in the immediate release of the appellant and the appeal is thus allowed. I order that the appellant be released from prison unless he is otherwise continuously held for some other lawful cause.



DR. A.J. MAMBI

JUDGE

20/5/2020

Judgment delivered in presence of appellant and the prosecution this Day of 20th of May 2020

DR. A.J. MAMBI

JUDGE

20/5/2020

Right of Appeal explained.

DR. A.J. MAMBI

JUDGE

20/5/2020