IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 151 OF 2005

NGASA MADINA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mwita, J.)

dated the 23rd day of May, 2003
in
Criminal Appeal No. 26 of 2003

JUDGMENT OF THE COURT

14 & 16 March 2007

LUBUVA, J.A.:

In the District Court of Nzega, the appellant was charged with the offence of rape contrary to sections 130 and 131 of the Penal Code. He was convicted on his own plea of guilty and was sentenced to life imprisonment.

It was alleged that on 8.9.2002, at the village of Mwasala in Nzega District, the appellant raped Tatu d/o Masisa, a child aged about three years. His appeal to the High Court (Mwita, J.) was dismissed. Dismissing the appeal against conviction the learned judge held that the appeal could not be entertained because the appellant unequivocally pleaded guilty when the charge was read out and incriminating facts stated which he accepted.

In this second appeal the appellant was unrepresented. The main ground raised is that the appellant did not plead guilty as charged. According to him, it was wrong for the trial magistrate to take it that he had pleaded guilty when in fact he had not. He also said that the words in the record attributed to him as saying *"it is true"* are not truly his words. He was forced to say so by the police. In the circumstances, he urged that the appeal against conviction can be entertained.

Mr. Mgengeli, learned State Attorney, for the respondent Republic, at first resisted the appeal. He maintained that as the appellant had pleaded guilty to the charge and later accepted the

facts when stated, the appeal against conviction could not be entertained. However, upon reflection when asked by the Court whether the facts disclosed the offence of rape, he prevaricated. He conceded that the facts as set out by the prosecution did not disclose the offence of rape for which the appellant was charged. In that light the State Attorney said there was merit in the appeal. He urged the Court to allow the appeal, quash and set aside the trial court's order of plea of guilty and the rest of the subsequent proceedings in the District Court and the High Court.

We find it desirable to examine closely what transpired in the District trial court as reflected on the record. On 11/9/2002 when the charge was read over and explained to the accused who was asked to plead his plea was:

> It is true I had sexual intercourse with Tatu a girl aged about 3 years who found me resting in my house.

This was entered as a plea of guilty to the charge.

Such a plea, it is to be observed at once that it is to our minds, most unusual and unlikely too that an accused person would plead in these words. However, we take the record for what it is worth and proceed to examine what transpired subsequently. Then the prosecutor stated the facts as follows:

> On 8/9/2002 the accused was at Mwashala village in the house resting at about 2.00 p.m. when Tatu d/o Masisa aged about 3 years was playing with other children and the accused called her inside the house and raped her. Then the parents of Tatu on tracing her for food found her in accused's room on the bed while sleeping together with accused person. The door had not been closed. The father of Tatu found the accused while naked and raised alarm. The accused was arrested and charged ...
>
> Accused: *All facts are true*

> Court: On his own plea of guilty the accused is convicted of rape contrary to section 130 and 131 of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. As mentioned earlier, he was sentenced to life imprisonment.

On these facts, it is instructive to look at the charge laid against the appellant. In the charge, the offence and law indicated is rape contrary to sections 130 and 131 of the Penal Code as amended by Act No. 4 of 1998. The particulars of offence read:

> That Ngasa s/o Madina charged on 8th day of September, 2002 at about 14.00 hours at Mwasala village within Nzega District in Tabora Region did have sexual intercourse with one Tatu d/o Masisa who is a girl aged 3 y ears not being his wife without her consent to it at the time sexual intercourse.

From the facts and the charge preferred against the appellant, the question is whether the facts disclose the offence of rape subject of the charge? For our part, as correctly submitted by Mr. Mgengeli, learned State Attorney, we have no hesitation in answering in the negative. The charge facing the appellant is rape, that the appellant had sexual intercourse with the young girl Tatu. On the other hand, it is clear that the facts as set out above to which the appellant pleaded saying *"all facts are true"* do not disclose the offence of rape. In the circumstances, it would follow therefore that the plea of the appellant was equivocal and not unequivocal as the trial magistrate entered.

In the light of the circumstances of the case in which the plea was equivocal, we are inclined to think that the case fits within the circumstances in which an accused person convicted on his own plea of guilty may appeal against the conviction upon the ground that the admitted facts did not constitute the offence charged, namely rape in this case. Circumstances in which an accused person convicted on his own plea of guilty may appeal were set out by Samatta, J. (as he then was) in the case of **Laurence Mpinga v. Republic** (1983) TLR

166. One of the circumstances stated was that upon the admitted facts the accused could not in law have been convicted of the offence charged.

In this case, the facts as set out show that Tatu was found sleeping on the bed with the appellant who, it is alleged was naked. Otherwise there was nothing more suggesting that sexual intercourse had taken place. In the absence of facts establishing sexual intercourse which constitute rape, a charge that the appellant faced, the facts fall short of the offence of rape as charged. On this, we think the State Attorney was correct in his submission that the facts read out to the appellant did not disclose the offence of rape.

However, we wish to make it clear that the circumstances in which the appellant was found with the child are highly suspicious. It is such a conduct that possibly some offence against morality or indecency could be established. But as the appellant was specifically charged with the offence of rape, and the case did not go on trial, the Court can hardly do anything about it at this stage by way of substitution for a lesser offence, if at all. In that situation, it goes

without saying that on the facts as shown above, it was wrong for the trial court to enter a plea of guilty to the charge. Instead, a plea of not guilty should have been entered and the case to proceed on trial.

On this point, we think, with respect, the learned judge on first appeal also fell into the error of taking it that the appellant had unequivocally pleaded guilty. Had he looked at the matter from this perspective, we think he would have come to a different conclusion.

For the foregoing reasons, the appellant's plea of guilty being equivocal, the appeal is allowed, the order of the trial District Magistrate of 11/9/2002 of plea of guilty, conviction and sentence are quashed and set aside. Similarly, the subsequent proceedings and judgment of the High Court in (HC) Criminal Appeal No. 26 of 2003 are quashed and set aside.

It is directed that the District Court at Nzega is to proceed with hearing Criminal Case No. 219 of 2002 by taking the plea of the accused afresh expeditiously but not later than 45 days from the date of this judgment.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR