

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

CRIMINAL APPEAL NO. 218 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

MASUMBUKO JOSEPH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision/Judgment of the High Court of Tanzania
at Mwanza)**

(De-Mello, J.)

**Dated 11th day of June, 2014
in
HC. Criminal Appeal No. 14 of 2014**

JUDGMENT OF THE COURT

4th & 11th December, 2015

KAIJAGE, J.A.:

Before the District Court of Misungwi at Misungwi, the appellant stood charged with the offence of rape. It was alleged that on the 4th day of August, 2012 at about 11:00 hours, at Chole-Bukumbi Village within Misungwi District in Mwanza Region, the appellant raped one Thereza d/o Paul without her consent.

When, on 22/8/2012, the charge was read over and fully explained to the appellant (then accused person), a plea of "**not guilty**" was accordingly entered and recorded by the trial court. Thereafter, for various reasons, the

hearing of the case on its merits was being adjourned from time to time until the 27th day of February, 2013 when the trial court received and recorded the evidence of PW1 Thereza d/o Paul. After PW1 had completed giving her evidence in-chief, the trial court's proceedings appearing at page 16 of the record went ahead thus:-

"Accused: *Your honour, I admit to have raped the victim. There is no need to waste the Courts precious time.*

Court: *The accused is hereby convicted on his own plea of guilty to the facts provided by the victim/complainant.*

*Sgd: S. A. Kassonso – PDM
27/12/2013."*

Following the appellant's conviction, the trial court sentenced him to thirty (30) years imprisonment. The appellant was aggrieved. His appeal to the High Court against such both conviction and sentence was unsuccessful, hence this second appeal which is predicated upon six (6) grounds listed in the memorandum of appeal, but the same boil down to the following one major decisive ground:-

"That, the two courts below erred in law in premising the appellant's conviction on a purported plea of guilty."

Before us, the appellant appeared in person, unrepresented. The respondent Republic had the services of Mr. Lameck Merumba, learned State Attorney.

When the appeal was called on for hearing, the learned State Attorney rose to concede that the said appellant's ground of appeal has force and merit. Elaborating on this, he submitted that the appellant was, on 27/2/2013, convicted upon a purported plea of guilty, whilst his earlier plea of "**not guilty**" entered by the trial court on 22/8/2012 in respect of a preferred charge was still valid, subsisting and had not been changed in accordance with the law. He maintained that the appellant's conviction based on a purported plea of guilty vitiated the trial court's proceedings beginning from where the trial court had completed receiving and recording the evidence in-chief of PW1, as well as the entire proceedings of the first appellate court.

On the strength of the foregoing exposition, the learned State Attorney invited us to allow the appeal by nullifying the vitiated proceedings

of the two courts below, quashing and setting aside the conviction entered and the sentence passed against the appellant. He further urged us to order a retrial.

On our part, we are in entire agreement with the learned State Attorney. Our reading of the record clearly shows that the procedural course taken by the trial court after PW1 had completed giving her evidence in-chief was highly irregular and fatal, in the absence of any indication that the appellant changed his earlier plea of "**not guilty**" to that of "**guilty**" in accordance with the provisions of section 228 (1) and (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) which reads:-

"S.228 (1). The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of a charge.

(2). If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."

In the light of the immediate foregoing, we hold a firm view that where, as in this case, there is a clear indication for the accused person to change his/her earlier plea to a preferred charge from that of "**not guilty**" to a "**guilty**" plea, the procedure prescribed under the provision of law hereinabove quoted must be followed. The trial court in this case convicted the appellant without recording a change of plea entered in accordance with the provisions of section 228 (1) and (2) of the CPA. The trial court ought to have read, once again, the substance of the preferred charge to the appellant and then the prosecution should have been asked to narrate the facts of the case, afterwhich the trial court could have validly recorded a change of the appellant's earlier plea. As matters stand in this case, we accept that there was no valid conviction entered against the appellant and this constituted a fundamental procedural irregularity, incapable of being cured under section 388 of the CPA.

Accordingly, we allow the appeal. We nullify the trial court's proceedings beginning from where PW1 had completed giving her evidence in-chief, as well as the entire proceedings of the first appellate court based on the null proceedings of the trial court. We consequently quash and set

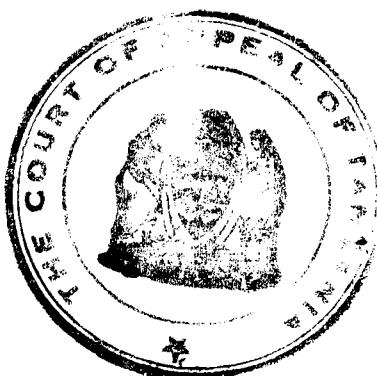
aside the conviction entered and the sentence imposed against the appellant. Finally, we order that the appellant be retried beginning from where PW1 had completed giving her evidence in-chief.

DATED at MWANZA this 8th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL



I certify that this is a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL