IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 137 OF 2019

(Appeal from the decision of the District Court of Chunya District at Chunya in Criminal Case No. 247 of 2017)

OSWARD S/O GODFREY @ MUSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 24/03/2020
Date of Judgement: 04/05/2020

MONGELLA, J.

The appellant was charged and convicted on the offence of rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code Cap 16 R.E. 2002. In the trial court it was alleged that on 20th December 2017 at Legezamwendo Hamlet in Chokaa village within Chunya District and Mbeya Region, the appellant did have carnal knowledge of one N daughter of S (being initials of the victim's names) a woman aged 27 years without her consent. He was ultimately sentenced to thirty years imprisonment and eight strokes of the cane. Disgruntled by this decision he has appealed to this Court under the following grounds:

1. *The trial court erred in law and fact for relying and convicting the appellant while the charge was not proved beyond reasonable doubt.*

2. *The trial court erred in law and fact for not allowing the witness, PW4, to read the contents of exhibit "PE1" contrary to law.*

3. *That the trial court erred in law and fact for failure to evaluate the evidence of the defense side and to consider the defense of alibi by the accused person contrary to law.*

4. *That the trial court erred in law and fact when it failed to rule out that the appellant has a case to answer (a prima facie case) contrary to the requirement of the law.*

The appellant enjoyed the legal services of Ms. Joyce Kasebwa, learned advocate and the respondent was represented by Ms. Sara Anesius, learned State Attorney. The appeal was argued orally by the learned counsels. Ms. Kasebwa abandoned the fourth ground and argued on the first three grounds.

Arguing on the 1st ground of appeal, Ms. Kasebwa submitted that the offence was not proved beyond reasonable doubt. She argued so referring the Court to page 6 of the typed proceedings whereby it appears that on the first day of hearing, the accused was not reminded of his charge so that he knows the offence and prepare his defence. She submitted that the proceeding shows that the trial court ordered the

charge to be reminded to the accused, whereby he pleaded not guilty and then PW1 started adducing evidence. She referred the Court to section 228 (1) of the Criminal Procedure Act which requires the court to state the substance of the charge and the accused to plea in accordance with the law. She contended that the record shows that there is nowhere where the substance of the charge was read for the accused to plea. She cited the case of ***Jafari Ramadhani v. Republic***, Criminal Appeal No. 311 of 2017 and that of ***Naoche Olembile v. Republic*** [1993] TLR 253 and argued that in both cases the Court of Appeal (CAT) ruled that the defect vitiates all the proceeding.

Responding to Ms. Kasebwa's arguments, Ms. Anesius argued that the proceeding as seen at page 6 shows that the trial court ordered the accused to be reminded of the charge and it recorded the plea of the accused. She said that the accused signed and the court entered a plea of not guilty to the charge. She thus disputed that the accused did not understand the charge. She added that the charge was not amended and thus the appellant's counsel's arguments are disputed. She distinguished the case of ***Jafari Ramadhani*** (supra) arguing that in this case, the records did not show at all if the charge was read but it was only the plea that was recorded unlike in the case at hand where the charge was read over.

On the second ground, Ms. Kasebwa argued that the offence was not proved because exhibit "PE1" which was the PF3 was admitted but the contents were not read as seen at page 14 of the proceeding. She argued that the non-reading of the contents of exhibit "PE1" is a legal

flaw as it denies the other party the opportunity of knowing the contents therein. She cited the case of ***Erneo Kidilo & Another v. The Republic***, Criminal Appeal No. 206 of 2017 (CAT at Iringa, unreported) in which it was held that it is mandatory that the contents be read to enable the accused to understand his charge and prepare defense.

Responding to the 2nd ground, Ms. Anesius agreed that the PF3 was not read over after being admitted. However, she argued that the same did not prejudice the rights of the appellant. She distinguished the case of ***Erneo Kidilo*** (supra) cited by Ms. Kasebwa and argued that the circumstances in this case are different from the case at hand in the sense that in the case at hand, PW4, a medical doctor, adduced evidence and the appellant never objected the evidence adduced. She argued that the evidence of PW4 was confined to the PF3, exhibit PE1, and was sufficient to make the accused understand the contents of the PF3. She cited the case of ***Chrizant John v. Republic***, Criminal Appeal No. 313 of 2015 in which the CAT stated that if the witness gave evidence but the contents of the document were not read, the same is not fatal.

On the third ground, Ms. Kasebwa submitted that the trial court failed to evaluate and analyse the appellant's evidence and thus failed to reach a just decision. She referred the Court to page 5 of the trial court's judgment and argued that the trial Magistrate only narrated what the appellant stated without analysing it. She argued further that the accused adduced the defence of alibi but the same was not considered. She contended that though the accused/appellant never filed notice for the defence of alibi, the court was not barred from considering the same. She

cited the case of ***Hussein Idd & Another v. Republic*** [1986] TLR 166 and that of ***Sadiq Kitime v. Republic***, Criminal Appeal No. 483 of 2016 in which the CAT ruled that failure to consider defence case is a serious defect. Basing on these cases, she argued that the trial court did not do justice to the appellant by not considering his defence.

Responding to this ground, Ms. Anesius conceded that the evidence of the defence was not analysed. However, she argued that this Court being the first appellate court can analyse the evidence and proceed to make decision. In support of her position she cited the case of ***Prince Charles Junior v. Republic***, Criminal Appeal No. 250 of 2014 in which the CAT directed that the first appellate court can treat the evidence as fresh evidence and give weight to it.

I have considered the rival arguments by both parties and proceed to observed as follows:

Regarding the first ground, I have gone through the proceedings of the case which at page 6 shows that the trial court Magistrate ordered for the charge to be reminded to the accused. He specifically wrote: "*Let the accused be reminded of his charge.*" In my considered view this was his order and not what exactly transpired in court on reading the charge. The proceedings do not show if the charge was really read to the accused or rather if the order of the court to that effect was complied with and at this appellate stage I find it unsafe to assume that the charge might have been read in accordance with the law in the absence of the same being reflected in the proceeding. Ms. Anesius distinguished the case of ***Jafarri***

Ramadhani (supra) on ground that in that case the trial court only recorded the plea. I however, find the case being relevant to the matter at hand because what is insisted by the CAT in ***Jaffari Ramadhani*** (supra) is the recording of the reading of the charge and the question by the court requiring him to plead thereto. Thus instead of the trial magistrate recording that "*let the accused be reminded of his charge*" he should have recorded something like: "*the charge is read over to the accused person in the language known to him (Kiswahili/English etc.) and he is asked to plead thereto.*" I thus find the ground having merit and uphold it.

On the second ground: it has been a rule that where any document is tendered and admitted in court as exhibit it has to be read over to afford the accused a chance to know its contents and an omission thereof may attract the document being expunged. (See: ***Lack Kilingani v. Republic***, Criminal Appeal No. 402 of 2015 (unreported); ***Sumni Amma Awenda v. Republic***, Criminal Appeal No. 393 of 2013 just to mention a few). The Court of Appeal however, in ***Chrizant John v. Republic*** (supra) as argued by Ms. Anesius had a slight change of position given the circumstances of the case. The CAT ruled that if the evidence of the witness capitalizes on the exhibit then the accused is not prejudiced. Specifically the Court held:

> *"In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayungi, the doctor who conducted deceased's autopsy, and because the evidence of that witness capitalized on exhibit P1 and he explained in detail the deceased's cause of death, also as his advocate was given chance to cross-examine her, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit P1."*

Ms. Kasebwa in her rejoinder argued that the case of ***Chrizant John*** (supra) is outdated as it was decided in February 2016. She urged the Court to be guided by the case of ***Erneo Kidilo*** (supra) which she cited because it was a current decision being decided in August 2019. With all due respect I find her argument so incorrect. The rules of precedent have it that decisions from the highest court of the land remain authoritative until when they are expressly overruled. Besides, I have read as well the case of ***Erneo Kidilo*** (supra) and in my opinion I find it distinguishable to the case at hand. In this case the CAT took the position it had in ***Lack Kilingani*** (supra) on the importance of reading the contents of an exhibit by considering the contents or nature of the document. The Court saw that the contents of the exhibits affected the ingredients of the counts against the appellants and it was not possible for the appellants to have known the contents in detail. The Court stated:

> *"We do not agree with the learned state attorney for the respondent for suggesting that the appellants must be taken to have known the facts contained in exhibits P4 (inventory form), P5 (Trophy valuation certificate) and P6 and P7 (the appellant's confessional statements), which were not read out in court. Contents of these exhibits carry detailed facts which affect ingredients of the counts preferred against these appellants."*

In the case at hand, PW4, the medical doctor gave a testimony that capitalized on exhibit PE1, which was the PF3, as he gave evidence on what he observed after examining the victim. Under the circumstances I find it right to be guided by the principle set in ***Chrizant John*** (supra) because the appellant knew what exactly what was the charge facing

him as the evidence of PW4 capitalized on exhibit PE1 and he got the opportunity to cross examine PW4. I therefore dismiss this ground.

On the third ground, I find that the appellant's main line of defence is that of alibi as he claimed not to be at the village where the incident occurred on that material day. The law under section 194 (4) of the Criminal Procedure Act, Cap 20 R.E. 2002 requires the accused intending to rely on defence of alibi to give prior notice. The provision states:

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

Where the accused does not give the notice as required, section 194 (5) of the same law comes into play whereby it gives room to the accused to furnish the prosecution with the particulars of the alibi at any time before the prosecution case is closed. The section provides:

> *"Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed."*

As argued by Ms. Kasebwa, the appellant never gave any notice nor furnished any particulars. However, under the circumstances, the court may accord no weight to such evidence. This is provided under section 194 (6) where it states:

> *"If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."*

Under the provision the court is thus required to see whether or not, in its discretion, it should accord no weight to the defence of alibi by the appellant. See: ***Kubezya John v. The Republic***, Criminal Appeal No. 488 of 2015 (CAT at Tabora, unreported). I have read the judgment of the trial court and found that from page 7 to 9, the trial court analysed the evidence of both sides. The trial court however, did not treat the appellant's defence in terms of section 194 of the CPA as enumerated above. The learned state attorney basing on the case of ***Prince Charles Junior v. Republic*** (supra) urged this Court as the first appellate court to analyse the appellant's defence if it sees that the trial court did not analyse the evidence as required. In analysing the appellant's defence of alibi it is my position that even though the accused person is not required to prove his innocence, where the defence of alibi is raised, he becomes obliged to demonstrate the same albeit on balance of probabilities. In the case of ***Kubezya John*** (supra) the CAT at page 23 held:

> *"We wish to interject here that we are alive to the position of the law that an accused person is under no legal duty to prove his innocence. But in situations where, like here, the accused person is depending on the defence of alibi, it is his duty to demonstrate his alibi albeit on a balance of probabilities..."*

I have gone through the proceedings in the case at hand, particularly the defence case and found nothing provided by the appellant to support his

defence of alibi. Under the circumstances, whereby no notice was issued prior, I disregard his defence of alibi.

At this juncture whereby the first ground of appeal has been upheld, I find myself asking a question on whether or not it shall be right to order retrial. The position is settled to the effect that a retrial is not to be ordered where there is likelihood of according the prosecution an opportunity to rectify its mistakes. The court thus has to consider the entire evidence. In the case of ***Shabani Madebe v. The Republic***, Criminal Appeal no. 72 of 2002 the CAT quoting the decision in ***Rex v. Vashanjee Liladhar Dossani***, Vol. 12 EACA 150 ruled that:

> *"An order for retrial is the proper order to make when the accused has not had a satisfactory trial."*

The CAT also quoted the case of ***Merali and Others v. Republic*** (1971) HCD no. 145 and ruled that:

> *"It is clear that the original trial was neither illegal nor defective. It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal.*

Quoting the case of ***Ahamed Ali Dharamsi Sumar v. Republic*** (1964) E.A. 481the CAT held:

> *"Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused."*

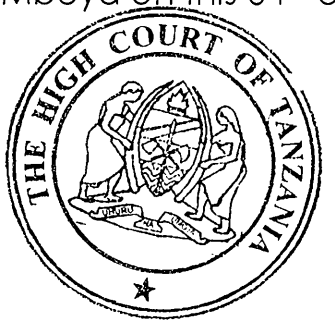
In ***Fatehali Manji v. The Republic*** (1966) E.A. 343 the Court of Appeal for East Africa held that:

> *"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 purposes of enabling the prosecution to fill gaps in its evidence at the first trial...each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

Considering the above settled legal position, the Court therefore has to take into account the interest of justice of both the accused and the victim, the chances of the prosecution filling gaps on insufficiency of evidence at the trial and whether the original trial was defective or not. As the proceeding is doubtful on whether the charge was read to the accused when the hearing started, I find the whole proceeding and judgment to be founded on a defective base. Under the circumstances I order a re-trial of the case in the District court. The prosecution should see to it that the re-trial starts with immediate effect. Meanwhile the accused shall continue to remain in custody.

Order accordingly.

Dated at Mbeya on this 04th day of May 2020



L. M. MONGELLA
JUDGE

Court: Judgment delivered at Mbeya in Chambers on this 04th day of May 2020 in the presence of the appellant, Mr. Luko Beda, learned advocate holding brief for Ms. Joyce Kasebwa, learned advocate for the appellant and Mr. Hebel Kihaka, learned State Attorney for the respondent.

L. M. MONGELLA
JUDGE