IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

JUDICIARY

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL 32 OF 2022

(From Manyoni District Court at Manyoni in Criminal Case No. 04 of 2020)

NKALANGO NKUMBULWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 26/10/2018

Date of Judgment: 22/12/2022

Mambi, J.

In the District Court the appellant **Nkalango Nkumbulwa** was charged with an offence of rape of a girl aged 12 years old c/s 130 (1) (2) (e) and section 131 (1) of the Penal Code, Cap 16 [R.E.2019]. The accused person was convicted on his own plea. The trial court having convicted the accused, it sentenced him to 30 years imprisonment and a corporal punishment of 12 strokes.

Aggrieved, the appellant filed his appeal containing four related grounds of appeal. In his grounds of appeal, the appellant mainly faulted his conviction by the trial court basing on his own plea in which he contends that it was equivocal.

During hearing, the layman appellant who was unrepresented adopted his grounds of appeal and he submitted that he had nothing to add. A part from relying on his ground of appeal. The Republic on the other hand, through the Learned State Attorney Ms. Mkina submitted that she was not supporting the appeal since there was no any irregularity at the trial court. The learned State Attorney was of the view that where the accused pleads guilty, it is not necessary for the exhibits to be read. The learned State Attorney contended that in the case at hand it was not necessary for the prosecution to read the caution statement and PF3 to the appellant/accused. The learned Ms. Mkina added that in the record there is nowhere the accused informed the trial court if he was not conversant with Kiswahili language and so to her the plea was clear. The learned State Attorney referred this Court to the decision of the court in **Lawrence Mpinga vs R,** (1983) TLR 166.

In his rejoinder, the appellant contended that he was told by the police to agree the offence so that he could be released. The appellant added that he did not commit the offence.

Before I addressed myself to the grounds of appeal, I went through the trial records to satisfy myself if the appellant/the accused did plea or not as contended by the learned State Attorney. Having carefully gone through

the proceedings and judgment of the trial court, I find the main issue is whether or not the appellant plea was properly taken and recorded or not.

In my perusal and findings from the records reveals that, the appellant/accused pleaded as follows: -

> *"it is true that on 17/3/2020 I raped one girl aged 12 years old".*

The records further show that having recorded the plea of the appellant/accused, then the prosecution was allowed to read the facts of the case to the appellant/accused for easy reference I wish to reproduce the so called facts and plea made by the accused at the trial court as follows:

1. *The name and particulars of the accused is as per the charge.*
2. *It is true that on 17/3/2020 unlawfully did had carnal knowledge with one girl aged of 12 years old.*
3. *It is true that I was arrested and sent to police station for further interrogation.*
4. *It is true I appeared before this court on 20/3/2020 in order to answer a charge against me.*
5. *It is true that I confessed before the police office that I committed the said offence."*

Reading between the lines on the purported plea and facts above can it be said it was a plea from the appellant/accused person? one would doubt on whether the appellant/accused understood on what he was pleading.

Those words recorded by the trial magistrate are seriously ambiguous. The trial. The records further shows that there were some irregularities of both proceedings and the judgment as the appellant's plea was **equivocal.** This shows that the trial magistrate failed to properly record and take the appellant's plea. In my considered view I find that there was no any plea that was recoded.

Looking on the facts it appears that the trial court was recording the replies of the appellant/accused from the facts read to him by the prosecution instead of recording the facts of the prosecution and then ask the appellant/accused as to which facts he was disputing and which facts he was admitting if any. On this, it is my considered view that the appellant did not understand the facts and contents of the charge sheet. This means he pleaded out of non-existed facts and charge sheet thus making the plea equivocal. The plea recorded creates doubts and this suggests that the appellant/accused was wrongly convicted on the purported plea that was equivocal. The trial Magistrate thus convicted the appellant/accused basing on non-existed plea. Indeed, as submitted by the appellant, the trial records reveals that the appellant seem to be convicted basing on equivocal plea which makes the proceedings, judgment and sentence fatally defective. It is trite law that the accused plea must be made voluntary after the accused has been **informed of** and **understands** his or her rights (emphasis added) and his plea must be immediately recorded to show if he pleaded guilty or not. The records shows that there were irregularities on the proceedings of the trial court as the court failed to address the appellant/accused on the facts of the prosecution before the pleaded.

