

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

(CORAM: MUGASHA J.A., MWANGESI J.A. And NDIKA J.A.)

CRIMINAL APPEAL NO. 404 OF 2018

FRANK S/O MLYUKAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Arising from the judgment of the High Court of Tanzania
at Iringa)**

(Banzi, J.)

dated the 14th day of September, 2018

in

HC (DC) Criminal Appeal No. 12 of 2018

.....

JUDGMENT OF THE COURT

17th & 20th August, 2020.

MWANGESI, J.A.:

FRANK S/O MLYUKA the appellant herein, was sentenced to life imprisonment by the District court of Kilolo at Kilolo, after pleading guilty to two counts of rape and unnatural offence allegedly committed against a young girl aged three years, whom for the sake of disguising her identity, we shall henceforth refer to her by the prefix letters of SS.

It was the case for the prosecution in the first count that, the appellant committed the offence of rape contrary to the provisions of sections 130 (1) (2) (e) and 131 (3) of the Penal Code Cap 16 R.E. 2002 (**the Code**). The

particulars of the offence were to the effect that, on the 9th day of February, 2018 at about 15:00 hours at Kihesa Mgagao village within the District of Kilolo in Iringa Region, the appellant did rape SS a daughter aged three years.

For the second count, the appellant stood charged with the offence of unnatural offence contrary to the provisions of section 154 (1) (a) (2) of **the Code**. The particulars of the offence were that; on the same date and time and place as in the first count above, the appellant did sodomize SS.

The factual background of the case went thus: on the 9th day of February, 2018 at about 15:00 hours, SS was playing outside her house while alone. Shortly, the appellant arrived and took her to a nearby house where he unaddressed her under pants and raped her, before sexually abusing her against the order of nature. The ordeal was reported by the victim to her mother, who in turn reported it to the Village Executive Officer (VEO) and later to the Police Station. Following the search which was mounted by the respective authorities, the appellant was arrested and charged with the two counts alluded above.

When the charges were placed at the door of the appellant, he pleaded guilty to both counts, a thing which moved the trial court to invite the prosecution to read out the facts substantiating both counts. The prosecutor read out the facts of the case and tendered exhibits to corroborate the commission of the offences in both counts by the appellant. These were, a PF3 which contained the findings of the Doctor who examined the victim after the incident (exhibit P1); a cautioned statement recorded by a police officer before whom the appellant confessed to have committed the offences (exhibit P2), and an extra-judicial statement recorded by a Justice of the Peace before whom the appellant also confessed to have committed the offences (exhibit P3).

When the appellant was asked by the trial Resident Magistrate, if he was admitting the facts which substantiated the charges read over to him, he willingly and in no uncertain terms stated that, they were correct and true. On the strength of the unequivocal plea of guilty by the appellant on both charges and the facts of the case read over to him, the Magistrate convicted the appellant as charged and sentenced him to the statutory sentences as hinted above.

The appellant unsuccessfully challenged the convictions and sentences meted out to him in the High Court of Tanzania at Iringa. Still undaunted, the appellant has come to the Court in a second and final appeal premising his grievance on four grounds which read: -

- 1. That, the two courts below erred in law in convicting the appellant of the offence of unnatural offence of which he was not cautioned with and the same did not feature in exhibits P1, P2, and P3.*
- 2. That, the two courts below erred in law in convicting the appellant of the offence rape as exhibit P2 was illegally obtained by being recorded out of the prescribed period of four hours, while exhibit P3 does not mention the said victim to have been raped by the appellant.*

Alternatively, to ground number 2 above:

- 3. That, the two courts below erred in law in convicting the appellant of the offence of rape while the charge sheet was incurably defective for the reason that, the particulars of the offence versus the facts of the case and the evidence on record did not tally specifically on the date of the commission of the offence.*

4. That, the two courts below erred in law in convicting the appellant, on the ground that the plea of guilty to both offences was imperfect as the particulars of the offence, the facts of the case and the evidence on record were at variance and unsatisfactory to clearly disclose the ingredients of the offences.

On the date when the appeal was called on for hearing before us, the appellant who was present in Court, was legally represented by Mr. Jally Willy Mongo, learned counsel, whereas the respondent/Republic had the able services of Mr. Abel Mwandalama, learned Senior State Attorney.

Mr. Mongo, in addressing us on the grounds of appeal, argued them conjointly for the reason that they all hinged on the plea of guilty which was entered by the appellant on both counts which he was convicted of. He argued that the pleas were equivocal. Expounding the second count in which the charge against the appellant was that of unnatural offence, he argued that the commission of the offence in the said count is not revealed by the exhibits which were tendered. What is seen in all exhibits, is the commission of the offence of rape. When the learned counsel was asked by the Court if the tendering of the exhibits after the appellant had pleaded guilty to the charged offence, was necessary, he responded it in the affirmative basing

on the holding in **Erneo Kidilo and Another Vs Republic**, Criminal Appeal No. 206 of 2017 (unreported).

With regard to the first count wherein the appellant was charged with the offence of rape, Mr. Mongo's challenge on the plea of guilty purported to have been entered by the appellant, was founded on the fact that there was variance of dates contained in the particulars of the offence in the charge sheet, and the facts which were read out in clarification of the offence. While the particulars of the offence indicated that the offence was committed on the 19th day of February, 2018, the facts of the case read out to the appellant, disclosed that the offence was committed on the 9th day of February, 2018. With the said discrepancies in the charge sheet, he argued, it could not be said that the plea of the appellant was unequivocal. He invited the Court to hold so.

When the learned counsel was probed by the Court if the variance of the dates which he pointed out to the two documents could not have been occasioned by mere slip of the pen, regard being had to the fact that, the date in the particulars of the offence for the second count tallied with that in the charge sheet, he succumbed. Nonetheless, he insisted that his concession to the typographical error notwithstanding, the plea of the

appellant in both counts, was not unequivocal. He thus requested us, to allow the appeal by setting the appellant at liberty, or else, he urged us to give the appropriate directions as we would deem fit for the interest of justice.

Responding to the submission by his learned friend, Mr. Mwandalama expressed his stance from the outset, that he was resisting the appeal. He positively argued that, the plea of guilty by the appellant in both counts was unequivocal. This was so on account that, the appellant willingly and clearly pleaded guilty to both the charges when they were read over to him and the facts which were given in detail by the prosecutor to clarify the commission of the offences. In support of his submission, he referred us to the stipulation under the provisions of section 228 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 (now 2019) (**the CPA**), as well as the holding in **Ramji s/o Mkapa Vs Republic**, Criminal Appeal No. 88 of 2014 (unreported).

On the issue of tendering exhibits after an accused person has pleaded guilty to the charged offence, Mr. Mwandalama, resisted the proposition advanced by his learned friend by submitting that it was not a legal requirement. In so asserting, he placed reliance on the decision in **Matia Barua Vs Republic**, Criminal Appeal No. 105 of 2015 (unreported), where

the Court held that tendering an exhibit be it an object or a document after an accused person has pleaded guilty to the charged offence, is not a legal requirement though it is desirable to do so. To that end, the learned Senior State Attorney, implored us to find no merit in the appeal and urged us to dismiss it in its entirety.

There is only one crucial issue which calls for our determination in the instant appeal, which is whether the pleas which were entered by the appellant to the charges which were read over to him, were unequivocal. To begin with, we reproduce *verbatim*, the provisions of section 228 (1) and (2) of **the CPA** that deals with pleas, which we think, are relevant to the determination of the appeal. They read: -

"(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"

What transpired in the trial court that has culminated to the instant appeal is well indicated on pages 3 through 5 which we reproduce hereunder: -

Court: charge read over and explained to the accused who is asked to plead thereto;

1st count;

Accused's plea in Swahili: Ni kweli nakiri kuwa nilimtomba mtoto huyo SS;

Accused's signature ---

Prosecutor's signature ---

Court: plea of guilty entered.

2nd count

Court: do you admit that you sodomized SS?

Accused's plea in Swahili: Ni kweli nakiri kuwa nililimfira mtoto SS

Accused's signature ---

Prosecutor's signature ---

Court: plea of guilty entered.

After having recorded the pleas of the appellant as indicated above, the trial Resident Magistrate invited the prosecutor to narrate the facts of the case which went as follows: -

Prosecutor: Your honour, the accused is charged with two counts; the first count is charged with the offence of rape contrary to section 130 (1) (2) (e) and section 131 (3) of the Penal Code Cap 16 R.E. 2002, and in the second account is charged with the offence of unnatural offence contrary to section 154 (1) (2) of the Penal Code.

That the victim in the present case is SS a little girl of three years. That on 9/2/2018 at about 3:00 pm evening SS was playing outside her house, she was alone. Shortly the accused came and took the victim to the house which is nearby then removed her pants, he took off his clothes then raped and sodomized her.

That the victim reported her ordeal to her mother who in turn reported to VEO and later the police. The accused was traced and arrested. In his cautioned statement before the police and in his extra-judicial

statement made before the justice of the peace, he confessed to commit the alleged offences.

That on 11/02/2018 the victim was medically examined by doctor Christopher Mbata who in his report stated that the victim had multiple bruises into the labia minora with bleeding, no hymen and he concluded that she was sexually assaulted.

It transpired that the accused was an occasional visitor at the house of the victim therefore she was familiar with the accused.

I pray to tender the PF3, cautioned statement and extra-judicial statement; and if there is objection I pray to read them out.

Accused: *I have no objection.*

Court: *PF3, Cautioned statement and Extra-judicial statement are admitted and marked as exhibits P1, P2 and P3 respectively.*

Prosecutor: *I pray to read the above exhibits.*

Court: *The contents of exhibits P1, P2 and P3 have been read out and explained to the accused and asked:*

Do you admit the facts?

Accused: Yes, the facts are true and correct.

Thereafter, the learned trial Resident Magistrate, proceeded to convict the appellant on his own plea of guilty and sentenced him accordingly.

In view of the facts borne out from the proceedings as shown above, what we had to ask ourselves is whether under the circumstances, it could be said that there was any ambiguity, vagueness or misapprehension in the pleas entered by the appellant to the offences which he stood charged with. Our answer after having closely considered the record, is in the negative. We are positive that the pleas by the appellant were clearly unequivocal and that, no appeal lay to the Court.

The circumstances which can entitle an accused person to challenge a conviction which was based on a plea of guilty, were stated in the decision of the High Court (Samatta, J.) in **Laurence Mpinga Vs Republic** [1983] TLR 166, and confirmed and adopted by the Court in **Josephat James Vs Republic**, Criminal Appeal No. 316 of 2010 (unreported) 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:

1. 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;

2. that he pleaded guilty as a result of mistake or misapprehension;

3. that the charge laid at his door disclosed no offence known to law; and

4. that upon the admitted facts he could not in law have been convicted of the offence charged."

The Court was confronted with a similar situation to the one under scrutiny in **John Samwel @ Kabaka and Another Vs Republic**, Criminal appeal No. 58 of 2005 (unreported), where the pleas of the accused persons to the charge which was read over to them was, "it is true". And when they were required to respond to the facts of the case which were narrated to them, they stated that, "it is true." Whereupon, the trial magistrate convicted

them as charged on a plea of guilty. They unsuccessfully challenged their convictions to the High Court. In rejecting their second appeal to the Court, the Court stated that: -

"On the basis of the record, we entertain no doubt in our minds that the learned Judge of the first appellate Court correctly dismissed the appeal. The appellants' plea being unequivocal, they were correctly convicted on their own plea of guilty."

See also: **Said Msiwaje @ Mwanalushu Vs Republic**, Criminal Appeal No. 464 of 2007 (unreported) and **Ramji s/o Mkapa Vs Republic** (*supra*).

Our examination of the pleas which were entered by the appellant to the charges which were read over to him as well as his response to the facts of the case when they were narrated to him, assures us that he clearly understood the nature of the charge against him and that is why, his response was even more detailed than what was contained in the charge sheet. In line with what we stated in **John Samwel @ Kabaka** (*supra*), there was no way in which there could be raised a question of imperfectness, ambiguity or misapprehension.

With regard to the complaint by the learned counsel for the appellant that the exhibits tendered in evidence were not read out to the appellant, we find the same to be unfounded because the record tells it all that, they were clearly read out as reflected on page 5 of the record of appeal. And even if they could not, still it was not fatal as it was held in **Matia Barua's** case that, tendering of exhibits where conviction is based on a plea of guilty, is not a legal requirement.

In that regard, we are constrained to go along with the learned Senior State Attorney, that the learned Judge of the first appellate Court, was justified in dismissing the appeal which was preferred by the appellant, because no appeal lay to that court in terms of the provisions of section 360 (1) of **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 or legality of the sentence.

[Emphasis supplied]

That said, we find the appeal by the appellant devoid of merit and dismiss it in entirety.

Order accordingly.

DATED at **IRINGA** this 19th day of August, 2020.


S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL



G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of August, 2020 in the presence of the Appellant in person and represented by Mr. Jally Willy Mongo, learned counsel and Ms. Jackline Nungu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.


H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL