IN THE HIGH COURT OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 61 OF 2021

(Arising from Kaliua District Court in Criminal Case No. 26 of 2020)

NJIKO LUMALA.....1ST APPLICANT

JILALA MASASILA.....2ND APPLICANT

MADOSE MASENGWA.....3RD APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of Last Order: 29/08/2022

Date of Delivery: 29/08/2022

AMOUR S. KHAMIS, J:

Jilala Masasila, Njiko Lumala, Madose Masengwa, Paskali Juma, Ntemi Mbojie and Sawaka Lutonja were arraigned in the District Court of Kaliua for two counts of armed robbery and gang rape.

The count of armed robbery was contrary to Section 287A of the Penal Code, Cap. 16, R.E. 2019.

The charges of gang rape related to two accused, Njiko Lumala and Madose Masengwa.

The prosecution alleged that on 23rd day of November 2020 around night hours at Songambele area, Kaliua District, Tabora Region, the six accused stole cash money totalling Tshs. 500,000/=

and one bedsheet valued at Tshs. 150,000/= properties of one Kulikoni s/o Reuben.

It was added that immediately during and after such stealing the six (6) accused used panga (bush knives) and clubs to threaten in order to obtain such stealing.

For the second count, the prosecution alleged that Njiko Lumala and Madose Masengwa on 23rd day of November 2020 during night hours at Songambele area, Kaliua District, Tabora region, did have carnal knowledge of one "XXX", a girl of 14 years old.

When the charge was read over to them, Jilala Masasila, Njiko Lumala and Madose Masengwa pleaded guilty and thus convicted on own plea of guilty.

The trial magistrate sentenced each of them to serve a thirty (30) years jail term.

In respect of the second count, Njiko Jilala was sentenced to life imprisonment.

Aggrieved by both conviction and sentence, Njiko Lumala, Jilala Masasila and Madose Masengwa knocked the doors of this Court by way of appeal.

Each of them filed a separate Petition of Appeal although the grounds of appeal listed therein are identical, namely:

1. That the alleged plea of guilty to the appellants was ambiguous and equivocal .

2. That from the records available, it does not show the response (reply) of the appellants to the facts of the case read to them by the prosecutor neither it is clear which appellant (accused) admitted which facts.

3. That the learned trial magistrate erred in law to allow the prosecutor to read the facts of the case under Section 192 (3) of the Criminal Procedure Act, Cap 20, R.E 2019 which caters for the accused person who have pleaded guilty.

4. That exhibit P.1. collectively, the alleged cautioned statement of the appellant was read aloud in Court before it was cleared for admission which affected the plea of guilty of the appellants. See ***NDAIYAI PETRO V REPUBLIC, CRIMINAL APPEAL NO. 277 OF 2012 (CAT – Unreported) and ROBINSON MWANJISI & OTHERS V REPUBLIC (2003) TLR 218.***

Apart from the above four grounds of appeal, Njiko Lumala had one extra ground of appeal, namely:

5. That even on the admitted facts, the appellant alone, could not be convicted on the offence of gang rape under Section 131 A of the Penal Code, Cap 16, R.E 2019 in the circumstances of which the sentence of life imprisonment also cannot stand.

Before me, Ms. Veronica Moshi, learned State Attorney, appeared for the Republic and orally argued the appeal.

The three appellants appeared in person and fended for themselves. They adopted contents of their respective Petitions of Appeal and urged to be released.

The appellants contended that they were badly beaten after arrest and forced to confess. Subsequently, they were forced to plead guilty to the charges.

Ms. Veronica Moshi strongly opposed the appeal and maintained that the appellants were properly charged, convicted and sentenced.

However, Ms. Moshi asserted that the cautioned statements (Exhibit P.1 collectively) were tendered by the public prosecutor and not read over in Court after admission.

She contended that on authority of ***ROBINSON MWANJISI V REPUBLIC*** such exhibits have to be expunged from the records.

Ms. Moshi further contended that despite of lack of exhibits, the appellants' conviction and sentences would stand because of pleas of guilty.

She asserted that the plea of guilty was neither ambiguous nor equivocal.

The issue is whether the appellants were properly convicted and sentenced.

In ***BALOLE SIMBA V REPUBLIC, CRIMINAL APPEAL NO. 525 OF 2017*** (Unreported) the Court of Appeal referred to its decision in ***ROBINSON MWANJISI V REPUBLIC (2003) TLR 218*** and observed that:

"The procedure for admission of a confestion is regulated by the Evidence Act, Cap 6, R.E 2019 and case law. Therefore like any other documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission before it can be read out to the appellant ....."

At page 9 to 10 of the typed ruling, the Court of Appeal pointed out that:

".....in the matter at hand, the cautioned statement of the appellant tendered by PW3 which was relied on to convict the appellant was not read out before being cleared for admission and this was irregular....."

In the present case, the disputed cautioned statement (Exhibit P.1 collectively) were tendered by the public prosecutor contrary to the legal requirements.

In ***THOMAS ERNEST MSUNGU @ NYOKA MKENYA, CRIMINAL APPEAL NO. 78 OF 2012*** (Unreported) the Court of Appeal held that"

"It is evident that the very duty of prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and a witness at the same time. In tendering the report the prosecutor was actually assuming the role of witness. With respect, that was wrong because in the process the prosecutor was not the sort of witness who could be capable of examination upon oath or affirmation in terms of Section 198 (1) of the Act. As it is, since the prosecutor was not a

witness he could not be examined or cross examined on the report."

Apart from that, Exhibit P.1. collectively was not read out in Court after admission.

The law in this area was well stated by the Court of Appeal in ***ROBINSON MWANJISI AND 3 OTHERS V REPUBLIC (2003) TLR 218*** thus:

> *"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted, before it can be read out".*

Having examined the trial court's proceedings, I am satisfied that the appellants' cautioned statements were not read out in Court contrary to the above mandatory legal requirements.

On account of the omissions stated herein above, Exhibit P.1 collectively is hereby struck out from the records.

The next question is whether the remaining evidence on record sufficiently proves the prosecution case beyond reasonable doubts.

In ***SMAIL BUSHAIJA V REPUBLIC (1986) TLR*** this Court held that:

> *"Before an appellate court uphold a purported plea of guilty it has to satisfy itself that:*
>
> *a) The charge drawn and signed by the trial magistrate is an offence known to law*
>
> *b) It is an offence over which the Court has jurisdiction*

c) *The offence charged is sufficiently identifiable from the fact as lodged by the complainant*

d) *The plea was unequivocal*

e) *Where applicable, the assessors played their statutory role."*

In ***MITINGE MIHAMBO V REPUBLIC (2001) TLR 348*** the law on plea of guilty was restated thus:

> *"It is the law of this country that an accused person is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence for which he stands trial. This is even more important in trials in which the accused is undefended. It is always prudent in the case of an undefended accused person who pleads guilty that care should always be taken to see whether he understood the elements of the crime to which he is pleading guilty."*

In ***BUHIMILA MAPEMBE V REPUBLIC (1988) TLR 174***, Chipeta, J (as he the was) held that:

> *"1. In any case which a conviction is likely to proceed on plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it "unequivocally"*
>
> 1. *The words "it is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one.*

2. *If, however, the words used by an accused person may perse, appear to be unequivocal plea of guilty , a conviction may properly be entered against him if the facts given by the prosecutor and agreed to as correct by the accused fully disclose the offence charged"*

In the present case, the charge read was properly drafted, disclosed offences known in law, namely armed robbery and gang rape and the facts read out by the prosecution equally disclosed full elements of the two offences.

When the charges were read over to them, the first appellant, Jilala Masasila stated:

"It is true I did commit robbery to the said person ....."

The second accused, Njiko Lumela, stated:

"It is true I did rob the said person and left with bed sheet...."

The third appellant, Madose Masengwa stated that:

"It is true we entered all five and robbery (robbed) the said person....."

On the second count, Njiko Lumela said:

"It is true I committed gang rape....."

Thereafter, the trial magistrate convicted each of the appellants on unequivocal plea of guilty and upon admission of the facts constituting the substance of the offence charged to be true and correct.

In such circumstances, I found nothing useful to fault the trial magistrate in entering a conviction against them.

I am therefore satisfied that the appellants offered an unequivocal plea of guilty and the sentences passed were within the provisions of the law.

The appeal is thus dismissed for lack of merits.

AMOUR S. KHAMIS

JUDGE

29/8/2022

ORDER

Judgement delivered in chamber in presence of the appellants in person and Ms. Veronica Moshi, State Attorney for the Republic.

Right of Appeal is Explained.

THE HIGH COURT OF TANZANIA

AMOUR S. KHAMIS

JUDGE

29/8/2022