**IN THE HIGH COURT OF TANZANIA**

**AT TABORA**

**DC CRIMINAL APPEAL NO. 131 OF 2018**

(Originating from Criminal Case No. 116 of 2015 of the District Court of Nzega)

**MASANJA MWINAMILA @ GIMBUI.....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

.....

**JUDGMENT**

.....

Date of Last Order: 19/03/2021

Date of Delivery: 23/03/2021

**AMOUR S. KHAMIS, J.**

In the District Court of Nzega, Masanja Mwinamila @ Gimbui was convicted on his own plea of guilty for the offence of kidnapping or abducting with intent to harm contrary to Section 250 of the Penal Code, Cap 16, R.E 2002.

The particulars of the offence were that on 15th day of June 2015 at or about 21.00 hours in Ugembe Village within Nzega District, he did kidnap one Magreth D/O Hamisi, a 6 years old girl with albinism in order to subject her to grievous harm.

Upon mitigation, the trial magistrate sentenced him to ten (10) years jail term.

Aggrieved by both conviction and sentence, Masanja Mwinamila @ Gimbui, landed in this Court with three grounds of appeal that can be conveniently rephrased as follows:

1. That language used by the prosecution and the trial Resident Magistrate at a time of reading the charge on 19th day of June 2015 was Swahili while the appellant, a

Sukuma by tribe and in tongue, was not afforded services of an interpreter in support of his defence.

2. That the charge and all ingredients of the offence were not read over and explained to the appellant in a Sukuma language, the language well known by the appellant.

3. That the record show that the police officer had set the trap of arresting the accused person but one wonder is that name and rank of the said police officer were not mentioned in the facts read by the prosecution. Worse still name of the purchaser was not mentioned.

When this appeal came for hearing before me, Mr. Deusdedit Rwegira, learned State Attorney, appeared for the Republic while the appellant fended for himself.

The appellant opted to respond to submissions by the Republic. Submitting for the Republic, Mr. Rwegira disputed the grounds of appeal and asserted that the appellant's plea was unequivocal.

Expounding, Mr. Rwegira contended that proceedings of the lower Court showed that the charge was read over to the appellant in a language understood by him.

He added that immediately after the charge was read over to him, the appellant submitted some extra information regarding an exchange between him and a policeman responsible for his arrest.

The learned state attorney asserted that the appellant was conversant with the language applied in the trial Court and sufficiently followed up the proceedings.

Further, Mr. Rwegira contended that the charge sheet and facts of the case disclosed all ingredients of the offence charged. He capped the submissions with an assertion that the confession was perfect in law.

In the alternative, Mr. Rwegira prayed for an order of retrial in case this Court finds the appellant did not understand nature of the charge.

Responding, Masanja Mwinamila @ Gimbui adopted the Petition of Appeal and implored this Court to allow the appeal, quash the conviction and set aside the sentence meted against him.

Having carefully considered the parties' rival contentions and upon full examination of the trial Court's records, I find that the grounds of appeal are devoid of merits.

It is trite law that before an appellate Court upholds a purported plea of guilty, it has to satisfy itself that the charge drawn and signed by the trial magistrate is an offence known to law, it is an offence over which the Court has jurisdiction, the offence charged is sufficiently identifiable from the facts as lodged by the complainant, the plea was unequivocal and where applicable, the assessors played their statutory role (See ***SMAIL BUSHAIJA V REPUBLIC (1986) TLR 1)***.

The trial Court's proceedings reveal that the facts constituting the offence were read over to the accused person in a language understood to him and immediately thereafter, the appellant went ahead to address the Court as hereunder:

> *"ACCUSED: I admit that I did kidnap the said child after I had been promised to be given Tshs. 100,000,000/= which was to be divided among three (s) people but when they arrested me the purchaser was not yet found. When they came to arrest me I did not know if at all they were police officers. They told me that they had Tshs. 90,000,000/= I agreed that the said Tshs. 90,000,000/= to be divided among three people in ratio of Tshs. 30,000,000/= each. I took them to our home place where I did take the said Magreth, I entered with her in the motor vehicle. After having entered in the motor vehicle they did handcuff my hands. At that time, I realized that they were police officers. Those ones who told me that they were the purchaser was not arrested. They arrested me alone. That is all."*

Observing the chain of events that had just taken place, the trial magistrate recorded that:

> *"The accused person has admitted all facts to be true and gave a narrative story on how everything happened."*

The question is whether the facts as adduced by the prosecution constituted the offence of kidnapping or abducting with intent to harm under Section 250 of **THE PENAL CODE, CAP 16, R.E 2002**.

The relevant Section reads:

> *"250. Any person who kidnaps or abducts another in order that that other person may be subjected, or may be disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person, or knowing it to be likely that the person will be so subjected or disposed of, is guilty of an offence and is liable to imprisonment for ten years."*

Grievous harm is defined in Section 5 of **THE PENAL CODE, CAP 16, R.E 2002** (now referred to as R.E 2019) to mean:

> *"any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense."*

In order to tackle the above posed question, a related query has to be answered. This is whether the facts in the present matter were well suited with the definition of grievous harm.

The facts read over by the prosecution in the trial Court were as follows:

1. *That personal particulars are as per the charge sheet (Masanja S/O Mwinamila @ Gimbui, Age - 44 years, Religion – Pagani, Occupation - Peasant, Tribe – Sukuma, Residence – Ugembe Village within Nzega District).*

2. *That on 15th day of June, 2015 at about 2100 hours the accused person was at Ugembe Village within Nzega District in Tabora region.*

3. *That at the same time, date and place the accused person did kidnap one Magreth D/O hamis who is aged 6 years*

*and albinism in order to put her in danger of being subjected to grievous harm.*

4. *That the accused person was arrested by the police officers who had set the trap of arresting the accused person after they had received an information, that the victim was kidnapped with the aim of being sold.*

5. *That the accused person is hereby charged accordingly."*

In line with the definitions provided under Section 5 of the Penal Code, in order for a harm to be grievous, it must be dangerous. A dangerous harm is defined to mean a harm endangering life.

In the case before me, the prosecution alleged that the appellant was arrested by police officers who had information that the victim was kidnapped with the aim of being sold.

It was also alleged that the appellant kidnapped the minor albinism girl in order to put her in danger and cause grievous harm.

It is on record that the appellant admitted all facts to be true and correct and volunteered additional information on the price set in selling of the abducted girl.

He also admitted that after the abduction, the girl was hidden at his residence while scouting for buyers and a rescue came at a time when policemen set a trap against him.

The ***OXFORD ADVANCED LEARNERS DICTIONARY, SEVENTH EDITION*** defines the word *"kidnap"* as:

> *"to take somebody away illegally and keep them as a prisoner, especially in order to get money or something else for returning them."*

In my view, the act of a stranger and an adult like the appellant to kidnap and subject a 6 years old girl with albinism to an unlawful imprisonment with a view of selling her as a commodity for huge sums of money, extremely endangered her life and amounts to a grievous harm.

It follows naturally that at the time of kidnaping the girl and throughout the period that she was hidden and unlawfully imprisoned by the appellant, she suffered psychological torture and as a result had to put up with nightmares, insomnia, memory loss, fatigue, anxiety, depression and posttraumatic stress disorder.

In view of these facts that are clear on the face of the record, I am in full agreement with the learned State Attorney that a contention of language barrier by the appellant, is an afterthought.

That similar allegation featured in the case of ***SAID MSWALE @ MWANALUSHI V REPUBLIC, CRIMINAL APPEAL NO. 464 OF 2007*** (unreported) wherein the Court of Appeal held that;

> *"The appellant's contention that he did not understand Kiswahili but only Kisukuma is an afterthought. Had he told the trial magistrate he had language difficulty and needed a Kisukuma/Kiswahili interpreter, the record, would have reflected the same."*

The trial Court's records further show at page 3 of the typed proceedings that the appellant ably mitigated on status of his family which depended on him, his HIV status and a fact that the offence was committed after he was seduced to do so.

For the above stated reasons, I am convinced that the appellant well understood the language used in the trial Court throughout its proceedings.

Consequently, this appeal is hereby dismissed in its entirety. It is so ordered.

**AMOUR S. KHAMIS**
**JUDGE**
**23/03/2021**

Judgment delivered this 25th day of March, 2021 in the presence of the Appellant in person but in absence of the Respondent.

**B.R. NYAKI**

**DEPUTY REGISTRAR**

**25/03/2021**

Right of appeal explained fully to the Court of Appeal proceeded by filing of Notice of appeal within 60 days.

**B.R. NYAKI**

**DEPUTY REGISTRAR**

**25/03/2021**

I certify that this is a true and correct copy of Original Judgment/Ruling/Order

Registrar

Date 1st April 2021