UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

BUKOBA SUB REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 56 OF 2023

(Origination from the Criminal Case No. 35 of 2023 of Muleba District Court)

INNOCENT LUTAISILE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 15/02/2024

Date of Ruling: 28/02/2024

BEFORE: G.P. MALATA, J

The appellant, **Innocent Lutaisile**, filed the present appeal challenging the decision of the Criminal Case No. 35 of 2023 of Muleba District Court whereby the appellant was convicted for rape and sentenced to serve life imprisonment contrary to section 130 (1) and (2) (e) and 131 (3) of the Penal Code, Cap.16 R.E.2022.

The appellant raised a total of eight (8) grounds of appeal. This court decided to deal with two grounds with direct effect to the disposition of the appeal. These are;

1. That the trial court failed to consider the appellant's defence/ evidence before entering judgment,
2. That, the trial court failed to accord right to the appellant to have interpreter as he does understand clearly Kiswahili the language used in the proceedings;

On 15/02/2024, this matter came for hearing and both parties were present. The appellant appeared in person whereas the respondent appeared through Ms. Matilda Assey learned State Attorney.

At the hearing, both parties submitted on the point, Ms. Matilda Assey learned State Attorney conceded to ground of appeal No.7 that, the trial court did not consider the appellant's defence in the judgment. This is due to the fact that, there is no discussion on the strength or weaknesses of the defence side before arriving to the decision, thus the judgment is one sided.

Ms. Matilda Assey learned State Attorney submitted further that, the defect however, can be addressed and resolved through section 388 of the Criminal Procedure Act, Cap.20 R.E.2022.

We accept that the learned trial Resident Magistrate "summarized the defence evidence" much as he/she did summarize the prosecution evidence. But that was not the complaint of the appellant. It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain.

Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis. The complaint of the appellant is that in the evaluation of the evidence, his defence case was not considered at all and this is one of his grounds of appeal before me which was conceded by Ms. Matilda, learned State Attorney.

It is trite law that, a judgment of the court must be writing and contain points of determination and the reasons thereof. This is echoed by section 312 (1) of the Criminal Procedure Act which reads;

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision,*

and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court"

The court of appeal in **Abel Masikiti Vs R** Criminal Appeal No.24 of 2015 the court had these to state

"It is trite law that failure to consider the defence is fatal and vitiates the conviction. This what was held in ***Hussein Idd and another Vs R*** *(1968) TLR 283"*

In the case of **Leonard Mwanashoka Vs The Republic**, Criminal Appeal No. 226 of 2014 the court of appeal principled that;

"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction. See, for instance,

(a) LOCKHART SMITH vs. R. [1965] EA 211,

(b) OKTH OKALE v UGANDA [1965] EA 555,

(c) ELIAS STEVEN v. R. [1982] TLR 313,

(d) HUSSEIN IDD & ANOTHER v.R. [1986] TLR 283,

(e) LUHEMEJA BUSWELU v R., Criminal Appeal No. 164 of 212 (unreported), 6

(f) VENANCE NKUBA & ANOTHER Vs R, Criminal Appeal No. 425 of 2013 (unreported), etc.

*In **VENANCE NKUBA** (supra), this Court categorically stated that: -*

> *"This infraction alone would have sufficed to quash the conviction but as we shall shortly demonstrate, the case for the prosecution was similarly undermined by some other disquieting factors."*

Finally, section 388 of the Criminal procedure Act depicts that;

> *"Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."*

This court therefore is inclined to agree with the presentations of both Ms. Matilda Assey learned State Attorney and appellant that, the trial court briefly summarized the appellant's evidence but failed to consider it in determining the case and reasons for turning it down. The trial court acts resulted into making one-sided judgment contrary to the law.

The trial court's error is fatal and has the effect of turning down the whole judgment as principled by the court of appeal in the afore cited authorities.

As to the second ground, the appellant is complaining of being denied right to understand clearly the proceeding which was conducted in Kiswahili the language which is seldom known to him.

This court went through the proceedings and noted that; **first**, the appellant did not really cross examine the prosecution witnesses, **second**, the appellant's status of not understanding well Kiswahili language is confirmed by PW4 who testified that;

> *"....I also went to the police, my mother is Dativa she is living at Bushumba. I told her I was raped. He said in Swahili when he threatened me.* ***He does not know much of Swahili language".***

Third, the appellant was not asked by the court on the language he is accustomed with.

Lastly, the law demands that, the charge sheet must be precise on all particulars to enable the accused understand the nature of offence he faces. This is echoed by section 132 of the Criminal Procedure Act. It reads;

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*

The charge sheet in question provided for statement of offence and particulars of offence. It provides for; ***one***, name of the accused, Innocent Lutaisile, **two**, date of commission of offence, 15/02/2023, **three**, place Rukondo Village, Muleba District in Kagera region, **four**, offence committed, unlawful sexual intercourse and **five**, name of the victim.

Having the charge sheet and facts read over and explained to the appellant, the court recorded the memorandum of agreed facts. The appellant Stated that;

> *Accused: "I admit to my name. I was arrested, I do not admit to the charge at police station and in court"*

The appellant's statement placed the Republic to the duty to prove all what is stated in the charge sheet beyond reasonable doubt save for the name of the accused and his arrest.

The charge sheet depicts that, the incidence took place at **Rukondo Village,** Muleba District, however, all the prosecution witnesses testified that, the incidence took place at **Nshisha** which name do not appear or relate to the one appearing in the charge sheet. This means that, the adduced evidence had nothing to do with what is stated in the charge sheet, the pleading in criminal cases of which parties are bound to.

All said and done and having noted that, the irregularities are fatal as stated herein above with its effect, this court finds that, the appellant's complaints have been well established.

Consequently, I hereby allow the appeal, quash conviction and set aside sentence imposed by the trial court. I further order for immediate released of the appellant unless lawful held for other offences.

IT IS SO ORDERED.

DATED at **BUKOBA** this 28th February, 2024.

G.P. MALATA

JUDGE

28/02/2024

JUDGMENT delivered at **BUKOBA** this 28th February, 2024 in the presence of Appellant and Ms. Alice Mutungi learned Sate Attorney for the Republic.

G.P. MALATA

JUDGE

28/02/2024