IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MASSATI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO.277 OF 2012

NDAIYAI PETRO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Mwaikugile, J.)

dated 17th day of October, 2012

in

Criminal Appeal No. 161 of 2012

JUDGMENT OF THE COURT

4th November, 2015 & 5th February, 2016

KIMARO, J.A.:

The appellant was convicted on own plea of guilty to the offence of rape contrary to section 130(1) (2) (b) and 131 of the Penal Code. He was sentenced to suffer imprisonment for a term of thirty years. The particulars of the offence alleged that on the 18th August, 2011 at NEWLAND within the

Municipality and District of Morogoro, the appellant had an unlawful carnal knowledge of one EDINA D/O SINDORI a girl of 24 years without her consent.

The record of appeal shows that after the appellant pleaded guilty, the trial Court conducted a preliminary hearing. When the facts which were prepared in respect of the preliminary hearing were read over to the appellant, the appellant admitted all the facts. A PF 3 and a caution statement of the appellant were also admitted in court as exhibits P1 and P3 respectively.

After that procedure, the trial court convicted the appellant on his own plea of guilty and sentenced him to imprisonment for thirty years.

The appellant was aggrieved and filed an appeal in the High Court. The respondent /Republic filed a preliminary objection to the effect that the appeal was not sustainable because the appellant pleaded guilty to the charge. The learned judge on first appeal upheld the preliminary objection and dismissed the appeal. In dismissing the appeal, the learned judge said:-

"Looking at the clear provisions of section 360(1) of

Cap. 20 R.E. 2002, and having made a finding that the

appellant made a plea of guilty to the offence charged with and the plea was unequivocal, an appeal against a conviction and sentence of an accused in a case he pleaded guilty, cannot in the light of the preceding cited section of Cap. 20 R.E. 2002 stand."

Aggrieved by the conviction and the sentence, the appellant filed six grounds appeal. In the first grounds of appeal the appellant claims that he was a layman and he did not understand the consequences of pleading guilty. In the second ground he contends that the facts did not tally with the charge sheet. He said if the caution statement that he made to the police was considered, he should have been convicted with attempted rape and not rape. As for the third ground the appellant claims that he should not have been convicted of rape because the PF3 did not support the charge of rape. The appellant laments in the fourth ground of appeal that the caution statement he made was not read over to him so that he could understand its contents. The fifth ground challenged the charge sheet on the section under which he was charged. In the last ground the appellant challenged the learned judge on first appeal for failure to take note of the

fact that the trial magistrate did not mention the section of the law that allowed him to impose the sentence of thirty years imprisonment.

When the appeal was called on for the hearing, the appellant appeared in person. He had no advocate to represent him. The respondent /Republic was represented by Ms. Rachel Magambo, learned Senior State Attorney, assisted by Ms. Martha Misonge also learned Senior State Attorney.

When the appellant was required to support the appeal, he felt more comfortable to hear what the respondents had to say in respect of his grounds of appeal first.

On the part of the learned Senior State Attorneys, at first they supported the conviction and the sentence. But with Court's intervention on whether the plea of the appellant was unequivocal, the learned Senior State Attorneys changed their mind and said that the plea of the appellant was not unequivocal. They referred to the facts that were led in support of the charge and agreed that since the caution statement that the appellant made to the police was not read over to him, that affected the plea of the appellant. They prayed that the appeal should be allowed and the case be ordered to go for a trial.

The appellant had nothing useful to say in reply. He prayed that justice should prevail.

An appeal is barred under section 360 (1) of The Criminal Procedure Act, [CAP 20 R.E.2002] if the record of the proceedings satisfies the appellate court that the appellant understood the charge and the facts well enough and the plea is unequivocal. This is what the Court has repeatedly said. In the case of **Khalid Athumani V R** [2006] T.L.R. 79 the Court held:-

> *"The Courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she understands the charge that has been laid at his/her door, discloses an offence known under the law and that he/she has no defence to it. A plea of guilty having been recorded, a Court may entertain an appeal against conviction if it appears that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it; or that upon the admitted facts he could not in law have been convicted of the offence charged."*

In a case where an accused person pleads guilty, the trial court does not conduct a preliminary hearing. A preliminary hearing is conducted where an accused person pleads not guilty and the purpose is to ascertain what is not in dispute so as to minimize the costs for calling witnesses not required. See section 192 of the Criminal Procedure Act, [Cap 20 R.E. 2002].

In this case what the trial magistrate did was to read the numerated facts as required in preliminary hearings. The appellant was then asked to say whether he admitted each of the numerated facts of which the appellant response was positive. That was followed by the parties signing on the agreed facts. After that the trial magistrate recorded that the accused was convicted on his own plea of guilty and then proceeded to sentence him as aforesaid.

After going through the record of appeal, we observe that the trial court went into error. Instead of the public prosecutor preparing the facts that would have enabled the appellant to say with certainty that he was pleading guilty to the commission of the offence of rape, the trial magistrate conducted a preliminary hearing. That resulted in a narration of facts which did not disclose the ingredients of the offence to the appellant. The caution statement that was tendered in court was not even read over to the

appellant. Even in entering a conviction for the offence of rape the trial magistrate did not record that the appellant admitted the facts to the commission of the offence. In the case of **Ramji S/O Mhapa V R** Criminal Appeal No. 88 of 2014 (unreported), the Court held:-

> *"We are increasingly of the view that the plea entered by the appellant at the trial court is clearly unequivocal.* ***From the facts we have gathered on record, there is no doubt that the appellant appreciated the ingredients of the offence of rape charged against."***

In this case we have shown that there was no compliance in ascertaining whether the plea of the appellant was unequivocal. Under the circumstances it will not be fair to say that the appellant entered a plea of guilty to the charge of rape that was preferred against him.

We allow the appeal. Using powers of revision under section 4(2) of the Appellate Jurisdiction Act, CAP 141 we quash and set aside the entire proceedings of the High Court in Criminal Appeal No.161 of 2011 proceedings for the preliminary hearing, the conviction and the sentence of the trial court.

We order that the case goes for trial before another magistrate with competent jurisdiction. The trial should be carried out expeditiously as possible.

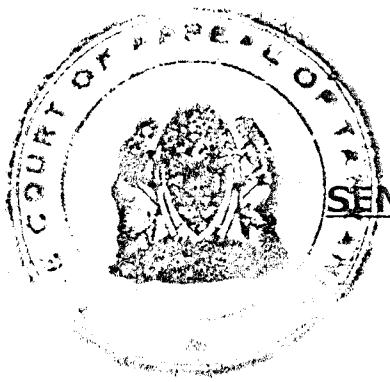
DATED at **DAR ES SALAAM** this 25th day of January, 2016.

N. K. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL