IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 11 OF 2019

MTUMWA SILIMA @ BONGE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated the 22nd day of November, 2018
in
HC. Criminal Appeal No. 183 of 2018

JUDGMENT OF THE COURT

24th March & 22nd April, 2021

MKUYE, J.A.:

The appellant, Mtumwa Silima @ Bonge, was charged before the Resident Magistrate's Court for Coast Region with two counts, to wit, unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap 16, R.E. 2002 (the Penal Code) and rape contrary to section 130 (2) (e) and 131 (1) of the same Penal Code. It was alleged in the first count that on 28th March, 2018 at Kwa Mathias – Mgongelwa area within Kibaha District in Coast Region the appellant did have carnal knowledge of

S. A. A. (name withheld to hide her identity), a girl aged 9 years against the order of nature.

In the 2nd count, it was alleged that the appellant on 28th March, 2018 at Kwa Mathias-Mgongelwa area within Kibaha District in Coast Region did have unlawful carnal knowledge of one S. A. A., a girl aged 9 years. When the charge was read over and explained to him, he pleaded guilty to the 2nd count. Then, he was convicted on his own plea of guilty and was sentenced to thirty years imprisonment. Aggrieved, he appealed to the High Court but his appeal was dismissed for lack of merit and the sentence was enhanced to life imprisonment as the offence of rape was committed to a child below the age of 18 years.

Still undaunted, he has brought this second appeal to this Court.

Before embarking on the merit of the appeal, we feel appropriate to narrate albeit briefly, the background of the matter. It goes thus:

The appellant and the family of S. A. A. (the victim) were known to each other. On the material day (28th March, 2018), the appellant was at the victim's home. While he was there, the victims' father escorted his visitor. When he came back, he found the appellant still there. He asked

him to leave but he did not get out as he remained at the house corridor. It was the prosecution case that as the victim went to fetch some drinking water, the appellant called her and he immediately put his right hand on her mouth, opened his trousers' zip, undressed her and inserted his male organ in her vagina. Meanwhile, the victim's father came out and upon arriving at the kitchen corridor, he found the appellant raping the victim. Later, the victim was taken to the hospital for medical examination where upon it was revealed that she was raped.

It is upon this set of facts that the appellant was arraigned before the trial court where he pleaded guilty to the offence of rape, convicted on his own plea of guilty and sentenced accordingly.

As alluded to earlier on, his appeal to the High Court was not successful. Hence, he has appealed to this Court faulting the High Court's decision on fifteen grounds of appeal as follows:

1) *The appellant was convicted on a defective charge sheet which did not disclose the time when the offence was committed and failed to mention an essential subsection of the Penal Code which defines the offence of rape.*

2) *The appellant was illegally apprehended and detained under police custody beyond the period prescribed in law without explanation for the delay.*

3) *The appellant's conviction was based on an equivocal plea of guilty which denied him his right to a fair trial as enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 and the principles of natural justice.*

4) *The appellant's conviction was based on an equivocal plea having regard that he denied the 1st count allegedly committed in the same transaction.*

5) *The appellant was not furnished with the complainant's statement contrary to section 9 (3) of the Criminal Procedure Act, Cap 20, R E 2002.*

6) *The appellant's conviction based on Exh P1 (the PF3), Exh P2 (confession statement) and Exh P3 (Extra Judicial Statement) which were unprocedurally tendered for being not read out in court.*

7) *The appellant's conviction based on PW1's (medical doctor) evidence who failed to mention the name of the victim and her age.*

8) *The appellant's conviction based on unreliable recognition visual identification evidence of PW1 and PW2 against the appellant.*

9) *The appellant's conviction was based on PW1's evidence, a medical doctor from Tumbi while PW3 said PW2 was examined at Muhimbili Hospital.*

10) *The appellant was convicted on statutory rape relying on the birth certificate (Exh P4) tendered by PW3 without having been read out in court after its admission.*

11) *The appellant was not brought to court within fifteen days after his arrest contrary to section 225 (2) of the Criminal Procedure Act, Cap 20 R E 2002.*

12) *The trial court did not give weight to the facts of the case when preliminary hearing was conducted.*

13) *The first appellate court misquoted the provisions of section 234 (1) and nonexistent provision of section 388(1) of the Criminal Procedure Act, Cap R E 2002.*

14) *The 1st appellate court rectified the appellant's sentence to life imprisonment without amending the charge sheet.*

15) *The appellant's conviction and sentence were sustained as a result of misdirection, non-direction and misapprehension of the nature, substance and quality of evidence on record.*

When the appeal was called on for hearing, the appellant appeared in person while linked through a video conference facility from Ukonga

Central Prison. The respondent Republic was represented by Mr. Emmanuel Maleko, learned Senior State Attorney assisted by Ms. Gladness R. Mchami, learned State Attorney.

At the outset, the appellant sought to adopt the memorandum of appeal together with his written submission and opted for the learned State Attorneys to respond first, while reserving his right to rejoin later, if need would arise. On her part, Ms. Mchami who first took the floor opposed the appeal and supported both the conviction and sentence.

Having examined the grounds of appeal and the submissions from both sides, we think, this appeal may be disposed of on the issue raised by the appellant on grounds nos. 3 and 4 in which basically the appellant is complaining that the 1st appellate court sustained the conviction based on an equivocal plea and thus denying him his right to be heard as enshrined in Article 13 (6) (a) of the Constitution; and that his conviction was sustained on the basis of an equivocal plea without taking into account that he had denied committing the offence in the first count which is alleged to have arose in the same transaction. We will begin with ground no. 4 as we think, ground no.3 cannot be answered unless we first dispose it.

In the 4th ground of appeal the appellant's complaint is that the 1st appellate court sustained his conviction on the basis of an equivocal plea without taking into account that he had denied committing the offence in the first count which is alleged to have arose in the same transaction.

In response to the 4th ground of appeal, Mr. Maleko argued that the plea of guilty was unequivocal in terms of section 228 (1) of the CPA. He pointed out that the charge was read over to him as shown at page 5 of the record of appeal and his reply to the second count on the offence of rape was "Ni kweli" literally translated "It is true". On top of that, the facts constituting the offence of rape were read over to him and he admitted that "Yote ni kweli" literally translated "all is true". The learned Senior State Attorney added that the particulars of the offence complied with section 132 of the CPA as they explained the nature of the offence including the age of the victim that she was nine (9) years old. He went on to submit that the 1st appellate court dealt with such issue and found that the plea was unequivocal. Though the 1st appellate court did not agree with the age of the victim, the appellant himself said the victim was a "mtoto mdogo" meaning a "little child". In this regard, he stressed that the appellant's

plea was unequivocal and urged us to find that the ground of appeal is baseless and dismiss it.

Section 228 of the CPA provides:

> "(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."* [Emphasis added]

In this case, when the 2nd count on the offence of rape was read over to the accused, he was recorded to have readily pleaded guilty and stated *"Ni kweli mhe, niliingiza mboo ikaingia kwenye uke wa S.A.A ni binti mdogo"* which literally translated "it is true your Honour. I inserted my penis into the vagina of S.A.A who is a little girl". Thereafter, the record of appeal shows at page 6 that the facts constituting the offence were read out to the appellant. Essentially, the

said facts gave a narration on the circumstances under which the offence was committed. They explained the date when, and the place where the offence was committed. They showed that on the material date the appellant was at the victim's home when the victims' father escorted his visitor. When he came back, he found the appellant there and even when he asked him to leave, he did not heed to that as he remained at the corridor while the victim went to fetch some drinking water. The facts further explained on how he called her, put his right hand on her mouth, opened his trousers' zip, undressed her and inserted his male organ in her vagina. Meanwhile, the victim's father came and found them in *flagrante delicto*. Later, the victim was taken to the hospital for medical examination where it was revealed that she was raped. After the facts were read over, the appellant responded that *"Ni kweli yote."* Literally translated, "All is true". Then followed the trial court's remark as follows:

> *"Court: The accused agreed with all facts as they were read over and explained to him."*

Then the record of appeal shows, after admitting the PF3 of the victim, the confession statement and the extra judicial statement as

Exhibits P1, P2 and P3 respectively, the trial court convicted the accused person on the 2nd count on his own plea of guilty. Incidentally, this issue was also raised in the 1st appellate court and it was found that the appellant's plea was unequivocal in respect of the 2nd count.

We have tried to explain at our best what transpired in the trial court in order to determine whether the plea was equivocal as complained by the appellant. The case of **Laurent Mpinga v. Republic**, [1983] TLR 166 cited with approval by this Court in the case of **Josephat James v. Republic,** Criminal Appeal No. 316 of 2010 (unreported) gives guidance on the circumstances under which the appellant can challenge the conviction on the plea of guilty. They include:

(a) That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished;
(b) That the appellant pleaded guilty as a result of mistake or misapprehension;
(c) That the charge laid at the appellant's door discloses no offence known to law;
(d) That upon the admitted facts the appellant could not in law have been convicted of the offence charged.

Having examined the charge and the facts read over to the appellant and his reply, we are certain that the appellant understood the nature of the offence and the words used by the appellant in response are very clear and unambiguous. There was no vagueness or misapprehension in the plea he entered before the trial court. To that end, we entertain no doubt in our mind that the appellant's plea of guilty was unequivocal and as such, we do not see any reason to fault the 1st appellate court's finding.

At this juncture, having deliberated on the 4th ground of appeal, we think, we are now in a position to respond to the 3rd ground of complaint. In the said ground of appeal, the appellant complains that the mode under which this matter was conducted, in that the appellant entered a plea of guilty under section 228 of CPA, did not allow the calling of the witnesses to prove the case. However, in our view, the appellant cannot be heard to claim that he was denied the right to be heard under Article 13(6) (a) of the Constitution in a situation where he was convicted on his own plea of guilty. That provision could have come into play if a full trial was conducted as is the case with the 1st count where he had pleaded not guilty, which was not the case in relation to the 2nd count of the charge.

At any rate, we are alive that a person convicted on his unequivocal plea of on guilty is, under section 360 (1) of the CPA, prohibited from appealing unless it is against the extent and legality of sentence. The said section provides:

> *"No appeal should 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"*

Looking at the circumstances of this matter in which the appellant's plea was unequivocal, we agree with the learned Senior State Attorney that no appeal was allowed. In this regard, we find grounds 3 and 4 devoid of merit. We dismiss them.

As we had intimated earlier on, for purposes of determining the merit of this appeal, we would have ended here. However, for completeness we feel obliged to deal with other grounds of appeal as well beginning with ground no. 1 which will be followed by grounds nos. 1, 2, 5, 7, 8, 9, 10, 11, 12, 13 and 15 together, then ground no. 6 and lastly ground no. 14

In the 1st ground of appeal which has two limbs, the appellant's complaint in the first limb is that the charge does not show the time when

the offence was committed; and in the second limb he complains that section 130 (1) of the Penal Code was not cited in the charge sheet.

In relation to the first limb of complaint, Ms. Mchami submitted that it is baseless because it is not a requirement of law for the time when the offence was committed to be shown in the charge sheet. According to her, section 135 (3) and item 4 of the 2nd Schedule to the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) do not require the time of the commission of the offence to be indicated.

As regards the second limb of complaint on non-citation of section 130 (1) of the Penal Code in the charge sheet, she readily conceded that it was not cited. However, she was quick to point out that despite the failure to cite it, section 130 (2) (e) and 131 (1) sufficiently explained the offence. At any rate, while relying on the case of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported), she argued that such anomaly was curable under section 388 (1) of the CPA.

In dealing with this ground of appeal, we propose to begin with the 2nd limb then the 1st limb will follow.

The manner in which the offences are to be charged is governed by section 135 of the CPA. In particular, paragraph (a)(i) (ii) and (iii) of the said section provides as follows:-

> *(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*
>
> *(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment,* ***shall contain a reference to the section of the enactment creating the offence;***
>
> *(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save*

that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required; (Emphasis added.)

The above cited provision of the law requires among others, a statement of offence to describe the offence and to contain a reference to the section of the enactment creating the offence (See also **Robert Madololyo and Another v. Republic,** Criminal Appeal No 46 and 428 of 2019 (unreported). It also requires the particulars of the offence to be set out, in ordinary language, as may be necessary for providing a reasonable information as to the nature of the of the offence charged - See **Mussa Mwaikunda v. Republic** [2006] TLR 387; **Isidori Patrice v, Republic,** Criminal Appeal No.224 of 2007 and **Juma Mohamed v. Republic,** Criminal Appeal No.272 of 2011 (both unreported). For instance, in the latter case of **Juma Mohamed** (supra) the Court stated that:

"It is clear from the above provisions that a statement of offence should describe the offence and ***should contain a reference to the section***

of an enactment creating the offence. *After the statement of the offence then the particulars of the offence should be set out."* (Emphasis added.)

In this case, the appellant was charged with the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code. It is evident from the record of appeal that section 130 (1) which creates the offence of rape was not cited. Thus, applying the above authorities it is certain that failure to cite the provision which creates the offence of rape was not proper.

As to the complaint that the time when the offence was committed was not indicated, we agree with Ms. Mchami that the provisions of section 135 do not provide for the time to be stated in the particulars of the offence. Also, item 4 of the Second Schedule to the CPA which sets out the Form on how in the offence of rape is to be framed does not also include a space where the time of commission of the offence has to be stated. It simply requires the name of the accused, the date of the offence, the place where the offence was committed and the name of the victim and lack of consent.

In this regard, since it is not a requirement for the time within which the offence is committed to be indicated in the charge sheet under provisions of section 135 and the Form set out in item 4 of the Second Schedule to the CPA, failure to do so did not render the charge defective. Consequently, we find this complaint baseless and we dismiss it.

Having found that the omission to include the provision which creates the offence of rape was wrong, we ask ourselves whether such omission prejudiced the appellant having in mind that the appellant was convicted on his own plea of guilty. In tackling this issue, we find it apt to reproduce the charge sheet as hereunder: -

> *"STATEMENT OF OFFENCE*
> *RAPE: contrary to section 130 (2) (e) and 131 (1) of the Penal Code 1 Cap 16, R.E. 2002.*
> *PARTICULARS OF THE OFFENCE*
> *MTUMWA SILIMA @ BONGE on 26th day of March, 2018 at Kwa Mathias – Mgongelwa area within Kibaha District in Coast Region did unlawfully have carnal knowledge to (sic) one S. A. A. a girl of 9 years".*

In the facts constituting the offence it was explained among other facts that:

"... the accused called her (touched) and immediately he put his right hand on her mount. From there he opened his trouser zip and he also removed the victim's clothes and he inserted his penis in the victim's vagina. He went on having sex with the victim in the kitchen corridor whereas the victim's father found them ready handed (sic) having sexual intercourse in the kitchen..."

Looking at both the particulars of offence and the facts of the case, it is vivid that they were clear that the appellant had unlawful carnal knowledge of a girl aged nine years. When the said particulars of the offence were read over to the appellant he pleaded guilty. Besides that, the facts which constituted the offence were in clear terms emphasizing how he raped a girl aged nine years. In fact, the facts read out to him were very clear to enable him to appreciate the seriousness of the offence he was facing. Thereafter, he admitted them to be true. To use his own words, he said *"Ni kweli yote"* literally translated *"All is true."* In such a situation we have no hesitation in answering the question we asked in the negative. We are of a firm view that, given that the appellant was appraised with all the particulars of the offence he was charged with, it cannot be said that the omission prejudiced him to the extent of acassioning miscarriage of justice. On this stance, we are guided by our

earlier decision of **Jamali Ally @ Salum** (supra) where faced with an akin situation the Court found that such an omission did not prejudice the appellant. The Court stated as follows:

> *"...the particulars of offence of rape facing the appellant, together with the evidence of victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citation and citation of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA.* "

It is plain in this case that the particulars of the offence and the facts constituting the offence which were read over to the appellant provided a clear explanation of the offence he was facing. Thus, he was not prejudiced. As such, even if section 130 (1) of the Penal Code was not cited, such anomaly is curable under section 388 (1) of the CPA.

We now wish to deal with grounds nos. 2, 5, 7, 8, 9, 10, 11, 12, 13, and 15 which the learned State Attorney argued are new as they were neither raised nor dealt with by the 1st appellate court. She pointed out that some of the grounds relate to the charge of unnatural offence which is different from the offence of rape to which the appellant pleaded guilty.

While relying on the case of **Athuman Rashid v. Republic,** Criminal Appeal No. 264 of 2016 (unreported), she urged us to refrain from entertaining them.

In terms of section 4 (1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA), this Court has jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. This implies that the Court has no jurisdiction to determine new matters which were not first heard and decided by the first appellate court. There is a plethora of authorities in which this Court has declined to deal with such grounds of appeal unless they are on matters of law. Among others is the case of **Ally Hussein v. Republic,** Criminal Appeal No 293 of 2018 (unreported) where we underscored as hereunder:

> *"... grounds no... in the memorandum of appeal relate to factual matters which were not deliberated and determined by the first appellate court. The law is settled that as a matter of general principle, unless there are points of law; this Court will only look into matters which came up in the lower court and were decided; and not on matters which*

were not raised or decided by neither the trial court nor the High Court on the first appeal.".

[See also **Julius Josephat v. Republic,** Criminal No. 6 of 2017 (unreported).

On our part, having gone through the said grounds of appeal we agree with the learned State Attorney that the grounds 2, 5, 7, 9, 10, 11, 12, 13, and 15 are new as they were not raised and determined by the High Court. In fact, they are not only based on factual matters but also some of them are inconsistent with the matter at hand as they are challenging on the matter which is still under trial. In this regard, those grounds being new, as they were not deliberated and determined by the first appellate court and are not points of law, they cannot be entertained by this Court because this Court lacks jurisdiction under section 6 (7) (a) of the AJA. As such, we cannot, but disregard them.

In the 6th ground of appeal, the appellant is complaining that the 1st appellate court sustained the appellant's conviction based on exhibits P1, P2 and P3 (the PF3, confessional statement and extrajudicial statement) which were not read over after being admitted in court. Ms. Mchami readily conceded that it is true that they were not read over after their admission.

However, she was quick to state that failure to read them in court did not vitiate the proceedings since it is not a requirement of law for the exhibits to be read over where the accused pleads guilty to the offence. She referred us to the case of **Frank Mlyuka v. Republic,** Criminal Appeal No. 404 of 2018 (unreported) where the Court relied on its earlier decision in the case of **Matia Barua v. Republic,** Criminal Appeal No. 105 of 2015 (unreported) in which it was stated that the tendering of exhibits after the accused person has pleaded guilty to the offence or where conviction is based on a plea of guilty, is not a legal requirement.

On our part, we agree with Ms. Mchami that, indeed, the PF3 (Exh. P1), the confession statement (Exh. P2) and the extra judicial statement (Exh. P3) were not read over in court after being admitted in evidence. However, given that the exhibits were tendered after the appellant had pleaded guilty to the offence, we are settled in our mind that failure to read them was not fatal because tendering of such exhibits in the case where the appellant pleaded guilty is not a requirement of law [See **Matia Barua's case** (supra)]. Even if they were not read over, they did not vitiate the proceedings. As such, we find this ground devoid of merit. We dismiss it.

As for the complaint in the 14th ground of appeal that the sentence was enhanced without first amending the charge, we are of a settled mind that the 1st appellate court properly enhanced it under the law. On this we are guided by our decision in **Johnson Charles v. Republic**, Criminal Appeal No. 53 of 2018 (unreported) in which the Court faced an akin situation. In dealing with the situation, it relied on the case of **Marwa Mahende v. Republic** [1998] TLR 249 in which the Court took the position that the superior courts have additional duty of ensuring that the laws are properly applied by the courts below including substituting improper sentences with the correct ones. It was also emphasized that such duty has to be performed subject to ensuring that the party to be effected by enhancement of sentence is heard. (See also **Joshua Mgaya v. Republic**, Criminal Appeal No. 205 of 2018 (unreported).

In this case the record of appeal bears out that both parties were heard before the 1st appellate court enhanced the sentence. Eventually, we find this ground not merited and we hereby dismiss it.

From the afore going, we are satisfied that the 1st appellate court properly upheld the appellant's conviction and properly enhanced the

sentence against the appellant. We, thus, find the appeal devoid of merit and dismiss it in its entirety.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgement delivered this 22nd day of April, 2021 in the presence of the appellant in person and Ms. Neema Moshi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL