IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And JUMA,J.A.

CRIMINAL APPEAL NO. 184 OF 2014

SOSTENES JOHN .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Khaday, J.)

dated the 19th day of October, 2013

in

Criminal Appeal No. 125 of 2009

JUDGMENT OF THE COURT

11th and 13th 2015

RUTAKANGWA, J.A.:

The appellant was arraigned in the District Court of Karagwe for raping a four-year old Kabugene d/o George on 9th December, 2007. When the charge was read over and explained to him on 13th December, 2007, he pleaded thus:

"It is true".

Thereafter, the prosecutor narrated the facts of the case in the presence and hearing of the appellant.

The narrated facts vividly showed that the appellant had sexual intercourse with the said four-year old Kabugene George at Mabira Village at 15.00 hrs. The prosecutrix reported the incident to her mother who, on examining her, saw blood oozing out of the vagina. A report was made to the police and Kabugene was sent to hospital. Upon his arrest, the appellant confessed to the police to have had sexual intercourse with the said Kabugene. To these facts the appellant responded thus:

"I admit the facts to be true and correct".

Following this unambiguous admission of the facts which clearly established the offence of statutory rape under section 130 (1) and (2) (e) of the Penal Code Cap 16, (the Penal Code) , the trial court convicted him as charged upon his own plea of guilty. When called upon to say something in mitigation, the appellant unequivocally said that he was sorry and promised *"not to repeat the same."*

As what he said in mitigation did not derogate from his unequivocal plea of guilty, he was sentenced a prison sentence of thirty (30) years and twelve (12) strokes of the cane, a prison sentence which was patently

illegal in view of the mandatory provisions of s. 131 (3) of the Penal Code.

That appellant was, apparently, aggrieved by the conviction. He preferred an appeal to the High Court complaining that the "said plea of guilty was ambiguous and unfinished as laid down in the case of **LAWRENCE MPINGA V.R** (1983) T.L R. 166" (1st ground). The second ground of appeal, which to us was patently ambiguous and unintelligible, was:-

> *"That, the learned trial magistrate had purposely and aimed to pass the conviction against I, appellant by invoking the particulars as he got informed by the intended witnesses."*

At the hearing of his appeal, the appellant told the learned first appellate judge that he was convicted because the proseuctrix's father "wanted to grab" his cattle. He further claimed that prior to being taken to court he had been assaulted by the police and as such he "was half unconscious". He accordingly prayed for his acquittal.

The learned State Attorney Mr. Mackanja, urged the learned judge to dismiss the appeal in it's entirety as the appellant's plea was by any stretch of imagination unequivocal. The learned first appellate judge agreed with him.

Relying on the case of R.v. **M/S S.P. Construction** [1998] T.L.R.6. (C.A) as authority, the learned judge was of the firm view that:-

> *"To hold or conclude that plea a of guilty is unequivocal an accused person is required to have an unambiguous plea to every constituent of the charge explained to him."*

On this we have found ourselves full agreement with her.

After revisiting the entire proceedings leading to the plea taking, conviction and sentencing of the appellant, the learned first appellate judge, was categorical that she had found no error committed by the trial court in treating the appellant's plea of guilty as unequivocal. She took this stance because:-

i. *there was nothing on record to suggest that the appellant did not fully understand what he was doing when he pleaded guilty;*
ii. *the plea was perfect and free from ambiguity;*

iii. there was no mistake or misapprehension of facts committed by the trial court; and

iv. *the charge preferred against the appellant disclosed the offence of rape whose nature the appellant fully appreciated, hence admitted thrice.*

She accordingly dismissed the appeal and now this second appeal.

In this Court the appellant had lodged a memorandum of appeal containing two grounds of complaint. At the hearing, the appellant who fended for himself abandoned the second ground of appeal. The retained first ground of appeal runs thus:.

> *"THAT the first appellate Hon. Presiding Judge failed to note that my plea was equivocal as at the time and date of the alleged rape I was not conversant with SWAHILI Language to have proper follow up of the proceedings of the trial court, hence unfair trial and unjust conclusion".*

The appellant had nothing useful to tell us in elaboration of this sole ground of complaint which was not part of his grounds of complaint in the

first appellate court. He only said that although he is now conversant with Kiswahili, at the time of his arraignment he was not.

Mr. Athumani Matuma, learned State Attorney for the respondent Republic, pressed us to reject this belated complaint as it is a mere afterthought. After rejecting this ground of appeal, he urged us to uphold the decision of the High Court and dismiss the appeal in its entirety as the appellant's plea of guilty was unequivocal. He also called for the revision of the illegal prison sentence.

To us, all things being equal, that is proceeding on the assumption that the appellant was conversant with Swahili language as of 13th December 2007, we would harbour no illusions on the soundness of the appellant's conviction as charged. Like the learned first appellate judge, we find that the preferred charge succinctly revealed the offence of statutory rape of which lack of consent of the prosecutix was not required to be established. We are equally satisfied that the narrated facts which the appellant is shown to have categorically accepted to be true, established every essential ingredient of this offence. Excepting lack of full appreciation or understanding of the charge due to language barriers, the admission of guilty entered thrice by appellant was impeccably unequivocal. The issue

confronting us here then, is whether the appellant did not fully appreciate the nature of the charge, he is said to have admitted, due to his claim that at that time he was not conversant with Swahili language. If that was the case, as there is no indication in the proceedings before the trial court that an interpreter was used, then he was not given a fair trial.

The crucial issue of whether or not the appellant was not conversant with Swahili language at the time his plea was taken is an issue of fact which could have been properly and adequately resolved by the trial District Court. Going by the trial court's record whose authenticity has never been challenged by the appellant to date, it is clear that the appellant never raised this issue in the said court. Again, as already alluded to above, this language handicap was not a ground of appeal in the High Court. Neither did he raise it as an additional ground at the hearing of his first appeal.

When the High Court gave the appellant the opportunity to elaborate on his grounds of appeal, he resorted to drawing red herrings as already shown above. It was when he was called upon to respond to Mr.

Mackanja's strong submission that he came up, for the first time, with this startling and, if we may be excused, outlandish claim, saying:-

> ***"Appellant:*** *I do not know if I raped a child. I could not have raped a child of 4 years old. I did not rape.* ***I don't know Swahili language****. I pray my appeal to be allowed".*

We hope he was not still "half unconscious". All the same, how could he be heard and believed that he was ignorant of Swahili language at the close of the hearing when he had at first addressed the High Court in the very language he was belatedly recanting? It is now increasingly clear to us that the appellant was trying to be a bit clever but too late. We cannot fall for this figment of his own imagination and let injustice reign supreme. We accordingly find ourselves in full agreement with the contention of Mr. Matuma, that this was a belated effort to save his neck , and if we may add, it was fronted to derail the wheels of justice and we reject it absolutely. We therefore find no merit in this appeal and accordingly dismiss it.

Having dismissed the appeal, we proceed to invoke our revisional powers under s.4 (2) of the Appellate Jurisdiction Act. Cap. 141, as pressed by Mr. Matuma, to quash and set aside the illegal jail sentence of 30 years. Having been convicted as charged under s.130 (1) and (2) (e), of the Penal Code, the minimum sentence to be imposed was life imprisonment as correctly pointed out by Mr. Matuma.

We according hereby substitute the lawful sentence of life imprisonment for the illegal one of thirty years imprisonment.

DATED at BUKOBA this 12th day of February, 2015.

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL