IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LILA, J.A., SEHEL, J.A., And LEVIRA, J.A.,)

CRIMINAL APPEAL NO. 82 OF 2020

SHEHE RAMADHAN @ IDD ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment of the High Court of Tanzania at Tanga)
(Aboud, J.)
dated the 12th day of August, 2016
in
(DC) Criminal Appeal No. 41 of 2016

.....

JUDGMENT OF THE COURT

18th & 24th September, 2020

LEVIRA,J.A.:

The appellant, SHEHE RAMADHANI @ IDDI was charged in the District Court of Korogwe at Korogwe with rape contrary to sections 130(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2002. He was convicted on his own plea of guilty and sentence to life imprisonment.

The prosecution had alleged that on 5th day of October, 2015 at about 14:00 hours at Makuyuni village in Mombo area within Korogwe District in Tanga Region, the appellant had canal knowledge of LK (the name withheld) a girl of 13 years (the victim). He was not satisfied with both the conviction and the sentence. Therefore, he appealed to the

High Court of Tanzania, Tanga Registry (the High Court). His appeal succeeded partly in respect of the sentence as the High Court Judge considered the age of the victim and came up with a finding that the sentence was excessive and thus reduced it to thirty (30) years imprisonment. Still aggrieved, the appellant has preferred the current appeal challenging both the conviction and the sentence.

Before we proceed any further, we wish to state albeit briefly what transpired at the trial court. It is on record of appeal that when the appellant was arraigned before the trial court, the charge was read over and explained to him. Thereafter, he was invited to enter his plea. He responded *"it is not true"* and the trial court entered a plea of not guilty. Following the appellant's plea of not guilty the trial had to take place. The preliminary hearing took place and the prosecution revealed their intention to call five witnesses and tender two exhibits during trial.

On 21st October, 2015 the trial commenced where Hadija Kiruwa (PW1) gave her testimony followed by other prosecution witnesses who testified on various dates including the victim (PW2), Police officer with No. F.6637 DC Daniel (PW3) and Doctor John Edes Fetnon (PW4).

It is noteworthy that on 5th January, 2016 when PW4 testified in the cause of which he tendered PW2's PF3 without any objection from

the appellant, there was a prayer by the appellant for the charge to be read over to him again. He intimated that he wanted to change his plea because he did not want to waste the court's time.

The trial magistrate admitted the PF3 as Exhibit P2 and granted the appellant's prayer. The charge was read over and explained to the appellant. Upon being given an opportunity to respond, the appellant said *"it is true I rape LK"*. Then the trial Magistrate entered a plea of guilty. Immediately thereafter, the trial Magistrate recorded **"Memorandum of Agreed facts/undisputed Facts"**. Then the appellant and the prosecutor signed and the trial Magistrate convicted the appellant on his own plea of guilty. The verdict of guilty was followed by previous records of the appellant and sentence.

In this appeal the appellant's grounds are as follows:

1. *That, the learned trial court did not comply with section 210(3) of the Criminal Procedure Act, Cap 20 RE 2002.*
2. *That both the appellate Judge and learned Magistrate erred in law and in fact by acting upon the cautioned statement of the appellant (exhibit P1) which its content was not known to the appellant as the same was not read out after being admitted in court.*

3. *That both the appellate Judge and the learned trial Magistrate erred in law and in fact by acting upon equivocal plea of guilty to the felony offence which sounds technical as such the indigent appellant was entitled to be represented by legal counsel paid for by the State for fair and candid trial.*
4. *That, both the appellate Judge and learned trial magistrate erred in law and in fact by acting upon the evidence of PW2 (the victim) whose mother (PW1) clarified before the trial court that her daughter (PW2) is insane.*
5. *That the prosecution did not prove their case beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented via video link to Maweni Central Prison, Tanga, whereas the respondent, Republic had the services of Mr. Waziri Magumbo and Ms. Elizabeth Muhangwa, both learned State Attorneys.

When the appellant was invited by the Court to submit on his appeal, he preferred to hear first from the learned State Attorney as he reserved his right to make a rejoinder.

In reply, Mr. Magumbo supported the appeal. He stated that the appellant has presented five grounds of appeal, but opted to submit only on the third ground regarding the appellant's plea.

It was his submission that having gone through the record of appeal, he discovered that the appellant's plea of guilty was equivocal. He referred us to pages 17 to 19 of the record of appeal where PW4 was giving his evidence and the appellant prayed to change his plea. According to him, the facts of the case were not read out to the appellant and the trial Magistrate did not record them. This failure, he argued, prejudiced the appellant by denying him the right to respond properly to the facts of the case.

He went on arguing that, it was improper for the trial magistrate to record "Memorandum of Agreed Facts" instead of the Facts of the Case. As a result, the trial Magistrate did not record a direct response of the appellant on the Facts of the Case and thus, the appellant was convicted on his own words instead of prosecution evidence. According to him, the appellant's response did not seem to respond to the facts of the case, more so because he was charged with rape of a child under eighteen (18) years but this did not feature in his response. In support of his arguments he cited the case of **Samson Danel Mwang'ombe v. Republic,** Criminal Appeal No. 106 of 2014 (unreported).

Following the shortcomings which he highlighted, the learned State Attorney submitted that the appellant's plea was equivocal. Therefore, he prayed for the appellant's conviction and the proceedings in respect of the plea of guilty to be quashed and the sentence set aside.

Besides, the learned State Attorney drew our attention to page 7 of the record of appeal, where PW2 testified but the trial Magistrate did not give the appellant an opportunity to cross examine her. Failure to give the appellant that opportunity, he argued, amounted to unfair hearing.

Mr. Magumbo submitted furthermore regarding another irregularity to the effect that, the appellant was not given a right to mitigation after being convicted and before being sentenced. In that regard, he said, the trial Magistrate did not have a base in assessing the appellant's sentence. He therefore urged us to remit back the case file to the trial court and order the proceedings to start from PW2's evidence. Finally, he prayed for the appeal to be allowed.

In rejoinder the appellant concurred with the submission made by the learned State Attorney.

From the above, the crux of the matter in this appeal is whether the appellant's plea was unequivocal. As introduced above, the appellant was charged with rape of a girl under 18 years. The offence of rape when committed to a girl under 18 years is complete when it is shown that there was sexual intercourse (see section 130(2)(e) of the Penal Code). It is immaterial whether the said girl consented or otherwise.

In the case at hand, the appellant pleaded guilty when the charge was read over to him for the second time as he requested and he entered his plea. The relevant part of the record of appeal is found at page 17 where PW4 prayed to tender the PF3 as exhibit and it was as follows:

> *"**PW4** – I filled in PF3 and handed it to the relative who brought the victim to the hospital. I pray to tender this PF3 form as an exhibit.*
>
> ***Accused:** No objection and I pray that the charge sheet be read to me again, I have changed my mind and I don't want to waste the court's time.*
>
> ***Court:** The PF3 is admitted as exhibit PW2. Since the accused wants to be reminded of the charge let him be reminded.*
>
> *Sgd: - SRM*
> *05/01/2016*

Court: *Charged read over and explained to the accused person who is asked to make his plea thereto.*

Accused: *"It is true" I raped LK.*

Court: *Entered as a plea of guilty.*

Sgd: SRM

05/01/2016

MEMORANDUM OF AGREED FACTS/ UNDISTUTED

Accused: *If found the victim LK cutting firewood along Gomba road. I talked to her about having sex with her and she consented and so I had sexual intercourse with her. Suddenly after I ejaculated she started bleeding heavily from her private parts, so I left and later, I got arrested. So all said is very true and I regret.*

Accused: *Signed*

P/Prosecutor: *Signed*

Court: *The accused is convicted on his own plea of gullty.*

Sgd- SRM

05/01/2016

Previous Record: *Nil*

But since rape case are rampant in our district, then a harsh penalty be imposed.

SENTENCE:

Despite the fact that the accused is a first offender but the act done by him to a young girl is very inhumane. In the circumstances the accused should serve imprisonment for life so as to deter him completely from causing the same harm to other children of the victim's nature. The rape acts greatly affect the child's psychology and destroy a victim's life. I so order.

Sgd: SRM

05/01/2016."

It is clear from the above excerpt that the facts of the case which could establish the essential ingredient of, what we refer more often as, statutory rape were not read over to the appellant. We observe that words of the appellant which the trial Magistrate recorded as *"Memorandum of Agreed Facts/ Undisputed"* do not suggest that he was admitting to the facts of the case rather whatever he said was out of blue. Also, in plea taking when the accused offers a plea of guilty, the trial court is required to record the accused words after the prosecution reads the "Facts of the Case" and not the Memorandum of Agreed Facts

as it is the case herein. The inspiration in this aspect can be drawn from the decision of the defunct East Africa Court of Appeal in **Rex v. Yonasani Egalu & 3 Others** [1942-1943] IX EACA 65; where it was stated:

> *"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 is to be allowed to take the place of 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 the form that will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally".*

The procedure to be followed by the trial court when an accused person pleads guilty to an offence charged was well explained in the case of **Adan v. Republic** (1973) EA 445 at page 446 in the following terms:

> *"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak*

and understand. The magistrate should then explain to the accused person all essential ingredients of the offence charged. If the accused, then admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty.

The Magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or assert additional facts which, if true, might raise a question as to his guilty, the magistrate should record the change of plea to "not guilty" and proceed to hold a trial. If the accused person does not deny the alleged facts in any material respect the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. ***Statement of facts and the accused's reply must, of course, be recorded..."*** [Emphasis added].

Being fortified by the above quoted position of the law, we are settled that since in the current case the trial Magistrate skipped a very

fundamental stage of reading the facts of the case, the statement of the appellant immediately after the *"Memorandum of Agreed Facts"* did not salvage the situation. In other words, it was not indicative that the facts of the case were read over to the appellant as required to make him understand every constituent of the offence with which he was charged. Failure by the prosecution to read out facts of the case is tantamount to lack of evidence to establish the offence which the appellant was charged with and it was fatal. For this reason, we agree with the learned State Attorney that, the trial Magistrate committed a serious procedural irregularity. We find that it was not safe for the trial Magistrate to convict the appellant on his own plea of guilty, which we observe, was not complete and hence equivocal.

We could end here but we note yet other irregularities in the proceedings worthy of our consideration. As clearly stated by the learned State Attorney upon being prompted by the Court, the appellant was not accorded right to mitigation after being convicted. The above reproduced part of the proceedings of the trial court bears the evidence that, the trial Magistrate only recorded the previous record of the appellant and when that was done, he proceeded to sentence him.

It is settled position that before sentencing an accused, the convicting court should consider both mitigating and aggravating factors

but this was not the case in the present case. The trial Magistrate only considered the aggravating factors and imposed the severe sentence to the appellant, which we say, was wrong. In **Akida Ramadhani Salehe v. R**; Criminal Appeal No. 349 of 2013 (unreported) whose facts are not in all fours with this case, the trial Judge, having convicted the accused she availed him an opportunity to mitigate after hearing from the prosecution on the previous records of the accused.

The appellant's advocate gave 6 mitigating factors, namely that; the accused was a first offender, that he had been in custody for 8 years already by then; that the deceased was his friend, that the deceased was the author of his death; that the deceased was a notorious thieving street boy, and was in poor health and that the accused was repentant for what he did. But in assessing the sentence the learned Judge stated:

> *"All stated by the counsel for the accused are considered. I therefore sentence the accused to fifteen years (15) imprisonment".*

The Court in determining the appeal observed that, what was stated by the trial Judge was inadequate and thus made the following statement which we consider relevant to our case:

> *"It was incumbent upon the Judge to specify which mitigating factors, she considered, and which aggravating factors prevailed over these*

mitigating factors. For instance, if she took into account only the mitigating factors, then it is obvious that she did not take into account that the appellant had pleaded guilty and the aggravating factors, because none of those were mentioned by the "accused's counsels". What distinguishes a judicial (even if discretionary) decision from any other administrative decision is that a judicial decision must be supported by reasons. Otherwise, it becomes an arbitrary one, for it has been said that ***it is a fundamental requirement of fair play and justice that parties should know at the end of the day why a particular decision has been taken".***
[Emphasis added].

Being guided by the above decision, as intimated earlier, the trial Judge in the cited case gave both parties equal opportunity before sentencing the accused. However, she failed to identify which mitigating factors she considered. In the case at hand, things are worse as the appellant was denied a room to mitigate completely. As a result, the life imprisonment sentence was meted upon him by the trial Magistrate without proper assessment which left no room for balancing the ends of Justice. It is our opinion that although the High Court reduced the appellant's sentence from life imprisonment to thirty (30) years

imprisonment, justice of the case was met because the basis of that reduction was the age of the victim as the first appellate Judge observed that, the victim was 13 years by then. So, the appellant ought to have been sentenced by the trial court to thirty (30) years instead of life imprisonment. In the circumstances, we hold that the severe sentence imposed on the appellant by the trial court was improper for failure to weigh both the aggravating and mitigating factors.

Another material irregularity in the proceedings of the trial court according to the learned State Attorney, which we agree, is that PW2 (the victim) was not cross-examined by the appellant after giving her evidence. Failure to give the appellant an opportunity to cross- examine PW2 amounted to unfair trial on the part of the appellant. Our thorough reading of the record of appeal reveals that, the trial Magistrate exercised his powers to deny the appellant the right to cross examine PW2 without assigning reasons. We find it apposite to reproduce what took place on 04th November, 2015 when PW2 testified.

Having conducted *voire dire* test the trial Magistrate stated as follows:

> "***Court:*** *Clearly the witness Latifah does not understand the meaning of oath or its effect. Although PW1 says that Latifah is not mentally fit but before this court she seems to be of*

enough understanding and capable of giving evidence without oath, ***no cross-examine will be conducted therefore.***"[Emphasis added].

Immediately thereafter, PW2 testified and the trial magistrate recorded the following:

"xxd: No cross –examination
xxd: Nil
Sgd. SRM
04/11/2015."

We note from the above except that, the trial Magistrate formed the opinion that he will not give the appellant opportunity to cross-examine PW2 even before attempting to do so. We say so because the proceedings do not suggest that he was given the opportunity to cross-examine. We note further that, PW2 testified without taking oath but this fact alone could not justify denial of appellant's fundamental right to cross –examine her. In **Ex-D. 8656 CPL Senga S/O Idd Nyembo and 7 Others v. R**, Criminal Appeal No. 16 of 2018 (unreported) while dealing with almost similar circumstance, the Court stated:

"We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony

under oath or affirmation (as the case may be) or not. This right is a fundamental one to any Judicial proceedings and thus the denial of it will usually result in the decision in the case being overturned. Unless, a party has waived his right to cross-examine the witness, the testimony of a witness cannot be taken as legal evidence unless it is subject to cross-examination. ***Consequently, the testimony affecting a Party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of crossing-examination (see Kabulofwa Mwakalile & 11 others v. Republic*** *(1980) TLR 144)"* [Emphasis added].

In the light of the above decision, we as well find that the evidence of PW2 does not qualify to be considered as a legal evidence to be acted upon by the court because the same incriminates the appellant but its truthfulness was not tested. Therefore, we agree with the learned State Attorney that the evidence of PW2 deserves to be nullified.

For the reasons stated above, we allow this appeal, quash the conviction, and nullify the proceedings of the High Court and plea taking proceedings by the trial court. We set aside the appellant's 30 years

imprisonment sentence. In exercise of our revisional powers under Section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, we nullify the evidence of PW2. We remit the case file to the trial court for another competent Magistrate to proceed with the trial from where it ended on 5th January, 2016. However, we direct the evidence of PW2 to be taken afresh. We further order expeditious trial and in case of conviction, the period of time spent by the appellant while serving the sentence shall be excluded in his new sentence.

In the meantime, the appellant shall remain in custody pending continuation of the trial. Order accordingly.

DATED at **TANGA this** 24th day of September, 2020.

S.A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of September, 2020 in the presence of the appellant in person via video link and Ms. Maisara Mkumba State Attorney for the respondent his hereby certified as a true copy of the original.

G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL