**IN THE COURT OF APPEAL OF TANZANIA**
**AT MBEYA**

**(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)**

**CRIMINAL APPEAL NO. 114 OF 2016**

**JELADA CHUMA.....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)**
**(Sambo, J.)**

**dated the 2nd day of December, 2013**
**in**
**DC. Criminal Appeal No. 60 of 2012**

.....

## JUDGMENT OF THE COURT

**28th & 29th August, 2019.**

**SEHEL, J.A.:**

This is a second appeal. It emanates from the Criminal Case No. 107 of 2012 of the District Court of Sumbawanga at Sumbawanga (the trial court) in which the appellant was convicted as charged on his purported plea of guilty to the offence of rape contrary to section 130 (1) (2) (e) and section 131 (1) (3) of the Penal Code, Cap. 16 RE 2002. He was sentenced to life imprisonment. His appeal to the High Court (the first appellate court) against the conviction and sentence was unsuccessful, hence this second appeal.

The brief facts of the case were such that, on 14th day of August, 2012 the appellant was arraigned before the trial court, facing a charge of rape

contrary to section 130 (1) (2) (e) and section 131 (1) (3) of the Penal Code, Cap. 16 RE 2002. It was alleged in the particulars of the offence that on 7th day of August, 2012 at Katazi village within Sumbawanga District in Rukwa Region the appellant had carnal knowledge of one **P.P,** a girl of nine years. When the charge was read over and explained to him, he pleaded as follows "Ni kweli Mkuu" meaning "It is true, Sir". The trial court entered a plea of guilty to the charge. Thereafter, the Public Prosecutor (the Prosecutor) read the facts of the case to the appellant. Subsequent to the reading of the facts, the trial court recorded the following:

> *"**COURT**: All facts have not been disputed.*
>
> *Accused: Sign*
>
> *PP: Sign*
>
> *Sgn: Mwanjokolo, RM*
>
> *14/08/2012."*

A PF3 and cautioned statement of the appellant were also admitted as exhibits P1 and P2 respectively without any objection from the appellant and their contents were not read out to the appellant. Following that procedure, the trial court convicted the appellant on his own plea of guilty and sentenced him to life imprisonment.

The appellant was aggrieved thus he lodged an appeal to the first appellate court. One of his grounds of appeal was that his plea was equivocal. From the outset we wish to point out that the learned State Attorney who appeared to argue the appeal at the first appellate court supported the appeal on the reason that the appellant's plea was not complete thus she prayed for the case to be remitted to the trial court to be heard again.

The first appellate court having heard the submissions on the grounds of appeal, it dismissed the appeal. In dismissing the appeal, it said:

> *"I do not detect any reason why or how the words "Ni kweli Mkuu" can be interpreted to be not complete on themselves! The grounds set out by this court in the case of* ***Laurence Mpinga v Republic*** *(supra) giving room for an accused person who has been convicted by any court of an offence "on his own plea of guilty" to appeal against the conviction, are not traced in the instant matter.* ***The accused plea was perfect and finished.****"* [emphasis added].

Aggrieved with the dismissal of his appeal by the first appellate court, the appellant has come to this Court still arguing that his plea was equivocal and thus prayed for an order of the retrial of his case.

At the hearing, Mr. Njoloyota Mwashubira assisted by Ms. Safi Kashindi Amani, both learned State Attorneys, appeared to represent the respondent

/Republic and the appellant appeared in person, he had no legal representation. On the basis of his grounds of appeal, the appellant prayed that his appeal be allowed.

Ms. Amani submitted on behalf of the respondent. She was brief and straight to the point that the plea of the appellant was equivocal because after he had pleaded guilty to the charge the record shows that he was not asked to respond to each and every fact read over to him by the Prosecutor. Instead the answer was given by the court when it recorded that the appellant admitted all facts. To cement her submission, she referred us to the case of **Eliko Sikujua and Another v. Republic**, Criminal Appeal No. 367 of 2015 (unreported). With this shortfall, she prayed for the case to be remitted back to the District Court for a retrial.

The appellant in his rejoinder concurred with the submission made by the learned State Attorney.

From the facts and submission, the sole issue before the Court for determination is whether the appellant's plea of guilty was unequivocal. Our starting point will be to review the provision of Section 228 of the Criminal Procedure Act, Cap. 20 (the CPA) that guides the procedure of plea taking at the subordinate courts. It provides:

> *"228 (1)* ***The substance of the charge shall be stated to the accused*** *person by the court,* ***and he shall be asked whether he admits or denies the truth of the charge.***
>
> *(2) If the accused person* ***admits the truth of the charge/ his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him,*** *unless there appears to be sufficient cause to the contrary."*

As to what entails the substance of the charge which the accused person should be asked by the trial magistrate has been well articulated in the case of **Andambike Mwankuga v. Republic**, Criminal Appeal No. 144 of 2010 (unreported) where it cited the case of **R v. Yonasani Egalu and Others** (1942) 9 EACA 65 and stated:

> *"In any case in which a conviction is likely to proceed on a plea of guilty, it is more 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."*

The procedure to be adopted by the subordinate courts in taking the plea of the accused person is explained in detail in the case of **Aden v.**

**Republic** [1973] EA 445 cited in **Eliko Sikujua and Another v. Republic** (supra) referred to us by the learned State Attorney that:

> *"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 the language which he can speak and understand. The magistrate should then explain to the accused person all the ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused said, as nearly possible in his own words, and then formally enter a plea of guilty.* ***The magistrate should next ask the prosecution 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 fact.*** *If the accused does not agree with the statement of facts or asserts addition facts which, if true, might raise a question as to his guilt 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 reply must, of course be recorded."* (Emphasis is added).

(See also **Khalid Athuman v. Republic,** Criminal Appeal No. 103 of 2005 and **Waziri Saidi v. Republic,** Criminal Appeal No. 39 of 2012 (both unreported)).

In the present appeal, we have indicated herein that the charge sheet was read out and explained to the appellant who pleaded thereto. Thereafter, the facts were read out by the Prosecutor to the appellant but after reading of the facts, the appellant was not given an opportunity either to dispute or add anything to the facts. He was not asked to state which facts he admits and the ones he disputes and if he had anything to add. Page 4 of the record clearly shows that the trial court recorded "All facts have not been disputed". It is not clear from the record as who had accepted those facts, is it the appellant or Prosecutor or the trial court itself? The record is silent on the appellant's position in regard to the facts read over to him apart from seeing his signature and Prosecutor's signature placed immediately after the trial court's recording. From the record, we are fortified to hold that after the facts constituting the offence of rape were read out to the appellant, the trial magistrate did not give a chance to the appellant to respond to each and every fact. With respect, we think if the first appellate court had looked into this point, it would have found the appellant's plea was equivocal and not

"*perfect and finished*". Since the appellant's plea was equivocal then no conviction and sentence could be made against the appellant.

In the end, we allow the appeal by quashing and setting aside the order of the trial court of 14th August, 2012 of plea of guilty, conviction and sentence of life imprisonment. Equally, we quash and set aside the subsequent proceedings and judgment of the High Court in Criminal Appeal No. 60 of 2012. We direct the case file to be remitted to the District Court of Sumbawanga at Sumbawanga to conduct a proper trial of Criminal Case No. 107 of 2012 after taking a fresh plea of the appellant.

**DATED** at **MBEYA** this 29th day of August, 2019.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

The Judgment delivered this 29th day of August, 2019 in the presence of Mr. Ofmedy Mtenga learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**