IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 160 OF 2019

(Appeal from the Judgment of the District Court of Chato at Chato (Kato, DRM i/c) Dated 22nd of November, 2017 in Criminal Case No. 361 of 2017)

YAULIMWENGU S/O MASHINGA @ AY..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of the last order: 30.03.2020

Date of Judgment: 01.04.2020

JUDGMENT OF THE COURT

M.K. ISMAIL, J

The Appellant was arraigned in court and convicted of the offence of armed robbery, contrary the provisions of ***section 287A*** of the Penal Code, Cap.16 R.E. 2002. The District Court of Chato at Chato, before which he was charged and tried, sentenced the appellant to a prison term of 30 years. Dissatisfied with both the

conviction and sentence, he has appealed to this Court. His Petition of Appeal has eight grounds of appeal as follows:

1. *That, the charged offence against the appellant was not proved beyond any shadow of doubt, thus not beyond reasonable doubt to wit (sic).*
2. *That, the judgment was defective for not considering the defence case, on its findings decision in that circumstance vitiate the whole case.*
3. *That, the charge sheet as per the judgment did differ with an evidence adduced in court in respect of how many court(s) was charged against the appellant (sic) and led to complex.*
4. *That, visual identification by to (sic) was not watertight, whereas neither any elementary factors of identity met (sic) to the required standard of law, despite a mere dock identification unreliable.*
5. *That, an exhibit PE1 was unprocedural (sic) made covered with threat and brutal torture rendered to unfree (sic) and involuntarily obtained at unlawful confession.*
6. *That, the layman and indigent appellant was not represented by any lawyer or counsel at any stage of the law stance (sic) from police to court to the legal Aid Act Cap (sic). Thus the trial was unfair and equal (sic) in law.*
7. *That, the case was full of contradiction from prosecutions (sic) evidence whether or not the appellant was apprehended at the rocus quo (sic) was collided (sic) with PW6 who claimed to arrest him*

following investigation, thus led to unbelievable and unreliable to sustain.

8. *That, it is a cardinal principle of law that any doubt erupt (sic) from prosecutions should be resolved in favour of the (accused) appellant, thus declared innocent.*

Brief facts of what transpired before trial and leading to the appellant's conviction are as follows:

That at around 2.00 am on 30th June, 2016, at Mohororo Village within Chato district in Geita region, the Appellant along with his fellow assailant known as Mateso Constantine and other assailants, armed with "domestic weapons" invaded the house of Washa Charles (PW1), broke into it attacked him and stole the sum amounting to TZS. 500,000/=. Helped by an electrical lamp, PW1 was able to identify the appellant with whom they lived in the same village. PW1 raised an alarm that gathered neighbours who apprehended the appellant at the scene of the crime. The matter was reported to the Police who visited the scene of the crime. The accused and PW1 were taken to the Bwanga Police Station where he recorded a statement and was furnished with a PF3 which enabled him to get medical treatment.

The appellant was arraigned in court along with Mateso Constantine. Trial proceedings culminated into a conviction. Both were sentenced to thirty-year imprisonment.

At the hearing of the appeal, the appellant appeared in person, while the Respondent was represented by Ms. Gisela Alex, learned State Attorney. Noting that the Appellant is a lay person who did not enjoy services of a lawyer, I guided that the Respondent's Counsel should be accorded the privilege of submitting on the appeal first, before the appellant makes his arguments in support of the grounds of appeal.

The learned State Attorney began her submission by supporting the conviction and sentence imposed by the trial court and urged this Court to uphold it. She then proceeded to submit on the first ground of appeal. I guided, however, that she should submit on the 2nd which ground carries a decisive importance that will determine the tenability or otherwise of the appeal. In respect of this ground, the learned State Attorney joined hands with the appellant in scathing the impugned judgment which did not factor

in the appellant's defence testimony. She termed the omission as a serious anomaly. She made reference to the decision in ***Jonas Bulayi v. Republic***, CAT-Criminal Appeal No. 49 of 2006 (unreported) in which it was held that failure to consider defence testimony is fatal to the trail proceedings. Mr. Alex urged the Court be inspired, as well, by the decision in ***James Balow & Others v. Republic***, [1981] TLR 383 which was quoted with approval in ***Jonas Bulayi***.

In consequence of the spotted anomaly, Ms. Alex prayed that, on this ground alone, the matter should be remitted back to the trial court for composing of a judgment which will cure the anomaly.

The appellant's submission on this ground was simple and straight. He prayed that the matter should be disposed of in this Court without remitting it back to the trial court as he believes that justice will not be better served to him. He argued that he has served a significant part of his sentence and that qualifies him for an acquittal.

From these non-contentious submissions by the parties, the question to be resolved is whether the defence testimony was considered in this case and, if not, what are the consequence? It is a settled position in our jurisprudence that a trial court must, in the process of arriving at a decision, consider evidence tendered before it, in its totality. Evaluation of evidence in piecemeal or in isolation of one set of testimony constitutes a fundamental error and, therefore, a recipe for gross injustice. In ***Henry Mpangwe and 2 Others v. Republic*** (1974) LRT 50, the Court quoted with approval, the decision of the predecessor superior Court in ***Ndege Marangwe v. Republic*** (1964) EACA 156, and held as follows:

> *"It is the duty of the trial judge when he gives judgement to look at the evidence as a whole ... It is fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it".*

A more illustrative position in this respect was provided by this Court in ***Elias Stephen v. Republic*** [1982] TLR 313 (HC), in which the following finding was made:

> *"It is clear from the judgment that the trial magistrate did not seriously consider the appellant's defence. Indeed, he did not even consider the other defence witnesses who testified to it. He merely*

stated 'defence of accused has not in any way shaken the evidence'".

This position of the law did not skip the attention of the Court of Appeal. In ***Malando Bad' and 3 Others v. Republic*** CAT-Criminal Appeal No. 64 of 1993 (unreported), the trial proceedings were quashed. Consequent thereto, an appeal was allowed and the appellant was set free. The superior Bench held:

> *"As was held by the Court of Appeal in **Okoth Okale v. Uganda** (1965) EA 555 it is an essentially wrong approach provisionally to accept the prosecution case and then to cast on the defence the onus of rebutting or casting doubt on that case. It is an error separately to look at the case for the defence but evidence should be looked at as a whole. We believe that had the trial magistrate not fallen into this error, his decision on the case would probably have been different."*

My unfleeting review of the impugned judgment reveals that adequacy and credibility of the defence evidence was given a wide berth by the trial magistrate. That means that the judgment was determined in total exclusion of the defence testimony. The trial magistrate was happy to make a finding based on the evidence of the prosecution and made a conclusion that the appellant was guilty. The appellant's defence was deemed an unwanted and

strange addition to what was the *trial magistrate's* foregone conclusion about the appellant's guilt. The appellant's testimony was consigned to the dustbin of oblivion the moment the trial magistrate was convinced by the prosecution's evidence was sufficient to make a finding of guilt.

In view of the foregoing, I subscribe to the respondent's contention and hold that the appellant's conviction was a one sided affair whose consequence is to have it vitiated, as accentuated in ***Lockhart-Smith v United Republic*** (1965) EA 217, in which it was held:

> *"...failure to take into account any defence put up by the accused will vitiate conviction..."*

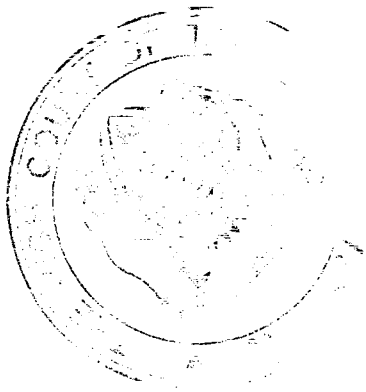
See also: ***Charles Samson versus Republic***, Criminal Appeal No. 29 of 1990 (unreported).

Consequently, I find this ground of appeal meritorious and it succeeds. On the strength of this ground of appeal, I quash the conviction and set aside the sentence against the appellant. I order

that the matter be remitted to the trial court for composition of a judgment that conforms to the requirements of the law.

It is so ordered.

DATED at **MWANZA** this 1st day of April, 2020.



M.K. ISMAIL

JUDGE

Date: 01/04/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present in person

Respondent: Ms. Gisela Alex, State Attorney

B/C: Leonard

Ms. Alex:

The matter is for judgment and we are ready.

Sgd: M. K. Ismail
JUDGE
01.04.2020

Appellant:

I am ready My Lord.

Sgd: M. K. Ismail
JUDGE
01.04.2020

Court:

Judgment delivered in chamber in the presence of the appellant in person, Ms. Gisela Alex, learned State Attorney for the respondent, and Mr. Leonard B/C, this 01st day of April, 2020.

M. K. Ismail

JUDGE

At Mwanza

01st April, 2020