IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
CRIMINAL APPEAL No. 26 OF 2023
(Originating from Criminal Case No.4 of 2023, Itilima District Court)

SUMBUKA S/O SAYI @ GIDALUJA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

10th & 18th July 2023

F.H. MAHIMBALI, J

The Appellant Sumbuka S/O Sayi, was charged in the District Court of Itilima for two counts of the charge namely; Abduction of Girls Under Sixteen Contrary to Section 134 of the Penal Code, Cap 16 RE 2022.

2nd Count; Rape Contrary to Section 130 (1) (2)(e) and Section 131 (1) of the Penal Code, Cap 16 RE 2022.

It was alleged that, the appellant herein on 3rd day of January 2023, at Laini A Village within Itilima District in Simiyu region, did take one girl of 15 years old (name withheld to disguise her identity) from Laini A village to Bariadi District without the consent of her parents and thus had sexual intercourse with her.

The appellant was convicted for his own plea of guilty on both counts and sentenced to suffer thirty years imprisonment for the second count and seven years imprisonment for the first count.

Aggrieved by the conviction and sentence of the trial Court, he has then appealed to this Court basing on three grounds namely;

1. *That the appellant's conviction in respect of a first count to abduction of a girl under 16 years was based on equivocal plea of guilty contrary to the law.*
2. *That the appellant having pleaded not guilty in respect of the second count concerning the offence of rape after a charge was read over to him, the honorable trial court magistrate erred in law for convicting and sentencing the appellant on ground that he admitted to brief facts of the case after the same were read over by prosecution.*
3. *That in the alternative to ground 2 herein, the appellant's conviction of the offence of rape was based on equivocal of plea of guilty contrary to the law.*

At the hearing of this appeal the appellant was resented by Mussa Makeja learned advocate, while Ms Mboneke Ndimubenya, learned State Attorney represented the Respondent/ Republic.

Arguing appeal, Mr. Makeja submitted that as to the first count after the charge had been read over, he pleaded guilty. However, reading the trial Court's records, the facts of the case were not read over and explained to the appellant.

The purported plea recorded by the trial court, its facts were not read and therefore the plea was equivocal.

He referred this court to the case of ***Adan versus Republic, (1973) EA 44 & 446,*** where the Court of Appeal narrated four steps before plea of guilty is recorded;

- The charge sheet and its ingredients are read over and explained in the language the accused person understand.
- That the accused person in his own enters that plea
- That the republic is duty bound to narrate facts of the case and each accused person responds thereto.
- if the accused person does not agree with the facts , any question of his guilty, his reply must recorded and change the plea thereof and if no change of plea, conviction must be received and stated of facts relevant to the question must be recorded.

Mr. Makeja further argued that, in considering the case at hand, steps 1to 3 as discussed herein above were not complied with, and thus denied the appellant was denied the narration of the facts and responding thereof.

Mr. Makeja also added that, the trial proceedings are clear that the appellant pleaded not guilty to the second count, but preliminary hearing were not conducted as requirement under Section 192 of the Criminal Procedure Act Cap 20 RE 2022.

At page 3 of the typed trial court's proceedings, the records state that the appellant admitted the facts of the case, but the proceedings did not state so.

Mr. Makeja also added that at page 9 of the typed proceedings of the trial court, provides for the listed exhibits, and they were tendered before the trial court without being read and explained to the appellant.

Therefore, Mr. Makeja, submitted that with all these circumstances, the appellant's right was prejudiced. He then pressed for retrial of the case, by quashing the conviction and sentences meted against the appellant.

On the side of the respondent, Ms Mboneke submitted that, the appellant was properly convicted and sentenced as charged. The plea which he made was unequivocal.

Mr. Mboneke further argued that the records of the trial court provide that the appellant pleaded guilty to the charge and facts as read over and explained to him. Ms Mboneke added that, the plea of guilty is governed under Section 228 of Criminal procedure Act. The same was compiled by the trial court. She referred this Court in the case of ***George Senga Mussa versus Republic, Criminal Appeal No.108 of 2008. (CAT)***

Moreover, Ms Mboneke submitted that when the accused pleads guilty it is not necessary exhibits to be tendered to the court.

With the second count, Ms. Mboneke admitted that the conviction of the appellant was merely based on facts in the first count. And the remedy to such defect is retrial as. She referred the case of ***Julius Charles @ Sharabaro and others versus Republic, Criminal Appeal No.167 of 2017. (CAT).***

In rejoinder, Mr. Makeja reiterated what he submitted in chief.

After I have heard both parties to the suit, I have now to determine whether this appeal has been brought with sufficient cause.

I have gone through the petition of appeal, records of the trial Court and submissions by both parties.

Looking at the trial Court's proceedings at page 2 and 3, the records don't provide whether, the facts of the case were read over towards the accused person (appellant).

In disposing of this appeal, I have found it convenient to start with the issue of non-compliance with section 192 of the Act. I am satisfied that the trial Court erred in law in failing to hold a preliminary hearing as provided for in Section 192 of the Criminal Procedure Act, as argued by the appellant's counsel. That being the case, I have asked myself this question: Did this omission vitiate the trial of the appellant?

The reply to that is not, I find support for this view in a number of decisions: These decisions include***: Mkombozi Rashid Nassor v R, Criminal Appeal No. 59/2003 (unreported), Joseph Munene and Another v R, Criminal Appeal No. 109/2002 (unreported), and Christopher Ryoba v R, Criminal Appeal No. 26 of 2002.***

In Ryoba's case there was noncompliance by the trial High Court with the provisions of Section 192 (3) of the Criminal Procedure Act in that no memorandum of agreed matters was drawn up along the requirements spelt out in the said sub-section, the appellant appealed to Court of appeal of Tanzania seeking the nullification of his trial on this ground only. The Court held that only the proceedings dealing with the preliminary hearing were vitiated and dismissed the appeal. Before dismissing the appeal, however, the Court observed thus;

> *"..... conducting a preliminary hearing is a necessary prerequisite in a criminal trial. It is not discretionary. The procedures stipulated under s. 192 are mandatory. And needless to say, s. 192 was enacted in order to minimize delays and costs in the trial of criminal cases. However, in the most unlikely event that a preliminary hearing is not conducted in a criminal case that trial proceeds without it will not automatically be vitiated ..... the proceedings could be vitiated depending on the nature of a particular case ....."*

Having so observed, it's clear that failure to conduct preliminary hearing cannot per se vitiate the proceeding as the same will depend on the nature of the case.

The case at hand ended upon the plea of the appellant and thus the trial Court basing on the plea of the appellant convicted and sentenced as charged. In my considered view the Court having grasped the facts of the case ought to have conducted full preliminary hearing in line with Section 192 of the Criminal Procedure Act to ascertain if what was pleaded guilty has sufficiently established the ingredients of the charged offence beyond reasonable doubt to amount conviction as charged. Failure of which prejudiced the rights of the appellant.

In regards to the admission of the documentary exhibits, that the same were not read over to the accused but the trial Court used them to convict the appellant. The law requires that, the documentary evidence to be read out in order to ascertain and make clear understood to the parties.

Under the circumstances the procedure adopted by the trial magistrate was illegal and the proceedings thereof cannot stand.

The desired procedure when the accused pleads guilty to the charge is to read the facts of the case in support of the charge and the contents of each documentary exhibit forming part of the facts after its due admission in accordance to the law governing admissibility of documentary exhibits. The accused will then be invited to state anything on the narrated facts

and contents of the tendered exhibits either admitting the facts and contents tendered against him or deny them. See; ***John Charles versus The Republic, Criminal Appeal No. 554 of 2014*** (CT) at Arusha delivered on 29/09/2021.

As far as to the need of the contents of documentary exhibits to be read to the accused person see the case of ***Robinson Mwanjisi & others versus Republic (2003) TLR 218***.

In the instant appeal as I have said, the appellant was subjected to an illegal procedure which denied him a fair trial. He was not invited to admit or deny the facts against him, the contents of exhibits tendered against him were not read nor he was invited to admit or deny such contents.

Further, in the case of: ***Robinson Mwanjisi and Others versus Republic, (supra)*** where the Court stated among other things that,

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

See also the case of ***Mbaga Julius versus Republic, Criminal Appeal No.131 of 2015, Jumanne Mohamed and two others versus Republic, Criminal Appeal No.534 of 2015*** (unreported) and

the case of ***Nkolozi Sawa and Another versus Republic, Criminal Appeal No.574 of 2016 (CAT)*** at page 7.

In the case of **Nkolozi** (supra), the Court observed that:

> ***"Failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits"***

In the case at hand, exhibits P1 (PF3), P2 (accused person's confession statement), and P3 (accused person's cautioned statement), were not read before the Court. The shortcoming to that effect is that such exhibits are expunged from the Court records as they were wrongly admitted.

Having expunged them, the prosecution case remains without any documentary evidence to prove the offence arraigned against the appellant. By so saying, no other independent evidence which incriminate the appellant holds the offences charged.

I also entirely agree with both counsels that, the plea by the appellant on the second count was equivocal and thus the Court ought to have recorded the plea of not guilty.

With all these observations, I find this appeal to have been brought with sufficient cause, I allow it by quashing all the proceedings, conviction and sentence thereof. In lieu of it, it is directed that let the matter proceed with the trial in the normal course in the absence of the purported plea of guilty as entered and the legal procedure on plea and trial to be strictly observed.

DATED at SHINYANGA this 18th day of July, 2023.

F.H. MAHIMBALI

JUDGE

Judgment delivered today the **18th day of July, 2023** in the presence of the appellant and respondent being represented by Ms Mboneke Ndimubenya, learned State Attorney and Ms Beatrice, RMA, present in Chamber Court.

Right of appeal explained.

THE HIGH COURT OF TANZANIA

F.H. MAHIMBALI

JUDGE

18/7/2023