THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.85 OF 2022

(Originating from Masasi District Court in Criminal Case No.111 of 2022)

PETER OSCAR @DAUDI.....**APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

15th & 18th May 2023

LALTAIKA, J.

The appellant herein, **PETER OSCAR @DAUDI**, was arraigned in the District Court of Masasi charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap.16 R.E. 2019]. It was the prosecution's assertion that on 14th day of October 2021 at or about 17:00 hours at Nakalola Village within Masasi District in Mtwara Region did have a carnal knowledge of one "ZZM" or the victim aged 13 years old.

When the charge was read over to the appellant, he pleaded guilty. Consequently, the lower court convicted him as charge and sentenced him to serve a thirty (30) years imprisonment term. Dissatisfied with both conviction and sentence, the appellant has lodged a Petition of Appeal comprised of seven grounds as follows:-

1. *That, the trial court failed to comply with requirements of section 235(1) and 312(a) of the Criminal Procedure Act Cap.20 R.E. 2002.*
2. *That, Honorable Judge, the trial court erred in law and fact for convicting and subsequently sentence the appellant on statutory rape while prosecution side failed to prove all ingredients of its case beyond reasonable doubt as required by our law.*
3. *That, Honorable Judge, the trial Magistrate erred in law and fact to convicting and fact to convicting and sentence the appellant while appellant pleaded not guilty at the infant stage see(page 1 of the typed proceeding).Accused plea: "sio kweli".*
4. *That, Honourable Judge, the trial court erred in point of law to convict and sentence appellant without taking into consideration the admitted fact his plea was imperfect ambiguous or unfinished and for that reason. The lower court erred in law in treating it's a plea of guilty while the appellant pleaded not guilty at infant stage. But during the preliminary hearing conducted the appellant agreed some fact at instant stage in memorandum of fact.*
5. *That, Honorable Judge that trial Magistrate erred in both in law and fact by convicting and sentencing the appellant while the PF3 was not tendered before the trial court by prosecution side to establish the evidence of statutory rape as required by law.*
6. *That the trial court erred grossly in point of law by admitting exhibit the victim clinic card as evidence unprocedurally in contravention of section 210(3) of the Criminal Procedure Act, the trial magistrate failed to address the appellant on his rights in order section 210(3) before its admission(clinic card).*
7. *That, Honorable Judge, the appellant was charged with the offence of rape c/s 130(1)(2)(e) and 131 of the Penal Code Cap.16 R.E. 2019 and the appellant agreed all the fact from the preliminary hearing (PH) Hon. Judge question is why the appellant agreed the facts while he was not able to follow the court proceedings due MENTAL ILLNESS.*

When this appeal was called for a hearing on 15/05/2023, the appellant appeared in person, unrepresented, while the respondent Republic enjoyed

the services of Mr. Melchior Hurubano and Ms. Atuganile Nsajigwa, both learned State Attorneys. The appellant displayed signs of mental incapacity. Following that situation, Mr. Hurubano took the floor and submitted that he had come across the court's order to explore the issue of the appellant's mental incapacity as per **Section 216(1) of the Criminal Procedure Act Cap 20 RE 2022.** He further contended that the cited section empowers the trial court to conduct an inquiry in case an accused is found to be of unsound mind. The learned State Attorney averred that since the law does not mention the appellate court, he prayed for an order of retrial so that the lower court can make an inquiry as per Section 216 of the Criminal Procedure Act (Supra). Mr. Hurubano, however, submitted that he supported the appeal.

The learned State Attorney contended that the appellant was charged with rape and, after being arraigned before the trial court, a charge was read to him, and he pleaded not guilty. However, during the Preliminary Hearing, when the facts were read to him, the appellant admitted all the facts. The learned State Attorney stressed that it was on that basis that the trial court **treated the appellant's admission as a plea of guilty** and sentenced him to 30 years' imprisonment.

Coming to the grounds of appeal after the above extremely insightful introductory remarks, which remarks this Court highly appreciated and commend the learned State Attorney accordingly, Mr. Hurubano opted to submit **only on one ground of appeal, which is the third ground**. He averred that on the third ground of appeal, the appellant complains that

the trial court erred in law and fact by convicting him based on his plea of guilty, while he (the then accused) pleaded not guilty to the charge.

It was Mr. Hurubano's thoughtful submission that it is indeed true that the accused had pleaded not guilty. However, the trial court entered a plea of guilty based on facts read to the accused. Such a practice, Mr. Hurubano contended, violated the legal requirements for entering a plea of guilty. To buttress his argument, the learned State Attorney referred the court to the case of **MICHAEL ADRIN CHAKI VS REPUBLIC, CRIMINAL APPEAL NO.399 OF 2019, CAT,** where the Court stated the conditions to be taken into consideration before entering a plea of guilty. He stressed that the two relevant conditions here are: (i) that the appellant is arraigned on a proper charge. This means that the plea of guilty must be taken from the charge and not the facts. Since the appellant had already pleaded not guilty to the charge, the court was supposed to enter a plea of not guilty, (ii) A court must satisfy itself without any doubt and must be clear in its mind that the accused fully comprehends what he is actually faced with; otherwise, injustice may result.

In view of the second condition, Mr. Hurubano reasoned, the trial court was supposed to satisfy itself by asking if the accused was aware of what he was saying. The learned State Attorney contended that even if the accused had pleaded guilty, the facts read over to him were insufficient to disclose the offense of statutory rape, as the age of the victim was subject to proof. To this end, Mr. Hurubano prayed to this court, pursuant to **Section 388(1) of the Criminal Procedure Act (Supra)**, to order a retrial of the case.

Having dispassionately considered the lower court's records and the arguments presented by the respondent, from the outset, it is uncontested that what the appellant has shown before this court leaves no doubts that he is unfortunately of unsound mind and unable to follow the proceedings. This should have captured the attention of the trial court as well. I think the act of pleading not guilty and proceed to accept the fact were indicative of mental imbalance. The learned trial magistrate needed only a slightly more focused attention to spare the anguish.

This brings me to the **third and seventh grounds** of appeal. The appellant has complained that he agreed to all the facts from the preliminary hearing because he was unable to follow the trial court's proceedings. Upon scanning through the trial court's records, my finding is that nowhere in the records provided to me did the trial court note the appellant's mental incapacity. Surely, the trial magistrate ought to have noted in writing in the court's file about the mental status of the appellant.

I am also certain that what the appellant demonstrated justifies that even when he was before the trial court, he displayed his mental disability to follow the court's proceedings. I say this because on 22/11/2021, the appellant was arraigned before the trial court and charged with the offense of rape, contrary to Section **130(1)(2)(e) and 131(1) of the Penal Code**. The charge was read over and explained to the accused, who pleaded not guilty to the charge.

The matter underwent several adjournments until 04/02/2022 when the case was called for the preliminary hearing. On that date, the trial

court reminded the accused/appellant of the charge he was facing by reading it over and explaining it to him. The appellant maintained his plea of not guilty to the offense of rape. Thus, the trial court proceeded and stated that the "memorandum of facts" (sic) (which included the facts for the preliminary hearing) were supplied to the accused and adopted as part of the trial court's proceedings.

With respect, the phrase **does not indicate** whether the facts of the preliminary hearing were read over and explained to the accused person in the language he understood. Furthermore, nowhere did the trial court record the appellant's admission of the facts of the preliminary hearing. However, the prepared memorandum of undisputed facts features the statement **"...is not in dispute."** The question that comes to my mind is who said "...is not in dispute": the court, the public prosecutor, or the appellant? Based on this finding, I conclude that the preliminary hearing was improperly administered by the learned trial Magistrate, as envisaged on pages 7, 8, 9, and 10 of the trial court's typed proceedings.

As alluded to earlier, the appellant did not admit the charge on both occasions; rather, he denied it, and that is why the trial court chose to proceed with the preliminary hearing under Section 192 of the Criminal Procedure Act. The alleged admission to the facts of the preliminary hearing does not entail that the appellant pleaded guilty to the offense of rape. Therefore, I am convinced that the trial court did not satisfy itself without any doubt that the appellant fully comprehended what he was faced with.

In light of the above observation, I am inclined to state that injustice was occasioned on the part of the appellant due to what is seen in the record of the trial court and what the appellant has demonstrated during the hearing before this court regarding his mental capacity. When it comes to unequivocal plea the Court of Appeal of Tanzania's decision in **MICHAEL ADRIAN CHAKI VS. REPUBLIC** (supra) is of utmost importance. It should guide the trial court and indeed all courts jurisdiction as per the doctrine of precedent. For the interest of clarity (and emphasis), I choose to reproduce the following part:

> *"Closely examined, the above criteria suggest that there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:-*
>
> 1. *The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof 7 must be properly framed and must explicitly disclose the offence known to law.*
> 2. *The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.*
> 3. *When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.*
> 4. *The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.*
> 5. *The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see **Akbarali Damji vs R.** 2 TLR 137 cited by the Court in **Thluway Akoonay vs Republic** [1987] T.L.R. 92);*
> 6. *Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the*

facts adduced disclose or establish all the elements of the offence charged".

Based on the above criteria, the appellant's admission to the facts of the preliminary hearing did not meet the test of an unequivocal plea. In simple terms, the appellant did not plead guilty to the charge of rape; rather, there were mere admissions regarding the facts, which do not constitute the offense of statutory rape.

I say this because no paragraph in the facts of the preliminary hearing features the age of the victim. The victim has simply been referred to as the "young girl." As we all know, in statutory rape, proof of the age of the victim is of utmost importance.

The failure to have a paragraph featuring the age of the victim in the facts of the preliminary hearing, while the appellant was convicted based on the admissions of those facts, is fatal and **cannot be cured under Section 388 of the Criminal Procedure Act**. I am convinced that the trial court improperly observed the procedures and purposes of Section 192 of the Criminal Procedure Act [Cap. 20 R.E. 2022]. Furthermore, the trial court erroneously convicted the appellant, as it was in violation of Section 228(2) of the Criminal Procedure Act.

Earlier, the learned State Attorney prayed that the matter be remitted to the trial court for a retrial. I intend to spend the rest of this judgment to examine whether such a prayer is feasible. My determination is illuminated by the shining light of guidelines handed down in the landmark case of **FATEHALI MANJI VS. THE REPUBLIC (1966) EA 343.**

These guidelines were adopted by the Court of Appeal of Tanzania in several decisions, such as **SAID MOHAMED MWANATABU @ KAUSHA AND ANOTHER VS. REPUBLIC,** Criminal Appeal No. 161 of 2016 (unreported). In Fatehali Manji vs. The Republic (supra), it was held:

> *"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 own facts and circumstances, and an order for retrial should only be made where the interests of justice require it."*

Considering the circumstances of this case, especially the content of the facts of the preliminary hearing, which lacks a paragraph featuring the age of the victim, I am convinced that ordering a retrial would enable the prosecution to fill in the identified gap, resulting in injustice to the appellant.

In other words, the facts of the preliminary hearing were defective due to the absence of the fact concerning the age of the victim, who is below eighteen years see **MAYALA NJIGAILELE V. THE REPUBLIC, CRIMINAL APPEAL NO. 490 OF 2015** (unreported), where the Court stated the following:

> *"Normally, an order of retrial is granted in criminal cases when the basis of the case, namely, the charge sheet, is proper and in existence. Since in this case, the charge sheet is incurably defective, meaning it does not exist, the question of retrial does not arise."*

Based on the above, I have no other choice but to quash the proceedings and conviction and set aside the sentence imposed by the lower court, as I hereby do. Furthermore, I do hereby order that **PETER OSCAR @DAUDI** be released from prison forthwith, unless he is held for a lawful cause.

It is so ordered.

E.I. LALTAIKA
JUDGE
18.5.2023

COURT:

This Judgement is delivered under my hand and the seal of this Court on this 18th day of May 2023 in the presence of Mr. Melchior Hurubano and Ms. Atuganile Nsajigwa, both learned State Attorneys for the respondent Republic while the appellant has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
18.5.2023

COURT:

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
18.5.2023