IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 62 OF 2019

(Arising from Original Criminal Case No. 96 of 2018 of the District Court of Urambo at Urambo)

CHEKO YAHAYA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

KIHWELO, J.

In the District Court of Urambo, the appellant and another co-accused stood jointly arraigned for one count which was predicated under the relevant provision of the Penal Code, Chapter 16 of the laws, R.E 2002 (the Code). More particularly, they were arraignment for armed robbery contrary to section 287A of the Code. The particulars were that on 28th February, 2008 at or about 03:00 am at Sinemagic area within Urambo District in Tabora region, did steal four bicycles valued at Tshs.400,000.00 the property of Abdi Hersi and immediately during and before such stealing did use machete to injure one Twaha Said in order to obtain the said property.

When the charge was read over and explained to the appellants at the commencement of the trial on 13th March,2018, they both denied the charge, whereupon the prosecution featured four witnesses and three bicycles as documentary exhibits. After full trial, the appellant was found guilty as charged and was convicted and sentenced to a jail term of 30 years. The trial court found the other accused not guilty and was accordingly acquitted.

Being unhappy with the conviction and sentence, the appellant marshalled seven grounds of complaint which when properly construed boils down to only 3 of them, **firstly** that the trial court did not properly compose the judgment; **secondly** that the prosecution did not prove its case beyond reasonable doubt; and **thirdly** that the trial court erred in failing to consider the defence case.

At the hearing before this Court, the appellant was fending for himself, unrepresented and the respondent Republic was represented by Mr. Innocent Rweyemamu learned State Attorney. The appellant had nothing to submit but he merely adopted the grounds of appeal he had filed before this Court. Mr. Rweyemamu in response he was fairly short. He readily supported the appeal of the appellant against conviction and sentence on three main grounds. **Firstly**, the fact that the trial court did not consider the defence case contrary to the requirements of section 213 of the Criminal Procedure Act, Cap 20 R.E 2002 (Henceforth "the CPA"); **Secondly**, he argued that there was no proof that the bicycles found with the appellant were the ones stolen at the scene of the crime and **Thirdly**,

the said bicycles were tendered in evidence before the trial court by a police officer who was not the owner.

A careful scrutiny of the records of the trial court, grounds of complain and the brief submission of the learned State Attorney, I am of the settled view that this appeal may be conclusively considered on the basis of the complaint regarding failure by the trial court to consider the defence evidence.

After carefully and cautiously going through the judgment of the trial court I have found that the appellant's contention carries weight. I have noted that in its entire judgment the trial court did not analyze the defence case at all despite the serious allegations by the appellant that the entire case was fabricated against him while referring to the earlier Murder Case No. 90 of 2008 in which he was charged but later acquitted during trial de novo. The trial court never said anything about his query regarding PW1 who the appellant alleged he was not one of the officers who arrested him and also the query that there was no tangible evidence to incriminate him in the case. Similarly, the trial court did not say anything about the contradictions the appellant alleged to exist (refer page 28 of the typed proceedings).

I therefore find considerable merit on the learned State Attorney's contention that the trial court did not consider the defence case in the course of the judgment and before conviction.

In my view, that was improper. I believe that the trial court ought to have analyzed and considered the appellant's defence in order to satisfy itself on whether or not his defence raised a reasonable doubt which is all it was required to do. Failure to do so constituted a miscarriage of justice in the case and it was a serious error.

The law is very settled and clear on this matter as the Court of Appeal has categorically stated that when a defence, however weak, foolish, unfounded or improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial court in order to vouch a miscarriage of justice on the accused. Where it may be found that the court(s) below did not observe this principle, there is no better option but to allow the appeal. See **Martha Swai v Republic,** Criminal Appeal No. 247 of 2013. In this case the Court of Appeal noted that the trial court in its entire judgment did not analyze the defence evidence and the same error was done by the first appellate court despite the appellant complain in ground 6 of the appeal. It is not enough to say that the defence of the accused has not in any way shaken the evidence of the prosecution. It also deserves an analysis. See **Ndege Marangwe v Republic,** Criminal Appeal No. 156 of 1964 cited in **Stephen John Rutakikirwa v Republic**, Criminal Appeal No. 78 of 2008 (unreported).

For the foregoing reasons, I find the appeal with merit and consequently, I allow it. The appellant's conviction is quashed, the 30 years imprisonment sentence is set aside with order of immediate release of the appellant from prison unless lawful held in on another cause.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Court: Judgment delivered this 17th day of December 2020 in the presence of the appellant but in absence of the Respondent.

Right of appeal explained fully.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020