IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 95 OF 2015

PETER TOATOA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwambegele, J.)

dated the 15th day of January, 2015
in
Criminal Appeal No. 29 of 2010

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JUDGMENT OF THE COURT

14th & 18th April, 2016

MZIRAY, J. A.:

The appellant, Peter Toatoa, was charged in the District Court of Nkasi with the offence of rape c/s 130 (1) and (2) (e) and 131 of the Penal Code, Cap. 16 R.E 2002.

According to the record of the trial Court, when the charged was read over and explained to him he pleaded guilty. The facts of the case were adduced and the appellant accepted them to be true and correct. He was consequently found guilty and convicted as charged on his own plea of guilty. He was sentenced to life imprisonment. His first appeal to

the High Court of Tanzania at Sumbawanga was dismissed, hence this second appeal.

Before us the appellant appeared in person unrepresented, whereas the respondent/ Republic was represented by Mr. Stambuli Ahmed, learned Senior State Attorney.

The appellant has raised four (4) grounds in which in essence he is challenging the trial court's finding that the plea he made was unequivocal, and that the first appellate court erred in upholding the finding and verdict of the trial court.

Initially, the learned State Attorney did not support the appeal but upon reflection, he supported the appeal. He submitted that on reading the facts on record in support of the charge he was convinced that the facts did not disclose the ingredients of the offence of rape because it was not mentioned in the facts that there was penetration, a fact which he said, was very essential. Further to that, the appellant asserted before the OCS that the alleged sexual intercourse was performed outside the parameters of the victim's vagina until he ejaculated.

From the facts above we have observed that the appellant's conviction was due to the alleged plea of guilty to the charge which was leveled against him. Under Section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E 2002 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 conviction on a plea of guilty may only lie where it is shown that the plea was equivocal (See **Matano Mnama V. R, Criminal Appeal No. 361 of 2014).** However, in **Lawrence Mpinga V. R, [1983] TLR 166** this court held among other things that 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:-

i. 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.
ii. that he pleaded guilty as a result of mistake or misapprehension.
iii. that the charge laid at his door disclosed no offence known to law, and.
iv. that upon the admitted facts he could not in law have been convicted of the offence charged.

As seen above one of the grounds which may justify the court to entertain an appeal based on a plea of guilty is where it may be successfully established that 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. This goes to insist therefore that in order to convict on a plea of guilty, the court must in the first place be satisfied that the plea amounts to an admission of every ingredient of the charge and the admission is equivocal. See the case of **Republic V. Yonasani Egalu & 3 others [1942-1943] E.A C.A 65** in which the court laid down as a matter of law that, in any case in which a conviction is likely to proceed on a plea of guilty it is most desirable not only that every ingredient of the charge should be explained to the accused, but that he should be required to admit or deny every ingredient of the offence, 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 thereto unequivocally.

Equally important is that, the facts to be adduced in support of the charge must disclose the ingredients of the charged offence. The case of **Saidi Omari Kombo V. R, [2000] TLR 315 and Ngasa Madina V. R, Criminal Appeal No. 151 of 2005,** (unreported) underscores the above position.

In our instant case, while we appreciate that the charge was properly drafted, and that it disclosed the offence of rape but we noted on the other hand that the facts which were adduced in support of the

charge did not disclose the ingredient of the offence of rape. The facts as reflected on page 2-3 of the record were as follows;

> *"on 09/08/2004 at 17.00 hrs at Korongwe Village, Nkasi District the accused while coming from his strolls, he went to Linus Mbalamwezi, found Cesilia Mbalamwezi who was his niece. The accused took her claiming to go and buy her sweets. They went to the bush. The accused undressed the girl's underpants, and had sexual intercourse with her and ejaculated. The accused then shaved her hair on the head, smeared the 'majivu' to her and took from her neck lace and left her (sic). The girl went back home, found her parents looking for her. She explained how the accused carnally knew her, she was found with underpants, had majivu [ashes] on the face and no hair on her head. The victim's mother looked into her private parts and found her to be carnally known. The victim mentioned the accused to be her ravisher. The police were informed and accused apprehended and taken to the police station.* ***The accused admitted before the OCS and said that he was sexing outside the vagina until he ejaculated."*** *(Emphasize supplied).*
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> *The accused admitted to have undressed her underpants, shaved her hair and smeared her*

with that sort of dust. The victim's mother was given PF3 and the victim was medically examined and found to be carnally known. The Doctor filled in the PF3. This PF3 read (reads) Exhibit P1. This is his caution statement Exhibit P2."

The appellant's response regarding the correctness or otherwise of those facts was as follows;

"All the facts are correct and I do admit them."

Admittedly, as they appear above, these facts did not disclose that there was penetration which is one of the essential ingredients of the offence of rape as properly submitted by Mr. Stambuli Ahmed, the learned State Attorney. There are number of authorities to this point, including those of **Minani Evarist V. R, Criminal Appeal No. 124 of 2007, Ainea Gideon V. R, Criminal Appeal No. 183 of 2008, Sindayigaya Francis V. R, Criminal Appeal No. 128 of 2009 and Burundi Deo V. R, Criminal Appeal No. 33 of 2010** (All unreported).

In the case of **Ainea Gideon V. R,** (supra) the court said;

"After careful reviewing the evidence on record and the submissions made by counsel, we are inclined to agree with the learned advocate for the appellant that the offence of rape has not been proved beyond reasonable doubt. In order

to establish the offence of rape, the following elements have to be proved:-

1. *That there was penetration*
2. *That there was lack of consent*
3. *That it was the appellant who committed the act"*

In the case of **Sindayigaya Francis V. R (**supra), it was stressed that short of evidence that there was penetration, the offence of rape cannot be said to have been proved.

Even, when we consider the appellant's response as to correctness of the facts or otherwise, we note that he admitted having sexual intercourse with the victim outside her vagina, and not otherwise. We believe that if the first appellate court had seriously scrutinized the facts presented before the trial court it would not have upheld the conviction.

That said and for the foregoing reasons, we are in agreement with Mr. Stambuli Ahmed, learned State Attorney that the conviction was improperly made because the narrated facts which the appellant is shown to have categorically accepted to be true, did not establish and disclose the offence of rape. In consequence, exercising the powers conferred to us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002, we quash the conviction and set aside the sentence. However, given the seriousness and the nature of the offence we direct for the trial court's record to be remitted forthwith to the District Court of

Nkasi for the expedited trial of the case before another Magistrate of competent jurisdiction. In the event of conviction, the period already spent in prison should be considered during sentencing.

Order accordingly.

DATED at MBEYA this 18th day of April, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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

E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL