IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 402 OF 2015

LACK S/O KILINGANI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Kihwelo, J.)

Dated the 17th day of August, 2015
in
DC Criminal Appeal No. 42 of 2014

JUDGMENT OF THE COURT

26th & 29th day of July, 2016

JUMA, J.A.:

The appellant LACK s/o KILINGANI was on 26th September, 2013 convicted on his own plea of guilty by the Senior Resident Magistrate, District Court of Mufindi at Mafinga (Nongwa-SRM) for the offence of rape of a twelve (12) year-old girl contrary to Section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. The particulars of the charge and the facts stated before the trial court alleged that the appellant

committed the offence at around 07:30 in the morning of 23/9/2013 at Ipilimo village in Mufindi District.

The appellant was aggrieved. He lodged his appeal in the High Court of Tanzania at Iringa (DC Criminal Appeal No. 42 of 2012). In his petition to the High Court, two out of the five grounds of complaints, the appellant contested the voluntariness of the evidence of the cautioned statement which was relied upon to convict him on his own plea of guilty. In dismissing the appeal, Kihwelo, J. found that the trial magistrate reached a correct decision because he followed both the letter and the spirit of the law in convicting the appellant. Further, the first appellate Judge noted that the appellant's plea of guilty was unequivocal.

Still dissatisfied, the appellant has preferred five grounds to support his second appeal. Amongst the grounds, the appellant still faults the two courts below that convicted him on his own plea of guilty, for placing reliance on cautioned statement (exhibit P2) and the medical examination report (exhibit P1), which the appellant claims were exhibited as evidence without first explaining his right to oppose the admission of the two documents. In so far the appellant is concerned, the exhibition of the two

documents contravened the law. He urged us to allow his appeal and order a new trial on basis of fresh plea of not guilty.

In order to determine whether the appellant's plea was unequivocal, it is appropriate to look back at the record of proceedings that led up to the appellant's plea of guilty. The trial court's record show that when the appellant was called upon by the trial Senior Resident Magistrate to plead to the charge after the substance of the same had been explained to him, the appellant replied– *"Kweli" (Transl. 'True')*. The learned trial magistrate recorded the following:—

> *"**Accused pleads guilty to the charges**; prosecutor is asked to read out the facts of the charges.*
>
> ***V.M. NONGWA-SRM***
>
> ***26/9/2013"***

The public prosecutor (Inspector F. A. Mwakajila) proceeded to outline the facts, revisiting how the victim of the rape, and her friend were walking to school when the appellant appeared. The appellant gave chase after the two girls. He caught up with the victim, pulled her into the bushes. He undressed her and himself. He pushed his victim to the ground,

covered her mouth before he proceeded to have sexual intercourse. After gratifying himself, the appellant had the presence of mind to escort the girl back to the village. But he ran away when he saw the approach of one Samson s/o Lulambo. The appellant was arrested two hours later and taken to Mafinga Police Station.

The public prosecutor also narrated that the appellant's cautioned statement was recorded by Detective Corporal Pendo. In that statement the appellant confessed to the offence of rape. It was further narrated that the victim of the rape was given a police form (PF3) which she took to the hospital for her medical examination and treatment. It was also while narrating the facts when the public prosecutor offered to tender the appellant's cautioned statement and the PF3 of the victim. The record also shows that the appellant admitted the facts as narrated, and expressed no objection to the exhibition of his cautioned statement and the PF3.

After the narration of facts the learned trial magistrate did not address the appellant on whether he accepted the substance of the narrated facts. All the same, the appellant stated the following:-

> ***"Accused:*** *I admit to the facts of the charges I have no objection the exhibits.*

Court: *the cautioned statement and PF3 admitted as exhibit P1 and P2 respectively.*

V.M. NONGWA-SRM

26/9/2013"

It was on the basis of the plea of guilty, admitted facts, that the trial magistrate found the appellant guilty of the offence of rape and accordingly convicted the appellant:

Court on verdict

"The accused person pleads guilty to the charges, and admits to the particulars of the offence and he is fully aware of what he is admitting, in that circumstances this court [has] no other option than to convict the accused person LACK S/O KILINGANI with the offence he stands charged with, he is therefore convicted on his own plea of guilty.

V.M. NONGWA-SRM

26/9/2013"

After his conviction, the appellant offered nothing in mitigation when he was called upon to, after the public prosecutor had prayed for a severe punishment to serve as warning to others. He was sentenced to thirty (30) years imprisonment.

When the appeal was called for hearing before us on 26th July, 2016 the appellant fended for himself. The respondent Republic was represented by Ms Blandina Manyanda, learned State Attorney. The appellant preferred the learned State Attorney submit first on his grounds of appeal.

At the outset of her submissions Ms. Manyanda expressed her support for the conviction and sentence, and urged us to dismiss the appeal. She stated that the appellant's plea was sufficiently unequivocal to sustain his conviction on a plea of guilty, and that the appellant had accepted as true, the facts which the public prosecutor had outlined.

We however pressed her to explain two salient matters which we thought had some bearing on the unequivocal plea of guilty, and which were not considered by the two courts below. **Firstly,** the apparent failure by the trial magistrate to specifically ask the appellant whether he agreed with facts that had been outlined. **Secondly,** the record shows that the appellant was not specifically asked, if he had any objections against the proposal by the prosecutor to tender his cautioned statement and the PF3. On reflection, the learned State Attorney changed her position; she came round to support the appeal. She submitted that because the facts contained in the cautioned statement and the PF3 were not read out to the

appellant, it cannot be said that the appellant was made fully aware of all facts to enable him to make an unequivocal plea of guilty.

As a way forward, Ms. Manyanda urged us to allow the appeal but return the matter back to the trial court for the taking of a fresh plea. She submitted further that the period the appellant has already spent in custody should be taken into consideration in case the appellant is convicted following his fresh trial.

As we pointed out earlier to the learned State Attorney, after the prosecutor had offered to present the PF3 and the cautioned statement as exhibits during his narration of facts— *"I would like to tender cautioned statement of the accused person, PF3 of the victim. That is all"* – the trial magistrate did not immediately intervene to prepare the accused for admission of those two documents. The appellant was left on his own devices to reply that he *"admits to the facts of the charges I have no objection the exhibits."* We may as well say that by failing to ask if he had any objections, the trial court did not clear the ground for the admission of the cautioned statement before this document could be exhibited as evidence.

Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in **Robinson Mwanjisi and Three Others vs. R.** [2003] T.L.R. 218, at 226 alluded to the three stages of **clearing**, **admitting** and **reading out**; which evidence contained in documents invariably pass through, before their exhibition as evidence:

> *"...Whenever it is intended to introduce any document in evidence, **it should first be cleared for admission**, and **be actually admitted**, before it can **be read out**....."*
> [Emphasis added].

In **Misango Shantiel vs. R.**, Criminal Appeal No. 250 of 2007 (unreported) the witness did not read the whole statement of the accused person. The Court observed that this made it hard for the accused to become aware of what was written in that statement. While referring to its earlier decision in **Matula V R** [1995] T.L.R. 3, the Court stated:

"...It is the principle of law that the prosecution must prove the case against the accused beyond reasonable doubt. ..... What the accused has to do is to cast doubt on the prosecution case. Short of other evidence for the prosecution to rely upon to prove the case against the appellant, the complaint by the appellant that the statement was not read over to him is sufficient to cast doubt on the prosecution case. The appellant is entitled to some benefit of doubt."

It is therefore not surprising that because the cautioned statement which formed part of the facts narrated by the prosecution, was not passed through the three stages the appellant questioned the voluntariness of his cautioned statement in his first appeal to the High Court. Unfortunately, the first appellate court did not address itself on the voluntariness of the confession which the appellant raised as one of his grounds of appeal. Instead, after revisiting section 228 (2) of the Criminal Procedure Act and case law subscribing convictions based on own plea of guilty; the first appellate court concluded that *"...the trial Magistrate followed both the letter and the spirit of the law in convicting the appellant which renders the appellant's plea unequivocal and, therefore, his conviction sustainable."*

Without clearing the cautioned statement for admission and reading the same out to the appellant, we cannot on second appeal, say that the

facts as narrated by the public prosecutor left no doubt the question whether or not the appellant fully understood the extent of the charge of rape, to enable him to confirm the narrated facts as true. The appellant's plea in his trial was not unequivocal.

We shall allow the appeal, quash the conviction and set aside the sentence. In the circumstances of this appeal where not a single witness had testified, a fresh trial will serve the best interests of justice. We order that the matter be remitted to the trial District Court of Mufindi at Mafinga for a trial de novo. It is so ordered.

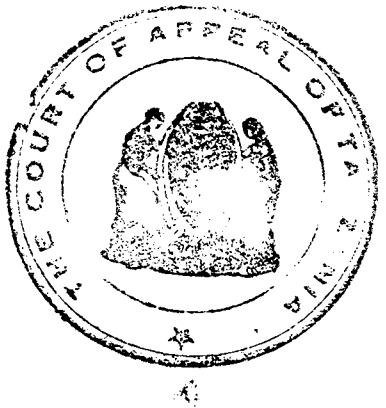
DATED at **IRINGA** this 28th day of July, 2016.

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

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



B.R.NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL