IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUGASHA, J.A., MWANGESI, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 217 OF 2018

JOSE MWALONGO..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kente, J.)

dated the 5th day of December, 2018
in
HC. Criminal Appeal No. 13 of 2019
.....

JUDGMENT OF THE COURT

14th & 19th August, 2020.

MUGASHA, J.A.:

In the District Court of Njombe at Njombe, the appellant was arraigned and convicted of Unnatural Offence, contrary to section 154 (1) (a) and (2) of the Penal Code Cap. 16 R.E 2002 as amended by section 185 of the Law of the Child Act No. 21 of 2009. Upon conviction, he was sentenced to a jail term of thirty years. Unamused, he unsuccessfully preferred an appeal to the High Court which found no cause to vary the decision of the trial court and proceeded to dismiss the appeal in its entirety.

Still discontented, the appellant has lodged an appeal to the Court seeking to challenge the decision of the High Court. In the Memorandum of Appeal, he has raised four grounds of complaint which we shall introduce at a later stage of our judgment.

The factual background giving rise to the present appeal is briefly as follows: It was alleged by the prosecution that, the appellant on 27/4/2016 at Ihalula village, within the District and Region of Njombe unlawfully did have carnal knowledge of a boy aged 10 years who shall be referred to as A.N in order to disguise his identity for the sake of the best interests of the child.

From the account of five prosecution witnesses, it is not in dispute that both the victim and the appellant resided at the residence of Emilia Mwalongo the victim's grandmother who testified as PW2. He was initially employed by PW4 the victim's father as a house help and later posted to stay with PW2. According to the testimonial account of PW2 and PW3 the victim, the appellant used to sleep with the victim in the same room. On 28/4/2016 after finishing dinner, PW2 asked the victim to retire to sleep, but he refused on ground that on the previous night the appellant who had returned from the local pombe shop, switched on the flash light of his mobile

phone, rubbed oil on his anus and sodomised him. The victim claimed to have raised alarm but his grandmother could not hear it and on the following morning he did not tell anyone and went to school. After the victim narrated what had befallen him, then his grandmother PW2 took him to her bedroom where he spent a night. On the following day, PW2 broke the news to her son Nestory Ngole PW4 the victim's father. The matter was reported to the Police where a PF3 was issued to the victim who was taken to the hospital and upon examination by Dr. Isaac Lulindi (PW5) it was established that he was sodomised. The appellant was arrested and charged before the District Court of Njombe and he was made to record the cautioned statement on 29/4/2016.

On the other hand, the appellant refuted the prosecution version and protested his innocence. He told the trial court that, before working at PW2's house, he had earlier worked for PW4 who had not paid his salary at the tune of TZS. 960,000/=. He denied to have slept with the victim.

As earlier intimated, the two courts below were satisfied that the prosecution case was proved to the hilt, hence the conviction and the sentence. As earlier indicated, the appellant before us has raised four grounds of complaint as hereunder paraphrased:

1. That, the Hon. Judge erred in law to dismiss the appellant's appeal without taking into account that since the victim was a child a Social Welfare Officer was by virtue of the law required to be present at the trial.
2. That, the hon Judge erred in law to dismiss the appellant's appeal without evaluating and considering the defence raised by the appellant.
3. That, the Hon. Judge erred in law having not considered the appellant's defence of provocation.
4. That, the Hon. Judge erred in law to give weight on the victim's evidence which was not corroborated by neither hearsay evidence of PW5 nor the PF3.

At the hearing before us, the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Ms. Pienzia Nichombe, learned Senior State Attorney. The appellant adopted the Memorandum of Appeal and when asked to expound on it, apart from denying to have committed the offence, he insisted that the case was framed in vengeance following refusal by the victim's father to pay his salary dues.

On her part, Ms. Nichombe initially did not support the appeal. However, when we invited her to address the Court as to whether the defence of the appellant was considered which is the gist of the complaint in the second ground of appeal, she changed her stance and conceded that both the trial and first appellate courts did not consider the appellant's defence. On his part, the appellant supported what was submitted by the learned State Attorney and prayed the appeal to be allowed and he be set at liberty.

Having heard the parties from either side and considering the ground of appeal and the record before us, the issue for our determination is whether the appellant's defence was considered and the related consequences. We begin with what transpired before the trial court whereby, having summarized the appellant's case the trial Magistrate dealt with such defence having concluded what is reflected at page 49 of the record as follows:

> *"The defence evidence has not been able to raise any reasonable doubt in the prosecution case regarding pieces of evidence tending to prove the second point for determination by this court."*

Before the first appellate court, at page 54 of the record the appellant raised the following ground in the petition of appeal:

> *"7. That, the learned Resident Magistrate misdirected himself for reaching this unfair judgment without evaluating clearly the [appellant's] defence."*

At page 73 of judgment of the first appellate court, the following is evident:

> *"Given the appellant's complaints the salient issues to be determined in this appeal are; whether PW3 was sodomised and if he was by who? Finally, it is whether the trial Court had considered the appellant's defence."*

However, at the end the learned High Court did not resolve the controversy surrounding the appellant's defence. From the extracted observation of the trial magistrate, it is glaring that the Magistrate dealt with the prosecution case on its own and arrived at the conclusion that the same comprised proof of the case and as a result, he rejected the defence case without making any analysis. The proper approach in our view was for the Magistrate to deal with both the prosecution and defence evidence and after analyzing such evidence, the Magistrate should have then reached the conclusion. Apparently, such course was inadvertently not considered by the

first appellate court. In the case of **HUSSEIN IDD AND ANOTHER VS REPUBLIC** [1986] TLR 166, the appellants were convicted of murder after the trial court dealt with the prosecution evidence implicating one of the appellants and reached the conclusion without considering the defence evidence. On appeal this Court thus held:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

[See also **SADICK KITIME VS REPUBLIC,** Criminal Appeal No. 483 of 2016 and **JEREMIAH JOHN AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No. 416 of 2013 (both unreported)]. In the latter case, the appellants who were convicted of the offence of murder, appealed to the Court complaining among other things, that the trial Judge did not adequately consider their defence of *alibi*. The Court made the following observation:

> *"The common ground to the effect that the appellants were not given a full hearing, in that their defence was not considered at all, and where it was, not adequately, affords us a good starting point of our discussion. We are*

of this view because our Constitution, in Article 13 (6) (a), compels all courts to give accused persons a fair or full hearing when determining their rights. It is now settled law that this duty is not discharged when the court does not consider either at all or adequately, the defence case."

On the consequences of such misdirection, failure to consider the defence case is fatal and usually leads to a conviction being quashed. See - **JEREMIAH JOHN AND 4 OTHERS VS REPUBLIC,** (*supra*), **MOSES MAYANJA @ MSOKE VS REPUBLIC, CRIMINAL** Appeal No. 56 of 2009, **MALONDA BADI & OTHERS VS REPUBLIC,** Criminal Appeal No. 69 of 1993 (both unreported) **OKOTH OKALE V UGANDA** [1965] E.A 555, and **LOCKHART – SMITH V. R** [1965] E.A 211 (TZ) among others.

In the **LOCKHART – SMITH V. R** (*supra*), the appellant, an advocate was convicted in the District Court of Dar-es-salaam on three counts of contempt of court due to certain remarks he made when representing his client in the District Court. Those words were found discourteous and disrespectful to the court and amounted to contempt of court. When convicting the appellant, the trial magistrate made the following remarks:

"In the instant case, I believe the evidence of the prosecution witnesses. I find corroboration in their testimonies. I also find that the accused uttered the words alleged and perpetrated the conduct alleged. I therefore reject the accused's statement. In the result, I find the accused guilty as charged. I hereby convict the accused on each of the three counts of the charge."

On appeal the trial magistrate was faulted for rejecting the appellant's defence only because he believed that of the prosecution witnesses. Thus, Weston, J, held: -

"The trial magistrate did not, as he should have done, take into consideration the evidence of the defence, his reasoning underlying the rejection of the appellant's statement was incurably wrong and no conviction based on it could be sustained."

Likewise, in the case under scrutiny, since the appellant was deprived of having his defence properly considered he was denied a fair and full hearing when determining his rights. In the circumstances, the conviction imposed cannot be allowed to stand. We accordingly quash the conviction

and set aside the sentence. Thus, the second ground of appeal is merited and it is sufficient to dispose of the appeal and we shall not belabor on other grounds raised by the appellant.

In view of the aforesaid, we allow the appeal and order the immediate release of the appellant from prison custody unless if he is held for some other lawful cause.

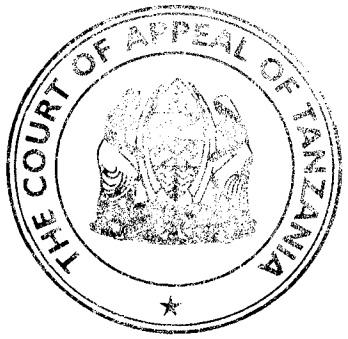
DATED at **IRINGA** this 18th day of August, 2020.

S. E. A MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2020 in the presence of the Appellant in person and Ms. Edna Mwangulumba assisted by Jackline Nungu, both learned State Attorney for Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL