THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 8/2020

(From the District Court of Rungwe at Tukuyu Criminal Case No. 84/2017)

AGASTO EMMANUEL.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 1.06. 2020

Date of Judgment: 08.06.2020

Dr. Mambi, J.

In the District Court of Rungwe at Tukuyu, Mbeya Region, the appellant with Zawadi Sanke were jointly charged with an offence of grievous harm c/s 225 of the Penal Code Cap 16 [R.E.2002]. The appellant (Agasto) was also charged with an offence of rape of a girl aged at eighteen years old c/s 131(1) (2) (e) and c/s 131 (1) of the Penal Code, Cap 16 [R.E.2002].The records from the trial court show that the appellant and Zawadi on the 7th day of May 2017 at 22:30 at Kisoko Vilage in Ryngwe District did cause grievous harm

to one Exaud Asuliwisye on his several parts of his body. The appellant is also alleged that on the same day, time and place did have carnal knowledge with the wife of the victim without her consent. While, the first accused (Zawadi) was acquitted, the appellant found guilt with two counts namely grievous harm and rape. He was convicted and sentenced to the total of 35 years for both two counts.

Aggrieved, the accused his lodged Criminal Appeal in this Court to challenge the conviction and sentence of the trial court. The appellant preferred six similar grounds of appeal.

The hearing of this matter was done electronically where all parties who remained at their places were electronically connected. The appellant who was unrepresented had nothing to add apart from adopting and relying on his grounds of appeal.

During hearing which was done electronically where both prates were connected through video conference, the appellants who were unrepresented adopted their grounds of appeal and they had nothing to add. The Republic through the Learned State Attorney Mr. Davis Sanga briefly submitted that he does agree with the grounds of appeal.

The Learned State Attorney submitted that, the evidence of both PW1 and PW4 is clear that the appellant was identified at the scene committing the two counts as charged. Mr. Sanga argued that all the grounds of appeal have no merit since the prosecution proved the charges against the accused beyond reasonable doubt.

The learned State Attorney further submitted that the evidence of PW1 (Victim) and PW4 is clear that the accused raped the victim. Mr Sanga was of the view that, the evidence of PW1 is clear that the victim and her husband recognized that appellant who raped her. He argued that the prosecution proved the case against the accused beyond reasonable doubt at the trial court.

I have thoroughly gone through the grounds of appeal raised and the submissions of both parties. The main issue is whether the prosecution proved the charges on both two counts beyond reasonable doubt on not. Before I answer this main issue I wish to re-emphasize that It is settled law that the prosecution is required to prove the case against the accused persons beyond reasonable doubt. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state (See ***Ali Ahmed Saleh Amgara v R [1959] EA 654)***. The state (The Republic) has the primary duty of proving that the accused has committed the *actus reus* elements of the offence charged, with the *mens rea* required for that offence. This can be reflected and founded on the famous maxim that "*he who alleges must prove*". This means that the principal burden is on the accuser, and in criminal cases the accuser is the prosecution, usually the state". 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. It is the trait law that in criminal cases

the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. The rationale for this principle and legal position is that since the burden lies throughout on the state (the Republic) , the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. This position was clearly clarified and underscored by the court in ***Milburn v Regina [1954] TLR 27*** where the court noted that:

> *"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

There is no doubt that as this court has already alluded in various cases that a prosecution case must, as the law is, be proved beyond reasonable doubt. The plain meaning of this principle is that the prosecution evidence must be strong to leave no doubt to the criminal liability of an accused person.

I will star addressing the second count that is rape which attracts severe penalty where the accused is found guilty. There is no doubt that the trial court found the appellant guilty on this count. The question before this court is that, did the prosecution proved an offence of rape beyond reasonable doubt. The trial records appear that the victim of rape (PW1) was raped while her husband was sleeping. At one point the victim husband testified he was attacked by the appellant and his husband but he did not say if he saw the appellant raping his wife. The trial records show that the first accused was not found guilty this implies that the appellant was

alone at the scene. Indeed the victim in her evidence also testified that she only saw the appellant as others run away and diapered before the appellant raped her. Now if he was alone at the scene how comes the victim was raped before her husband while her husband just watching until the appellant finished raping her wife. There is no doubt that as it had severally held that the best evidence of rape comes from the victim (See ***SELEMANI MAKUMBA VS REPUBLIC [2006] TLR 384)*** in which the court at page 379 held that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."*

However, it is the primary duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused/appellant and there was penetration. Indeed the evidence of PW1 and PW2 is full of contradiction and creates more doubts if PW1 was actually raped by the appellant. I have also noticed that the trial Magistrate in his judgment at page 7 and 8 just summarized the defence evidence without analyzing, evaluating and giving his reasons on his decision. The Magistrate at page 10 is just saying and I quote:

> ***"This kind of evidence intends to mislead as PW2 saw and identified the appellant trough the light of solar bulb"***

Reading from the above question, can one say that the trial Magistrate really analyzed and evaluated both the evidence of prosecution and defence?. In my view the answer is NO. It is trait law that very judgment must be written or reduced to writing

under the personal direction of the presiding judge or magistrate in the language of the court and must contain the **point or points for determination, the decision thereon and the reasons for the decision ,** dated and signed. 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.***

The position of the law is clear that the standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts.

Looking at the above statement by the magistrate it is clear that he did not consider and analyze the defence evidence apart from just subjecting himself to the prosecution evidence.

It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. If one look at the judgment it is clear that the Magistrate did not consider the defence evidence apart from just basing on the prosecution evidence. This according to the law is fatal as it can occasion to injustice to the other party

that is the defence or the appellant in our case. I wish to refer the decision of the court in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania 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****".*

See also ***Ahmed Said vs Republic C.A- APP. No. 291 of 2015, the court at Page 16*** which underscored the importance of without considering 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 also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trait law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the ***point or points for determination, the decision thereon and the reasons for the decision*** **,** dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This can be reflected from section 312 of CAP 20 [R.E.2002] on the mode and content of the judgment which provides as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination,*** *the decision thereon and the* ***reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.

(3) .....

(4) ...."

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgmentI am of the settled view that the trial court did not subject the defence evidence to any evaluation to determine its credibility and cogency. The position of the law is clear that the standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts. 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. 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 on an offence of rape was really established and proved beyond reasonable doubt.

Coming to the first count that is grievous harm, I have no doubt that the evidence show that the offence of was really established and proved beyond reasonable doubt. The evidence of the victim is clear that he saw the accused/appellant invading him for the sake of stealing his money. I don't need to dwell much on this since

prosecution evidence as indicated under the proceedings and judgment of the trial court is clear. The only offence that was not proved as I alluded was rape. In this regard I find the trial magistrate properly found the accused guilty.

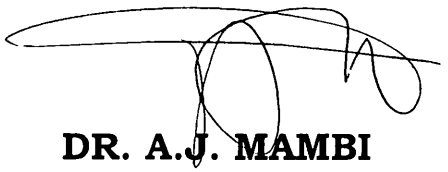
The offence under which the appellants was supposed to be charged and convicted has minimum sentence of five years. The word ***"liable"*** under the provision of the law (section 225 of the Penal Code) in my view means five years imprisonment is the maximum sentence but the court has discretion to impose lesser offence depending on the circumstance of the case. Considering the period the appellant has been in custody (almost four years) the appellant, I find proper the appellant to be released from the prisons. I am of the view that a term of imprisonment of more than three years from the date hereof, could be a lesson for him to learn that crime does not pay. This means that this appeal is partly allowed to the extent of the orders I have made. This court thus orders the appellant to be released from prison unless he is otherwise continuously held for some other lawful cause.

DR. A.J. MAMBI

JUDGE

8.06.2020

Judgment delivered in Chambers this 8th day of June 2020 in presence of both parties.

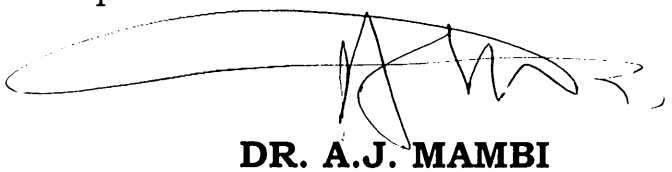


DR. A.J. MAMBI

JUDGE

8.06.2020

Right of Appeal explained.



DR. A.J. MAMBI

JUDGE

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