IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A., And WAMBALI, J. A.)

CRIMINAL APPEAL NO. 211 OF 2016

LEONARD RAYMOND.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Lukelelwa, J.)

dated the 22nd day of May, 2003
in
Criminal Appeal No. 77 of 2002.

JUDGMENT OF THE COURT

19th & 27th February, 2019

MZIRAY, J. A.:

The appellant, Leonard Raymond was arraigned for unnatural offence in the district court of Masasi at Masasi contrary to section 154(1) (a), (2) (c) of the Penal Code, Cap 16 R.E. 2002. It was alleged that on 2.8.2002 at or around 17.00hrs at Liyola Village within Masasi district, the appellant did have carnal knowledge of one Geofrey Thomas against the order of nature.

When the charge was read over to him, he replied: *"It is true I had committed unnatural offence to Geofrey s/o Thomas",* following which a plea of guilty was accordingly entered. Subsequently, the facts were

read over to him to which he also admitted. On the basis of the plea of guilty, the appellant was duly convicted and sentenced to life imprisonment. On his first appeal, the High Court found no cause to fault the verdict of the trial court. It dismissed the appeal in its entirety.

Still aggrieved, the appellant has come to this Court on a second appeal. He has filed two memoranda which in a nutshell he is complaining that his plea in the district court was equivocal because he did not grasp the nature of the offence on account of the fact that in the charge sheet the age of the victim was not disclosed and also the charge itself was not explained to him. He also complained that the PF3 did not support the plea of guilty as there was no evidence to the effect that the victim was carnally known against the order of nature. In essence the appellant's grievance is that in the circumstances of the case his plea of guilty could not be maintained as it was not unequivocal.

When the appeal came up for hearing, the appellant appeared in person, unrepresented. When invited to argue his appeal, he did not have much to say before us but he merely stated that he would respond after the learned State Attorney had submitted. The respondent Republic was represented by Mr. Kauli George Makasi, learned State Attorney who in actual fact resisted the appeal. He briefly submitted that under

section 360(1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002], (the CPA) no appeal lies where an accused person has been convicted on his own plea of guilty save as regards the legality of sentence meted out to him. He added that, though the charge did not disclose the age of the victim, the appellant knew the nature of the offence, which he did not deny and that the facts and particulars of the case as presented by the prosecution were very clear. The age of the victim and all ingridients constituting the offence were established. The appellant also admitted the same.

As to the complaint of the contents of the PF3, the learned State Attorney submitted that it is not always necessary that the contents of the PF3 must match with the facts that were adduced in court. He said that, the absence of bruises or spermazoa in the victim's anus does not necessary mean that he was not carnally known. The only thing that ought to have been proved is penetration, which in this case was proved and admitted by the appellant, he argued.

This appeal centers on the question whether the appellant's plea in the trial court was unequivocal. If we establish that the plea was unequivocal then that will be the end of the matter as section 360 (1) of

the CPA bars appeals from a conviction based on plea of guilty. The said provision states:

> *"360. (1) 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 or legality of the sentence."*

The above is the general rule. We are however mindful of the fact that under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. See **Laurent Mpinga v. Republic** (1983) TLR 166 and **Ramadhani Haima v. The D.P.P,** Criminal Appeal No. 213 of 2009 (unreported)**.** In **Laurent Mpinga's** case, Samatta, J. (as he then was), stated thus:

> *"An accused person who had been convicted by any court of an offence on his own plea of guilty, may appeal against the conviction to a higher court on the following grounds:-*
>
> 1. *That 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 a mistake or misapprehension;*
3. *That the charge laid at his door disclosed an offence not known to law; and*
4. *That upon the admitted facts, he could not in law have been convicted of the offence charged."*

We think it is now desirable, at this juncture, to reproduce the appellant's plea and what transpired in the trial court. After the charge of unnatural offence was read over and explained to him, he is recorded as having said:

> *"It is true I had committed unnatural offence to Geofrey s/o Thomas".*

The appellant's plea was recorded as one of guilty and the following facts were read over to him:-

> *"The victim is Godfrey s/o Thomas aged 8 years, a resident of Liloya Village Masasi District.*
>
> *The accused is a peasant of CCM Mkuti area – Masasi. On 2.8.2002 at around 17.00 hours the accused went to Liloya Village from Masasi town where he met the victim picking small mangoes in a tree. Accused told the victim to follow him to the bush where he could give him some big*

mangoes. The victim followed the accused to the bush there were [sic] accused forced the victim to have carnal knowledge against the order of nature (through the anus).

After fulfilling his ambition accused left the victim who reported to his parents, who reported to the V.E.O of Liloya. The accused was traced, and arrested by the V.E.O. of Liloya who when asked, admitted to have had carnal knowledge of victim against order of nature and asked for pardon.

The matter was reported to the police who arrested accused and interrogated and admitted to have done the act against the victim.

The victim was taken to the District Hospital Mkomaindo where he was examined, and the PF.3 showed accused did not ejaculate as there were no semen seen around or inside the return. Even accused in his caution [sic] statement admitted to have had carnal knowledge of the victim against the order of nature but said he did not ejaculate.

I pray to tender the cautioned statement of accused and PF.3 as exhibits for the prosecution.

***Accused**: No objection*

***Court**: Admits caution [sic] statement and PF.3 tendered as exhibit P1 and exhibit P2 respectively.*

***Sgd:** M.O. Lilibe*

District Magistrate Incharge

7/8.2002

***Court**: Asks the accused whether the facts are true he states.*

***Accused:** "I admit all the facts of the case as true as adduced in court."*

The appellant after having admitted the facts, the trial court convicted him as charged. He was then invited to give his mitigation and upon doing so, the trial court proceeded to sentence him to serve life imprisonment.

As to the contents of the PF3, we subscribe to the view expressed by the learned State Attorney that the absence of bruises or spermazoa in the victim's anus that for real, does not mean that he was not carnally known. There is no requirement of the law that for unnatural offence to be established some bruises or spermatozoa must be seen in the anus of the victim. The most important element in sexual offences is penetration, which in this case is not disputed. The appellant complained also that

the age of the victim was not established in the charge sheet. This complaint is baseless because it is categorically stated in the facts adduced by the prosecution at page 4 of the record of appeal that at the material time the victim was aged 8 years old.

Section 228 (1) of the CPA provides as follows;

> *"(2) If the accused 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 shall appear to be sufficient cause to the contrary".*

Upon going through the facts produced by the prosecution we are satisfied that the offence specified in the charge had been made out. For a charge of unnatural offence to succeed, the prosecution has to prove that the appellant penetrated his male organ in the anus of the victim and such penetration however slight, is sufficient to constitute the sexual intercourse necessary for the offence. See **Daniel Nguru** & **Others v. Republic**, Criminal Appeal No. 178 of 2004 and **Omari Kijuu v. Republic**, Criminal Appeal No. 39 of 2005 (both unreported).

In view of the above considerations we find that the appellant pleaded guilty to the charge of unnatural offence with full understanding of the charge against him. There are no grounds given to convince us that the appellant did not fully understand the nature of the offence when he pleaded guilty to the charge.

It is for the above stated reasons that we dismiss the appeal in its entirety.

DATED at **MTWARA** this 26th day of February, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL