IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 106 OF 2020

ALLY SHABANI @VONJELE.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from a decision of Morogoro District Court at Morogoro)

(Waziri- Esq, RM.)

dated 6th December, 2007

in

CRIMINAL CASE No. 726 of 2007

JUDGEMENT

29th September & 2nd December 2020

ACK. Rwizile, J

About 13 years ago, the appellant was arraigned of rape contrary to section 130 and 131(2) of the Penal code. He was convicted by the District Court of Morogoro on his own plea of guilty and sentenced to a statutory minimum sentence of 30 years imprisonment. This was three days after an allegation of raping a 12-year-old girl- (her name is concealed) on 6th December 2007.

It was alleged in the charge sheet that on 3rd December 2007 at about 7.00hrs at Masaga village Matombo within the District and Region of Morogoro, he had carnal knowledge of a girl aged 12 years. Before the District Court on the day he was arraigned, he admitted to have committed the offence and so was sentenced.

It is not known as to what happened to the appellant to appeal after a decade, but it seems, despite all delays, he secured an extension of time to appeal out of time. To support this appeal, he advanced 8 grounds of appeal, all hinging on the fact that he was convicted on an equivocal plea, and that exhibits tendered by the public prosecutor were not ready in court. The respondent contested this appeal. The appellant being a lay man had nothing to say. He asked this court to consider grounds of appeal.

On party of the respondent, MS Faraja learned State Attorney was of the view that the appellant admitted the offence. Under section 360 (1) of Criminal Procedure Code, he submitted, the appellant is not allowed to appeal. It was submitted that this appeal is a misconception and so should be dismissed.

Having pondered the submission of the respondent and the request by the appellant. I have to start by admitting that it is true as stated by the learned State Attorney, section 360 (1) of CPA does not allow one to appeal upon conviction following a plea of guilty. In the clear wording of the law, it is stated;

> *360-(1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence*.

In this case, the appellant does not appeal against the extent of the sentence but its legality. This means, after a plea of guilty one may appeal on either of the two points of law. That is, extent and legality of the sentence. In advancing the course of justice, the Court of Appeal, held in the case of **Safari Deemay vs R**, Criminal Appeal No. 269 of 2011, (CA) unreported) that appealing is possible even when one pleaded guilty, but it has to be under some circumstances, such as;

i. *That the plea taken was imperfect, ambiguous or unfinished;*
ii. *That he pleaded guilty as a result of mistake or misapprehension;*
iii. *That the charge does not disclose the offence known to law, and*
iv. *That upon admission of facts, the accused could not in law be convicted of the offence charged*

The appellant has advanced grounds of appeal stating that the plea taken was married by irregularities on exhibits because they were not read in court, and that the trial court did not explain the essential elements of the offence. To be able to appreciate the intensity of his complaint, the record speaks for itself on what transpired in court on 6th December 2007;

> ***Court**: Charge read over and explained to the accused person in a language understood by him and said in Swahili.*
>
> ***Accused;** in his own words; it is true*
>
> ***Court:** Entered Plea of Guilty to the charge.*
>
> ***Sgd. Hon. A Waziri – RM***
>
> ***06/12/2007***
>
> ***Prosecutor:** Adduces statement of facts.*
>
> ***Court**: -Charge read over and explained to the accused person in a language that understood by him and asked to plea thereto:*
>
> ***Accused:** It is true*
>
> ***Court:** Entered plea of Guilty.*
>
> ***Sgd. Hon. A Waziri – RM***
>
> ***06/12/2007***
>
> ***Court:** Prosecution adduces statement of facts.*
>
> 1. *That, personal particulars are as per the charge sheet.*
> 2. *That, on 03/12/2007 around 19.00 hrs accused was at Misaga Matombo within the district and Morogoro Region.*
> 3. *That, on the said date and area accused did rape one (name concealed) a girl of 12 years and before committing that act accused did threaten that girl with a panga.*
> 4. *That, being hurt (name) did call an alarm and some people rescued her though they found the accused to have successfully have unlawfully carnal knowledge with her.*
> 5. *That, in interrogation accused admit to commit such offence.*
> 6. *That, on 03/12/2007 accused was brought before this court.*

Prosecution: *- I pray to tender the caution statement and PF.3 of the victim on exhibit.*

Accused: *I have no objection.*

Court: *The caution statement and PF.3 admitted and marked as exhibit P1,2 respectively.*

That's all

Court: *Facts agreed.*

Accused signed.

Prosecution Signed

S.192(3) of C.P.A 1985 CAP 20 R.E complied with.

Sgd. Hon. A Waziri – RM

06.12.2007

Court: *I hereby convict the accused person as charged on his own plea of guilty and on admitting the material facts of the case.*

Sgd. Hon. A Waziri – RM

06.12.2007

From the above, it can be rightly gathered that the trial court **first** conducted the preliminary hearing under section 192 of CPA, **second**, the same did not explain to the appellant the ingredients of the offence charged, **third** the same made no finding as to whether the appellant had admitted facts that established all essential elements of the offence, **fourth** as well, exhibits tendered (P1 and P2) were not read in court. The Court of Appeal in the case of **Khalid Athumani v. R,** Criminal Appeal No. 103 of 2005 (unreported) had this to say in respect of the proper procedure upon entering a plea of guilty in court;

> *The procedure was well explained by Spry V.P. in* ***Adan v Republic*** *(1973) EA 445 at page 446 in the following terms - "When a person is charged, the charge and the 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 the 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 asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused 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. The statement of facts and the accused's reply must, off course, be recorded…

From the above, it must be noted that there are six steps clearly elaborated in the case. They are 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 on his guilt, his reply must be recorded and change of plea entered.

(v) If there is no change of plea, a finding of guilty explaining all essential elements of the offence (facts and exhibits if any) must be recorded

(vi) Then, the court has to enter conviction and should record a statement of the facts relevant to sentence together with the accused's reply.

As I have shown before, these mandatory directives were not followed, especially that of informing the appellant of the essential elements of the offence. This is important because that is what forms the foundation of the whole plea. Lastly, it was not proper for the trial court to conduct the preliminary hearing and admit documents without reading them in court. This was fatal as it was held by the Court of Appeal when dealing with the similar stance in the case of **Ndaiyai Petro v R**, Criminal Appeal No. 277 of 2012 (unreported)

> *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 Mhapa v R,*** *Criminal Appeal No. 88 of 2014 (unreported), the Court held: -*
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> *"... 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..."*

In the strength of the authorities cited, it can therefore be concluded that the appeal has merit.

The next question to determine is what is the appropriate order in respect of this case. Under normal circumstances, the best cause of action to take is to order a retrial. But in this case, I decline to do so. I will show why.

First, as seen before, it has taken at least 13 years for the appellant to pursue this appeal. It is striking that the same appeared before the District Court on 6th December 2007, three days after his arrest. It was on 3rd December 2007. On that day, upon arrest, he is alleged to have admitted the offence before the police officer, the so called a caution statement was recorded, exh. P1. The victim was taken to hospital and examined on the same day, exhibit P2, a PF-3 to that effect. According to the charge sheet, the appellant was 67 years and has been in custody since 3rd December 2007. He is now 80 years.

Second, and most important, the victim of rape, was a girl of 12 years, she is now at least 25 years. As descent as she was by then, is she in the first place expected to remember such brutal events exactly as they happened. But still, will it be securing her best interest to reopen the wound that has perhaps healed. Under section 4(2) of the Law of Child Act, it is not at the best interest of child to order a retrial. The law states under section 4(2);

> *The best interests of a child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts or administrative bodies.*

But, in doing so, I am not landing in a virgin land, where eagles themselves have never landed. Before the coming into force of the law of the child Act, Tanzania had ratified the Convention on the Law of the Child (CRC) 1989. In implementing article 3(1) of the same, which is now similar to section 4(2) of LCA, Court of Appeal in **Jackson Davis vs R**, Criminal Appeal No 127 of 2005, had this to say;

> *"…We are fortified in our view by the provisions of article 3(1) of the United Nations Convention on the Rights of the Child (CRC), 1989, which Tanzania has ratified. Article 3(1) of the CRC places an obligation on courts of law to give the best interests of the child paramount importance in child matters by stating: -*
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> > *Article 3 (1) In all actions concerning children, whether undertaken by Public or private social welfare institutions, Courts of law, administrative authorities or legislative bodies, the best interests of the child shall be of*

primary consideration. Furthermore, much water has passed under the bridge since the trial was conducted. On the other hand, the appellant has been in prison, initially in remand and after conviction, in jail from time he was arrested to date. In those circumstances, we refrain from ordering a retrial..."

In the case of **Davis** (supra), events occurred 5 years back when the victim was 9 years old, she was 14 years old at the time of the appeal before Court of Appeal. In this case, rape was alleged committed on the victim 13 years back when she was 12 years old. I am in doubtful whether it will be in the best interest of the victim who is now 25 years old to put salt in the otherwise healed injury. This would be, as good as taking her back to the trauma and mental anguish suffered at the time she was victimized. I therefore, quash the conviction and set aside the sentence imposed on the appellant. I order his immediate release from prison, unless otherwise lawfully held.

ACK. Rwizile
Judge
02.12.2020

Delivered in the presence of the appellant and Mr. Kalinga State Attorney for the respondent**.**

ACK. Rwizile
Judge
02.12.2020

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY