

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL 14146**

**REFERENCE NO. 202405262000014146**

*(Arising from the Criminal Case No. 114 of 2022 of the District Court of Tarime at  
Tarime)*

**GODFREY IPANDIKILO..... APPELLANT**

*VERSUS*

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

*20<sup>th</sup> & 25<sup>th</sup> June, 2024*

**L. M. KOMBA, J.:**

This is the decision against an appeal by the appellant who was dissatisfied by the decision of the District Court of Tarime (the trial court) where the trial Magistrate convicted the appellant for the offence of rape contrary to section 130(1) (2)(e) and 131(1) both of the Penal Code, [Cap 16 R.E. 2019] and preventing a school girl from attending school regularly contrary to rule 4(2) of GN No. 280 of 2002, read together with section 35 (3) and

(4) of Education Act, Cap 353. Appellant was sentenced to 30 years and 1 year respectively.

It was alleged by the prosecution that on 27<sup>th</sup> May 2022 and 2<sup>nd</sup> June 2022 at Bukondo village within Ukerewe District in Mwanza Region the appellant prevented one girl (victim), student of Tai secondary school from attending school regularly.

Respondent denied the facts by plead not guilty. Following the plea, prosecution had 5 witnesses and four (4) exhibit to prove their case. As hinted earlier, the Trial Magistrate convicted the appellant hence this appeal with nine (9) grounds which I find no need of reproducing them right now.

When the matter was scheduled for hearing, Republic was represented by Mr. Tawabu Yahya, a State Attorneys while the appellant fended for himself.

While preparing for hearing of this appeal, I came across with legal issue. It was compliance of section 192 of the CPA during Preliminary hearing. I have read proceedings and find some procedures were not adhered. I

invite both parties to address this court on the procedure during PH specifically on reading over the memorandum of agreed facts.

**State Attorney** who had a time to read proceedings was of the submission that on 20/09/2022 during preliminary hearing at Tarime District Court, there are some procedures were not adhered as listed under section 192. That observation he said was from both typed and hand written. It was his further submission that the section uses the word shall which means the process has to be complied and completed. Basing on **Republic vs Abdallah Salum @ HAJI**, Revision No. 4 of 2019 CAT he was of the position that the proceedings of 20/09/2022 which led to full trial and the judgment which is the cause of this appeal should not be maintained. So far as the proceedings was conducted contrary to requirement of law, he prayed the proceedings from 20/09/2022 up to 24/03/2023 to be nullified and further this court to nullify the judgment and set aside conviction and sentence. The he provided a suggestion that I may order Preliminary Hearing to be conducted afresh in accordance to the provisions of law by conducting preliminary, then trial and a new judgment has to be composed basing on retrial.

Appellant had a different position following State Attorney submission that when the Republic fail to prove the offence, the appellant has to benefit from that. He submitted that so far as irregularity was caused by the court, he should not be punished by ordering rehearing after all that time spent in prison and prayed the mistake to benefit him.

Having heard and carefully considered submissions from the applicant and respondent counsel, I find that the main issue for consideration is whether the conduct of the Preliminary Hearing related to Criminal Case No. 144 of 2022, **Republic vs Godfrey Ipandikilo @ Mbogo**, which is the subject of the present appeal was proper within the confines of the law and if not, what is the proper consequence thereto. The said PH was conducted on 20/09/2022.

At the same time, for better understanding of the sequence of events on what transpired during the conduct of the impugned proceedings, on the respective day particularly the Preliminary Hearing, it will be useful to reproduce the relevant proceedings found from page 5 then move to pages up to 8 which reads as follows:

**Date:** 20/09/2022

**Coram:** Y. C. Myombo, SRM

**For Pros:** A/Insp Kombo

**CC:** Maria

**Accd:** Present

**PP:** The case is coming for preliminary hearing, I am ready to proceed.

**Accused:** I am ready.

**PP:** I pray to remind the charge to the accused person.

**Court:** The charge read over and explained to the accused person.

**Accused:** **1<sup>st</sup> court:** "It is not true"

**2<sup>nd</sup> count:** It is not true

**Court:** The PONGE to both counts.

**Sgd:** Y. C. Myombo, SRM

**20/09/2022**

### **PRELIMINARY HEARING**

1. That, the accused charged with two counts as per the charge sheet.
2. That, the accused's names and person particulars are as per the charge sheet.
3. That, on 27/05/2022 and 02/06/2022 the accused person was at Bukondo village in Ukerewe District – Mwanza.
4. That, on 27/05/2022 and 02/06/2022 in the said village the accused raped one Zakia D/ Nicholaus aged 16.
5. That, on 27/05/2022 in the same village the accused hindered the victim to go to school (Tai Secondary School – Rorya.

6. That, on 02/06/2022 the accused was arrested and at the police station he admitted to have committed the said offence.
7. That, on 28/08/2022 the accused was brought to court to answer his charge.

### **UNDISPUTED FACTS**

1. That, his names and person particulars are as per the charge sheet.
2. That, on 27/05/2022 the accused was at Bukondo village in Sengerema.
3. That, on 08/08/2022 the accused was brought before this court where he denied his offence.

**Accused:** Signed

**PP:** Signed

**Sgd: Y. C. Myombo, SRM**

**20/09/2022**

### **LIST OF WITNESSES**

*The list of witnesses are as shown in the memorandum of facts*

### **LIST OF EXHIBIT**

- PF3 of the victim
- The attendance register

*That's all.*

**Court:** S. 92(1), (2) and (3) of CPA Cap 20 RE 2019 C/W

**PP:** I pray for the hearing date.

**Mbogo Magina Ipandikilo (surety)**

*Your honor I have come to tell this court that I am disqualifying myself being the surety of the accused as he wants to escape from his case.*

***Mbogo Magina Ipandikilo (Surety): Signed***

***Court:*** *Since one of the sureties has disqualified himself from being the surety of the accused that means the accused now does not fulfill the bail condition therefore he will remain in custody till when he gets another (3<sup>rd</sup> surety).*

***Sgd: Y. C. Myombo, SRM***

***20/09/2022***

***Order:*** *i) Hearing on 03/10/2022*

*ii) ARIC*

***Sgd: Y. C. Myombo, SRM***

***20/09/2022***

Having imported the above record of the proceedings related to conduct of Preliminary Hearing in Criminal Case No. 114 of 2022, I find prudence to analyse how the provisions of law has been analysed by court decisions for the purpose of and proper conduct of the Preliminary Hearing in criminal trials. Section 192 of the CPA as amended by Act No. 3 of 2011 and also the Rules found in GN 192 of 1988 are relevant. Section 192 (1) (2) and (3) provide as follows:

*192.-(1) Notwithstanding the provisions of sections 229 and 283, if an accused person pleads not guilty the court shall as soon as is*

*convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.*

*(2) In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.*

***(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed,***

*4 ) ..... (5 ) ..... (6 ) .....*

As admitted by State Attorney, the law was not complied of after the undisputed facts drawn by the trial Magistrate were not read to the respondent during Preliminary Hearing. That is clear from the typed proceedings as well as hand written proceedings. It is clear that after the court had drawn undisputed facts, typed proceedings shows that



thereafter, the appellant and Prosecutor signed but actually in the hand written proceedings neither appellant nor prosecutor signed the undisputed facts. Moreso, there is nothing on record showing that after undisputed facts were recorded, they were read over and explained to the appellant in a language he understands as prescribed under Section 192(3) of the CPA.

The referred section has been interpreted by the Court of Appeal in **Hamimu Hamisi Totoro Zungu Pablo and Two Others vs Republic**, Criminal Appeal No. 170 of 2004 (unreported) where the Court was faced with a situation of a defective Preliminary Hearing and held;

*'... We have studied the proceedings of this day and we are satisfied that they were not conducted properly. In terms of section 192 of the Criminal Procedure Act, (CPA) both the accused and the prosecutor have to agree to the memorandum of undisputed facts before such facts are recorded as being undisputed'.*

Further in **Kanuda Ngasa @ Kingolo Mathias vs Republic**, Criminal Appeal No. 247 of 2006 (unreported), where one of the grounds of appeal was failure to comply with sections 192 (3) of the CPA and the Court held;

*'It is trite law that failure to prepare a memorandum of undisputed facts, or to read and explain the contents of the said memorandum to the accused is non-compliance with the mandatory provisions of*

*the law. Where there is such noncompliance, as rightly argued by Mr. Magongo and Mr. Kakwaya, the provisions of subsection (4) do not come into play. Nothing shall be deemed to have been proved'.*

Latter on in the year 2019 the court maintained the same interpretation in **Republic vs Abdallah Salum @ Haji (supra) that;**

*'...it goes without saying that the Preliminary Hearing was not conducted properly and contravened mandatory provisions that is, section 192(3) of the CPA, and that the discerned procedural irregularities are fatal and incurable.'*

In the premises, the entire Preliminary Hearing proceedings in Criminal case No. 144 of 2022 conducted at the District Court of Tarime at Tarime from 20/09/2022 by Y. C. Myombo - SRM are hereby nullified, quashed and set aside. Procedural irregularity cannot benefit the appellant as prayed as the fault occurred at preliminaries and it was on procedures. As a way forward, I direct that the trial in Criminal Case No. 114 of 2022 should as soon as practicable, begin afresh at the stage of Preliminary Hearing. Order Accordingly.

**DATED** at **MUSOMA** this 25<sup>th</sup> day of June 2024.



*Nkk*  
**M. L. KOMBA**  
**JUDGE**

Judgment delivered in the presence of appellant who appeared in person and in the absence of Republic.

Right of appeal explained.



NK  
**M. L. KOMBA**

**Judge**

**25<sup>th</sup> June, 2024**