IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 187 OF 2019

(Appeal from the Judgment of the District Court of Kwimba at Ngudu (Mtete, RM) Dated 4th of September, 2019 in Criminal Case No. 190 of 2019)

ISAYA S/O MICHAEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

27th April, & 20th May, 2020

ISMAIL, J

On the appellant's own plea of guilty, the District Court of Kwimba at Ngudu, convicted the appellant of three counts and sentenced him to terms of thirty years' imprisonment; fine of TZS. 200,000/= or imprisonment for five years; and ten-year imprisonment in respect of attempted rape, sexual harassment, and stealing from the person, respectively. These sentences were ordered to run concurrently.

It was alleged, in respect of the 1st count, that at about 08:00 hours on 1st September, 2019, at Ngumo village, within Kwimba district in Mwanza region, the appellant attempted to rape ABC (in pseudonym), contrary to section 132 (1) of the Penal Code, Cap. 16 R.E. 2002. With respect to the 2nd count, the allegation is that on the same date, at the same time and place, the appellant sexually assaulted ABC by inserting fingers into her vagina, contrary to section 138D (1) of the Penal Code, Cap. 16 R.E. 2002; while in the 3rd count the appellant is alleged to have stolen a set of mobile phone make Bontel, valued at TZS. 30,000/=, the property of ABC, contrary to section 269 (a) of the Penal Code, Cap. 16 R.E. 2002. The offence in respect of the third count occurred at 08:00 hours on 1st September, 2019, at Ngumo village within Kwimba district in Mwanza region.

The facts that bred the charges are scanty. They are actually a reproduction of the particulars of the offence. What is clear from the thin trial court record is that following the allegations drawn in the charge sheet, the appellant was arraigned in court on 4th September, 2019 and he pleaded guilty to all of the counts. The facts were read and the appellant's cautioned statement was tendered and admitted as Exhibit P1

without any objection from the appellant. On conviction, the appellant was handed a custodial sentence for a term of fourteen years. Incredibly, it is the appellant's Cautioned Statement, admitted as exhibit P1 which shed a little bit more light than the statement of facts as contained in the statement. In the said statement, the appellant alleged that after the aborted sexual intercourse, he stole a mobile phone from the victim. Stunning, nonetheless, is the fact that the appellant alleged that he did not attempt to rape the victim. Instead, the victim consented to the sexual intercourse which aborted when his penis let him down by failing to erect. He, in turn, resorted to the use of fingers that he inserted into the victim's vagina. It is this failed indulgence that landed him into trouble. He was tried, convicted and sentenced to fine and imprisonment both of which are the subject of the instant appeal. Aggrieved by the trial court's verdict, the appellant has taken a ladder up, vide a five-ground petition of appeal paraphrased as follows: ***One***, the plea of guilty was equivocal; ***two***, that the trial court erred in not taking into account that the plea of guilty is not confined to admission of charge or element that constitute the crime of the crime itself only; ***three***, the trial court failed in its duty of satisfying itself as to whether the appellant knew the meaning

of the plea of guilty; ***four***, that the trial magistrate erred when he failed to avail the appellant an opportunity to plead to the memorandum of facts read out by the prosecutor; and ***five***, that the trial court's judgment was defective for not embodying section of the law under which the conviction was sustained.

Hearing of the appeal pitted the appellant who fended for himself, against Ms. Gisela Alex, learned State Attorney who represented the respondent. Not unexpectedly, the appellant did not have anything to add on to his grounds of appeal, other than urging the Court to allow his appeal and set him free.

In her brief address, Ms. Alex began by expressing her support to the conviction and sentence passed by the trial court. Noting that the appellant was convicted on his plea of guilty, the learned attorney was of the view that in terms of section 360 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA), such convictions are non-appealable. Making reference to page 1 of the typed proceedings, Ms. Alex contended that, the appellant pleaded guilty to all the counts and was convicted in all of them. She submitted that, in terms of section 282 of the CPA, where an accused pleads guilty, the plea will be recorded and the accused be

convicted accordingly. She held the view that an appeal from such conviction ought to be on the sentence only.

On the contention that facts were not read out to the appellant, Ms. Alex argued that, while the prosecutor was recorded (at p. 2 of the proceedings) as saying that the appellant (then accused person) has admitted to the facts, there is nothing to indicate that the appellant admitted to the facts. She was quick to submit, however, that the provisions of section 282 of the CPA do not provide that facts must be read. Submitting in the alternative, Ms. Alex contended that if the facts were not read out, the mistake was committed by the trial magistrate and this would render the plea equivocal. She asserted that the remedy is to invoke section 388 of the CPA and remit the matter back to the trial court for a re-trial.

The learned attorney spotted yet another anomaly. This is in respect of the fact that the cautioned statement (exhibit P1) was admitted but was not read out. She was of the view that this anomaly rendered the same liable to expunging from the record.

On whether the provisions of section 228 (2) of the CPA were complied with during the plea taking, Ms. Alex held the view that the words used were not as nearly as those used by the appellant because she believed that the appellant did not plead in English. She maintained that this, as well, is the error which can be rectified by having the matter remitted for retrial. She urged the Court to order a trial *de novo*.

The appellant rejoined by reiterating his urge that the Court should find him not guilty and order his acquittal.

Deducing from the respondent's submission, the main contention revolves around the issue of whether the plea of guilty made by the appellant was equivocal. Before I get into the heart of the analysis, let me preface by stating that it is trite law that an appeal shall not lie against conviction on a plea of guilty 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). Thus, if the accused's plea was unequivocal and complete and conviction is entered, the narrow avenue that he has is to challenge legality or otherwise of the sentence imposed but not the conviction. The exception to this general rule includes where the plea from which the conviction

stemmed was equivocal or imperfect. Whilst the respondent finds no fault in the appellant's plea in all of the three counts, the appellant decries the manner in which it was extracted and recorded. It fell below the threshold of an unequivocal plea of guilty. Settlement of this contest required me to glance at p.1 of the proceedings dated 4th September, 2019, at which the following was recorded:

DATE: *04.09.2019*
CORUM: *V.C. MTETE - RM*
PROS: *A/INSP. SHIGULA PP*
CC: *TINGAI J.A - RMA*
ACC: *Present*

PP: Charge is read over and explained to the accused person who is asked to plead thereto.

First count: *True*

Court: *Entered as plea of Guilty*

Second Count: *True*

Court: *Entered as plea of Guilty*

3rd Count: *True*

Court: *Entered as plea of Guilty*

These short pleas, ***"True",*** were followed by what is contended to be facts of the case in respect of which the appellant was not called upon or at least was not recorded that he was called upon to say whether the said facts are correct. It is common knowledge that the process of taking and recording pleas has to conform to the provisions of section 228 (1) and (2) of the CPA, which guide on the procedure that should be taken by the trial court, ahead of its conclusion that the accused's plea of guilty was indeed perfect and unambiguous. It entails the trial magistrate leading the prosecutor to read the facts of the case to the accused person. The facts are a summary of evidence which enables the trial magistrate to gauge if the plea of guilty offered by the accused are in fact of an admission of the ingredients that constitute the offence in respect of which the plea of guilty has been made.

As intimated earlier on, the appellant's plea was recorded in the one word style of "True" in respect of all the three counts. This word, as rightly conceded by Ms. Alex, is most certainly, not in the language that the appellant used in his plea. The actual words used when the appellant purportedly pleaded guilty were not reproduced in the proceedings. As such, it cannot be said that the word "True" is in the same mould as the

words envisioned in section 228 (1) and (2) of the CPA. It follows that, by not toeing the line set by the cited provision of the law, the trial magistrate was despicably offending the imperative spirit of the law.

This Court and the superior Courts have stated time and time again that pleas which fail to meet the threshold set out by the law, such as ***"It is true"***, ***"True"*** or ***"Correct"***, are deficient and unable to form the basis for conviction. When they apply, they throw the proceedings into a serious credibility crisis and the net effect is to have the pleas adjudged equivocal and render the proceedings, the ensuing convictions and sentences nothing but a travesty and has the consequence of vitiating the entirety of the proceedings.

This sloppy conduct was censured by the Court of Appeal in ***Safari Deemay v. Republic***, CAT-Criminal Appeal No. 269 of 2001 (unreported), in which it was held:

> *"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".*

Following in the footsteps of the foregoing decision was the decision in ***Josephat James v. Republic***, CAT-Criminal Appeal No. 316 of 2010 (unreported), wherein 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."

Both of the decisions of the superior Bench as cited above, drew an inspiration from the decision of its predecessor, the Court of Appeal for East Africa in the landmark case of ***Adan v. Republic*** [1973] EA 445. In this case which is credited for laying down a foundation on the procedure that should be conformed to when a charge is laid on the accused's door. Spry V.P., (as he then was) made the following postulation:

"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].*

The trial proceedings in the instant case cannot escape the wrath that arises from the infractions committed by the trial court in recording the appellant's plea. The recording was done in a manner that leaves a lot to be desired.

Ms. Alex holds the view that section 282 of the CPA does not obligate the prosecution to read facts of the case. She contends that once a plea of guilty is made the next step is to convict. Thus, while she appreciates that there is a speaking error in the conduct of the trial proceedings, her conviction is that such error did not have the impact of abrogating what obtains in section 282 of the CPA, and that the requirement of reading the facts are superfluous to what the law provides. With greatest respect, this contention is as flawed as it gets. It defies the

established legal position as accentuated in the cited decisions and as emphasized oftentimes. The importance of conformity to this requirement did not skip the attention of this Court in ***Republic v. Tarasha*** (1970) HCD No. 252, in which the following observation was made:

> *"**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); and ***Simon Magobe v. Republic***, HC-Criminal Appeal No. 16 of 2019 (Mwanza-unreported).

It is legit to hold that conformity to section 282 of the CPA does not extinguish the obligation that the prosecution and the trial court have in ensuring that the requirements of section 228 (1) and (2) are not flouted, and it does not matter whether the accused has pleaded guilty or not. After all, section 282 of the CPA is narrow in scope since it only comes into play where a plea of guilty is entered.

Looking at the facts purportedly read out subsequent to the appellant's plea of guilty, it is gathered that the prosecution reproduced what was already in the charge sheet admitted in court on 4th September, 2019, on basis of which criminal proceedings against him were founded.

The facts are acutely wanting in material details necessary for the trial magistrate's assessment as to whether the plea was unequivocal. They lacked all necessary ingredients of the offence and it can barely be said that such facts provided the basis for conviction and assessment of the appropriate sentence to be imposed. Generally speaking, the trial court was starved of sufficient facts on which to make a rational finding of guilt against the appellant. Glaring and equally disturbing, is the fact that even in their modest fashion as displayed in the proceedings, there is no evidence that these facts were brought to the attention of the appellant and asked if they represented the correct account of the what they conveyed. Since the appellant did not attest to their correctness, it can only be concluded that the appellant's plea was extracted while he was oblivious to the key ingredients of the offence he pleaded to. As such, ingredients would only be discerned from the facts in respect of which the

appellant gave no word. Needless to say, the trial court strayed into a fundamental error that bred nothing but an injustice.

The net effect of all these anomalies is to render the plea of guilty highly suspect, equivocal and one which can be rightly relegated to a plea of not guilty. They also vitiate the conviction and sentences passed against the appellant, they being the off springs of a nullity.

As a consequence, I allow the appeal and order that the matter be remitted to the trial court for trial before another magistrate.

It is so ordered.

Right of appeal explained.

DATED at **MWANZA** this 20th day of May, 2020.

M.K. ISMAIL

JUDGE

Date: 20/05/2020

Coram: Hon. M. K. Ismail, J

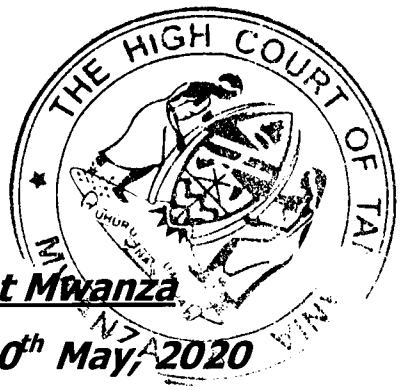
Appellant: Present online

Respondent: Present online

B/C: Leonard

Court:

Judgment delivered in chamber, in the virtual presence of both parties (through audio tele-conference) and in the presence of Mr. Leonard B/C, this 20th May, 2020.



M. K. Ismail

JUDGE

At Mwanza

20th May, 2020