IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT SUB REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 85 OF 2022

(Originating from the decision of the District Court of Kalambo at Matai in Criminal Case No. 92 of 2022 dated the 2nd Day of August,2022)

BENJAMINI S/O MICHAEL .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

17th February, 2023 & 28th April, 2023

MRISHA, J.

The appellant **Benjamin S/O Michael** was arraigned before the District Court of Kalambo at Matai with one count of Attempted Rape Contrary to section 130(2) of the Penal Code, CAP 16 R.E. 2019. He pleaded guilty to the charge and was sentenced to serve a thirty years custodial sentence.

Having been aggrieved by the conviction and sentence meted against him by the said trial court, he knocked the doors of this court with a

view of requesting this court to nullify the whole proceedings of the lower court, quash the conviction, set aside the sentence imposed on him and order that he be released from remand custody.

His appeal is composed of six grounds namely: -

i. That, the appellant did not commit the serious offence of an Attempted rape alleged by the prosecution side,
ii. That, the said charged offence was not proved beyond reasonable doubts,
iii. That, the trial magistrate erred in law and in fact by relying on the appellant's plea of guilty without taking into consideration that it was the first time for the appellant to stand before it,
iv. That, the charge sheet was not read twice to the appellant and explained correctly in order to make the trial court satisfy itself if the appellant understood what he was pleading before the court,
v. That, the trial court erred in law and in fact by convicting and sentencing the appellant without giving him a chance to say, or add anything, or to dispute the alleged facts,
vi. That, the trial court erred in law and in fact by convicting and sentencing the appellant while the appellant was promised by the police that if he confesses, he will be let free.

Before going far, I will provide a summary of what transpired in the trial court which led to the conviction and sentence of the appellant herein. In the lower court it was alleged that on 26.07.2022 at Mvula Village within Kalambo District in Rukwa Region at night hours, the appellant invaded the house of one Frank s/o Maembe where **Irene d/o Frank** lived, took her outside, stopped her from shouting and attempted to rape her. However, his mission failed because the victim's father confronted the appellant who ran away.

That few days later the appellant was arrested and was taken to Mwimbi Police Post whereupon he was interrogated by F. 1854 Sargent Alfred and he confessed to have committed the offence of Attempted Rape. Thereafter, the appellant was taken to Matai Police Station and on 02.08.2022 he was arraigned before the trial court with one count of Attempted Rape. He pleaded guilty to the said charged. Consequently, he was sentenced to serve a sentence of thirty years in prison.

When this appeal was called on for hearing the appellant stood alone, legally unrepresented, whereas the respondent Republic was represented by Ms. Safi Kashindi, learned State Attorney. Upon being given a chance to address this court regarding his grounds of appeal the appellant briefly said that he did not commit the charged offence.

He said he was apprehended on 25.07.2022 when he was at the farm and was taken to the police station. He requested this court to admit his grounds of appeal and adopt the same as his submission and proceed to allow his appeal, quash the conviction entered against him by the trial court and set aside the sentence of thirty years in custody so that he becomes free.

On the other side, Ms. S. Kashindi opposed the appellant's appeal and urged this court to uphold the conviction and sentenced entered by the trial court. She clarified that since the trial court's records show that the appellant unequivocally pleaded guilty to the charged offence then he has no room to appeal against his conviction; the only remedy for him was to appeal against the sentence. She cited the provisions of section 360(1) of the Criminal Procedure Act, CAP 20 R.E. 2022(the CPA) to cement her support her submission.

She also submitted that the trial court properly recorded the appellant's plea in terms of section 228(1) (2) of the CPA hence, she argued, the appellant's plea was an unequivocal and the appellant's first ground of appeal has no merit.

Regarding the second ground of appeal, Ms. S. Kashindi insisted that since the appellant had pleaded guilty to the charged offence then the

prosecution could not call witness to prove the same because section 228(2) of the CPA gives the trial court a mandate to convict and pass sentence against the accused person who pleads guilty to the charged offence.

She also attacked the appellant's third ground of appeal by submitting that the appellant was given an opportunity to comment on the facts which were read over to him subsequent to his plea of guilty; hence his ground of appeal has no legs to stand.

When addressing this court about the third and fourth grounds of appeal Ms. S. Kashindi indicated that the same are similar to the above ground, hence she jumped to the fifth ground and pointed out that the trial court gave the appellant an opportunity to say whether he admits all facts stated by the Public Prosecutor and he admitted to all the facts meaning that he was given a chance to make clarification or deny some facts which he could find to be wrong.

Talking about ground number six, Ms. S. Kashindi submitted that such ground is an afterthought because the appellant did not raise it at the trial stage; he was supposed to address it during the trial when the charge sheet was read over to him or at the time the prosecution conducted a Preliminary Hearing. She finally urged this court not to deal

with such ground for being an afterthought and proceed to dismiss the appellant's appeal and upheld the conviction and sentence passed by the trial court.

However, when prompted by this court to address it on the manner used by the trial court in admitting the appellant's caution statement and marked it as exhibit P1 and the age of the appellant, Ms. S. Kashindi changed her previous position. She said she had noted that there were some procedural irregularities committed by the trial court.

She clarified that after clearing exhibit P1 for admission, the trial magistrate did not direct the Public Prosecutor to readout the contents of such exhibit. According to her, that was a procedural irregularity and it is an incurable defect, hence she prayed this court to expunge the said document from the court's records because appellant was supposed to know the contents of such document.

She went far by pointing that although the charge sheet which was submitted before the trial court indicates that the appellant was 19 years old at the time he committed the alleged offence and/ or arraigned before the trial court, yet by looking on the appellant he appears to be a child which tells that he is still younger than the age shown in the charge sheet. She was of the view that the trial court ought to address

itself first on the issue of age in order to determine his age instead of making an informal assessment that the appellant had attained the age of majority.

Having submitted on the above two points, Ms. S. Kashindi prayed this court to order a retrial and direct the trial court to conduct an inquiry in order to determine the proper age of the appellant at the time he was arraigned with the charged offence. That marked the end of her submission.

On his part, the appellant briefly joined hands with Ms. S. Kashindi by submitting that he was born on 20.12.2005 and that he was 16 years and 7 months when he was arrested on 26.07.2022. He concluded by saying that he had been raised by his grandmother and that is the person who told him about his birth date, hence, he added, he was not 19 years when he was arrested and finally arraigned before the trial court for an offence of Attempted rape.

The issue for my determination of this appeal ought to be whether the appellant's grounds of appeal have merit. However, my discussion, in the course of determining the present appeal, will go beyond that. This is because at first the counsel for the respondent Republic opposed the

instant appeal and prayed to this first appellate court that the conviction and sentence passed by the lower court be upheld.

However, after being prompted to address this court on the issue of procedure applied by the trial court in admitting exhibit P1 and the age of the appellant Ms. S. Kashindi changed her previous position, made her submission on the same and finally she prayed this court to order for a retrial due to some procedural irregularities which, she said, were committed by the trial court. On that note my task will be to determine whether there were such irregularities and if so, whether the same have occasioned miscarriage of justice.

I have dispassionately read the submissions by both parties in relation to this appeal. I have also gone through the trial court proceedings and findings just to get a clear picture of what the appellant is complaining of. Having done so I have reached to a conclusive finding that the trial magistrate properly recorded the appellant's plea and went on to afford the appellant with an opportunity to comment on the correctness or otherwise of the facts which were read over to him by the Public Prosecutor. Hence, I share the same view with Ms. S. Kashindi that there was nothing wrong with the appellant's plea.

It is clear from the trial court's records, particularly at page 3 of the typed proceedings, that the appellant pleaded guilty to the offence of Attempted Rape contrary to section 130(2) of the Penal Code. It is also clear and undisputed that after the trial court had entered a plea of guilty the appellant was given a chance to air his comments about the alleged facts and the records show that he certified to the trial court that all that was read to him was correct and he admitted it.

That entails that the trial magistrate properly complied with the procedure of recording accused plea as provided under section 228(1)(2) of the CPA, which tells that the appellant's plea is an unequivocal plea. Having said the above, I find grounds number 1,2,3,4 and 5 of the appellants to be unfounded and I dismiss them for want of merits.

As for ground number six in which the appellant complains that he was tortured and promised by the police that should he confess to have committed the charged offence he would be let free, I find the same to be an afterthought and lacks some legs to stand. I say so because, that is a new fact because it was not addressed by the appellant at the trial stage as argued by Ms. S. Kashindi.

It is a trite law that the appellate court cannot deal and/or entertain matters which were not raised and disposed of by the lower court. Such legal position was reiterated by this Court in the recent case of **Kenedy Makuza vs Monalia Microfinance Ltd**, PC Civil Appeal No. 01 of 2021, High Court of Tanzania at Dodoma at page 9 whereby in the course of discussing the above principle of law, my learned brother Kagomba, J cited the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 (Unreported) in which the Apex Court held that,

> *"It is now settled that as a matter of general principal this court will only look into matters which came up in the lower courts and were decided; and not on new matters which were not raised or decided by the trial court".* See also the case of **Juma Manjano v R.** Cr. Appeal No. 211 of 2009, CAT at Arusha (Unreported).

In the present appeal the appellant has raised a purely new matter that he was tortured and that the police had promised him to be let free if he confess to the charged offence. Basing on the above principle of law I find his complaint to be unfounded because the same was not raised in the lower court.

In my view things could be different had he raised it during trial especially when he was given an opportunity to comment on the alleged facts or when the Public Prosecutor prayed to tender Exhibit P1 as an exhibit. The above being said, I find the appellant's six ground of appeal to be baseless.

Next for my determination is whether there were such irregularities and if so, whether the same have occasioned miscarriage of justice. When addressing this court on the issue of procedure, Ms. S. Kashindi pointed out that she had gone through the trial court's proceedings and noted that the contents of Exhibit P1 were not readout in court to enable the appellant know the contents of such document.

She went on to say that such omission is an incurable defect because the appellant was prejudiced thereby. She finally asked this court to expunge it from the record. Her new submission was not challenged by the appellant which tells that he was sailing on the same boat with the learned counsel for the respondent Republic.

Times without number this court and the Apex court being the courts of record, have been insisting on the proper procedure of admitting documents and the consequences for refraining from abiding to such legal requirement. I will give some few examples just to add more

emphasize on the need to do so. For instance, in the case of **Juma Lwila@Masumbuko v. The Republic**, Criminal Appeal No. 215 of 2019, CAT at Iringa (Unreported) at page 13, the Court of Appeal had the following to say,

> *"...we would, at first, recall what we said in our decision in* ***Robinson Mwanjisi & Others v. Republic*** *[2003] TLR 218. In that case, we stressed not just the need for a documentary exhibit to be cleared for admission and then be actually admitted in evidence* ***but we also underlined the procedural imperative that the contents of such document be read out after is admitted because the party against whom the document is sought to be proved is entitled to know the contents thereof."*
>
> [Emphasis added].

Also, in the case of **Josephat s/o Kitugi@Mbogo v. Republic**, Cr. Appeal No. 203 of 2019, HCT at Musoma (Unreported) at page 3 this court through Honourable Kahyoza, J. cited the case of **Sunni Amman Awenda v. Republic**, Criminal Appeal No. 393 of 2013 with a view of displaying the legal consequence of an omission by the trial court to

read the contents of a caution statement to the accused person after clearing it for admission.

In that case the Court of Appeal held that, "*...the omission to read the contents of the cautioned and extra judicial statement out was a fatal irregularity as it deprived the parties to hear what they were all about. It was therefore improper for the trial court to rely on it.*"

In the present case it appears the above procedural requirement was not complied with by the trial court. This is evidenced at page 3 of the typed trial court's proceedings, and I take liberty to reproduce a relevant part of it in order to justify the above observation as follows: -

> "*...Your honour, I pray to tender accused's caution statement as an exhibit if there is no objection from the accused person...*
>
> ***Court**: Accused is asked whether he had any objection on producing caution statement as an exhibit in court.*
>
> ***Sgd***
>
> ***RM***
>
> ***18.08.2022***
>
> *Accused: Your honour, I have no objection on production of caution statement as an exhibit.*

Court: *Accused's caution statement is admitted and marked as Exh. P1.*

Sgd

RM

18.08.2022

Court: *Accused is asked whether he admit all facts adduced by public prosecutor.*

Sgd

RM

18.08.2022

Accused: *I admit all facts as adduced by public prosecutor.*

Sign: *Accused person.*

Sign: *Public Prosecutor.*

Sgd

RM

18.08.2022

Section 228(2) of the Criminal Procedure Act, Cap 20 R.E. 2019 complied with.

Sgd

RM

18.08.2022".

From the above except it is obvious that the contents of Exhibit P1 were not read out by the Public Prosecutor who tendered it, as required by the law. Hence, I find that the omission by the trial magistrate to comply

to such procedure is a fatal irregularity which cannot leave the said exhibit to be safe. Consequently, I expunge it from court record.

Having done so, and before going to the last issue for determination, I find it pertinent to determine one sub issue which is whether, after expunging the appellant's caution statement from record, his conviction can still be sustained.

Such sub issue cannot detain this court in determining it. Despite expunging exhibit P1 from record, I am of the considered view that since the appellant's plea was unequivocal as indicated above, then I cannot fault the trial magistrate who relied on it to ground a conviction against the appellant. In the trial court after the charge was read over and properly explained to the appellant in a language clearly understood to him, the trial magistrate gave him a chance to plead to the charged offence and in the course of responding to such question the appellant, at page 1 of the typed trial court's proceedings, was quoted to have said that,

"Ni kweli nilijaribu kumbaka Irene d/o Frank"

At this juncture, it does not need any reasonable man to use much energy to arrive at a conclusive finding, which I also subscribe, that the above appellant's plea was clear and unequivocal. I have also gone

through the facts read over and properly explained to the appellant and observed that the same constitute the offence of Attempted Rape to which the appellant herein stood charged before the trial court. It is due to the reasons which I have endeavoured to assign above, that I answer the above sub issue in affirmative and I sustain the conviction entered against the appellant.

Ms. S. Kashindi also addressed this court on the issue of an age of the appellant. She was of the view that even by looking at the appellant he appears to be a young person who could not be an adult at the time he was arraigned before the trial court. Basing on that observation the said learned State Attorney urged this court to order a retrial so that the age of the appellant can be determined by the trial court by way of conducting an inquiry.

As indicated above, the appellant made some few remarks on that point when given an opportunity to address this court on the same. He said he was not 19 years old at the time he was apprehended, that is 26.07. 2022. According to him, at that time he was 16 years and 7 months and that it was his grandmother who told him about his birth date since he was raised by her.

On my part, I have spent time to read the trial court's proceedings to see whether the trial court dealt with the issue of appellant's age. Through my observation, I have noted that the trial court neither entertained such issue in the course of recording its findings which led to the conviction of the appellant, nor did it do so at the time of recording proceedings in relation to assessment of sentence.

In my view the trial magistrate ought to go further by conducting an inquiry in order to determine the precise age of the appellant who appears to fall in the borderline between a younger person and an adulty. It is not enough to rely on an assumption especially when an accused person appears to fall between a younger person and an adulty.

Those are not my words; they have their basis on the case law as well as the statutory law. For example, In the case of **Republic vs JN (A Child)** [1977] HCD, No. 269 it was held that, *"...where a person is alleged to be a person just on the borderline between a younger person and an adult, medical evidence should be called for to determine the precise age of the accused person, to assure proper procedure and sentencing".*

Even the Law of the Child Act [Cap 13 R.E. 2019] (the LCA) provides under section 113(1) that, *"Where a person, whether charged with an*

offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person".

Also, section 114(2) of the LCA provides a guidance to the trial court which is confronted by the situation indicated under the former provision. It provides that, *"Without prejudice to the preceding provisions of this section,* ***where the court has failed to establish the correct age of the person brought before it, then the age stated by that person,*** *parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person."* [Emphasis added].

It should be noted here that age is an important aspect in conducting trials before a court of law. This is because apart from helping the courts to determine their jurisdictions, it has an impact when it comes to sentencing of an offender. So, an omission to conduct an inquiry on the accused's age is fatal as it occasions a miscarriage of justice on the part of an accused person. See the case of **Athanas Mbilinyi vs. The Republic**, Criminal Appeal No. 275 of 2020, CAT at Iringa (unreported).

In the present appeal it is evident that the trial magistrate did not tax his mind on the need to conduct an inquiry about the appellant's age.

He ought to do so at the time the charge sheet was placed before him when the appellant was arraigned before the trial could. He could also do so when recording the aggravating and mitigating factors. That could assist him to know the precise age of the appellant in order to pass a proper sentence, if the outcome of the inquiry could reveal that the appellant is an adulty.

Conversely, the said trial magistrate could dismiss the charge for want of *jurisdiction ratione personae*, if the end results of the inquiry would be that the appellant is a young person, and proceed to direct the Public Prosecutor to arraign the appellant before the Court with competent jurisdiction in terms of section 98(1)(a) of the LCA.

Since the trial magistrate failed to comply with the above procedural requirement, then I find it obvious that the trial court committed a procedural irregularity which, in my considered view, occasioned a miscarriage of justice on the part of the appellant.

It follows therefore, that due to the procedural irregularities indicated above, the sentence of thirty years in prison meted on the appellant cannot stand. This appeal is partly allowed to the extent that the conviction of the appellant is sustained; consequently, the sentence meted on the appellant is set aside.

In addition to the above, I order that the original casefile be remitted to the trial court for it to conduct an immediate inquiry on the appellant's age subject to the relevant law as indicated above, and proceed to pass a proper sentence. Meanwhile, the appellant shall remain in remand custody until final determination by the trial court in compliance to the above directions.

It is so ordered.

A.A. MRISHA
JUDGE
27.04.2023

Dated at **SUMBAWANGA** this 27th Day of 2023.

A.A. MRISHA
JUDGE
27.04.2023