IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 234 OF 2007

DANIEL SHAYO.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 17th day of December, 1998
in
Criminal Rev. No. 9 of 1998

JUDGMENT

19th &26th February,2010

MANDIA, J.A.

On 20/8/1998 Daniel Shayo appeared before the District Court of Moshi to answer a charge of Defilement contrary to Section 136 of the Penal Code. When the charge was read over and explained to the accused person, his answer was "It is true." This plea made the trial District Magistrate enter a plea of "Guilty" against the accused

person. Thereafter the prosecutor outlined the facts to the trial court. At the end of the outline the accused person said " **I admit the facts adduced by the prosecution side as being correct and true."** The court then convicted the accused person on his own plea of guilty.

The facts on record which the then accused person admitted to being true are that on 18/8/1998 at about 8.30 am in the morning a woman by the name of Lucy Hipoliti was frying buns (maandazi) inside her house. She was aroused by cries of her two year old daughter Theresia coming from inside the appellant's room. She went over there and found the accused person holding a tin of water which he said he (accused) wanted to use to wash Theresia's private parts. Lucy became suspicious and examined the child's private parts and found signs of defilement. A report was made to the Police who issued a PF3 – Exhibit P1 – after which the accused person was charged.

As we remarked earlier, the appellant admitted the outline of facts and was duly convicted. The facts point out to two odd

happen-stances. The first one is the act of him being found in the same room with a two year old child who had cried out a short while before, and the second one is the act of him being found holding a tin of water which he said he wanted to use to wash the private parts of the child. These acts are rather odd, if not hair – raising, but it is a far cry from saying they are proof of the offence of defilement. Yet the words " it is true" and these facts convinced the trial court that there was proof of defilement, and it entered a conviction on a plea of guilty. In the case of R. versus YONASANI EGALU & OTHERS, (1942) 9 EACA 65 at P. 67 the earstwhile Court of Appeal for Eastern Africa had given a standard guideline on taking of pleas by trial courts held, inter alia, that:-

> " *In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused person is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution)*

it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."

The outline of facts, even though admitted by the then accused person to be true, do not show the constituents of the offence of defilement. Rather they merely raise a suspicion of the offence, and we all know it is trite law that suspicion, however grave, cannot be the basis of conviction in a criminal charge.

Leaving aside the aspect of proof - that the constituents of the offence were not proved before conviction was entered - there was the aspect that the taking of the plea fell short of the expected standard. As we remarked earlier, the accused person's plea was "it

is true." This was taken by the trial court as a plea of guilty to the charge. In R v Tarasha (1970) HCD n. 252 the court remarked thus:-

> " *There is no short cut to a trial and in every case where there is a plea of guilty the prosecution must give the facts. It often happens that the facts given do not establish the offence and a plea of guilty cannot be accepted. This is a case in point assuming that the facts are as stated in the complaint.* ***Moreover "it is true" cannot be an unequivocal piea of guilty by it self." (emphasis ours)***

Again in Kato v R (1971) HCD N 364 it was held:-

> " ***The procedure relating to the calling upon the accused person to plead is governed by Section 203 of the Criminal***

Procedure Code Cap 20. In our view, if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words " it is true when used by an accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self-defence or provocation."

The court record shows that the accused person's plea was taken on 20/8/1998 and conviction entered on the same day, yet the trial magistrate did not pass sentence on the same day for a reason which he put on record that she did not have the amended law for the offence, presumably one that she would have used to pass sentence. For some unexplained reason sentence was deferred to 21/8/1998, then to 25/8/1998 and lastly to 26/8/1998 when sentence was passed. Despite the adjournments the trial court metted out a

sentence of imprisonment of twenty years on the accused person based on the charge of defilement as filed. We are perplexed as to why the trial court adjourned sentencing three times only to pass sentence on the charge as filed. If the trial magistrate knew that the law had been amended as early as 20/8/1998 why did she take the plea?

The record shows that about one month later, on 23/9/1998, revisional proceedings were opened in the High Court of Tanzania at Moshi. On 17/12/1998 the appellant appeared before the High Court when the Republic, represented by Mr. Maimu, learned State Attorney, addressed the court at page 7 thus:-

> " **Mr. Maimu**:-
>
> The accused was charged under a section and a repealed law. Defilement c/s 136 of the Penal Code was repealed under Section 10 of the Sexual Offences Special Provisions Act No. 4/1998.

Under the Sexual Offences Act No. 4/1998 children are covered by Section 3 of the said Act whereby a girl is any female under 18 years of age. The accused should therefore have been charged under Section 130 and 131 as amended by the Sexual Offences Act No. 4/98.

The offence and section should be deleted and cured by substituting the offence of Rape c/s 130 (2) and 131 (3) of the Penal Code as amended by the Sexual offences Act No. 4 of 1998.

As for the Minimum Sentence of the charged offence, the offence of rape has a Minimum sentence of life imprisonment because the victim of rape was an infant aged two years. Let the sentence be so revised."

After this address by the Republic, the accused person addressed the court thus:-

> "**Accused**. It is the police who advised me to plead guilty so that I would be set free. I pleaded guilty because I feared the police would assault and beat me up. I pray that I be set free."

After this address by the accused person, the High Court vacated the sentence of twenty years imprisonment passed by the trial court and in its place substituted a sentence of life imprisonment. This led to the present appeal.

In this appeal, the appellant is self represented and the Respondent Republic is represented by Mrs Neema Ringo, learned Senior State Attorney. The appellant filed a memorandum of appeal containing five grounds which even the learned Senior State Attorney

under Section 240(3) of the Criminal Procedure Act, 1985.

The learned Senior State Attorney did not support the conviction and sentence. She argued that the offence which the appellant was charged with was alleged to have been committed on 19/8/1998, by which time the Sexual Offences Special Provisions Act had been in operation since 1/7/1998. Learned Senior State Attorney argued that the Act which came into operation on 1/7/1998, among other things, deleted the offence of defilement from the Penal Code with no substitute, which means the appellant was arraigned on repealed law. She also argued that the appellant's plea was equivocal and contravened Section 228(2) of the Criminal Procedure Act, 1985 which governs the taking of pleas.

The quote we made earlier on our judgement about the trial magistrate entering a conviction and then adjourning the proceedings in order to get a copy of the amended law shows that the trial court

knew that the law had changed but all the same proceeded to sentence on the basis of repealed law. We are in agreement with the learned Senior State Attorney that a conviction based on a charge unknown to the law is vitiated – See UGANDA versus KENERI OPIDI (1965) EA 614, ISMAIL BASHAIJA VR (1986) TLR 1 and LAWRENCE MPINGA VR (1983) TLR 166.

The record of trial shows, at pages 7 and 8, that the revisional proceedings revised upwards the sentence only, and left the conviction based on a non-existent law intact. This was a fundamental error which vitiated the revisional proceedings, and which this Court cannot allow to stand. In exercise of our revisional jurisdiction under Section 4 (2) of the Appellate Jurisdiction Act, as amended by Act Number 17 of 1993, we quash the revisional proceedings held in the High Court and order that the appellant be released from custody unless he is held on some other lawful cause.

It is so ordered.

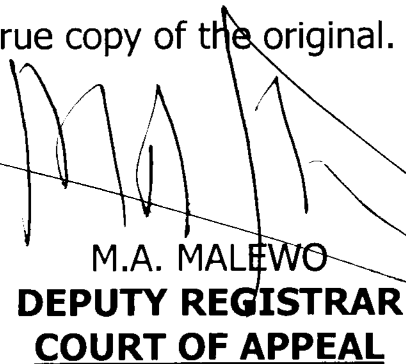
DATED at ARUSHA this 25th day of February, 2010.

H.R. NSEKELA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL