IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 552 OF 2016

FIKIRI KATUNGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Makani, J.)

dated the 2nd day of December, 2016
in
(DC) Criminal Appeal No. 16 of 2015

JUDGMENT OF THE COURT

11th & 14th May, 2020

KWARIKO, J.A.:

The appellant, Fikiri Katunge was formerly arraigned before the District Court of Shinyanga with the offence of armed robbery contrary to section 287A of the Penal Code [CAP 20 R.E. 2002] (now R.E. 2019). The particulars of the offence were that: on the 3rd April, 2013 at Kitangiri area within the Municipality and Region of Shinyanga, the appellant stole a mobile phone make Chinese valued at TZS 30,000.00 the property of one Aziza d/o Juma and at or immediately after such stealing threatened the said Aziza d/o Juma with a knife in order to obtain and retain the said mobile phone. He denied the charge and at

the end of the trial, he was convicted and sentenced to thirty years' imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court. Undaunted, he is before the Court on a second appeal.

The facts of the case which gave rise to the appellant's conviction can be summarized as follows. Saimon Juma (PW1) and Aziza Juma (PW4) were said to be husband and wife respectively. The latter worked as a hotel attendant at a place called Matanda. The appellant and PW1 were also known to each other as they had been working at the same daladala stand. On a certain date not agreed on by them, they met on the way and following a different versions of what was alleged by each of them in their evidence, the appellant was arrested and charged as stated above.

In his evidence, PW1 testified that on the material day at 20:30hrs PW1, was riding a motorcycle. He was on his way to pick PW4 who was coming from work. At Kitangiri area he met the appellant going the same direction. The two spoke as they knew each other before as they were doing daladala business together. Thereafter, the appellant asked PW1 to give him TZS 500.00 which he said did not have. The appellant threatened to take ignition key of the motorcycle. By that time, PW4 was about ten paces away moving towards them.

When PW4 reached where the two men were standing, she asked PW1 to take her home because she was not feeling very well. At that point, the appellant clobbered her and snatched her phone. When PW1 tried to intervene, the appellant withdrew a knife and stabbed PW4 on the face. On this aspect, while PW1 said the appellant headbutt PW4 on the face and sustained injuries on her mouth, PW4 said the appellant stabbed her with a knife on the face near the eye.

PW1 and PW4 said that although it was total darkness at the scene, they identified the appellant through the motorcycle's lights. They raised an alarm and people responded but the appellant had already escaped. Report of the incident was sent to the police station where a PF3 was issued for PW4 to go to the hospital. It was admitted during the trial as exhibit P1.

Furthermore, according to the evidence of Ernest Makoye (PW2), a night watchman, in the same night and same time i.e at 20:30hrs, he was going to buy mobile phone re-charge voucher from a shop when he met a male person. After greetings, that person offered to sell him a mobile phone at TZS 15,000.00. However, after some negotiations, that person reduced the price to TZS 8,000.00. At the same time someone called on that phone but the seller who picked the call pretended that

the network was not good hence did not talk. At that point, PW2 became suspicious and asked for the owner of the phone so that they could negotiate the price. That move made that person to run away leaving the phone with PW2.

PW2 reported the matter to the Police Station where he met No. F 4275 DC Laurent (PW3). PW2 contended that he was asked by PW3 to keep the phone and track all calls on the belief that the owner could eventually be traced. Fortunately, he said, PW4's mother and sister called and told him that, that number belonged to PW4. After two days, a male person called who happened to be PW1. The two agreed to meet at the police station where the phone was allegedly identified to be the stolen one. With the help of PW1, the appellant was arrested on 6/4/2013. He was interrogated by No. E9477 DC Tegemea (PW5) but denied the allegations.

During the trial, the alleged stolen phone make, Nokia 5130 was admitted in evidence as exhibit P2. Further, in a bid to impeach the evidence of PW4, her statement which she gave at the police station soon after the incident, was admitted in evidence as exhibit D1.

The appellant was the only witness in his defence. He raised a defence of alibi in that on the material day, he was at Kahama having

gone there to see his mother since 29/3/2013. Whilst there on 30/3/2013 he communicated with his ex-girlfriend who happened to be PW4. He informed her that he would be coming to take his belongings. He added that, in the course of their conversation, PW4 told him that some people were looking for him.

He went on to state that when he returned home on 6/4/2013 he met PW1 at Kitangiri area on a motorcycle with another man. PW1 snatched his mobile phone and demanded to know why he was threatening his girlfriend. Thereafter, he was taken to the police station. Upon interrogation he denied the allegations. He complained that PW4 left him for PW1 whom she loved most and that the two lovers had conspired to frame the case against him. At the end of the trial, the appellant was convicted and sentenced as stated above.

The appellant's memorandum of appeal before this Court raised eight grounds of appeal but for the reasons to be apparent soon, we wish not to reproduce them herein.

At the hearing of the appeal, the appellant appeared personally without legal representation via a video conference facility while Mr. Tito Ambangile Mwakalinga, learned State Attorney represented the respondent Republic.

When the appellant was called on to argue his appeal, he preferred for the State Attorney to begin his address in reply to the grounds of appeal reserving his right to rejoin should the need to do so arose. On his part, Mr. Mwakalinga made his stance opposing the appeal. It also transpired that the 3rd and 4th grounds of appeal were new because they were not raised before the first appellate court. They were thus not argued. The learned counsel therefore argued only on the remaining grounds of appeal.

In the eighth ground, the appellant complained that the courts below erred for failure to analyze the entire evidence. the learned State Attorney submitted that the entire evidence was evaluated by the two courts below. When probed whether that analysis involved the appellant's evidence in defence, the learned State Attorney argued that when the trial court said at page 73 of the record of appeal that it had analyzed and considered the entire evidence, it should be taken by inference that the defence evidence was considered.

We have considered the eighth ground of appeal and the submission by the learned counsel. Upon perusal of the trial court's judgment, it is clear that the evidence from both sides was summarized. Thereafter, the learned magistrate analyzed the prosecution evidence

and concluded that the same had proved the charge beyond reasonable doubt. The trial court did not analyze the defence evidence. In his defence the appellant raised a defence of alibi to the effect that he was on safari at the material day. He also explained at length that the case is a frame- up by PW1 and PW4 because the latter was his former girlfriend who had left him for PW1. The trial court did not at all consider such evidence in line with the prosecution case before it decided whether the charge was proved beyond reasonable doubt. It is our view that, the evidence of either side cannot be said to have been considered by inference as argued by the learned State Attorney. At page 73 of the record of appeal the trial court magistrate said thus:

> *"Having analyzed and considered the evidence of both sides, the facts of the case and the applicable law, I am of the opinion that on the basis of the above findings, I am satisfied beyond reasonable doubt the prosecution has proved its case against the accused, Fikiri s/o Katunge."*

Although the trial court said that it analyzed and considered the evidence from both sides, in fact it is the prosecution evidence only which was given prominence before the court found that the charge against the appellant was proved beyond reasonable doubt.

It is a settled law that, non-consideration of the defence evidence is fatal irregularity which vitiates the whole proceedings and conviction. This has been the pronouncement in many Court's decisions where such an issue had been subject of discussion. Some of such decisions are in the cases of **Jonas Bulai v. R,** Criminal Appeal No. 49 of 2006, **Stephen Silomon Mollel v. R,** Criminal Appeal No. 248 of 2016, **Ally Patrick Sanga v. R,** Criminal Appeal No. 341 of 2017, **John Mghandi @ Ndovo v. R,** Criminal Appeal No. 352 of 2018 and **Daniel Severine & Two Others v. R,** Criminal Appeal No. 431 of 2018 (all unreported), to mention just a few.

In the case of **Jonas Bulai** (supra), where the trial Judge did not consider the defence evidence, the Court stated that;

> *"It is settled law that failure to consider the evidence of the defence is fatal to the trial or proceedings: see for example,* ***JAMES BULOW & OTHERS V. R*** *[1981] T.L.R. 283. It is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty. In this particular case the trial judge, unfortunately, did not do so."*

Again, faced with similar situation, the Court said in the case of **Daniel Severine & Two Others** (supra) that;

> *"It is trite law that, non-consideration of the defence evidence is fatal irregularity to the trial and the whole proceedings and it vitiates the conviction."*

Unfortunately, the appellant's line of defence did not also get the attention of the first appellate court. The same scenario arose in the case of **Ally Patrick Sanga** (supra) where the first appellate judge fell into the same trap with the trial magistrate, the Court had this to say;

> *"It is therefore our conviction that the fist appellate court's failure to re-evaluate the evidence of the defence constituted an error of law and by affirming a conviction based on evidence which had not been duly reviewed was also another error which renders the conviction unsafe."*

Non-consideration of the defence evidence before arriving at the decision amounts to a breach of one of the rules of natural justice, which is the right to be heard before being adjudged. See also **Stephen Silomon Mollel** (supra). The right to be heard is also safeguarded

under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended.

Having been satisfied that the defence evidence was not considered, we agree with the appellant in the eighth ground of appeal that the trial court did not analyze the evidence from both sides before reaching a verdict. As such, we nullify the judgment of the trial court and the High Court, quash the conviction and set aside the sentence. Eventually, we order the release of the appellant from prison unless he is otherwise lawfully held.

DATED at **TABORA** this 13th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered on 14th day of May, 2020 in the presence of the Appellant in person via video conference and Mr. John Mkony, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL