IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 12 OF 2016

PETER S/O KOMBE .....APPELLANT

VERSUS

D. P. P. .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Sumbawanga)

(Nyangarika, J.)

Dated the 5th day of October, 2015
in
DC. Criminal Appeal No 26 of 2015

JUDGMENT OF THE COURT

11th & 14th December, 2018

MMILLA, J.A.:

The appellant, Peter Kombe, was charged in the District Court of Nkasi at Namanyere in Rukwa Region with the offence of rape contrary to sections 130 (1), (2) (e) and 131 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code). The victim was a child then aged five (5) (name is withheld).

On the day the charge was read over and explained to the appellant when he first appeared before the trial court on 1.12.2014, he was recorded

to have pleaded that "it is true". Upon that, the public prosecutor prayed for the case to be adjourned to another date when it would come for preliminary hearing.

The case was called again on 28.1.2015. On that day, the public prosecutor read the following facts in court:-

"FACTS TO DETERMINE THE MATTERS WHICH ARE NOT IN DISPUTE UNDER SECTION 192 OF THE CPA [CAP 20 R.E.2002].

1. That the complainant in this case is (the) United Republic of Tanzania.
2. That the accused person in this case is Peter s/o Kombe, Fipa, 19 yrs, Christian, peasant of Kantawa – Nkasi.
3. That on 25th day of November, 2014 (he) was at Kantawa village within Nkasi District in Rukwa Region.
4. That at (the) material date, time and place the accused person did have carnal knowledge to one (C d/o K), a girl of five years old.
5. That the accused person was arrested by Police officer on 25/11/2014 and sent to Kipande Police Post for further investigation.
6. That on 1st day of December 2014 the accused person was brought before a court of law to answer this allegation, and after the charge

was read over to him and interpreted in simple language, the accused person 'Entered Plea of Guilty'."

It was reflected at page 3 of the Record of Appeal that after reading those facts to him, the appellant admitted that they were true. On the basis of that, the court convicted him and subsequently sentenced him to thirty (30) years' imprisonment. The appellant was aggrieved and appealed to the High Court of Tanzania, Sumbawanga Registry. That court dismissed the appeal, but enhanced the sentence from thirty (30) years imposed by the trial court to that of life imprisonment. Undaunted, he preferred this second appeal to the Court.

The memorandum of appeal filed by the appellant raised five (5) grounds which in fact boil down to only three of them as follows:-

1. That he was convicted on a plea which was equivocal;
2. That prosecution did not produce the PF3 as evidence before the trial court; and
3. That the first appellate court improperly enhanced the sentence from thirty (30) years to that of life imprisonment.

When the appeal came for hearing before us on 11.12.2018, the appellant appeared in person and fended for himself; whereas Ms Mwajabu Tengeneza, learned State Attorney, represented the respondent/Republic. The appellant prayed the Court to adopt his grounds of appeal and chose for the Republic to respond first, but reserved his right for rejoinder if need would arise. We accordingly invited Ms Tengeneza to respond.

At the outset, Ms Tengeneza informed the Court that she was supporting the appeal, but for a different reason from those raised in the grounds of appeal. Her focus was on the charge sheet, which she said was defective in that clause (e) in subsection (2) of section 130 of the Penal Code was written by hand without impressing the signature to justify the insert, hence her view that it was fatally defective. She relied on the case of **Zebedayo Mtetema v. Republic**, Criminal Appeal No. 484 of 2015, CAT (unreported) in which the Court stated that it is dangerous to rely on alterations made by hand without impressing a signature. In view of that defect, she urged the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), quash the proceedings and judgment of both courts below, set aside the sentence, and order the appellant's release from prison.

On his part, the appellant stated briefly that he was supporting the submission of the learned State Attorney, and asked the Court to release him from prison.

We have earnestly considered the submission advanced by the learned State Attorney. Admittedly, there is that alteration effected by hand but no signature was impressed to vindicate the insertion. In a fit case, that amounts to a defective charge.

We are aware of the instructions of section 132 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). That section, requires the offences to be specified in the charge, also that the charge must indicate the necessary particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It provides that:-

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

Certainly, an omission to cite in full a provision creating any particular offence will necessarily offend this provision, thus rendering the charge incurably fatal because a defective charge will deny the accused person chance to properly prepare his defence – See the case of **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011, CAT and **Magesa Chacha Nyakibali & Another v. Republic**, Criminal Appeal No. 307 of 2013, CAT (both unreported).

Upon carefully reading the proceedings of 28.1.2015, including the facts which were adduced before the trial court, the conviction that followed, and the sentence thereof; it is certain that the insertion of clause (e) to subsection (2) of section 130 of the Penal Code was done before the charge was read to the appellant, which is why it is reflected in those proceedings. That means no injustice was occasioned because the appellant understood the nature of the offence which was leveled against him. In the circumstances, the case of **Zebedayo Mtetema** (supra) is distinguishable to the present case.

Notwithstanding what we have just said however, a close scrutiny of the plea which was recorded shows very clearly that it was equivocal in as much as the appellant was shown to have merely responded that "it is true"

without any elaborations. We have also realized that the trial court compromised the procedure as regards what ought to have been done after it believed that the appellant had pleaded guilty to the charge. We endeavour to elaborate.

We wish to kick-off the discussion by making reference to section 228 (2) of the CPA which instructs the trial court what to do in case an accused person pleads guilty to the charge. That section provides that:-

> *"If the accused admits the truth of the charge,* ***his admission shall be recorded as nearly as possible in the words he uses*** *and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."* [The emphasis is added]

In the case of **Burete Peter v. Republic**, Criminal Appeal No. 20 of 2010, CAT (unreported) in which the case of **Kato v. Republic** (1971) H.C.D. 364 was approved, the Court said that 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. In

such situations therefore, is desirable to record the plea of the accused in a manner envisaged by section 228 (2) of the CPA just quoted above.

Equally important, the facts of the case must be explicit, and must disclose all the necessary ingredients of the charged offence. They must be read over and explained to the accused person to afford him opportunity to understand the nature of the case against him - See the cases of **Joseph Mahona @ Joseph Mboje @ Magembe Mboje v. Republic**, Criminal Appeal No. 541 of 2015, CAT (unreported), **Adan v. R.** [1973], E.A. 445 and **Hando s/o Akunay v. R**. (1951) 18 E.A.C.A. 307. In **Hando s/o Akunay's** case, the East Africa Court of Appeal repeated:-

> *"Before convicting on a plea of guilty every ingredient of the offence must be explained to the accused and asked to plead. Otherwise the conviction would be faulted."*

In **Adan's** case, the procedure on how to record pleas of guilty was clearly set out as follows:-

(i) The charge and all the ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii)The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the fact or raises any question of his guilt, his reply must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

The rationale for emphasizing this articulate procedure was best explained in the case of **John Faya v. Republic**, Criminal Appeal No. 198 of 2007, CAT (unreported) in which reliance was on the case of **R. v. Yonasani Egalu and others** (1942) 9 E.A.C.A 67. In **Yonasani Egalu's** case the Court said that:-

> *"In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when on admission by the accused 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. In the present case, we think with respect, that the learned trial magistrate should have explained to the appellant in clear language every ingredient of the charges and required him to admit or deny the same and recorded the exact words the appellant used in his admissions or denials, as the case may be, in a form indicating that the appellant fully understood the charges he unequivocally pleaded thereto. In this case the appellant admitted facts which do not support the offences charged. In our view the

appellant did not plead to the offences charged in the first and second counts".

In the present case, the trial court wrongly fixed a date for preliminary hearing entailing the preparation for a full trial. The proper procedure was for the trial court to invite the public prosecutor to adduce the facts of the case, read them to the appellant and see if he was admitting them. He would then access them to find out if they disclosed the necessary ingredients of the charged offence. Unfortunately, the trial court did not do so. The facts which were relied upon in convicting the appellant were inadequate in that they did not disclose the necessary ingredients of the offence he was charged with. That was indeed improper and it amounted to an unfair trial.

For reasons we have assigned, we invoke the revisional powers under section 4 (2) of the AJA, on the basis of which we quash the proceedings and judgment in both courts below as well as the conviction thereof, and set aside the sentence which was meted out against the appellant.

The remaining huddle is; what is the way forward in circumstances such as these? Will it be proper to order a retrial?

As often expressed in a number of cases, a retrial will only be ordered when the original trial was illegal or defective, or where the interests of justice require it – See the case of **Fatehali Manji v. Republic** [1966] E.A. 343. It was expounded in that case that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require".*

In the present case, the appellant was charged with rape in which the victim was a child then aged five (5) years, therefore that by any standards it was a serious offence. Since the nullification of the proceedings was

occasioned by fundamental defects in the trial, we are firm that public interests demand us to, and we hereby order a retrial before a different magistrate having the jurisdiction to try such cases. We direct however, for the trial of this case to be expedited.

Order accordingly.

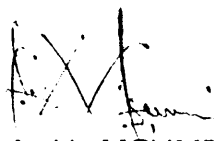
DATED at **MBEYA** this 13th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL