

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

(CORAM: MUNUO, J.A., KIMARO, J.A. And MJASIRI, J.A)

CRIMINAL APPEAL NO. 464 OF 2007

SAID MSWAJE @ MWANALUSHU APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Tabora)**

(Kihio, J)

dated 31st day of August, 2007

in

Criminal Appeal No. 123 of 2005

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JUDGMENT OF THE COURT

29 & 31 May, 2012

MUNUO, J.A:

The appellant, Saidi Mswaje @ Mwanalushu was convicted on his own plea of guilty in Nzega District Court Criminal Case No. 123 of 2005 in which he was accused No. 2. He first appeared in the trial court on the 28th July, 2005 and pleaded not guilty to 4 criminal counts namely:-

Count 1: Burglary c/s 294 (1) of the Penal Code Cap. 16 R.E 2002 in that on the 9th July, 2005 at 02.00 hours at Mwanhala Primary School area in Nzega District within Tabora Region, the appellant, jointly with others who are not

parties to this appeal, broke into the dwelling house of one Masingi s/o Kitoki with intent to commit an offence, to wit, armed robbery.

Count 2: Armed robbery c/s 285 and 286 of the Penal Code in that on the same date, hours and place, after breaking into the dwelling house of Masingi s/o Kitoki, the bandits, including the appellant, stole one mattress 4" x 5" valued at Shs. 40,000/= two bicycles make phoenix valued at Tshs 80,000/=, another bicycle make Mellan valued at Shs. 60,000/= a Panasonic radio valued at Shs 10,000/= a radio cassette valued at Shs 30,000/= one watch valued at Sh 13,500/=, Cash 80,000/=; total stolen property valued Shs 80,000/= and immediately before and after the stealing, used a bush knife to obtain and retain the stolen property.

Count 3: Rape c/s 130 and 131 (1) of the Penal Code in that on the same date, time and place, jointly and with other suspects, after breaking and entering the complainant's house, the appellant raped Neema d/o Kitoki without her consent.

Count 4: Rape c/s 130 and 131 (1) of the Penal Code, on the same, date, hour and place, the appellant jointly with others, after breaking and entering the house of the complainant, the appellant had carnal knowledge of one Wakuru s/o Nyaburi without her consent.

When the case came up for a preliminary hearing on the 27th September, 2005 the appellant changed his plea from not guilty to guilty. The record reflects the same at pages 11- 14 at page 11 the record which reads and we quote:

"Date : 27/09/2005

Coram: K.M. Rashidi – DM

P.P: Mwakalukwa – Insp.

Accd: Selemani Hamisi and others – all present.

C.C: Ngungu – R/O

P.P. Case for Preliminary Hearing.

Court: Charge reminded to the accused person who plead thus:-

1st Count:

1st Accused: "It is not true"

2nd Accused: "It is true"

I burgled that house of the complainant and stole from therein.

3rd Accused: " It is not true "

4th Accused: " It is not true"

5th Accused: " It is not true"

2nd Count:

1st Accused: "It is not true"

2nd Accused: "It is true" I robbed that property at

knife point from the complainant ."

3rd Accused: "It is not true "

4th Accused: "It is not true"

5th Accused: "It is not true"

6th Accused: It is not true"

7th Accused: It is not true"

3rd Count:

1st Accused: "It is not true"

2nd Accused: "It is true"

3rd Accused: "It is not true "

4th Accused: "It is not true"

4th Count:

1st Accused: "It is not true"

2nd Accused: "It is true. I raped that girl."

3rd Accused: "It is not true "

4th Accused: "It is not true"

Entered as a Plea of Guilty in respect of the second accused on 1st, 2nd, 3rd and 4th Count and Pleas of NOT GUILTY on the rest of the accused persons on all counts charged with.

K. M. RASHID

DISTRICT MAGISTRATE

27/09/2005."

The prosecutor narrated the facts on the plea of guilty as shown at pages 13 to 14 of the record of appeal. At page 14 the 2nd accused, now the appellant stated:

2nd Accused: Facts stated are correct. I burgled the said house and robbed some property therein and raped the two girls in their bedroom.

Conviction: Second accused is convicted on his own pleas of guilty on all

four counts as charged.

Sgd: K. M. RASHID

DISTRICT MAGISTRATE

27/09/2005.

Previous Conviction: 2nd Accused:- Nil

2nd Accused:

Mitigation: I have four children and a wife who depend on me.
I pray (that) the court deals with me leniently. I was with Yohana when we committed these offences and (he) is now at large”

The trial magistrate then proceeded to sentence the appellant to:

Five (5) years imprisonment on Count 1.

Thirty (30) years imprisonment on Count 2

Life imprisonment on Count 3

Life imprisonment on Count 4

The sentences to run concurrently. It is pertinent to point out here that Accused No 5, one Tatu Ngassa, had pleaded guilty to counts 1 and 2 on the 19/07/2005, accepted the prosecution facts as correct and was accordingly convicted of burglary c/s 294 (1) of the Penal Code in Count 1

and armed robbery c/s 285 and 286 of the Penal Code in Count 2. She was sentenced to 5 years and 30 years imprisonment respectively; the sentences to run concurrently. Hence, Accused No 5 did not again appear at the preliminary hearing.

The facts are not complex. On the fateful night, the appellant and six other co-accused persons broke into the dwelling house of the complainant, one Masingi Kitoki. The gangsters robbed 2 bicycles, a radio, a radio cassette, a watch and cash shs 80, 000/= . The total value of the stolen property was Tshs 313, 500/= . In the execution of the armed robbery the bandits threatened the victims with a knife in order obtain and retain the stolen property. To make matters worse, the bandits had carnal knowledge of the two daughters of the complainant which is why the appellant was also charged with the offences of rape in counts 3 and 4 on the charge sheet.

Aggrieved by the conviction and sentence, the appellant unsuccessfully lodged Criminal Appeal No. 123 of 2005 in the High Court of Tabora before Kihio, J. Hence this second appeal.

In this appeal, the appellant filed five grounds of appeal challenging the conviction and sentences imposed on him by the trial court and faulting the learned judge for upholding the same. All in all, the appellant contended that his plea of guilty was not unequivocal, that he did not in fact plead guilty to the charges and that he did not understand the nature of the case because of language difficulty for he was not fluent in Kiswahili, his vernacular being Kisukuma.

Mr. Hashim Ngole, learned Senior State Attorney supported the conviction and sentences imposed on the appellant. Observing that the record of the appellant's plea of guilty on each of the four counts and accepting the prosecution facts to substantiate the charges, speaks for itself. The appellant, the learned Senior State Attorney submitted, clearly pleaded guilty as illustrated *supra* without any ambiguity or vagueness so he was properly convicted of the offences charged.

The learned Senior State Attorney cited the case of **Laurent Mpinga versus R (1983) TLR 166** in which Samata, J. as he then was, held, and we quote:-

“(i) An appeal against conviction based on an unequivocal plea of guilty cannot be sustained, although an appeal against sentence may stand.

(ii) an accused person who has been convicted by any court of an offence “on his own plea of guilty” may appeal against the conviction to a higher court on any of the following grounds:-

- 1. That, even taking into consideration the admitted facts, his 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 plea of guilty was as a result of mistake or misapprehension;*
- 3. That the charge laid at his door disclosed no offence known to law; and*
- 4. That upon the admitted facts he could not in law have been convicted of the offence charged.”*

In this appeal, the learned Senior State Attorney, further observed, the appellant accepted the prosecution facts as correct. That is, on the 9th July 2005, past midnight, he and other bandits burgled into the dwelling house

of one Masingi Kitoki, seized two bicycles, a radio, a radio cassette, a watch and cash shs 80,000/= at knife point. After looting the said property, the appellant and his co-bandits raped the complainant's two daughters. Having accepted the facts as correct, the appellant was in law, properly convicted on his own plea of guilty. Under the circumstances, the learned judge rightly dismissed his first appeal, Mr. Ngole urged.

The learned Senior State Attorney referred to the case of **Stephano Ndagizi & Jumanne Said versus Republic (1994) TLR 62** in which the Court held that:-

"armed robbery, punishable with a minimum sentence of thirty year's imprisonment, is a more serious offence than robbery with violence punishable with a minimum sentence of fifteen years imprisonment; a conviction for armed robbery therefore, could not be legally substituted for robbery with violence."

In the present appeal, the learned Senior State Attorney pointed out that the appellant had been charged with the offence of rape in counts 3 and 4 but he was erroneously sentenced to the scheduled sentence of life

imprisonment for gang rape, a more serious offence the appellant not been charged with. Hence, Mr. Ngole urged us to vary the sentence and substitute it with the mandatory sentence of thirty years imprisonment scheduled for rape c/s 130 (1) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002.

After scrutinizing the plea of guilty the appellant offered, his acceptance of the prosecution facts to substantiate the charges against him and the appellant's submission before us that he did not understand Kiswahili so he failed to understand the nature of the proceedings, we find no iota of merit in this appeal.

Although the appellant had no right of appeal on the conviction, we thoroughly examined the proceedings and satisfied ourselves that the plea of guilty the appellant offered was unequivocal. We are of the settled view that the plea of guilty was properly entered because the appellant clearly admitted the charges of burglary c/s 294 (1), armed robbery c/s 285 and 286; and rape c/s 130 (1) and 131 (1) of the Penal Code, Cap. 16 R.E.

2002. The facts were fully narrated to him and he accepted them as correct.

In that situation, his conviction on his own plea of guilty cannot be faulted. The appellant's contention that the he did not understand Kiswahili but only Kisukuma is an afterthought. Had he told the trial magistrate he had language difficulty and needed a Kisukuma/Kiswahili interpreter, the record would have reflected the same.

Having pleaded guilty to the charge, the appellant would only be entitled to appeal against the sentence pursuant to the provisions of section 228 (1) of the Criminal Procedure Act, Cap 20 R.E.2002 which states, *inter-alia*:-

"2 (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 the charge.

(2) If the accused 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 shall appear to be sufficient cause to the contrary”.

In view of the above, we agree with the learned Senior State Attorney that the appellant should have been sentenced to the scheduled minimum sentence of 30 years imprisonment for rape c/s 130 (1) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002 and not to life imprisonment for gang rape, an offence he had not been charged with. We accordingly set aside the sentences of life imprisonment on counts 3 and 4 and substitute therewith the scheduled minimum sentence of 30 years imprisonment.

Under the circumstances we dismiss the appeal on conviction for it is devoid of merit. The appeal on the sentences on counts 1 and 2 fails because they are prescribed mandatory sentences under the Minimum Sentence Act. The sentences on count 3 and 4 are quashed and set aside and substituted therewith, the minimum sentence of thirty years imprisonment for the offences of rape on counts 3 and 4.

The sentences to run concurrently. We order accordingly.

DATED at **TABORA** this 29th day of May, 2012.

E. N. MUNUO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(Z. A. Maruma)
DEPUTY REGISTRAR
COURT OF APPEAL