IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 133 OF 2010

AMBAKISYE MWAIPUNGU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mbeya)

(Mackanja J.)

dated the 15th day of December, 2003

in

Criminal Appeal No. 122 of 2003

JUDGMENT OF THE COURT

28 June, & 5 July, 2011

MASSATI, J.A.:

The appellant was charged with the offence of rape in the District Court of Rungwe at Tukuyu, in Mbeya Region. It was alleged that, he did have carnal knowledge of one Vumilia d/o Anyelwise, a girl of 14 years of age, on the 5th day of July, 2003 at Kikolo Masukulu village, within Rungwe district. It was further alleged that, what the appellant did, constituted an offence under section 130 (1) and 131(1) of the Penal Code Cap 16 RE 2002 as amended by the Sexual Offences (Special Provisions) Act, No. 4 of 1998. From what appeared to be a plea of guilty, the District Court convicted him as charged and sentenced him to 30 years imprisonment, and ordered him to pay to the victim the sum of Tshs 100,000/= as

compensation. His attempts to appeal to the High Court were unsuccessful as the appeal was summarily rejected for want of sufficient ground of complaint. After obtaining extension of time, he has now lodged an appeal in this Court.

In his memorandum of appeal, the appellant, who has appeared in person in Court, has attacked the order of summary rejection of his appeal by the High Court on five grounds. **First**, that it was wrong for the first appellate judge to have rejected the appeal summarily without scrutinizing the proceedings that led to his conviction. **Second,** that he was wrongly convicted on a plea of guilty when the plea was equivocal. **Third**, that the PF3 was admitted without affording the appellant the opportunity to comment or object to it. **Fourth,** that there was no cautioned statement to prove that, the appellant confessed to the commission of the offence. And **Lastly,** that there was no medical evidence to prove the rape, as the alleged medical personnel was neither qualified, nor was any legally admissible report tendered. The appellant adopted those grounds at the hearing.

The respondent /Republic was represented by Mr. Vicent Tangoh, the learned Senior State Attorney. He did not seek to support the conviction of

the appellant. He supported all the grounds of appeal, but in addition, submitted that the charge was preferred under the wrong provision of the law, as the applicable provision for a victim of rape below 18, was section 130(2)(e) and not section 130(1) of the Penal Code. He also went on to submit that the record did not reflect that the charge was read over to the accused and that he was asked to plead thereto. It is simply the court itself which recorded what appeared as the appellant's plea. But, even in the alleged plea, the appearance of the words "I was a bit confused" imply that the plea was not unequivocal. Lastly, Mr. Tangoh was of the view that even the facts that were read over to the accused/appellant did not allege penetration, which was an essential element of the offence of rape. He therefore asked us to quash all the proceedings, conviction and sentence, and orders of the lower courts and make such order as the justice of the case may demand.

This appeal may be disposed of on a narrow compass. Was the purported plea of guilty on which the conviction of the appellant rests unequivocal? Was the order of summary rejection of the appeal proper?

It is the law that before proceeding to convict an accused on his own plea of guilty, the trial court must explain every ingredient of the alleged offence to the accused, who must be asked to plead thereto (see **HANDO s/o AKUNAAY v. R, (**1951)18 EACA 307, **ADAN v. R,** (1973) EA.. 446; **JOHN FAYA v. R**, Criminal Appeal No. 198 of 2007 (un-reported), and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally **(**see **R. v. YONASANI EGALU & OTHERS** (1942) 9 EACA 65.

The record in the present case chronicles a dangerous departure from the law and the practice on the taking of pleas. When the appellant first appeared in court on 8/7/2003, the record shows that there was a statement of the offence and the particulars thereof. They appeared like the charge sheet itself. There is no record that this was read over to the accused and that he was asked to plead. Instead, immediately after the particulars of the offence the following passage appears:-

> Court: "It is true I had carnal knowledge of one Vumilia d/o Anyelwise as I was a bit confused. I did not drink pombe but I

do remember of all what I did to the victim one Vumilia d/o Anyelwise and I regret for it".

X R.T.P.

Court Entered as Plea of Guilty

Signed .....

08/07/2003.

First, it is clear that these are not the words from the accused, but from the court itself, for we are a shade unsure whether the words such as "carnal knowledge" could have come from the appellant's mouth, it being a legal technical term. But second, even if these words had come from the accused, the plea of guilty was negatived when he uttered the words "I was confused" because that introduced an explanation or ambiguity as to his state of mind when the alleged offence was committed. So the charge was not only not read over and the accused asked to plead in his own words, but also if there was any exchange that took place between the appellant and the court, the appellant introduced some ambiguity or explanation in his plea. The proper construction to put to such a plea is a

matter of law, but it has long been settled that any ambiguous plea must be taken as a plea of not guilty. (see **WAKELIN v. R** (1951) 18 E.A.C.A 311.

Even assuming that there was a plea of guilty, it was again an established practice that the prosecutor should then state the facts containing all the ingredients of the offence (see **HEMEDY MKONDYA v. R,** Criminal Appeal No. 69 of 2007 (unreported) before asking the accused person to confirm them. In the present case after the prosecution had outlined the facts, the following is what was recorded to have happened:-

> "Today – 08/07/2003, the facts so far adduced by the public Prosecutor to be all true and correct.
>
> XRTP of Accused.
>
> Sgd. .....
>
> 08/07/2003
>
> Court "Upon the accused having pleaded guilty and admitting all the facts of the case to be all true, I do here by convict him on his own plea of guilty as charged"

Sgd.....

The paragraph that begins with "Today"... still appears to be part of the prosecutor's narration of facts. It is not indicated whether the words belong to the accused. But, as Mr. Tangoh has submitted, even if that paragraph could be attributed to the appellant, there is no allegation in the said facts whether there was penetration, for the offence of rape to stick. As the law stands now such allegation ought to have been specifically mentioned and proved (See **Ex 13 9690 SGT DANIEL MSHAMBALA v R,** Criminal Appeal No. 183 of 2004 and **MOHAMED JUMA & ANOTHER v. R,** Criminal Appeal No. 25 of 2009 (both unreported). So it is our finding that the alleged plea of guilty by the appellant was not unequivocal.

It is true that the High Court has powers to reject appeals summarily under section 364(1) of the Criminal Procedure Act, (Cap 20 – RE 2002). The section provides as follows:-

> "(1) On receiving the petition and copy required by section 362, the High Court shall peruse them and –

(a) if the appeal is against sentence and is brought on the grounds that the sentence is excessive and it appears to the court that there is no material in the circumstances of the case which could lead it to consider that the sentence ought to be reduced,

(b) if the appeal is against conviction and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or without substance; or

(c) if the appeal is against conviction and sentence and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance, and that there is no material in the

judgment for which the sentence ought to be reduced,

the court may forthwith summarily reject the appeal by an order certifying that upon perusing the record, the court is satisfied that the appeal has been lodged without any sufficient grounds of complaint".

This Court has warned that, such powers have to be exercised sparingly and with great circumspection, especially where important or complicated questions of facts and law are involved (see **IDDI KONDO v. R.** Criminal Appeal No. 46 of 1998, **JUMA HAMIDU v. R**, Criminal Appeal No. 67 of 2001 and **CHRISTOPHER NZUNDA & 2 OTHERS v. R,** Criminal Appeal No. 152 of 2006 (all unreported).

In **KARIOKI s/o GACHOHI v. R** (1950) 17 EACA 141, the erstwhile East African Court of Appeal observed:-

"An appeal can only be summarily dismissed in cases where it is filed on the ground that the conviction is against the weight of evidence, or that the sentence is excessive. It cannot be summarily

dismissed where it is filed on the ground that a court has wrongly construed a plea of guilty".

In that case, the court was considering the true construction of section 352(2) of the Kenyan Criminal Procedure Code which was substantially in *pari materia* with section 364(1) of the Criminal Procedure Act of Tanzania and we find that decision highly persuasive. So, in our view, the High Court can only summarily reject an appeal under section 364(1) of the CPA if the appeal is brought on the ground that the conviction is against the weight of the evidence or that the sentence is excessive, and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt or that the appeal is frivolous and without substance. Before this Court, the appellant has complained that the plea at the trial court was equivocal, and that the High Court should not have overlooked it. We agree with him. If, as Mr. Tangoh has submitted in the present case, the first appellate court had carefully perused the record, (as the law demands) the facts, and the pleas attributed to the appellant, he would no doubt, have come to a different conclusion. This in our view, is a clear case where the two courts below wrongly construed the appellant's plea. The High Court should not therefore have summarily dismissed the appeal.

It is for all the above reasons that we proceed to find that the plea of guilty of the appellant was wrongly recorded by the trial court and the High court wrongly rejected his appeal summarily. We accordingly allow the appeal and quash the conviction, and set aside the sentence and order of compensation. If the Director of Public Prosecution is so minded, he may reinstitute the case for the appellant to enter a fresh plea. Otherwise we order his immediate release from prison unless otherwise lawfully held.

It is so ordered.

DATED at **MBEYA** this 1st day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL