

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

(CORAM: RAMADHANI, C.J., MUNUO, J.A. And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 153 OF 2005

KALOS PUNDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Mtwara)**

(Lukeleiwa, J.)

**dated the 20th day of June, 2005
i n
Criminal Appeal No. 15 of 2005**

JUDGEMENT OF THE COURT

18 & 27 November, 2009

MUNUO, J.A.:

The appellant, Kalos Punda was convicted on his own plea of guilty in Criminal Case No. 12 of 2004 in the District Court of Liwale. It was alleged by the prosecution that on the 15th February, 2004 at about 09.00 hours, at

Likongowele village within Liwale District in Lindi Region, the appellant attempted to rape one SM contrary to section 132 (1) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences Act No. 4 of 1998.

When the appellant appeared in the trial court on the 20th February, 2004, the charge was read over to him and he pleaded:

"It is true".

The trial Senior District Magistrate entered a plea of guilty to the charge. The appellant, furthermore accepted the facts as correct. The original record shows that the trial magistrate then found the appellant guilty and accordingly convicted him of attempted rape as charged.

To discern whether the plea of guilty was unequivocal, we need to look at the facts the appellant accepted as true:

"FACTS OF THE CASE"

It was on 15/2/2004 at about 9.00 am. Bi. SM was going to her shamba carrying a three litres gallon of water. The accused asked her for some water to drink.

Complainant denied to give him some water. Accused person told her that he was not after water but he was after her body. From there accused person chased her and caught her and pulled her into the bush and removed her clothes. Complainant [raised an] alarm and at the same time she did bite him with her teeth. As a result the accused failed to rape her.

People came there and accused tried to run away. But he was chased and arrested and taken to police station where he was charged with this offence and taken to this court to answer the charge. That is all."

From the original record, the proceedings state, and we quote:

Accused person is asked whether the facts of the case are true or not.

Accused person says: The facts of the case are true.

The accused then signed the same and so did the trial Senior District Magistrate. The latter then proceeded to convict the appellant thus:

Court: Accused person is charged as the charge stands.

Accused person pleaded guilty to the charge.

Now for his own plea and admission of the facts of the case accused person Kalos Punda is convicted for his own plea under the same section 132 (1) of the Penal Code, Cap 16 Vol. I of the Laws as amended by section 8 of the Sexual Offences Special Provisions Act No. 4 of 1998.

Sgd.....SDM

20/2/2004.

The record shows that the appellant had no previous convictions:

Previous Convictions:

no previous convictions at all. But I pray for the court to impose a severe punishment because our Parliament always condemns about this act which leads to shame women.

In mitigation, the appellant stated:

I pray for the court not to impose severe punishment because although I have committed such an offence it was not my will but I was forced by devil.

We have quoted the proceedings of the trial court to illustrate that the appellant pleaded guilty to the charge, accepted the prosecution facts as true, and in mitigation, the appellant pleaded that he committed the offence

"not by his will" but that he "was forced by the devil."

In this appeal, the appellant filed five grounds of appeal. He had indicated on page 2 of his memorandum of appeal in the last two lines of paragraph five that he would neither be present nor be represented by a lawyer at the hearing. He did, however, appear before us, and prosecute his appeal in person.

In the grounds of appeal and in his oral submission before us, the appellant stated that the complainant was his lover for a long time but she concocted the case against him because he was impecunious and failed to give her money after sexual intercourse. He further stated that had it not been for the long relationship he had with the complainant he would not have pleaded guilty to attempted rape. He claimed in ground three of the memorandum of appeal that he failed to give the complainant Sh.1,000/= within an agreed time frame of five days so she instigated his arrest on allegations of attempted rape.

He urged us to set him free saying that "the penalty should be abolished for the interest of the society and for the Republic ..."

In his oral additional grounds of appeal, the appellant complained that he was wrongly convicted on the evidence of PW1. He blamed the learned judge for not rejecting the evidence of PW1. We note, however, that there was no PW1 in this case for the appellant pleaded guilty to the charge.

The Respondent Republic was represented by Ms Angela Kileo, learned State Attorney. Supporting the conviction and sentence, Ms Kileo observed that the appellant unequivocally pleaded guilty to the charge of attempted rape and accepted the prosecution facts as correct so he was properly convicted by the trial court. In this regard, the learned judge rightly dismissed the first appeal. Furthermore, the learned State Attorney contended, the appellant having pleaded guilty to the charge, he only has a right to appeal against the sentence as stipulated under the provisions of section 360 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002, citing the case of John Samwel @

Kabaka and Another versus Republic, Criminal Appeal No. 58 of 2005, Court of Appeal of Tanzania (unreported), in which the court considered an appeal on a plea of guilty and observed that —

The appellants' plea being unequivocal, they were correctly convicted on their own plea of guilty. It would follow that no appeal would lie on a plea of guilty

In this case, the appellants having been convicted on their unequivocal plea of guilty cannot now be heard to complain about the conviction

The learned State Attorney further cited the case of Laurent Mpinga versus Republic [1983] TLR 166 wherein Samatta, J. as he then was, set out the criteria for tampering with a plea of guilty. Ms Kileo argued that there is no cause to interfere with the conviction and sentence appealed against so the appeal ought to be dismissed in its entirety.

As reflected above, the appellant pleaded guilty to the charge and did not dispute the prosecution facts in support of the offence of attempted rape. Under the provisions of section 360 (1) of the Criminal Procedure Act, Cap 20 R.E. which state *inter alia* —

360. (1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and

has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence.

We are satisfied that in this case, the appellant was rightly convicted on his own unequivocal plea of guilty in that he pleaded guilty to the charge and also accepted the prosecution facts in support of the charge of attempted rape contrary to section 132 (1) of the Penal Code, Cap 16.

Furthermore, we affirm the holding in the case of Laurent Mpinga versus Republic [1983] TLR 166 in which the High Court pronounced the criteria for interfering with a plea of guilty namely:

- 1. that even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;*
- 2. that the appellant pleaded guilty as a result of mistake or misapprehension;*
- 3. that the charge laid at the appellant's door disclosed no offence known to law; and*

4. *that upon the admitted facts the appellant could not in law have been convicted of the offence charged.*

We are, indeed, satisfied that in the present case, the prosecution facts constituted the offence of attempted rape contrary to section 132 (1) of the Penal Code, Cap 16. We are also satisfied that the appellant pleaded guilty unequivocally because he accepted the prosecution facts as true. He, furthermore, pleaded in mitigation that the devil had driven him to commit the offence so he should not be punished severely. In this respect, his story of long friendship and the victim concocting the charge of attempted rape to avenge because he failed to give her Shs.1,000/= is, in our considered opinion, a mere afterthought.

The next question is whether there is ground for varying the sentence of 30 years imprisonment imposed on the appellant.

In Laurent Mpinga's case cited *supra*, the appellant had robbed Sh.20/= from a school girl. Noting that under the provisions of section 6 of the Minimum Sentences Act, 1972, do not apply to properties valued less than Sh.100/=, the High Court reduced the then statutory sentence of seven

years imprisonment for robbery with violence contrary to section 285 of the Penal Code to 4 years imprisonment by observing that:

Bearing in mind, among other things, that the appellant had pleaded guilty, this is a case where justice ought to have been tempered with mercy a sentence of 4 years imprisonment would have adequately reflected the society's revulsion against the appellant's antisocial conduct. The sentence of seven years imprisonment is reduced accordingly.

It appears to us that the Sexual Offences Special Provisions Act, 1998 does not provide for lesser sentences for attempted offences, in this case, attempted rape contrary to section 132 (1) of the Penal Code to differentiate attempted rape from the offence of rape contrary to sections 130 and 131 of the Penal Code. In practice, however, attempted offences ordinarily carry a less severe penalty as is the case with the offence of murder contrary to section 196 which carries a capital punishment of death but offences lesser than murder such as manslaughter, and, or attempted murder have lighter punishments.

The above said, the sentence imposed on the appellant is statutory so the Court cannot reduce it.

We accordingly dismiss the appeal in its entirety for it is devoid of merit.

DATED at MTWARA this 27th day of November, 2009.

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

(K I T U S I)
SENIOR DEPUTY REGISTRAR