IN THE HIGH COURT OF TANZANIA

AT DODOMA

CRIMINAL REVISION NO. 2 OF 2008

(ORIGINAL CRIMINAL CASE NO. 181 OF 2008

OF SINGIDA DISTRICT COURT AT SINGIDA)

THE REPUBLIC ..... PROSECUTOR

VERSUS

ALLY RAMADHANI ..... ACCUSED

5/10/2009 & 20/11/2009

RULING

HON. MADAM, SHNGALI, J.

During my normal administrative duties as a Judge-In-Charge of the High Court Dodoma Zone, I received several fortnight Criminal Cases return from District Courts. In the course of inspection of the Singida District Court fortnight returns, I came across the Criminal Case No. 181 of 2008 where the accused person **ALLY S/O RAMADHANI** was charged with the offence of Incest by Male contrary to Section 158 (1) of the Penal Code, Cap. 16. The accused was convicted on a plea of guilty and sentenced to a hundred (100) years imprisonment.

That sentence shocked me. Immediately I directed the District Registrar, High Court Dodoma to call for the case file for further inspection. On receiving the case file I was further shocked and disappointed by the apparent legal and procedural irregularities in the handling of the whole case. I then ordered the District Registrar to open this Criminal Revision file and notify the parties.

Although in terms of section 375 of the Criminal procedure Act, 1985 the court is not obliged to hear the parties on revision, the practice has been to notify the Director of Public Prosecution for he may wish to participate and comment on the matter - see **DPP vs ABDOUL ISMAIL (1993) TLR 193**. Likewise the accused/respondent who was serving his long sentence at Isanga Prison within Dodoma Municipality was summoned although he had nothing useful to submit before the court. In this revision, therefore Mr. Wambali, learned State Attorney appeared for the applicant/Republic.

It is important at this point to give a brief account or background of the matter and the procedure adopted by the trial Resident magistrate in conducting the case. The case against the accused/respondent started on 7th October, 2007. After several mentions, on 1st July, 2008 the case was called for a Preliminary hearing in terms of section 192 of the Criminal Procedure Act, 1985.

On that date the charge was not read over to the accused person. The trial court record indicate that the facts number 1 to 11

were admitted. The record does not show the recorded facts, nor the person who read the facts before the court nor who admitted those facts. At the end of the so called admitted facts both the prosecutor and accused/respondent are recorded to have signed the record. Then the trial court recorded what I may guess was admission of exhibit PF3 of the victim. The record is silent on whose PF3 was it and who exactly produced it. Thereafter, the trial Resident Magistrate pronounced a *"Ruling"* and convicted the accused/respondent on his own plea of guilty.

To say the least the procedure adopted by the trial Resident Magistrate is tantalizing, confusing and contrary to the procedural law. For avoidance of doubt let me quote in-extenso what transpired in the trial court resulting the accused/respondent to be rammed with a faceless sentence of hundred years imprisonment.

"1/07/2008
Coram:- N.A. Baro, R.M.
P.P. :- Insp. Adamu.
Accused:- present.
C/Clerk:- Mwanahamisi.

***PROS**:- For hearing today, facts are ready.*

PRELIMINARY HEARING OPEN

MEMORANDUM OF DISPUTED AND NON DISPUTED FACTS

Fact No. 1 – Admitted.

Fact No. 2 – Admitted.

Fact No. 3 – Admitted.

Fact No. 4 – Admitted.

Fact No. 5 – Admitted.

Fact No. 6 – Admitted.

Fact No. 7 - Admitted.

Fact No. 8 – Admitted.

Fact No. 9 – Admitted.

Fact No. 10 – Admitted.

Fact No. 11 – Admitted.

Signed by Prosecutor – Inspector Adamu.

Signed by Accused;- Ally Ramadhani.

Exhibit – PF3 of the victim.

***RULING**:- Upon facts read to the accused person who pleaded guilty from the facts read to him unequivocally, it follows therefore that the same is hereby convicted on his own plea.*

***CRIMINAL PREVIOUS RECORDS**:- The accused is the first offender it is not recorded as to any offence committed by him before.*

***ACCUSED'S MITIGATION** – I pray for forgiveness since I have pleaded guilty. That my family depends on me for their entire life.*

SENTENCE:- *Recommendation by the public prosecutor that the accused is the first offender and accused mitigation that his family is depending on him for their life in entirety are all taken into consideration by this court.*

Nevertheless, the offence committed by the accused is very capital one that requires this court to punish the doers so as ditter others from so doing.

Section 158 (1) (a) of the penal Code is clearly quoted. "Any male person who has prohibited sexual intercourse with a female person who is to his knowledge his grand daughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction if the female is of the age of less than eighteen years to imprisonment for a term of not less than thirty years." It follows therefore that the said child is a female been raped by his father and that she is of the age of 16 years. So the accused is hereby sentenced to imprisonment for 100 years (one hundred) years. Order accordingly.

Sgd. N.A. BARO - R.M."

There is no place in the trial court record to show that on that date the charge was read over and explained to the accused/respondent in order to enter his plea of guilty or not guilty in terms of section 228 of the Criminal Procedure Act. Secondly, the case was at the preliminary hearing stage and therefore; the trial Resident Magistrate was supposed to conduct a Preliminary hearing

in terms of section 192 of the Criminal procedure Act. Thirdly, the trial Resident Magistrate failed to record in writing the alleged *"admitted facts"* nor the name/person who submitted them before the court. Furthermore the record is silent on who produced the alleged exhibit PF3. Furthermore the alleged pronounced *"Ruling"* is fictious because it has no leg to support. The whole procedure adopted by the trial Resident Magistrate is cumbersome, clumsy and illegal because he confused plea taking and preliminary hearing procedures.

The procedure in trials before subordinate courts, including plea taking is clearly provided under Part VII (a) of the Criminal procedure Act, 1985: While the Procedure for Accelerated Trial and Disposal of cases (Preliminary Hearing) is provided under part B of Part VI, (General Provision Relating to trials) of the Criminal Procedure Act, 1985.

In conducting a preliminary hearing the trial Resident Magistrate was required to comply with the Accelerated Trials and Disposal of cases Rules GN 192/88 made under section 192 (6) of the Criminal Procedure Act, 1985 – **See MUGETA S/O MANYAMA VS THE REPUBLIC; Criminal Appeal No.15 of 2004 (CA)** MWANZA Registry (unreported). Furthermore, failure by the trial court to take a plea of the accused nullifies the proceedings – see **THUWAY AKONAAY VS. R (1987) TLR 92 CAT and R VS NANJI KARA (1967) HCD 1974.**

The position of the law regarding to the plea of guilty is as enumerated in the famous case of **REX VS YONASANI EGALU & OTHERS (1942) 9 EACA 65** when the Couirt of Appeal said at Pg. 67:

> *"In any case in which a conviction is likely to proceed on a plea of guilty it is 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 what he says should be recorded in a form which will satisfy any appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."*

In the present case the trial Resident Magistrate failed to observe the above procedure and adopted his own.

Mr. Wambali, Learned State Attorney supported the revision and commented that the whole procedure adopted by the trial Resident Magistrate is confusing and foreign to the Criminal Procedure Act 1985.

On the issue of sentence, Mr. Wambali submitted that having illegally rushed to convict the accused/respondent, the trial Resident Magistrate committed another grave error by sentencing the accused to a hundred years imprisonment. He started that the proper

sentence for the offence of incest by male under section 158 (1) of the Penal Code is thirty years imprisonment if the female is of the age of less than eighteen years. Therefore, had the case been properly conducted the accused would have been liable to a sentence of thirty years imprisonment.

Mr. Wambali, Learned State Attorney is absolutely correct. The trial Resident Magistrate had no jurisdiction nor mandate to impose a self created draconian sentence of hundred years imprisonment. In conducting criminal cases and imposing punishment, Magistrate are always guided by the provisions of the law, practice and precedents. Where the law gives them discretion to make a decision, such discretion must be used judiciously.

Let me emphasize here again that much as everyone would wish to a quick disposition of cases, adherence to the requirement of the law and rules of procedure is mandatory because justice hurried is justice buried – see **BOKO MIKIDADI VS REP. Miscellaneous Criminal Revision No. 6 of 2004, (HC)** Tanga Registry (unreported).

In conclusion therefore, and in exercise of my revisional powers under section 373 of the Criminal Procedure Act, 1985 I hereby quash the conviction against the accused/respondent, set aside the sentence of hundred years imprisonment imposed against him and declare the whole proceedings conducted before the trial Resident Magistrate in this matter null and void.

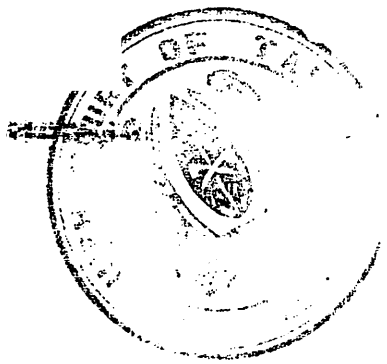
I further direct for a re-trial of the case before another Resident Magistrate if the Director of Public Prosecution wishes.

M.S. SHANGALI

JUDGE

20/11/2009

Ruling delivered in the presence of Mr. Wambali, Learned State Attorney for the applicant/Republic and the respondent/Accused in person.



M.S. SHANGALI

JUDGE

20/11/2009

ORDER: - A copy of this judgement to be supplied to the trial Resident Magistrate in person for his future guidance.

M.S. SHANGALI

JUDGE

20/11/2009