IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 164 OF 2019

(Appeal from the Judgment of the District Court of Chato at Chato (Kato, SRM) Dated 22nd of November, 2017 in Criminal Case No. 357 of 2017)

SELEMANI S/O RASHID @ MASELE ..... 1ST APPELLANT

YAULIMWENGU S/O MASHINGA @ AY..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

29th April, & 20th May, 2020

ISMAIL, J.

This appeal has nine grounds of appeal which are intended to perforate the decision of the trial court which convicted and sentenced the appellants and their co-accused. They were convicted of armed robbery, contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 (as amended by Act No. 3 of 2011). In consequence of the conviction, all of the accused persons, including the appellants, were sentenced to imprisonment for a mandatory term of thirty years. As it shall be

apparently clear shortly, I have chosen to have this appeal disposed of through the second ground of appeal.

Let me preface my analysis by stating brief facts which bred the present appeal. It is about a robbery incident which occurred at Nyambatimba village within Chato district in Geita region. It was alleged that on 14th June, 2016, at about 02.00 hours PW1, Yulith Pancreas, the owner of a liquor selling store was asleep in her house. She suddenly heard her door broken and the appellants, together with their fellow assailant, Mateso Constantine, walked into the house and put her under restraint and ordered her to surrender the money she had. In order to coerce her into action, the 1st accused injured her using a machete. PW1 gave in and surrendered a set of mobile phone valued at TZS. 55,000/- and a cash sum to the tune of TZS. 750,000/-. The assailants who hailed from the same village were allegedly identified by PW1 and named them when she reported the incident to the police. A police swoop led to the arrest of the assailants and eventual arraignment in court where they were tried, convicted and sentenced to imprisonment. The appellants and their co-accused denied involvement in the alleged robbery incident. They prayed that they be acquitted of any wrong doing, claiming that they were

innocent. Their defences did not resonate as the trial magistrate made a finding of guilt against them.

At the hearing, the appellants fended for themselves, unrepresented, while the respondent enjoyed the usual services of Ms. Gisela Alex, learned State Attorney. As intimated earlier on, the appellants' joint petition of appeal has nine grounds of appeal. Noting the decisive importance that the second ground has in this appeal, I guided that submissions of the parties should be confined to that ground of appeal alone. Not uncommon, the appellants implored the Court to consider their grounds of appeal, as presented, and order their acquittal on the ground that they did not commit the offence with which they were charged. Submitting in respect of the second ground of appeal, Ms. Alex began with her usual preambular statement to the effect that she was supporting the conviction and sentence passed against both of the appellants. In respect of the second ground, Ms. Alex submitted that after going through the judgment, in relation to the second ground of appeal, she was of the view that defence testimony was not considered. She was quick to add that in such a situation the appropriate remedy is to declare the judgment a nullity. She buttressed her point by referred this Court to a decision in ***Jonas Bulai &***

Others v. Republic [1981] TLR 83. The learned attorney contended that this flaw was fundamental and can only be cured by having the matter remitted back to the trial court for composition of a judgment which will factor in the appellants' defence.

In rejoinder, the appellants were unanimous in their call to have the matter resolved in this Court by having them acquitted and set free, instead of ordering a re-trial as they have no faith in the trial court and are worried that the court may still return the same verdict of guilty.

From these brief submissions, the singular question is whether the impugned judgment suffers from the cited deficient and, if so, what is the consequence of all that? It is a cardinal principle, in the composition of the judgment, that analysis of the factual issues adduced by the parties must involve consideration of both sets of facts i.e. prosecution and defence evidence and apply them to the relevant law. Trial courts are, therefore, under obligation to ensure that determination of cases considers the totality of evidence tendered before them, and not in parts and bits. Evaluation of evidence in peace meal or in isolation of one set of testimony is an abhorrent conduct with has the effect of rendering the judgment

profoundly erroneous and lacking in legitimacy. It is a partisan conduct which goes to the root of the decision itself.

Glancing through the impugned judgment, it is revealed that while evidence of the accused persons was summarized by the trial magistrate, the story that this defence testimony carried was not given any thought in the entirety of the judgment. This means that the guilt of the appellants was a pre-meditated affair and a foregone conclusion which would be stained if the defence testimony was brought into the equation. While this may sound convenient to the trial court, it was act of mammoth neglect of duties that has caused a serious credibility crisis to the judgment delivered by the trial court.

The trial court's duty to create a balance in composing determinations is a requirement that has been restated oftentimes by this and superior courts. In ***Elias Stephen v. R*** [1982] TLR 313 (HC), the Court decried the trial court's failure to consider the accused person's defence (appellant). The Court observed as follows:

> *"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'".*

Instructively, the just cited decision followed in the footsteps of the Court's decision in ***Henry Mpangwe and 2 others v. R*** [1974] LRT 50, in which the holding in ***Ndege Marangwe v. R*** 1964 EACA 156 was quoted with approval. It was 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".*

Underscoring the critical importance of having all inclusive decisions is the Court of Appeal of Tanzania, through a multitude of its decisions. In ***Malando Bad' & 3 others v. Republic,*** CAT-Criminal Appeal No. 64 of 93 (Mwanza) (unreported), the appellants' appeal succeeded on account of the trial court's failure to consider the prosecution and defence testimony cumulatively. The superior Court made the following conclusion:

> *"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."*

A more elaborate and precise position on the matter was accentuated in one of the recent decisions of the Court of Appeal of Tanzania. In ***Michael Joseph v. Republic***, CAT-Criminal Appeal No. 506 of 2016 (Tabora) (unreported), a similar flaw was brought to the fore and the superior Bench had this to say:

> *"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."*

While the parties' views on the trial court's failure are not dissimilar, the disputation is on the next course of action. The respondent is rooting for a re-trial while the appellants' desire is that the matter be finalized by simply declaring them innocent and order their acquittal. The trite position is that the consequence of all this is to resort to a tested principle propounded in ***Lockhart-Smith v. United Republic,*** [1965] EA 217, in which it was held:

> *"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 behalf introduces that reasonable doubt which entities 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."*

Since acquittals are a result of insufficiency of the evidence adduced by the prosecution or other peculiar and compelling circumstances which do not exist in this case. No assessment has been done to ascertain sufficiency or otherwise of the prosecution's testimony and the effect the defence testimony would have on the case. There is no evidence, either, or genuine fear that a retrial will hand the prosecution an opportunity to weave its testimony and tie any loose ends in the evidence. In the absence of all that, the acceptable practice that meets ends of justice is to order a re-trial. In this case a re-trial will only be limited to composing a new judgment that factors the appellants' defence. This view is consistent with the holding in ***Paschal Clement Branganza v. Republic*** [1957] EA 152, in which it was held:

"A retrial is ordered where there has in fact been a previous trial that was conducted but which is vitiated by reason of an error in law or procedure... Where a trial of a case is declared a nullity, it means that there has never been a trial as the purported trial had no legal force or effect.... ***Where a trial of a case is declared a nullity for non-compliance with the provisions of law, the court will bear in mind the gravity of the offence, justice of the case and all other circumstances in ordering a fresh trial to the accused."***

The defunct Court's view was echoed in its subsequent decision in ***Fatehall Manji v. Republic*** (1966) EA 343, as follows:

"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."

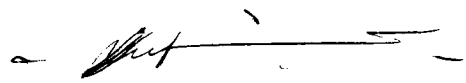
See also ***Dominico Simon v. R.*** (1972) HCD 152; ***R v. S. S. Salehe*** (1977) HCD 15; and ***Shaban Abdallah v. Republic*** CAT-Criminal Appeal No. 255 of 2013 (DSM) (both unreported).

Inspired by the cited decisions and, given the circumstances under which the vitiation has been ordered in the instant appeal, re-trial is an inevitable and just course of action.

Consequently, I order that the matter be immediately remitted to the trial court for composition of a judgment which conforms to the legal requirements.

Right of appeal explained.

DATED at **MWANZA** this 20th day of May, 2020.



M.K. ISMAIL

JUDGE

Date: 20/05/2020

Coram: Hon. M. K. Ismail, J

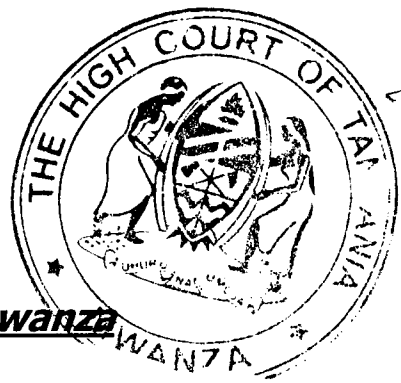
Appellant: Present online

Respondent: Present online

B/C: Leonard

Court:

Judgment delivered in chamber, in the virtual presence of both parties (through audio tele-conference) and in the presence of Mr. Leonard B/C, this 20th May, 2020.



M. K. Ismail

JUDGE

At Mwanza

20th May, 2020