The Trial Magistrate was required to comply with section 228 of the Criminal Procedure Act, Cap 20 [R.E.2019]. As I alluded that the proper section for taking plea is 228 of the Criminal Procedure Act, Cap 20 [R.E.2019] which reads as follows:

> *"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) 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 appears to be sufficient cause to the contrary****.*
>
> *(3****) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***
>
> *(4)* ***If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.***
>
> *5)(a) If the accused pleads–*
>
> *(i) that he has been previously acquitted of the same offence; or*
>
> *(ii) he has obtained a pardon at law for his offence, the court shall first try whether or not in fact such plea is true.*
>
> *(b) If the court holds that the evidence adduced in support of such plea does not sustain the plea, or if it finds that such plea is false in fact, the accused person shall be required to plead to the charge.*
>
> *(6) After the accused has pleaded to the charge read to him in court under this section, the court shall obtain from him his permanent address and shall record and keep it".*

From my findings and observations, it clearly shows that the trial magistrate failed to properly conduct proceedings by skipping one step of taking plea which is bad in law. In my considered view I find that there was no any plea that was taken and recoded. I am of the settled mind that the Trial Magistrate did not properly conduct the proceeding for the plea taking under the law.

It is the trite law that an accused has to state if he admits all those essential elements of the offence charged or not, the magistrate must record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. There are various authorities that have addressed an issue of plea. For instance, in the case of ***Adan v Republic (1973) EA 445***, cited by the case of ***Khalid Athumani v. R, Criminal Appeal NO. 103 OF 2005***, (unreported), it was explained that:

> *"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 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 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."

In view of the above findings, it can confidently be concluded that, failure to properly record the accused/ appellant's plea leaves doubt as to whether the appellant pleaded basing on the particulars of the offence against him. It is a general rule that, the accused person must be given the benefit of doubt as underscored by the court in the case of ***Director of Public Prosecutions v Elias Laurent Mkoba and Another [1990] TLR 115 (CA)***.

Worth also referring the persuasive decision made **Lord Denning L.J**. (as he then was) in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162 which has similar scenario to our case in hand. **Lord Denning L.J** observed and stated that:

"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In view of the above findings, it can confidently be concluded that, failure to properly record the accused/ appellant's plea leaves doubt as to whether the appellant pleaded basing on the particulars of the offence against them. In the circumstances I am satisfied that the appellant's conviction and sentence were properly done as the trial court failed to notice some irregularities which lead to injustice on the part of the accused who is now the appellant. The question at this juncture would now be, having

observed such irregularities, would it be proper for this court to order retrial or *trial de novo?* There are various authorities that have underlined the principles and circumstance to guide the court in determining as to whether it is proper to order retrial or *trial de novo* or not.

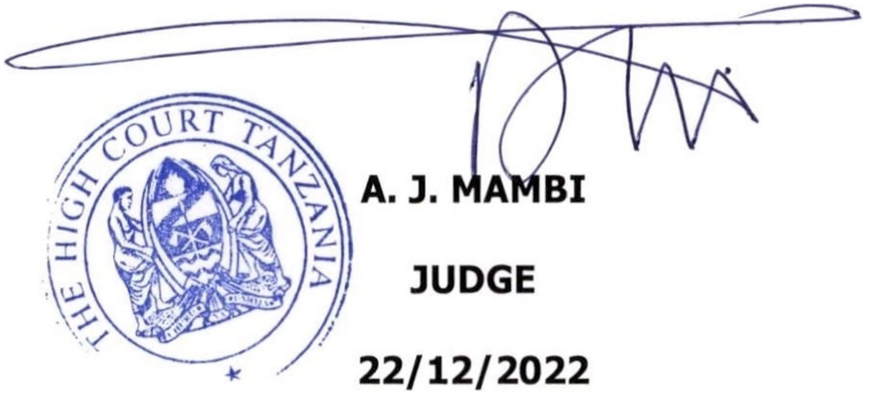
I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013***, where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said: -

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where* ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person****..."*

Looking at the circumstance of the case at hand, I find it proper if the matter be referred back to the trial court for trial *de novo* as the interests of justice requires it to do since there is no any likelihood of causing an injustice to the accused person/appellant. In terms of Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2002] it is the finding of this court that on the account of improper recording of the appellant's plea, this court is satisfied that such errors, omissions or irregularities has in fact occasioned failure of justice to the accused.

It is trite law that before any appellate court makes an order for retrial or trial *de novo,* the court must find out as to whether the original trial order was illegal or defective and whether making such order (retrial or trial *de novo*) will create more injustice to the appellant/accused person. After going through and appraising the records, I am satisfied that had the trial court been diligent in the discharge of its functions by complying strictly with the provisions of the law, the outcome of this appeal might have been different. In the circumstance, given the nature of this case, the interest of justice demands that a retrial be ordered. This must be done as expeditiously as possible.

In my considered and firm view, in our case at hand the irregularities favour this court to order for retrial and the interests of justice requires me to do so and I hold so. Depending on the outcome of the new judgment, the parties in this case shall be at liberty to start afresh the process of appeal. The appellant shall remain in custody pending the final determination of his matter.



A. J. MAMBI

JUDGE

22/12/2022

Judgment delivered in Chambers this 22nd day of December, 2022 in presence of both parties.

A. J. MAMBI

JUDGE

22/12/2022

Right of Appeal explained.

A. J. MAMBI

JUDGE

22/12/2022