

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: RUTAKANGWA. J.A .. MBAROUK. I.A .. And ORIYO. J.A.) CRIMINAL APPEAL NO. 144 OF 2010 ANDAMBIKE MWANKUGA..... ~ APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the decision of the High Court of Tanzania at Mbeya) (Lukelelwa. J.) dated the 6 th day of April, 2010) in Criminal Appeal No. 56 of 2009 JUDGMENT OF THE COURT Date 22 & 27 June, 2011 MBAROUK. J.A.: In the District Court of Rungwe at Tukuyu, the appellant was found guilty on his own purported plea of guilty to the offence of rape contrary to section 130(1) (2) and 131(1) of the Penal Code Cap. 16 Vol. 1 of the Laws as amended by the Sexual Offences (Special Provisions) Act No. 4 of

1998. He was sentenced to life imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court (Lukelelwa, J.) where his appeal was dismissed. Undaunted, he has lodged this second appeal. At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Mr. Tumaini Kweka, learned State Attorney. The appellant filed a memorandum of appeal containing seven grounds of complaint which we think can be narrowed down to one ground that the plea was equivocal as the learned trial magistrate did not state the substances of the charge. The appellant had nothing useful to add apart from what he has stated in his memorandum of appeal, understandably so being a lay person who is unrepresented. On his part, Mr. Kweka agreed that the charge and the facts in this case were too general. They did not specify the ingredients of the offence of rape contrary to section 130(4) of the Penal Code. He submitted that, neither the charge nor the facts read to the appellant specifically disclosed that there was penetration to prove that sexual intercourse took place. He further submitted that, the record is not clear on whether the charge and facts were read to the appellant in the language he understood before the appellant was found guilty. Mr. 2 Kweka urged us to find that the proceedings of this case were therefore, irregularly conducted. Hence, he prayed that the proceedings to be nullified and order the case be remitted to the trial court to take the appellant's plea afresh before a magistrate with competent jurisdiction. The appellant had nothing useful to submit, but he prayed for the Court to consider the period he has stayed in prison. As pointed out earlier, in the instant case, the appellant was found guilty and sentenced to life imprisonment after he purportedly pleaded guilty to the offence of raping a girl aged six (6) years old. However, as we have

noted earlier on, the charge and the facts failed to disclose specifically the ingredients of the offence of rape which could have made the appellant understand the charge against him clearly before pleading guilty. As the record shows, the particulars of offence in relation to the charge were as follows:- "That Andambike s/oMwankunga charged on 26th day of April, 2000 at Mbaka Village within Rungwe District and Mbeya Region did have 3 carnal knowledge with NEVA d/o MBOGOTA a girl of 6 years aid" Clearly, those alleged particulars were too general. The narrated facts then, ought to have specifically mentioned what the appellant did to Neva (the victim). Instead, it was said that the appellant raped Neva, without more. Section 130(2) of the Penal Code states that: "A male commits the offence of rape if he has sexual intercourse with a girl or woman " (Emphasis added) The erstwhile Eastern African Court of Appeal in the case of R. V. Yonasani Egalu and Others (1942) 9 EACA 65 at 67 held: "in any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent. " 4 (Also see: Hando s/o Akenay v. R, (1957) 18 EACA 307 and John Faya v. R, Criminal Appeal No. 198 of 2007 (unreported). Those decisions emphasize the need to specify every constituent of the charge to be explained to the accused before he pleads guilty. However, in the instant case, it is clear from the record of proceedings that this was not done. The public prosecutor simply said:- " so at the juncture the accused took his penis and removed Neva's clothes including the under wear and raped the girl " We are of the considered view that those facts were insufficient to prove that sexual intercourse took place as per section 130(4) (a) of the Penal Code. In other words those facts were not sufficient to prove penetration, which is a pre-requisite requirement to prove rape. For instance, see the decision in the case of Mathayo Ngalya @ Shabani v. Republic, Criminal Appeal No. 170 of 2006 and Ex-B9690 SSGT. Daniel Mshamba v. Republic, Criminal Appeal No. 183 of 2004 (both unreported). Facts ought to have been given to establish that there was penetration, without which there cannot be rape. 5 Apart from those defects, as pointed out by Mr. Kweka, the record does not show that the charge and the facts of the case were explained to the appellant in a language he understood. The appellant claimed both in the High Court and in this Court that he is a layman, uneducated knowing only "Kinyakyusa" language, that is why when the charge was read, he pleaded guilty without intending to do so. As it was held by the erstwhile Court of Appeal of Eastern Africa in the case of Adan v. Republic [1973] E.A. 445 that:- "The charge and the essential ingredients of the offence should be explained to the accused in his own language or in a language he understands." (Emphasis added). In the instant case, the charge and the facts of the case were not explained to the accused in his own language or in a language he understood. This is because no interpreter is shown to have been employed in the case. Surely, that was an irregularity too. 6

- We are then of the considered opinion that if the first appellate court had considered these irregularities it would have reached a different

conclusion.

For the reasons stated herein above, we are constrained to nullify the whole proceedings in this case and set aside the purported of guilty and sentence. In the event, we order the case to be remitted to the trial court to allow the appellant to plead afresh. It is so ordered. DATED at MBEYA this 23 rd day of June, 2011. E.M.K. RUTAKANGWA JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL K.K. ORIYO JUSTICE OF APPEAL I certify that this is a true copy of the original. ~KYA SENIOR DEPUTY REGISTRAR COURT OF APPEAL 7

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