IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 169 OF 2019

(Appeal from the Judgment of the Resident Magistrates' Court of Misungwi at Misungwi (Marley, RM) Dated 19th of February, 2019 in Criminal Case No. 22 of 201)

SIMON MAGOBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of the last order: 15.04.2020

Date of Judgment: 21.04.2020

JUDGMENT OF THE COURT

ISMAIL, J

The Appellant was arraigned in court on a charge of abduction, contrary to ***section 133*** of the Penal Code, Cap.16 [R.E. 2002]. It was alleged that, on 21st day of January, 2019, at around 12:00 hours, at Mwajombo village in Misungwi District within Mwanza region, the appellant took away one Gaudencia d/o

Zebedayo, a girl of 16 years of age, out of the custody or protection of Zebedayo s/o Madirisha against her will. On his own plea of guilty, the appellant was convicted, and he was handed down a custodial term of seven (7) years. Discontented by the conviction and sentence imposed by the trial court, the appellant preferred this appeal. The Petition of appeal has five grounds: ***one***, that the conviction was founded on an equivocal plea of guilty; ***two***, that the trial magistrate did not consider the fact that facts of the case which would contain factual and legal issues were not instituted in court; ***three***, that trial court erred in law and fact when it considered that facts of the case contained all ingredients of the offence; ***four***, that the trial magistrate erred in law by imposing a maximum sentence that did not consider the appellant's mitigation; and ***finally***, that the appellant's plea of guilty was not corroborated by any other evidence from the prosecution or defence side.

Quite atypical of many criminal cases, this case did not have any semblance of facts from which background of the matter could be drawn. This means that resort has to be had to the scanty

information found in the particulars of the offence of the charge sheet, filed in court of 19th February, 2019. These particulars have been reproduced above.

At the hearing of the appeal, the appellant appeared in person and fended for himself, while the respondent was represented by Ms. Gisela Alex, learned State Attorney.

Noting that the appellant is unrepresented and lay, I guided that submissions in respect of the appeal should begin with the respondent's counsel while the appellant would submit last. This guidance was well taken by the parties.

Submitting in opposition to the grounds of appeal, Ms. Alex began by stating that she supported the conviction and sentence imposed on the appellant. With respect to the ***first three grounds,*** she argued that conviction of the appellant was on a plea of guilty, consistent with ***section 360 (1)*** of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA). She argued that the said provision clearly provides that appeals shall not lie against convictions on plea of guilty, except on the extent and legality of the sentence. Making

reference to page 1 of the proceedings, Ms. Alex submitted that the accused pleaded guilty by saying: ***"It is true"***. She added that in terms of ***section 282*** of the CPA, where the accused pleads to a charge, the plea should be recorded and he may be convicted based on the plea. The learned attorney contended that the prosecution read the facts as seen at page 2 of the proceedings, and that such facts were replete with all ingredients of the charged offence. She added that the appellant pleaded guilty on his own volition after listening to what was read over to him. She argued that the plea was unequivocal. Citing the exceptions listed down in ***Robert N. Mbwilo v. Republic***, CAT-Criminal Appeal No. 154 of 2017 (unreported), Ms. Alex contended that none of the exceptions are in concurrence with the appellant's case. She was of the view that to the extent that ingredients of the offence were read out and admitted to, the plea was unequivocal, and there was no mistake or misapprehension. She contended that there is no room of appealing against the plea of guilty. Ms. Alex conceded, however, that the record is not clear on who read the facts of the case. She nonetheless argued, in the alternative, that the provisions of ***section***

282 of the CPA are to the effect that conviction can be secured based on a plea of guilty without there being facts of the case.

As regards ***ground four***, the respondent's counsel focused on the appellant's mitigation. She conceded that the sentence imposed by the trial court was illegal for not conforming to ***section 170 (1)*** of the CPA. She noted that the presiding magistrate was of the rank of a resident magistrate in charge of the district, far lower a rank than that of a senior resident magistrate who is allowed to impose a sentence in excess of five years. She urged the Court to apply the provisions of ***section 388*** of the CPA and substitute the sentence with a fitting one.

Submitting on the ***fifth ground***, Ms. Alex submitted that the ground is misconceived since in law, there is no requirement for corroborating a plea of guilty. She held the view that the appellant's contention on this ground is hollow.

In sum, the learned counsel prayed that, save for correction of the illegal sentence, the rest of the grounds of appeal be dismissed.

The appellant was extremely brief in his submission. He only alleged torture as the basis for his plea of guilty to the charge. He prayed that he be acquitted of the charge and be set free.

Not oblivious to the fact that the outcome of its findings is not of decisive effect, it behooves me to begin with ***ground four*** of the appeal. The appellant's gravamen of complaint in this ground is that the sentence imposed did not take into consideration his mitigation. This ground has been put in a better shape by Ms. Alex who conceded that the sentence imposed on the appellant was excessive and in wanton violation of the provisions of ***section 170*** of the CPA. The basis for her contention is that the magistrate who imposed the sentence is of a rank lower than that of the senior resident magistrate.

I couldn't agree more with Ms. Alex's submission. The trite position is that a sentence can only be justified, in law, if it conforms to the provisions of the law under which it is imposed. In this case, the trial magistrate ought to have cast an eye on the provisions of ***section 170 (1) (a)*** of the Criminal Procedure Act (*supra*) and

choose the appropriate sentence which falls within the purview of his powers. This provision states in no uncertain terms that, subject to other provisions of the law on minimum sentence, magistrates below the rank of a senior resident magistrate cannot impose a custodial sentence whose term exceeds five years. A cursory glance at the trial proceedings reveals that magistrate who presided over the trial proceedings was of the rank of a district resident magistrate. This is a judicial officer of a rank lower than that of a senior resident magistrate. His sentencing powers are, by virtue of the cited provision, capped to five years of a custodial term. It follows, therefore, that anything beyond the cap of five years is manifestly excessive and far beyond the scope of his powers. This denotes that the sentence of seven years imposed on the appellant is unlawful and unsupportable. In such a case, the settled position is that the illegality is remedied by enlisting the intervention of this Court with a view to substituting it with a fitting sentence. These powers are conferred upon the Court by ***section 388*** of the CPA.

It should be noted, however, that intervention of this Court is a decision which should be called into action quite sparingly. The rationale for this restriction is not hard to discern. It simply affirms the fact that sentencing is a discretionary power that is bestowed on and exclusively enjoyed by a trial court. Thus, in ***Bernadeta d/o Paul v. Republic*** [1992] TLR 97, it was held, *inter alia, "that an appellate court should not interfere with the discretion exercised by a trial judge as to sentence except* ***in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive***". (Emphasis is mine).

The cited decision borrowed a leaf from the decision of the defunct Court of Appeal for Eastern Africa in ***R v. Mohamed Ali Jamal*** (1948) 15 E.A.C.A. 126. (See also ***James Yoram v. R*** (1951) 18 E.A.C.A. 147). In all of the cited decisions, the uniform message is that powers of intervention by this Court can only be invoked upon satisfaction that the irregularity sought to be remedied is mammoth and has occasioned a miscarriage of justice. This appears to be the

case in these proceedings. However, for the reasons that will be apparent soon, this path will not be preferred in this matter.

Conclusion of the discussion in respect of ground four takes me back to the appellant's complaints in grounds one, two and three of the petition of appeal. They revolve around the issue of plea of guilty. The appellant's contention is that his plea was equivocal and inconclusive. As such, it could not constitute the basis for conviction and sentence. Ms. Alex finds no sense in this argument, on the ground that and that the plea was made after the charge was read over, pleaded thereto, after facts were read over and found to be correct by the appellant. She contends that there was no mistake or apprehension of facts in the process. As correctly postulated by the respondent's counsel, the established position is that a conviction on a plea of guilty is not appealable except where, upon the admitted facts, the accused could not in law have been convicted of the offence charged (See: ***Laurence Mpinga v. Republic*** [1983] TLR 166).

The question that arises is whether the appellant's plea falls in the realm of pleas which are predicated upon facts that are incapable of supporting the conviction. This question is answered by glancing through the proceedings of the trial court dated 19th February, 2019, in which charges were read and the appellant pleaded by simply saying: ***"It is true"***. This expression was followed by reading of what is contended to be facts of the case which read as follows:

> *"Name and address of the accused as on the charge sheet. That on the 21/01/2019 at Mwajombe Village the accused did abduct a girl known as Gaudencia D/o Zebedayo aged 16 years old from her parents protection and was leaving with her but accused was arrested and herein Court, accused person admitted on the same as charge."*

While the record shows that facts were read, the pertinent question: did this process conform to the requirements of ***section 228 (1) and (2)*** of the CPA. Ms. Alex contends that the provisions of ***section 282*** of the CPA do not obligate the court to go through the rigours of ***section 228 (1) and (2)*** of the CPA. I find the contention as narrow as it is misleading. While the ***section 282*** instructs what should happen subsequent to the accused's plea of guilty, ***section 228 (1)***

and ***(2)*** guides on what the court should do before it concludes that the accused has pleaded guilty, and that such plea is perfect and unambiguous. It is only then, that ***section 282*** would be brought into play and pass a conviction. It implies that the trial court is under mandatory obligation to satisfy itself that the procedure enshrined in ***section 228 (1) and (2)*** of the CPA is followed, whether the accused has pleaded guilty or not. The procedure requires the trial magistrate to lead the prosecutor to read the facts of the case to the accused person. These facts must be a summary of evidence, and the summary is intended to satisfy the trial magistrate if the plea of guilty is an admission of the ingredients of the offence. As stated earlier on the appellant's plea was in the expression of ***"It is true"***. These words were recorded in English and it is not apparent such words are, as nearly as possible, in the words he used when he purportedly pleaded guilty to the charge. This is so because the words used by the appellant, which I have every reason to believe that they were not in English, were not reproduced in the proceedings.

Pleas which are premised on these 'bare bones' words such as ***"It is true"*** have, time and again, been roundly adjudged to be falling short of the required threshold and are hardly taken to constitute an unequivocal plea of guilty. Thus, when they are applied, as is the case here, they have the potential of rendering the ensuing convictions a mere charade that cannot pass the test of a plea of guilty.

In ***Josephat James v. Republic***, CAT-Criminal Appeal No. 316 of 2010 (unreported), the Court of Appeal of Tanzania held as follows:

> *"(1) The expression "It is correct", used by the appellant after the charge was read to him, was insufficient for the trial court to have been unambiguously informed of the appellant's clear admission of the truth of its contents. In the circumstances, it is doubtful whether that expression by itself, without any further elaboration by the appellant, constituted a cogent admission of the truth of the charge.*
>
> *(2) It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged.*
>
> *(3) The trial court was enjoined to seek an additional explanation for the appellant, not only what he considered "correct" in the charge, but also what it was that he was admitting as the truth therein. The trial court was not entitled by*

the answer given, "it is correct", to distil that it amounted to an admission of the truth of all the facts constituting the offence charged.

(4) In view of the seriousness of the offence and sentence of life imprisonment imposable on conviction, this serious irregularity occasioned a failure of justice.

(5) The statement of facts by the prosecutor, after the plea of guilty was entered by the trial court was a mere repetition of the charge. No facts were disclosed as to what the sole witness who reported the incident to the police actually witnessed or which of the facts she substantiated. In this case, this assumed importance because the victim, a boy aged two and a half years, could not possibly have testified, being an infant. Moreover, it is not known what medical evidence was available, if at all it was and what it had revealed.

(6) The duty is that of the prosecution to state the facts which establish the offence with which an accused person is charged. The statement of facts by the prosecution serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence, and it gives the magistrate the basic material to assess sentence."

The foregoing position was inspired by another superior Bench's decision in ***Safari Deemay v. Republic***, Criminal Appeal No. 269 of 2001 (CAT- unreported), in which a warning was sounded to trial courts to the effect that:

"Great care must be exercised especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment. We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate in his own words as to what he is saying "is true".

Noteworthy, is the fact that in both of the just cited decisions, the superior Court was bolstered in its resolve by the decision of its predecessor Court in ***Adan v. Republic*** [1973] EA 445. In this case, Spry V.P., laid out very elaborate procedural steps that must be abidingly followed by a trial court when an accused person is arraigned in court and called upon to plead to the charge that has been levelled against the accused. He held as follows:

"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 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 the charge 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, of course, be recorded.*** *" [Emphasis supplied].*

It follows that the trial courts' obsession with the use of the words ***"it is correct"*** or ***"it is true"*** is an abhorrent conduct that has far reaching implications to the charges levelled against the accused. So devastating is the conduct that it renders the plea of guilty equivocal in this case and I hold so.

Ms. Alex has contended that reading of the facts is not a mandatory requirement and she has cited ***section 282*** of the CPA as her fortress against any onslaught. With due respect, this is a fallacious contention. It goes against an established position in the decisions cited above. In ***Republic v. Tarasha*** (1970) HCD No. 252, this Court held as follows:

*"**There is no shortcut to a trial and in every case where there is a plea of guilty the prosecution must give facts**. It often happens that the facts given do not establish the offence and a plea of*

guilty cannot be accepted. This is a case in point assuming that the facts are as stated in the complaint. ***Moreover, 'it is true' cannot be an unequivocal plea of guilty by itself.*** *" [Emphasis supplied]*

See also: ***Mitinge Mihambo v. Republic*** [2001] TLR 348 (HC); ***Keneth Manda v. Republic*** [1993] TLR 107 (HC); ***Munisi Marko Nkya v. Republic*** [1980] TLR 59 (HC).

This takes me back to what is read in court as facts of the case on 19th February, 2019. This is reflected in the excerpt quoted above. As I alluded to earlier on, the facts are a mirror image of the particulars of the offence as contained in the charge sheet. It is a repetition of what was already laid on the appellant's door. While it was expected that the facts would shed light which would enable the trial magistrate to satisfy if the plea was unequivocal by having all ingredients of the offence illustrated, and provide the basis for conviction and assessment of the appropriate sentence to be imposed, nothing close to that can be gathered from the facts of read out to the appellant.

But even assuming, just for the sake of argument, that this bunch of words has what it takes to be called facts, the other

blatant flaw in the proceedings is that it is not told who read the facts. The requirement of the law is to have the court order that the facts be read by the prosecutor (see ***Adan v. Republic*** *(supra)*). The proceedings are silent on whether this order was given by the court. What is seen is that after the plea of guilty had been recorded, facts of the case were recorded. This creates the impression that facts were probably read by the trial court, an act which if proven, would amount to a serious affront of the law.

The combination of these two infractions bring me to the conclusion that facts of the case, worth the name, were not read to the appellant. It follows, therefore, that the plea of guilty recorded against the appellant was not based on any ingredients of the offence the appellant stood charged with. It is fair to conclude that the plea taken by the appellant was not unequivocal.

Before I wind up my analysis, it behooves me to revisit the charge sheet which found the proceedings and against which a plea of guilty was entered. The charge reveals that the appellant's culpability was predicated on ***section 133*** of the Penal Code

(supra). To appreciate the trajectory that I intend to take, I find it apt to reproduce it as hereunder:

> *"Any person who with intent to marry or have sexual intercourse with a woman of any age, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against her will, is guilty of an offence and is liable to imprisonment for seven years."*

In the charge that bred the present appeal, the prosecutor's intent was to predicate the offence under the said provision of the law. If this was the intention, the expectation would be that the particulars of the offence would include words or phrases which convey the intent of the alleged abduction. Words like "*with intent to have sexual intercourse with EFG .... detains her, against her will...*" ought to have been included in the particulars of the charge. As it were, these words were omitted, leaving the charge lacking a vital component in holding the appellant culpable of the offence of abduction. It is an affront of ***section 132*** of the CPA which sets a condition that a charge must contain necessary particulars. It provides as hereunder:

> *"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.****"[Emphasis supplied]*

Crucially, this omission renders the charge sheet patently defective and incapable of founding any conviction (see: ***Fred Nyenzi v. Republic***, CAT-Criminal Appeal No. 121 of 2016 (unreported).

Having exposed flaws which marred the trial proceedings, it is my conviction that the net effect of all these brazen infractions is to vitiate the proceedings, quash the conviction and set aside the sentence, both of which are an offspring of the nullity.

Having adjudged the trial proceedings a mere farce, the next issue requires me to direct on the next course of action. This matter has not been canvassed by the parties at the hearing, save for scanty submission made by the appellant who urged the Court to acquit and set him free. It should be noted that acquittals are ordered in very compelling circumstances, most often when the conviction is set aside because of insufficiency of evidence or

where the appellate court is of the firm belief that allowing the case to be re-tried will hand the prosecution to weave a case that is patently weak and lacking in evidence. But, if the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result, the practice is to order a re-trial. The defunct East African Court of Appeal held in the old case of ***Paschal Clement Branganza v. Republic*** [1957] EA 152, as follows:

> *"A retrial is ordered where there has in fact been a previous trial that was conducted but which is vitiated by reason of an error in law or procedure... Where a trial of a case is declared a nullity, it means that there has never been a trial as the purported trial had no legal force or effect.... Where a trial of a case is declared a nullity for non-compliance with the provisions of law, the court will bear in mind the gravity of the offence, justice of the case and all other circumstances in ordering a fresh trial to the accused."*

The position in the just cited case was elaborately and decisively restated in ***Fatehali Manji v. Republic*** (1966) EA 343. In brief terms, the defunct superior Court held as follows:

> *"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where conviction is*

set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the trial... each case must be made there the interests of justice requires it."

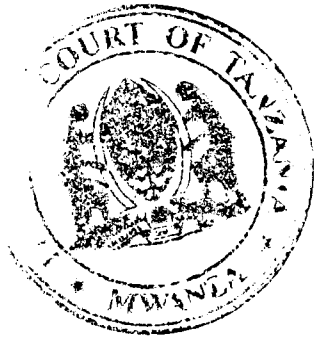
See also ***Dominico Simon v. R.*** (1972) HCD 152; ***R v. S. S. Salehe*** (1977) HCD 15; and ***Ngasa Madina v. Republic***, Criminal Appeal No. 151 of 2005 (unreported).

In the present case, the error that led to the nullification of the proceedings did not touch on matters of evidence since no evidence was tendered in court, owing to the fact that the convicion was, on account of the impugned plea of guilty. This takes away the possibility of handing the prosecution a chance of knitting its evidence with a view to filling in gaps which would be exposed on appeal. While chances of securing a conviction are not apparent in this case, circumstances surrounding it persuade me to hold that re-trial preserves interests of justice for both parties. I also take note that, unlike in the ***Josephat James' case*** in which the appellant served a jail term for a decade, in this case the appellant has served in excess of one year. This relative short stint in prison does not warrant an acquittal.

Accordingly, I order that the matter be remitted back to the trial court for re-trial.

I so order.

DATED at **MWANZA** this 22nd day of April, 2020.



M.K. ISMAIL

JUDGE