IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CRIMINAL APPEAL NO. 282 OF 2015

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

PETER SHANGWEA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Hon. Mugasha, J.)

dated the 17th day of September, 2008
in
DC. Criminal Appeal No. 16 of 2008

JUDGMENT OF THE COURT

23rd & 27th May, 2016

MMILLA, J.A.:

In this appeal, Peter Shangwea **(the appellant)**, is contesting the judgment of the High Court of Tanzania at Moshi which upheld conviction and sentence by the District Court of Moshi at Moshi in Criminal Case No. 591 of 2006. Before that court the appellant was charged with unnatural offence contrary to section 154 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that he had the carnal knowledge of Kimari s/o Samwel (**the complainant)** against the order of nature. Upon a plea of guilty, he was sentenced to 30 years imprisonment.

The brief back ground facts of the case were that the appellant and the victim boy were residents of Msitu wa Tembo village in Kilimanjaro Region. On 6.7.2006 around 18:00 hours, the complainant allegedly went to the family home of the complainant and asked the latter to accompany him to one Binti Nassoro to collect the heads of cattle, the property of the complainant's father. The latter obliged. On the way to the said Binti Nassoro, the appellant allegedly grabbed the complainant who was then 12 years old, wrestled him down, removed his clothes and stuffed some into the victim's mouth in order to prevent him from raising alarm, coupled with threats to kill him. He had carnal knowledge of him against the order of nature. After he was done, he went away leaving his victim at the spot where he violated him.

After re-composing himself, the complainant returned home and reported the incident to his parents. The latter's father reported the incident at an undisclosed police station. He was given a PF3 and instructed to send the complainant to hospital for medical examination and treatment. The records show that he was sent to KCMC hospital at which he was hospitalized.

Meanwhile, the police traced the appellant and succeeded to arrest him. He was interrogated and allegedly admitted to have committed the offence. Also, he offered a cautioned statement which was admitted in court as exhibit P1. He was subsequently charged with the said offence. As already pointed out, he was sentenced to 30 years imprisonment upon a plea of guilty.

On a second thought, the appellant felt that justice was not done in the case. He appealed to the High Court of Tanzania at Moshi.

On 23.4.2008, the matter was placed before the judge of the High Court at Moshi. On that day, Mr. Majaliwa, learned State Attorney, informed the court that on reading the trial court's proceedings dated 12.7.2006, he realized that the trial court admitted the PF3 (exhibit P1) after the appellant had been convicted. After considering that point, the first appellate court found it as a fact that the PF3 was improperly admitted. It declared the proceedings of 12.7.2006 a nullity.

However, the record shows that later on the first appellate court heard the appeal, dismissed it, and upheld conviction and sentence. In dismissing the appeal, that court found that the appellant's plea of guilty

was unequivocal. Relying on section 360 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002, it found that the appellant had no right of appeal against a conviction on a plea of guilty, save for the legality of the sentence. Once again, the appellant was aggrieved, he appealed to this Court.

In its judgment dated 22.11.2013 in Criminal Appeal No. 354 of 2008, this Court found that the appellant's notice of appeal was fatally defective and struck out the appeal. The appellant started afresh, hence the present appeal.

The appellant, who appeared in person and fended for himself, filed a nine point memorandum of appeal. A close scrutiny shows that those grounds may conveniently be bridged into only two of them; **one** that the plea was equivocal; and **two** that the charge was fatally defective.

At the commencement of hearing, the appellant elected for the Republic to commence, he intimated to say something, if need would arise thereafter.

On taking the stand, Mr. Makule, the learned State Attorney who represented the respondent Republic, hurried to inform the Court that he

was supporting the appeal. Concerning the first ground of appeal on equivocality of the appellant's plea, Mr. Makule submitted that the appellant's reply to the charge that "it is true" was equivocal since it was not clear as to what he was admitting. This is even worse, he went on, when it is considered that the facts which were adduced did not disclose the ingredients of the offence.

On the second ground regarding the competency of the charge, Mr. Makule submitted that it was defective in as much as it revealed that the appellant was charged under section 154 (1) of the Penal Code without more. He contended that the charge ought to have shown the specific provision which established the offence the appellant was faced with under clauses (a) to (c) to section 154 (1) of the Penal Code. For those reasons Mr. Makule urged the Court to allow the appeal.

It is certain that when the charge was read over to the appellant on 10.7.2006 when he appeared before the trial court for the first time, his reply was that "It is true". The trial Court entered as a plea of guilty. That was followed by the narration of facts which were also read to him in line with the demands of the law. Again he was recorded to have told the court

I admit. In the circumstances, the issue is whether or not the appellant's plea was unequivocal.

We wish to begin by re-stating generally that the words **"it is true"**, when used by the accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one. A plea such as this can only be accepted where the court considers that the facts given by the prosecution reasonably amounted to full disclosure of the ingredients or elements of the offence. Where the facts do not disclose the ingredients of the charged offence, the appellate court cannot avoid holding that the plea was equivocal – See **Ngasa Madina v. Republic,** Criminal Appeal No. 151 of 2005, CAT, Mwanza Registry (unreported).

In our instant case, the facts given by the prosecution did not in our view, reasonably amount to a full disclosure of the ingredients or elements of the offence charged because the appellant ought to have been required to admit or deny every constituent of the offence. That was not done. The rationale for that was best expressed in the case of **Republic v. Yonasani Egalu and 3 others** (1942 – 1943) IX – X E.A.C.A. 65 in which the Court said that:-

"(3) That in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent 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."

In the present case, we believe that hadn't this fact escaped the eye of the first appellate judge, we think that her conclusion could not have been the same. Thus, we agree with Mr. Makule that the appellant's plea was equivocal. We hold that this ground has merit.

In practice, in view of our above finding, we would have quashed the judgment of the first appellate court as well as the conviction by the trial court, set aside the sentence, and ordered a retrial. However, for the reasons we are about to assign in respect of the second ground of appeal, we desist from ordering a retrial.

As correctly submitted by Mr. Makule, the charge was grounded on section 154 (1) of the Penal Code without more. However, that section is subdivided into clauses (a), (b) and (c). For the sake of clarity, section 154 (1) (a), (b) and (c) of the Penal Code provide that:-

"S. 154 (1): Any person who–

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years."

As seen above, these clauses provide for different offences. Thus, it was wrong for the charge in the circumstances of this case, to have not indicated under which of the three clauses the appellant's offence fell – See the case of **Musa Mwaikunda v. Republic** [2006] T. L. R. 387.

In **Musa Mwaikunda's case** (supra), the appellant was charged with the offence of attempted rape contrary to section 132 (2) of the Penal Code. He pleaded guilty to the charge and the trial court convicted him

accordingly. After an unsuccessful appeal to the High Court, the appellant lodged a second appeal to the Court. The Court, among other things, sought to satisfy itself on whether the charge disclosed an offence against the appellant given the fact that the charge sheet omitted to mention under which of clauses (a), (b), (c) and (d) under subsection (2) of section 132 thereof his offence fell. The Court stated that:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence. Bearing in mind, the charge in the instant case ought to have disclosed the aspect of threatening which is an essential element under paragraph (a) above. In the absence of disclosure it occurs to us that the nature of the case facing the appellant was not adequately disclosed to him. The charge was, therefore, defective, in our view."*

In our present case, the charge with which the appellant was charged is tainted with the same problem. This being the position, we believe that had the first appellate court took note of this defect, it could not have failed to see that the said charge was fatally defect as we hold it to be. Therefore, this ground too merits, we allow it too.

That said and done, we allow the appeal. We quash the conviction and set aside the sentence. We order the appellant's immediate release from prison unless he is otherwise being continually held for some other lawful cause.

DATED at **ARUSHA** this 26th day of May, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL