IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

HC. CRIMINAL APPEAL NO. 176 OF 2021

(Arising from the judgment of Chato District Court in Criminal Case No. 192 of 2019)

ALPHONCE JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd May & 4th July, 2022

DYANSOBERA, J.:

The appellant was convicted by the District Court of Chato on his plea of guilty to the offence of impregnating a primary school girl c/s 60A (3) of the Education Act [Cap 353 R.E. 2002] as amended by Section 22 of the Written Laws (Misc. Amendments) Act No. 2 of 2016. It was alleged in the particulars of the offence that the appellant at unknown dates of July, 2019 at Buseresere village within Chato District in Geita Region did impregnate one JL, a Standard Four pupil at Buseresere Primary School. He was sentenced to 30 years' prison term.

Aggrieved, he has appealed to this court challenging the trial court's decision on six grounds of appeal which point out to the propriety of the plea of guilty he entered before the District Court.

At the hearing of this appeal, the appellant stood on his own, unrepresented while the respondent Republic was represented by Ms Margareth Mwaseba, learned Senior State Attorney.

Adopting his five ground-petition of appeal, the appellant informed this court that he had nothing useful to add.

Responding to the petition of appeal, Ms. Margareth Mwaseba declined to support the appeal arguing that the appellant's appeal was misconceived in view of the clear provisions of section 360 (1) of the Criminal Procedure Act which bars appeals based on convictions on pleas of guilty save only on legality of sentence.

On the first and second grounds of appeal, she dismissed the appellant's complaint that force was used and submitted that the it is on record that the mentioned statement was read out and the appellant admitted the facts.

On the rest grounds of appeal, Ms. Mwaseba was of the view that the offence was proved beyond reasonable doubt as the appellant pleaded guilty. The appellant admitted to have impregnated the girl, he was given a chance to plead and admit or deny the facts. In her view, there is nothing to fault the decision of

the district court as the appellant's plea of guilty was unequivocal and proper in law.

In his rejoinder, the appellant reiterated his prayer that the appeal be allowed arguing that the State Attorney was not present and that he was tortured so as to admit and get a lenient sentence.

It is on record of the trial court's proceedings that when the charge was read over and explained to the appellant, he is recorded to have pleaded guilty. As rightly pointed out by Ms Margereth Mwaseba, under section 360 (1) of the Criminal Procedure Act [Cap. 20 R.E.2019] the appeal against conviction for an accused convicted on his own plea is barred save an appeal against the legality of sentence. Section 360 (1) of the Criminal Procedure Act, Cap 20 of R.E. 2002 provides: -

> *"(I) 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.*
>
> *(2).....(not relevant)*

The above provision which clearly envisages that upon a plea of guilty, there is no right of appeal unless it is on extent of legality of the sentence is a general rule which is not without exceptions. These exceptions were amply elucidated by this court in the case of **Laurent Mpinga v. R**, [1983] TLR p. 166 and affirmed by the Court of Appeal of Tanzania in

various cases including the case of **Kalos Punda v. R**, Criminal Appeal No. 153 of 2005 (Mtwara Sub-Registry-unreported) and are the following:-

1. *That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty.*

2. *That the appellant pleaded guilty as a result of mistake or misapprehension*

3. *The charge laid at the appellant's door disclosed no offence known to law; and*

4. *That upon the admitted facts the appellant could not in law have been convicted of the offence charged.*

From the submissions, the grounds of appeal and the trial court's record, two issues call for determination by this court. First, whether the plea was unequivocal and second, whether the law respecting the modus operandi applicable where the accused pleads guilty was followed.

As far as the first issue is concerned, as I understand, for a plea of guilty to stand, the court must be satisfied that the accused fully understood and appreciated the charge that is laid against him and that he/she intends to plead guilty thereto.

This court in the case of **Mitinge Mihambo v.R**, [2001] TLR page 348 held that the accused should not be taken to admit an offence unless he pleads guilty to it in unmistakable terms with the appreciation of essential elements.

Further, in the case of **DPP v. Reuben Makujaa** [1992] the Court observed at page 2 that before accepting a plea of guilty by the accused, the court must be satisfied that the accused's reply is nothing but a clear admission of guilty. The accused cannot be said to have admitted if he did not understand the ingredients of the offence charged.

In the instant case, it was not established that the appellant pleaded guilty to it in unmistakable terms with the appreciation of essential elements. I say so because the record does not show that the essential ingredients of the offence charged were detailed to the appellant and he appreciated them. To be safe, the trial court was duty bound to explain to the appellant all essential ingredients of the offence before recording a plea of guilty. As the record of the trial court depicts, there is nothing showing that before entering a conviction, the trial district court ensured that and appellant had first, fully understood and appreciated the charge laid against him and second, that he intended to plead guilty thereto. For that reason, the plea was not unequivocal.

With regard to the second issue, the trial court's record indicates that a preliminary hearing was conducted and the appellant agreed to the recorded facts.

For clarity and ease of reference, the record of the trial court as reflected in the trial court's proceedings dated 26.9.2019 from page 2 to page 4 indicates that when the charge was read over and explained to the appellant he pleaded guilty and then after the charge was reminded over to him, he is recorded to have stated:

- *'it is true that I impregnated the said girl.'*

The trial court's record then goes as follows:

Court: *The court has satisfied that the accused person has pleaded guilty in his words that it is true, he impregnated the victim (J.L). these words implies that the plea is unequivocal and satisfied that he understood the charge.*

P.P.: *I pray to read the facts of the case for the accused*

Court: *facts admitted and read over to the accused person*

MEMORANDUM OF AGREED FACTS DURING THE PRELIMINARY HEARING IN TERMS OF SECTION 192 (3) AND (4) OF CPA.

The following are the matters agreed upon:-

1) *The fact that the person particulars of the accused person agreed upon.*
2) *The fact that the personal particulars of the victim in this case agreed upon*
3) *The fact that on unknown date July, 2019 at Buseresere village, Chato the accused person impregnated one Jema d/o Lugozo @ Damas, a pupil of STD IV agreed upon*
4) *That on 22nd September 2019, the accused person was arrested by Mateso (p.4) and sent to police station agreed.*
5) *The fact that on 23rd Sept. 2019 the accused person cautioned by police officer G.206 DC Matete agreed to commit offence agreed*

6) *The fact that on 26th September 2019 the accused person was arraigned before Chato District Court and confessed to commit the offence agreed upon by accused*

Exhibit intended to relied upon:

1) *Cautioned statement of the accused person*
2) *PF 3 of the victim Juma Lugozo @ Damas*
3) *Copy of attendance Register of Buseresere Primary School*
4) *Copy of Clinic Card of Jema Lugozo @ Damas*

Contents of the document:

Acc: *It is true I wrote the statement and confessed before a police officer*

person Accused: *I agree on the PF 3 of the victim to be received, no objection your honour.*

Court: *the accused person the contents of the documents have read over and explained to him no objection. The court has satisfied that the plea of an accused is unequivocal in respect of 2nd count.*

Thereafter the court convicted the appellant forthwith.

Surely, the law was violated in two aspects, first, no facts of the alleged offence were stated by the public prosecutor as required by the law and the appellant was not given an opportunity to dispute or explain the facts or add any relevant fact. Second, the learned trial Resident Magistrate treated the matter as if the appellant had pleaded not guilty to the charge and that is why he conducted a preliminary hearing and adopted matters not in dispute.

With due respect, he miserably misdirected himself in the application of the law. The conduct of preliminary hearing does not apply where the accused pleads guilty. It only applies where the accused denies the charge and a plea of not guilty

is entered, then for purposes of accelerating the trial and disposal of the case, the preliminary hearing is conducted under section 192 read together with Accelerated Trials and Disposal of Cases Rules, GN No. 192 of 1998. Of course, Section 192 should be read together with section 229 of the same Act.

The law is settled as to the procedure to be adopted when an accused person pleads guilty to an offence with which he is charged. Section 228 (2) of the CPA states: -

> *"If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses, and the magistrate shall convict him and pass sentence upon or make an order against him, unless there shall appear to be sufficient cause to the contrary."*

The guidelines on the application of section 228 of the Criminal Procedure Act were well elucidated by the Court of Appeal in various cases. Examples of such cases includes the case of **Khalid Athuman V. Republic,** Criminal Appeal No. 103 of 2005 and the case of **Juma Selemani @Paul vs Republic,** Criminal Appeal No. 394 of 2016 (both unreported). According to those case laws, the guidelines given by the Court of Appeal are found in the following observations: -

"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 formerly 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 the facts or asserts additional facts which, if true, might raise a question as to his guilt, 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, of course, be recorded".

Undoubtedly, the trial District Court in the present case, adopted a wrong procedure by applying inapplicable law as indicated above. That occasioned miscarriage of justice as the appellant was treated as if he had pleaded not guilty and was convicted as if a trial was conducted. It is difficult to say with certainty that the appellant intended to plead guilty to the charged offence.

For the reasons stated above, I find that the appellant's plea was unequivocal and the law was violated. The conviction and sentence were therefore, illegal. This, to my view, occasioned injustice to the appellant.

Since the conviction and sentence were premised on violation of the law of the land, they cannot be allowed to stand.

I find the trial court misdirected itself on essential legal procedure which occasioned miscarriage of justice. In the circumstances, I am constrained to declare the whole trial court's proceedings, judgment and subsequent order a nullity. The same are quashed and set aside. The conviction is thereby quashed and sentence set aside.

Should I order a re-trial?

The general rule is that where a trial is nullified on the basis that the trial was illegal or defective, the remedy is to order a retrial unless there are reasonable grounds for making a different order. This position was echoed in the case of **Rex**

versus Dinu d/o Sombi and 2 Others Vol.14 EACA 136 in which the Court of Appeal of Eastern Africa nullified the trial and ordered a retrial in a murder case because the learned trial Judge had not complied with the provisions of Sections 279 to 283 of the Criminal Procedure Code, Tanganyika, which omission might have affected the opinion of the assessors and therefore occasioned a failure of justice.

In this case, I find to be in the interest of justice to order a fresh trial. In consequence thereof, I order the case to be remitted back to the District Court for re-trial before another Magistrate of competent jurisdiction. I direct that in case the appellant is convicted, the term of imprisonment he has already served in custody should be taken into account.

Appeal allowed to that extent.

W.P. Dyansobera
Judge
4.7.2022

This judgment is delivered under my hand and the seal of this Court on this 4th day of July, 2022 in the presence of the appellant and the learned Senior State Attorney for the respondent Republic, Ms. Dorcas Akyoo.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera
Judge