IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

(BUKOBA DISTRICT REGISTRY)

CRIMINAL REVISION CASE NO. 2 OF 2019

(Originating from Criminal Case No. 122 of 2019 of Karagwe District Court at Kayanga)

ESTHER SHARON SELESTINE ---------- APPLICANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

RULING

06/05/2020 & 08/05/2020

Mtulya, J.:

The present Revision was called by this court on its own motion after learning that the decision in Criminal Case No. 122 of 2019 (the case) of Karagwe District Court at Kayanga (the court) may have faulted prerequisites of law in criminal procedure when convicting Esther Sharon Selestine (the Applicant) in her own plea of guilty. The record of the case was called and examined under the mandate of this court in the provision of section 372 of the Criminal Procedure Act [Cap. 20 R. E. 2019] (the Act) to call and determine correctness and legality of the order passed in the case.

The facts of the case briefly were that: Ms. Esther Sharon Selestine (the Applicant) was arraigned before the court for two counts, namely: desertion of child contrary to section 166 of the Penal Code [Cap. 16 R.E 2019] (the Penal Code) and neglecting to provide necessaries for child contrary to section 167 of the Penal Code.

The particular of offence for the first count shows that the Applicant on 14th day of January 2019 at Kilela Village within Kyerwa District in Kagera Region unlawfully deserted her child Tuinemungu Selestine aged one week and left her without any means of support. In the second count, the particulars of offence depicts that on the same day within the same area the Applicant unlawfully neglected to provide necessaries of food, shelter, clothes and other necessaries of life for her child.

On the 11th April 2019, when the case was scheduled for hearing, and after the charge was read over and explained to the Applicant, she pleaded guilty of the offences. Following the plea, the learned trial magistrate formulated and recorded his own facts and found the Applicant guilty and convicted her on both counts. Finally, the trial magistrate sentenced the Applicant to serve two years

imprisonment for each count and ordered the sentences to run consecutively.

This court after inspection of the record found out that there were three irregularities to be addressed, namely: plea of the Applicant, facts formulated and read, and the necessaries claimed. Following the detection, this court exercising its powers under the provision of section 374 of the Act to hear any party before determination of the Revision, summoned both parties in this case to argue the Revision. However, it was only the Republic which registered its presence through the services of learned State Attorney Mr. Juma Mahona.

This court raised and explained the irregularities on the record after it had found out that determination on the irregularities does not prejudice the Applicant under the provision of section 373 (2) of the Act. Mr. Mahona on his part conceded the faults and cited the authority in the decision of **Hyasint Nchimbi v. Republic, Criminal Appeal No. 109 of 2017** stating that the plea at the court was not unequivocal.

Mr. Mahona also supported the Revision with regard to facts presented in the case, which do not disclose the offence of desertion and who read them before the court. According to him the facts depicted on record do not disclose necessary ingredients of the charged offence of desertion of child or neglecting to provide necessaries for child and were written down by the court without showing who read them before the Applicant. To Mr. Mahona, even the said necessaries are vague and were not shown specifically in the proceedings.

In the present Revision, the manner in which the plea was taken by the court is contrary to the provision of section 228 (2) of the Act and decisions in **Saidi Mamboleo Sanda v. Republic, Criminal Appeal No. 25 Of 2008** and **Deus Gendo v. Republic, Criminal Appeal No. 480 of 2015** as the Applicant did not admit to all the necessary elements of the charged offences. At page 1 of the typed proceedings, it is shown that after the charge was read over, the Applicant was asked to plea, she just stated *it is true*. However, the Applicant was not specific to what she was admitting in her plea. Still, the facts constituting the offences charged were not narrated to her.

Again, there were facts recorded after Applicant's plea. However the facts were narrated and recorded by the trial magistrate contrary to the requirement of the law in criminal procedure. In this case, the public prosecutor is not seen anywhere in the proceeding save for the Coram. It is unfortunate that even after narration and recording, the court did not provide an opportunity of the right to be heard to the Applicant so that she could be called and state whether she admit any of the facts as true or otherwise. At page 2 of the typed proceeding of the case, it is depicted that just after the court recorded the facts, it proceeded to convict the Applicant.

This practice is contrary to the requirement in the provision of section 228 of the Act and practice of our courts in **Adan v. Republic (1973) EA 445 and Khalid Athuman v. Republic, Criminal Appeal No. 103 of 2005** where it was stated that accused persons are required to admit the charge and facts knocked at their doors. The practice of presenting facts which are distinct from the charge sheet cannot be allowed to flourish in our courts.

There is another fault in the case with regard to the offences charged. Apart from general allegations from the charge sheet, the

facts enumerated by the court were vague and still do not disclose necessary ingredients of the offences charged. At page 2 of the typed proceedings, the court printed four (4) paragraphs depicting the facts of the case. However, the statements in the named paragraphs are vague and do not disclose any offence(s). That is contrary to the decision in **Laurence Mpinga v. Republic [1983] TLR 166.**

I am therefore of the view that the Applicant's plea was equivocal. Even so, she was not invited to admit or deny the facts and finally, the facts printed in the case were vague contrary to the provisions of the law in the Act and precedents of this court and our final court of appeal.

Before I hand down my pen, I wish to thank Mr. Juma Mahona, learned State Attorney, who represented the Republic in this Revision. Mr. Mahona was of great value in assisting this court to arrive at justice by providing supporting precedents of this court and Court of Appeal. He moved this court as an officer of the court, not otherwise.

Having said so, and considering the stated reasons above, I quash the proceedings, conviction and set aside the sentence imposed

to the Applicant for the reasons that the plea was not unequivocal, facts did not support the offence charged and were vague contrary to the provisions of the law in the Act and precedents of this court and Court of Appeal.

Considering the Applicant has spent a year behind bars, and taking regard the best interest of the child who is currently without his/her mother and noting the best interest of justice and presence of Corona Virus Diseased - 2019 pandemic and congestion in our prisons, I hereby set the Applicant free from the date of pronouncement of this Revision, that is 8th May 2020, unless otherwise she is held for lawful cause.

It is accordingly ordered.

F.H. Mtulya

Judge

08/05/2020

This Judgment was delivered in chambers under the seal of this court in the presence of learned State Attorney, Mr. Juma Mahona and in the presence of the Applicant, Ms. Esther Sharon Selestine.

F.H. Mtulya

Judge

08/05/2020