IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MJASIRI, J.A. MMILLA, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 24 OF 2016

BARAKA LAZARO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khaday, J.)

Dated the 23rd day of December, 2015

In

Criminal Case No. 172 of 2013

JUDGMENT OF THE COURT

27th February, & 3rd March, 2017

MMILLA, JA.:

On 3.7.2013, Baraka Lazaro was charged before the District Court of Karagwe at Kayanga with rape contrary to sections 130 (1) (e) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition 2002. He pleaded guilty. On conviction, he was sentenced to a term of life imprisonment on account

that the victim was 3 years old. He unsuccessfully appealed to the High Court of Tanzania at Bukoba, hence this second appeal to the Court.

The facts of the case were very brief. The appellant, who is the biological father of the victim child (Margreth d/o Baraka), was alleged to have raped the latter on 11.5.2013 at around 6.45 p.m. at Nyakakika village within Karagwe District in Kagera Region. The facts showed that the appellant sexually assaulted the complainant at the time the victim's mother, one Elizabeth Lazaro, was away to the bush to cut grass. On arrival home, Elizabeth Lazaro noticed that her child was not alright. He examined her and noticed that she had injuries at her private parts. The little girl told her mother that it was her father who inflicted the said injuries in the course of raping her. Her mother reported the incident to the authorities. Consequently, the appellant was arrested and subsequently charged before the District Court of Karagwe at Kayanga as it were.

Before us, the appellant appeared in person and had no legal representation. His memorandum of appeal raised two grounds; **one** that in the absence of the medical examination report, the case against him was not proved beyond reasonable doubt; and **two** that his plea was equivocal.

On the other hand, the respondent Republic enjoyed the services of Mr. Athuman Matuma, learned Senior State Attorney. At the commencement of hearing, the appellant chose for the Republic to begin, he signified to respond later.

In his submission, Mr. Matuma stated at the outset that he was not supporting the conviction. However, he prefaced his submission by two essential observations which were predicated on the propriety of the charge and the plea thereof. He wondered whether it was proper for the charge to have been based on sections 130 (1) (e) and 131 (1) of the Penal Code. He submitted that it was improper, because the charge ought to have been anchored on sections 130 (1), (2) (e) and 131 (1) of the Penal Code. He added that given such a situation, the appellant pleaded to a defective charge.

Mr. Matuma was swift to submit, however, that according to the cases of **Juma Mohamed v. Republic**, Criminal Appeal No. 272 of 2011, CAT and **Charles Makapi v. Republic**, Criminal Appeal No.85 of 2012, CAT (both unreported), the said defect is curable. Yet, if there are cumulative defects in any given case, the defect in the charge should be treated as incurable. In the circumstances of this case, he went on to

submit, there are other defects in the case which, when combined with the one in the charge it becomes incurable, leading to the conclusion that the plea was equivocal.

In that regard, Mr. Matuma pointed out that the facts which were offered by the prosecution after the purported plea of guilty were wanting in that they did not disclose the ingredients of the offence of rape, including the requirement of penetration. He also contended that the facts which were given in court by the prosecution were hearsay.

On another point, Mr. Matuma contended that among the facts given was that the appellant had offered a cautioned statement in which he allegedly admitted the commission of the offence. However, that document was not tendered and admitted in court as evidence.

Apart from that, Mr. Matuma submitted that looking at page 3 of the Court Record, it is evident that after the facts were read over and explained to the appellant, the trial court did not ask the appellant to respond on whether or not they were true and correct as contemplated by the law. He added that instead, immediately after the facts were stated, the trial court purported to record a "Memorandum of Undisputed Facts",

followed by yet another appellant's admission to the offence. Mr. Matuma argued that it was unprocedural in the circumstances of a case in which an accused may be regarded as having pleaded guilty to the charge.

On the basis of those shortcomings, Mr. Matuma asked the Court to find merit on the appellant's complaint that the plea was equivocal and allow the appeal.

After he was probed on whether or not to release the appellant was proper in the circumstances of this case, regard being had to the nature of the offence he was charged with, as well as the period he had been in jail, Mr. Matuma succumbed that given those factors, an order for retrial would be appropriate.

On his part the appellant supported the submission of the learned Senior State Attorney. He however, pressed the Court to order his release from prison.

After carefully considering the submission made by the learned Senior State Attorney, we think, before dealing with the observations pointed out by him, we should restate the law on appeals emanating from a plea of guilty such as the present one.

Generally, the law bars appeals originating from a plea of guilty except as to the extent of legality of the sentence. That is in terms of section 360 (1) of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2002 (the CPA) which provides that:-

> *"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent of legality of the sentence"*

Under certain circumstances however, an appeal may be entertained notwithstanding that an accused person may have been convicted by a trial court of an offence following a plea of guilty if it raises any one of the grounds which were enunciated in the case of **Laurence Mpinga v. Republic** [1983] T.L.R. 166 which, being a decision of the High Court is of a persuasive value. However, upon being convinced that it expounded a sound principle, it was subsequently approved by a number of decisions of this Court, including the cases of **Josephat James v. Republic,** Criminal Appeal No. 316 of 2010, CAT and **Ramadhani Haima v. Republic**, Criminal Appeal No. 213 of 2009, (both unreported). According to these cases, those grounds are as follows:-

1. The plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in treating it as a plea of guilty;
2. An appellant pleaded guilty as a result of a mistake or misapprehension;
3. The charge levied against the appellant disclosed no offence known to law, and
4. Upon the admitted facts, the appellant could not in law have been convicted of the offence charged.

Our present appeal falls under the first requirement/ground.

We are now moving to the observations pointed out by Mr. Matuma. As already pointed out, the appellant in the present appeal was charged with the offence of rape contrary to sections 130 (1) (e) and 130 (1) of the Penal Code. However, a careful reading of section 130 (1) thereof, shows that apart from the fact that there is no clause (e) to sub-section (1), the charge could not be correct without citing subsection (2) of that section under which clause (e) features. It is certain therefore that the charge was not based on the proper provision charging the offence of rape in the circumstances of this case where the victim of that crime was a child then aged 3 years. That being the case, we agree with Mr. Matuma that the

charge was defective. The immediate issue however, is whether such defect is curable.

To begin with, we would like to restate the position that normally a defect in a charge is curable under section 388 of the CPA (See the cases of **Deus Kayola v. Republic**, Criminal Appeal No. 142 of 2012, CAT and Octavian **Moris v. Republic**, Criminal Appeal No. 254 of 2015 CAT (both unreported), unless for some circumstances, such as where there are cumulative defects which may render the charge incurable - See the case of **Charles Makapi** (supra), among others.

In the case of **Charles Makapi**, the appellant was charged under sections 130 and 131 of the Penal Code **instead** of sections 130 (1) (2) (e) and 131 (1) thereof. The Court noted also that the particulars of the offence did not contain a proof of the age of the victim given the fact that the offence was a statutory rape. The Court stated as follows:-

> *"We are increasingly of the view that, the cumulative effect of the defects examined herein above leads us to find that section 388 of the Act cannot apply under the circumstances in this case to cure the defects. We are further of the view that had the two courts*

below considered these defects, they would have arrived at a different conclusion.

Taking into account that each case has to be decided according to its own facts, we are obliged to find that the charge in this case is incurably defective."

See also the case of **Boniface Aiden v. Republic**, Criminal Appeal No. 35 of 2012 CAT (unreported).

In the present case, the charge was not the only defect. We agree with Mr. Matuma that there were other shortcomings. Apart from the fact that the facts did not establish whether or not there was penetration, it is also incontrovertible that the appellant was not afforded an opportunity to respond to the facts produced after he had pleaded guilty to the charge. Similarly, it is plain that the cautioned statement referred in the facts was not tendered and admitted as evidence. So also the PF3 as complained by the appellant.

Since the appellant never responded to the facts as to whether they were true and correct, and because the alleged cautioned statement was

not tendered and admitted as evidence, we are of the firm view that the appellant's plea was unfinished.

We would, at this juncture, restate the essence of articulate facts in instances where a conviction proceeds on a plea of guilty. We have in mind what was stated in the case of **Yonasan Egalu and 3 others v. Rex** (1942-1943) IX-X E.A.C.A. 65. It was held in that case as follows:-

> *" 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".*

When we relate the above with the situation in our present case, we agree with Mr. Matuma that the appellant's complaint that the plea was

equivocal merits and we allow it. Consequently, we quash proceedings, judgments of both lower courts, and the conviction thereof and set aside the sentence passed by the trial court and upheld by the High Court.

However, given the seriousness of the offence the appellant was alleged to have committed, and because he has only stayed in prison for 3 years and seven months, order a retrial before another magistrate. We direct the record to be remitted to the trial court for carrying out the instructions just given.

The appeal succeeds to that extent.

DATED at BUKOBA this 2nd day of March, 2017.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL