IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 361 OF 2014

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

MATANO MNAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(F.S.K. Mutungi, J.)

dated the 9th day of July, 2013
in
Criminal Appeal No. 64 of 2012

JUDGMENT OF THE COURT

29/05/2015 & 02/06/2015

KILEO, J.A.:

The appellant was charged in the District Court of Kondoa at Kondoa with unnatural offence contrary to section 154 (1) of the Penal Code. It was alleged that on the 9th day May, 2007 at 02.30 hours at Kidoka village within the District of Kondoa in Dodoma Region he did have carnal knowledge of one Juma s/o Tambo, a child of 12 years of age against the order of nature. He was convicted on his own plea of guilty and sentenced to 30 years imprisonment and 12 strokes of the cane. His appeal to the

High Court was unsuccessful hence this second appeal. Both in the High Court and before this Court his main complaint has been that his plea of guilty was not an unequivocal one.

The appellant appeared in person at the hearing of the appeal. He did not have much to say (understandably being an unrepresented layman) but opted to let the respondent address us first. The respondent Republic was represented by Ms Beatrice Nsana learned State Attorney who conceded to the appeal.

In terms of section 360(1) of the Criminal Procedure Act (CPA) where an accused pleads guilty to an offence and is convicted on such plea of guilty his remedy lies only in appealing against sentence. An appeal against a conviction on a plea of guilty may only lie where it is shown that the plea was equivocal.

The learned State Attorney submitted that the facts of the case that were read over to the appellant were confusing and did not constitute the offence he was charged with. Ms Nsana further conceded that there was no conviction entered in terms of section 235 of the Criminal Procedure Act. In the circumstances she urged us to allow the appeal and remit the matter to the trial court for it to re-take the plea and proceed in

accordance with the law. Ms Nsana made reference to a decision of this Court in **Kalos Punda versus the Republic;** Criminal Appeal No. 153 of 2005 (unreported) where the Court cited with approval a High Court decision in **Laurence Mpinga versus Republic** [1983] TLR 166 where Samatta, J. as he then was pronounced the criteria for interfering with a plea of guilty in the following terms:

> *(i) An appeal against a conviction based on an unequivocal plea of guilty generally 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 he pleaded guilty 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 **Adan v. Republic,** [1973] E. A. 445 at page 446 the then Court of Appeal for Eastern Africa while addressing itself to the procedure that should be followed where an accused person pleads guilty had this to say:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material*

*respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded,(see also:**Chamrungu** v **S.M.Z.** (1988 LRC(Crim.) 26 at page 29."*

A careful look at the facts which the appellant is said to have admitted shows, as rightly pointed out by Ms Nsana, that they were indeed quite confusing and it is actually difficult to make any sense out of them. A reproduction of the proceedings of the day that the appellant's plea was taken will show what we mean.

"Date 16/5/2007
Coram: J.P. Mtuiy, PDM
For Pros: Insp. Madatta
Accused: Present
C.C. Mnyeke
Court: *Charge read over and explained to the accused persons who plead*
"It is true."
Court: *Entered as a plea of Guilty.*
FACTS
Accused is Matano Mnapa aged 33 years of Kidoka Village, Kondoa Dodoma Region.

On 9/5/2007 accused was at Kidoka, and at the time went to time of complainant for farm purposes and while asleep, complainant, accused went near him undressed him he is 12 years and in a Sodom found accused had sodomized him favour himself with spermatozoa would his factices and claimed and severe pains at his anus. Accused arrested sent to Haneti Police Station and to Kondoa.

The ..... Was given a PF3 and went to Haneti hospital where found a promises even his anus. Or tender the PF3 as PE1.

Accused: *Facts as addused by prosecution is correct.*

Court: *On reading found guilty accused home for the conviction.*

Sgd. J.P. Mtuiy, PDM

16/5/2007

PREVIOUS CONVICTION

Accused is a first offender, accused had done an offence which is dangerous and regard a sworn sentence.

MITIGATION:

I am 40 years old, who pray for bail.

It is clear that the facts as reproduced above were confusing and did not constitute the ingredients of the offence of unnatural offence. At first we thought that the record we had had typing errors but an examination of

the original record was not of any assistance to us. Moreover, the record shows that the appellant in mitigation prayed for bail. In mitigation accused persons do not normally ask for bail but they advance factors to convince a trial court to reduce a penalty that it may otherwise impose. Asking for bail when he was called upon to provide mitigating factors suggests that the appellant had not comprehended what had actually taken place. His response should have alerted the trial court, and the High Court should have noted that the appellant's plea was not unequivocal.

The record as per reproduced proceedings also indicates that no conviction was entered against the appellant after he had purportedly pleaded guilty to the charge. This contravened the provisions of section 235 (1) of the CPA which states:

> **"235. (1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."**

The provisions of section 312 (2) CPA were also contravened. In terms of this provision the trial magistrate was required upon conviction to specify the offence of which, and the section of the Penal Code or other law under

which, the accused person was convicted and the punishment to which he was sentenced. To say: *"on reading found guilty accused home for the conviction"* did not certainly meet the criteria laid down under s. 312 (2) and to make matters worse no sense at all can be made out of the above statement.

Having considered the matter as above, we are satisfied that the appeal was filed with sufficient cause for complaint. We accordingly allow it. Conviction is quashed and sentence is set aside. Both the High Court proceedings as well as those in the trial court save for the charge are nullified. We order that the matter be remitted to the trial court for re-taking of the plea and proceeding with the case in accordance with the law. We also direct that the matter should be handled by a different magistrate and judge other than those who previously dealt with it.

In the mean time we direct that the appellant be taken to the trial court immediately for plea taking and thereafter consider to admit him to bail if conditions permit.

It is accordingly ordered.

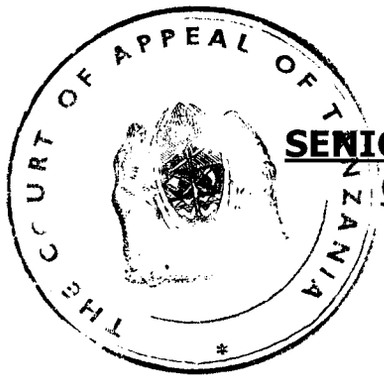
DATED at **DODOMA** this 30th day of May, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL