IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 25 OF 2019

(Appeal from the Judgment of the District Court of Sengerema at Sengerema (Ndyekobora, RM) dated 11th of December, 2018, in Criminal Case No. 97 of 2018)

ANTHONY MABULA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

27th April, & 18th May, 2020

ISMAIL, J.

Anthony Mabula, the appellant herein, has preferred this appeal challenging the conviction on a charge of robbery by the District Court of Sengerema sitting in Sengerema, in respect of Criminal Case No. 97 of 2018. It was alleged that at 20:00 hours on 5th June 2018, the appellant together with a Mr. Mashimba Kafuru who has since been acquitted, robbed Sospeter Emmanuel a SANLG motor cycle with registration No.

MC 169 BSR, contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 (as amended by Act No. 4 of 2004).

The facts giving rise to this appeal are quite straight forward. They are to the effect that on 5th June, 2018, a certain Mr. Sospeter Emmanuel, a cyclist, popularly known as boda boda, was parked along Kamanga road, within Sengerema District in Mwanza region. At about 20:00 hours, the appellant appeared and asked to give him a ride to Bukala, Old Zaburi area. On reaching the destination, the appellant who posed as if he was consulting his wallet for the fare held the victim by the neck and a scuffle ensued. As they were wrestling for the control of the motor cycle, another assailant who was later identified as Mashimba Kafuku, weighed in and hit the victim on the head with what was believed to be an iron bar. The assailants got the better of the victim who fell down. The appellant seized the opportunity and took the motor cycle and fled. The matter was reported to the police. A police swoop managed to apprehend the appellant and his co-assailant. PW2, DCPL Bahati, who investigated the matter had the trial court hear that, the appellant, who was identified by PW1, the victim, confessed to the commission of the offence. It was also adduced that PW3, Nicolaus Edward, who was an eye

witness to the incident identified the appellant as the perpetrator of the robbery incident. The totality of this evidence led to the arraignment of the appellant and his accomplice in court whereat guilt of the appellant was established. While his co-accused was acquitted, his defence of non-involvement in the incident was barren of fruits. On conviction, the appellant was handed a custodial sentence for a term of fourteen years.

Aggrieved by the trial court's verdict, the appellant has preferred this appeal. The grounds of appeal with their inherent grammatical errors are as follows:

1. ***THAT,*** *the conviction was wrongly based on a theoretical and deficit claims of appellants dock identification which was not supported by prior descriptions offered to any first recipients during the first information report.*
2. ***THAT,*** *the appellants conviction was wrongly and unfairly being mounted on identification evidence made under unfavourable conditions which was not supported by the essential elementary factors of positive identification.*
3. ***THAT,*** *the presiding court wrongly relied on unfounded assumption as to the claimed appellants confession regardless of*

its involuntariness in extraction and further admittance out of the min-trial-test.

4. ***THAT**, the would be confession statement was tendered and proved into court to back up the investigator's claims.*
5. ***THAT**, the trial court wrongly sat as an ordinary court in trying and deciding the case against the child appellant i.e. 15 years old.*
6. ***THAT**, the trial court erred in law to award imprisonment sentence to a child appellant contrary to the terms specified under Child Act, 2009.*
7. ***THAT**, the entire proceeding was unlawful held in absence of social welfare officers and/or appellant guardian, parents and his close relatives.*

At the hearing of the appeal, the appellant fended for himself, unrepresented, while the respondent was represented by Ms. Gisela Alex, learned State Attorney. With nothing useful to add to his seven grounds of appeal, the appellant urged the Court to consider them and acquit him of any wrong doing. He prayed that he be set at liberty.

Ms. Alex's submission was focused and concise. She chose to narrow her address on two issues. One related to trial court's failure to consider defence testimony in the composition of the judgment. She conceded that failure by the trial magistrate to consider the defence evidence was an anomalous conduct which rendered the judgment a nullity. She buttreassed her contention by citing the reasoning in the case of **Jonas Bulai v. Republic**, CAT-Criminal Appeal No. 49 of 2006 (unreported), in which it was held that such failure constituted a fatal omission that vitiated the proceedings. The learned attorney prayed that the matter be remitted back to the trial court for composition of a new judgment.

The second limb of the learned attorney's submission was in respect of the appellant's age. Maintaining that the appellant's age was 18 years, Ms. Alex found fault with the appellant's silence when the right time came. She contended that the appellant had a chance to raise it during the preliminary hearing or even the trial proceedings, either by way of cross examination or when he adduced his defence testimony. On what appears at page 17 of the proceedings as the appellant's age, Ms. Alex contended that the age indicated in the proceedings is nothing but a trifling error, a typo. Fortifying her contention that this was not a seriously contended

issue, the learned attorney cited the case of ***Deogratias Nicholaus v. Republic***, CAT-Criminal Appeal No. 211 of 2011 (unreported) wherein it was held that facts not cross examined on are considered to be admitted facts. Holding that the appellant's contention as an afterthought, the learned attorney prayed that the grounds touching on the age be dismissed.

In conclusion, the learned state attorney prayed that the trial court's judgment be quashed, conviction and sentence be set aside, and the matter be remitted to the trial court for composition of a new judgment.

In rejoinder, the appellant reiterated what he submitted earlier on. He prayed that he be set free as the charges were trumped up.

For reasons that will be apparent soon, I propose to deal with this matter by confining my findings on the first issue. This relates to the respondent's concession that the trial court's decision was a one sided affair that edged out the appellant's testimony. It only factored in the evidence of the prosecution, ignoring the defence testimony. A cursory glance at the impugned judgment vindicates the respondent's view. It is simply a decision that is made up of the testimony adduced by the

prosecution with no reference, whatsoever, to what appears at the foot of page 2 of the judgment as a summary of the testimony adduced by the appellant. Inexplicably, however, the summarized testimony was left unattended as the trial magistrate went about making a finding of guilt based on what convinced her from the prosecution evidence. This is what is commonly referred to as piecemeal evaluation. In this case, however, it was actually a case of exclusion of evidence. It is akin to condemning a party unheard, taking into account that the appellant's voice would only be heard through his testimony which was given a wide berth by the trial court. In so doing, the trial court strayed into a mammoth error whose consequence is dire, going to the root of the proceedings.

Trial courts have been warned against this conduct through a plethora of court pronouncements, and the common message in all of those pronouncements is that decisions arising out of this flawed process are nothing but a mere charade which cannot be allowed to sail through.

In ***Henry Mpangwe and 2 others v. R*** (1974) LRT 50, the Court quoted with approval the decision of the defunct Court of Appeal for Eastern Africa in the old case of ***Ndege Marangwe v. R*** 1964 EACA 156. In the latter, the predecessor appellate Court held:

"It is the duty of the trial judge when he gives judgment 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".

In the subsequent case of ***Elias Stephen v. R*** (1982) TLR 313 (HC), this Court was critical of the conduct demonstrated by the trial magistrate who chose to be swayed by the testimony of the prosecution at the expense of the defence's. It was held:

"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'".

Weighing in on the mighty importance of balancing the evidence in the composition of the judgment, the Court of Appeal had the following observation in ***Michael Joseph v. Republic***, CAT-Criminal Appeal No. 506 of 2016 (Tabora) (unreported):

"In the appeal before us, it is evident from the excerpt of the trial court judgment ... that .... it ignored the material portion of the evidence laid before it by the accused person, now the appellant herein. The trial magistrate totally ignored the evidence of the appellant and worst still he did not even consider that defence in his analysis."

The view in the foregoing excerpts followed in the footsteps of the superior Bench's previous pronouncement in ***Malando Bad' and 3 others v. Republic,*** CAT-Criminal App. No. 64 of 93 (Mwanza) (unreported). In this case, the appellant had his appeal allowed and released from prison on the same ground. It was remarked thus:

> *"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."*

While it is unanimously agreed that the trial court's decision is shrouded in flagrant violation of the dictates of the law on the composition of the judgment, the next inevitable question is, what then befalls the instant appeal? The answer to this question is preceded by the question as to what is then is the fate of the impugned judgment? The answer to the latter lies in the holding made in the landmark case of ***Lockhart-Smith v. United Republic,*** [1965] EA 217, in which the following principle was propounded:

"Speaking generally ... It is for the prosecution to prove its case beyond reasonable doubt. It cannot do this unless the evidence given by or on behalf of the accused is put into the balance and weighted against that adduced by the prosecution. The question is whether anything the accused has said or which has been said on his behaif introduces that reasonable doubt which entitles him to his acquittal.

The principle is elementary, but fundamental nonetheless, and authority be needed for the proposition that ***failure to take into account any defence put up by the accused will vitiate conviction****, it is not hard to find.... The learned magistrate in this case, in my view, did not, as he would have done, take into consideration the evidence in defence, and for this reason the conviction ... cannot be allowed."*

Vitiating the conviction is not an end by itself. It requires this Court to guide on the next course of action as far as this appeal is concerned. The position of the law is to have the matter judgment vitiated and have the matter remitted for a re-trial that will cure the anomaly. This is consistent with the position set in ***Fatehali Manji v. Republic*** (1966) EA 343, in which it was held:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the trial... each case must be depend on its own facts and circumstances and an

order of retrial should only be made where the interests of justice require."

See also ***Paschal Clement Branganza v. Republic*** [1957] EA 152; ***Dominico Simon v. R.*** (1972) HCD 152; ***R v. S. S. Salehe*** (1977) HCD 15; ***Ngasa Madina v. Republic***, CAT-Criminal Appeal No. 151 of 2005; and ***Shaban Abdallah v. Republic*** CAT-Criminal Appeal No. 255 of 2013 (DSM) (both unreported).

In the upshot, on account of this one ground, this appeal succeeds. The judgment is quashed, conviction and sentence are set aside, and the matter is remitted for re-trial with a view to immediately composing a new judgment that conforms to the requirements of the law.

I so order.

Right of appeal explained.

DATED at **MWANZA** this 18th day of May, 2020.

M.K. ISMAIL

JUDGE

Date: 18/05/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present online – Mob. No.

Respondent: Present online – Mob. No.

B/C: B. France.

Court:

In view of the COVID 19 pandemic, and pursuant to the order (if any) parties are present online; the appeal is heard by way of Audio Teleconference.

Sgd: M. K. Ismail
JUDGE
18.05.2020

Ms. Gisela Alex, State Attorney:

The matter is for judgment and we are ready for it.

Sgd: M. K. Ismail
JUDGE
18.05.2020

Appellant:

I am also ready.

Sgd: M. K. Ismail
JUDGE
18.05.2020

Court:

Judgment delivered virtually in the online presence of the appellant, Ms. Gisela Alex, State Attorney for the respondent and in the presence of Ms. Beatrice B/C, this 18th May, 2020.

M. K. Ismail
JUDGE

At Mwanza
18.05.2020