THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 90 OF 2021
(Originating from Momba District Court at Chapwa, Criminal Case No. 115 of 2018)

JACOB SIMON MBUKWA...1ST APPELLANT
SEIF OMARY NGWATA...2ND APPELLANT
LAZARO VENANCE SINKAMBA....................................3RD APPELLANT
IBRAHIM ANYAWILE KIBONA.....................................4TH APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

Dated: 23rd May & 13th June, 2022

KARAYEMAHA, J

On 11/06/2018 the appellants, namely, Jacob Simon Mbukwa, Seif Omary Ngwata, Lazaro Venance Sinkamba and Ibrahim Anyawile Kibona (hereinafter, the 1st, 2nd, 3rd and 4th appellants) were arraigned before the Court of Resident Magistrate of Momba at Chapwa where they were charged with the offence of armed robbery allegedly committed jointly and together by them.

By a charge sheet lodged in the trial court on 11/06/2018, the appellants faced one count of Armed Robbery contrary to section 287A of

the Penal Code, (Cap. 16 R.E. 2002) [now R.E. 2019]. The allegation is that on 15/01/2018 at about night time at Makambini area Tunduma Township within Momba District in Songwe Region, they stole one TV make Sing sun valued at Tshs 350,000/=, one cellular phone make Nokia valued at Tshs. 40,000/=, one cellular phone make Tecno valued at Tshs. 45,000/=, one cellular phone make Nokia valued at Tshs. 25,000/=, one cellular phone make Tecno J8 valued at Tshs. 350,000/=, one computer laptop make HP valued at Tshs. 520,000/=, air phone (sic) valued at Tshs. 20,000/=, one speaker valued at Tshs. 25,000/=, and cash money Tshs. 835,000/= all total valued at Tshs. 2,200,000/= the properties of Dora Felix. It was alleged further that at immediately before and after stealing did assault her using a machete on her different parts of her body in order to obtain the said properties.

In a bid to prove the charge, the prosecution summoned seven witnesses, namely, Sifa Jackob Kabisa (PW1), Dora Felix (PW2), F1470 D/CPL Adonick (PW3), F6960 D/CPL Bashari (PW4), G3508 DC Khalfan (PW5), ASP Nickson Philipo Mwesigwa (PW6) WP 9476 DC Pendaheri (PW7) and G 222 DC Samson Kisa Kapila (PW8). In addition, 6 exhibits, namely, cautioned statements, search order, extra judicial statements, a TV and a cellular phone make Nokia were tendered and admitted as exhibits PE1, PE2, PE3, PE4, PE5, and PE6 respectively.

Perhaps before going into the nitty-gritty of the appeal, it may be apt to narrate, albeit briefly, the relevant background facts leading to the appellants' arraignment. It is this: PW1 was in her house on 15/01/2018 at about 03:00 pm (at night) when she heard someone knocking on her door. Prior opening she listened to the voices moving from her room to the sitting room. While there she heard someone ordering the other to enter inside. That order made her run to her room to seek for assistance but before she could secure one bandits had entered in her room. She never recognised any because they forced to lie on her stomach and gave them her hand bag which had money which they demanded. After ten minutes when the situation had become cool, she woke up and found her laptop computer make HP, earphones, TV make singsung 25", small radio, her cellular phone make Tecno J8, a small Nokia cellular phone and Tecno stolen including cash Tshs. 835, 000/=. The incidence was first reported to the ten cell leader. Later the matter was brought to the attention of the police and wheels of investigation led to the arrest and arraignment of the appellants. The trial court believed that the prosecution had proved the case beyond reasonable doubt and refused the appellants' defence. Consequently, the appellants were convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by the findings of the trial court, preferred the instant appeal to protest their innocence. Their petition of appeal contains one ground, to wit, the trial court erred in law and fact to convict and sentence the appellants in a case that was not proved to the required standard.

On 23/05/2022 when this appeal was called on for hearing, appellants were present and were represented by Ms. Nyasige Kajanja, learned advocate whereas Mr. Baraka Mgaya, learned State Attorney, represented his usual client the respondent republic.

Before the appeal could be heard on merit, Mr. Mgaya rose up and raised a point of law.

Submitting on the raised point, the learned State Attorney's observation that in composing the judgment, the trial court contravened section 312 (1) of the Criminal Procedure Act [Cap 20 R.E 2019] (hereinafter the CPA). He submitted on what he considered to be flaws apparent on the eight paged trial Court's judgment. Firstly, Mr. Mgaya contended that the trial Magistrate simply summarises the evidence of the prosecution witnesses and defence witnesses. After that the trial magistrate merely concluded that from the evidence of the prosecution, the case was proved beyond reasonable doubt. Thereafter, she convicted the appellants. Secondly, he faulted the judgment by stating lacking points of determination, i.e., issues and decision and reasons for that decision.

Thirdly, he was emphatic that the trial Magistrate did not evaluate the evidence.

Mr. Baraka's another onslaught was that there was no judgement at all because it lacked very crucial ingredients such points of determination and decision and reasons for the decision. In his view the flaw is fatal and incurable.

In view thereof, the learned State Attorney urged the Court to remit the file and the return the appellants to the trial court so that it may compose a legally accepted judgment because according to him there is no judgment upon which this court can base to quash or uphold the decision.

On her part, Ms. Kajanja expressed an unequivocal support of what Mr. Baraka observed and submitted on. She only deferred with him on what would be the way forward. According to her the appeal intended to challenge what the trial court did including unearthed flaws. She held the view that the order to return the appellants to the trial court so that a legal judgment may be composed will see them remaining in jail for a long period for no apparent good reason. It was her view that the appeal be heard on merit or else they should be acquitted.

In his terse rejoinder, Mr. Baraka reiterated what he contended in his submission in chief. He however, cautioned that for the court to decide whether or not the charge was proved, this court must conduct as an appellate court. In his view, that can be done when there is a proper and legally accepted judgment. Short of this, Mr. Baraka remarked, this court has no jurisdiction. He submitted further that the suggestion that by Ms. Kajanja that this court should step in the trial court's shoes and re-evaluate the evidence was unfounded because this court has nothing to re-evaluate.

After having carefully gone through the grounds of appeal and submissions by either part, I have to ascertain whether or not the trial court composed a legally accepted judgment and if not what the way forward is. Responding to Mr. Baraka's point of law this court dutifully went through the judgment of the trial court and found out that the trial magistrate did not in any way consider the evidence from both parties. She just narrated what every prosecution witness said in his or her testimony without analysing and evaluating the said evidence. She did not do so for the evidence given by the defence side as well.

In law, failure to evaluate evidence by the trial court leads to injustice on the parties, especially the party whose interests are adversely affected; in this case, the appellants. The duty of the Magistrate is not only

to hear and receive the evidence from both parties, but also to take up that evidence, evaluate it and finally reach a considered conclusion. Failure to do so renders the judgment, conviction and orders arising from it nullity.

In the case of **Shija Masawe vs. Republic,** Criminal Appeal No. 158 of 2007 CAT - DSM (Unreported) it was held inter alia that

> *"... in writing Judgment, the judge or magistrates will not only have to summarize and analyse the body of evidence and the law, but also to evaluate in order to determine its worth, credibility and significance by using the legal standards of admissibility, burden and standards of proof and weight of such evidence for both prosecution and defence in criminal cases and the parties in civil cases."*

Similarly, in the case of **Republic vs. Alphonce Jackson**, Criminal Appeal Case No. 87 of 2019, CAT Mbeya dated 24 February, 2020; the principle in respect of the evaluation of evidence was once again expounded as follows:

> *"The law is clear that, and it has occasionally held so by the court in various cases that before any court makes its decision and Judgment, the evidence of both parties must be considered, evaluated and reasoned in the judgment."*

In the matter at hand, the trial court's judgment only contains a summary of the prosecution evidence followed by a finding that the same undisputedly establishes the offences that the appellants were charged with. Nothing more. It is reflected in the judgment at page 7 that after summarising the evidence by both parties, the trial Magistrate stated as follows, I quote:

> *"That due to the finding above this court is with the view(sic) that the prosecution side proved the offence of armed robbery as against all accused persons beyond reasonable doubt... hence I convict them under section 235(1) and 312(2) of the CPA [Cap 20 R.E 2002] for the offence of armed robbery c/s287 A of the Penal Code [CAP 16 R.E 2002] as amended by Act No 03 of 2011"*
>
> *Sgd: RM*
> *21/11/2019*

The quoted excerpt indicates categorically that the trial Magistrate jumped to a conclusion without showing points of determination, i.e., issues and decision and reasons for the decision. Above all the trial Magistrate did not evaluate the evidence. I gather from the holding in **Republic vs. Alphonce Jackson** (supra) that it is trite law that the judgment must show how the evidence has been evaluated with reasons with a view to determine its credibility and cogency.

In the instant case there was no evaluation and analysis of the evidence before the court had concluded that the appellants were guilty and convicted them. The judgment, therefore, falls short of the requirement of section 312 of the CPA. The non-compliance with the above section of the CPA renders the judgment incurable therefore crumbles the whole judgment.

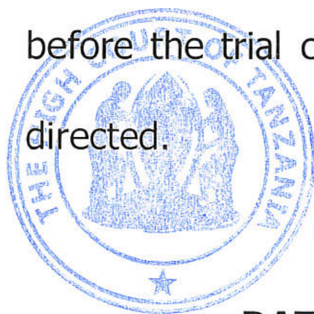
On the strength of the foregoing, it is my considered view that the duty of any decision maker to compose judgment includes the duty to analyse the evidence, evaluate the same, look into its relevance and applicability. It also extends to looking into the credibility and cogency of the witnesses and last giving the reasons of the decision. In this case, it is unfortunately that the trial court abdicated that duty. At any rate this abdication denies this court on appeal the materials to act upon in consideration of the appeal.

I am aware that being the first appellate court, this court is entitled to step into the shoes of the trial court and re-evaluate evidence. However, since that evaluation involves the consideration of the demeanor and credibility of the witnesses, I find the trial court to be better positioned to do the job. Nevertheless, I agree with Mr. Baraka that this court has nothing to re-evaluate because nothing was evaluated by the trial court. In

addition there is no judgment in place to enable this court do the needful according to the law.

That said, I hereby return the case to the trial court for the magistrate with competent jurisdiction to recompose the judgment using the recorded evidence during the trial in accordance with the dictates of section 312 of the CPA. The tusk must be completed within 15 days after receiving the file. After recomposing the judgment as directed, the same be delivered to the parties and whoever will be dissatisfied will have the right to appeal against it.

As this ground suffices to dispose of this appeal as it has, though not on the merit of the case, there is no need for this court to engage itself on the raised ground in the petition of appeal. The appellant be resurfaced before the trial court on being summoned for receiving the judgment as directed.



DATED at **MBEYA** this **13th** day of **June, 2022**

J. M. KARAYEMAHA
JUDGE