IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 36 OF 2022

SHIJA JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of the District Court of Shinyanga at Shinyanga.]

(Hon. M. O. Mchomba RM)

dated the 7th day of December, 2021
in
Criminal Case No. 116 of 2021

JUDGMENT

19th April & 13th December, 2023.

S.M. KULITA, J.

This is an appeal from the District Court of Shinyanga. The appellant herein above was charged for Attempt to Commit Unnatural Offence, contrary to the provision of section 155 of the Penal Code [Cap 16 RE 2019]. It was alleged that, on 30th September, 2021 at Relini area within Shinyanga Municipality in Shinyanga region, the appellant did attempt to commit Unnatural Offence to one JB (not his real name) against the order of nature.

In a nut shell, the record transpires that, on the date that had been fixed for Preliminary Hearing, the appellant, after being reminded to the charge leveled against him, narrated facts of the case to the effect that, on the fateful day, he went to the victim's home. He then took the said victim to the unfinished house, and undressed him for the purpose of sodomizing him. However, no sooner had he started committing it, a person appeared and rescued the victim. He was at that time arrested, beaten and taken to the police station

Following those facts as presented by the appellant himself in his reply to the charge when it was read over to him, the trial court entered a plea of guilty. It then proceeded to convict and sentence the appellant accordingly.

That decision which involved the imprisonment term of 30 (thirty) years aggrieved the appellant, hence this appeal with 4 (four) grounds. Among them is that, the trial court wrongly convicted him while procedures for entering the plea of guilty was not followed.

On 8th February, 2023 this appeal case came for hearing. The appellant appeared in person whereas Ms. Gloria Ndondi, State Attorney, appeared for the respondent.

In support of the appeal, the appellant prayed for his grounds of appeal to be adopted as the submissions for his appeal.

In her reply to the third ground of appeal, Ms. Ndondi, State Attorney, admitted the position that, during trial at the subordinate court, the prosecution side never stated facts of the case, but it is the appellant who did so. She added that, the trial court relied on those facts to convict the appellant. She however stated that, the said procedure is not fatal as the facts which the prosecution had prepared, are the same as to what the appellant had narrated in his reply to the charge when it was read over to him. To her, allowing the prosecution to re-state facts of the case would be a repetition, and that, as long as no prejudice had occurred on the appellant's party, there was no fatality.

Concerning this ground of appeal, I earnestly went through the lower court's record and the submissions made in that respect. The record reveals that, the parties are not in dispute that, the appellant was charged with Attempt to Commit Unnatural Offence. As well, the records show that, the trial court convicted the appellant making reliance on his own stated facts. The issue is whether it was proper for the trial court to enter conviction on the appellant's own narrated facts.

In **Waziri Saidi V. Republic, Criminal Appeal No. 39 of 2012, CAT (unreported)** in which the Court of Appeal quoted the decision of the erstwhile Court of Appeal of East Africa in **Adan V. Republic [1973] EA 445** which underscored the procedure to be followed when the accused person pleads guilty. It was articulated at page 446;

> *"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 guilt, 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" ***(emphasis is mine).***

In connection with the above excerpt, what the appellant in the present case has stated, was his plea, which the law requires the Magistrate to record it as nearly as possible to the appellant's own words. But, the law goes further, requiring the Magistrate to order the Prosecution to state the facts of the case. The law also requires the appellant to have replied again on the Prosecution's narrated facts of the case. As the above excerpt dictates, this procedure would enable the court to determine whether the appellant maintains his plea of guilty or changes. Such determination, would make the trial court either to enter a plea of **guilty** and sentence the Accused (Appellant) accordingly, or **not guilty** and continue with trial (hearing). It is not a procedure for the prosecution not to state their facts for the reason that, those facts resemble to the appellant's plea that has been recorded.

On that account, I find it that, the procedure taken by the trial court to enter the plea of guilty and convict the appellant without the

prosecution's facts being narrated before the court was wrong. Had the prosecution narrated their facts, the appellant might have changed his plea by even adding something, which in the eyes of the law would mean a defence, thus plea of not guilty would have been entered.

That being the case, I hereby nullify the proceedings of the trial court which followed soon after the charge being read over to the appellant, quash conviction and set aside the sentence. It is further ordered that the original file be remitted back to the trial court to continue in accordance with the legal procedures for plea taking.

In the event the appellant comes to be convicted, the trial court should deduct the duration of sentence that the appellant has already served in prison for this case. For the sake of justice, the forthcoming trial should be done by another Magistrate with competent jurisdiction.

In upshot, the **appeal is partly allowed** to that extent.

S.M. KULITA
JUDGE
13/12/2023