IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 351 OF 2020

ALLY SHABANI @ SWALEHE.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dodoma

(Siyani, J.)

dated the 21st day of April, 2020
in
Criminal Appeal No. 155 of 2019

.....

JUDGMENT OF THE COURT

17th & 24th August, 2021

MWANDAMBO, J.A.:

Ally Shabani @ Swalehe, the appellant, was convicted by the District Court of Kondoa on his plea of guilty of the charge of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code, [Cap. 16 R. E. 2002]. The particulars of the offence alleged that on the material date at a village called Kelema Kuu, in Chemba District, Dodoma Region, the appellant had canal knowledge of a 9 years girl whose name shall be

concealed to hide her identity. Upon such conviction, the trial court passed on the appellant the mandatory life sentence.

In terms of section 360 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002 – now R.E. 2019] henceforth the CPA, no appeal lies against conviction on the accused's own plea of guilty except where it is against the legality of sentence. All the same, the appellant preferred his appeal to the High Court sitting at Dodoma against both conviction and sentence predicated on four grounds largely faulting the trial court for convicting him on an equivocal plea of guilty. The first appellate Court was satisfied that the appellant's plea was undeniably unequivocal and dismissed his appeal. Not amused, the appellant has preferred the instant appeal.

Even though the memorandum of appeal contains six grounds of appeal, the appeal turns on ground one which faults the first appellate court for sustaining appellant's conviction and sentence based on an equivocal and ambiguous plea of guilty. In our view, the appellant's complaint on want of proof of the charge beyond reasonable doubt, reliance on irregularly admitted cautioned statement and extra judicial statements do not arise in an appeal such as this one. This is so because the trial court did not try the appellant following his plea of guilty. On the

other hand, the admission of the cautioned and extra judicial statements was not an issue before the trial court which admitted the said statements upon the appellant indicating that he had no objection against their admission.

During the hearing of the appeal, the appellant appeared in person, unrepresented. He had nothing in addition to his grounds of appeal which he invited us to find sufficient to overturn the conviction and allow the appeal. The respondent Republic was represented by Ms. Neema Taji, learned State Attorney, resisting the appeal. The learned State Attorney was emphatic in her submission contending that the first appellate court rightly dismissed the appellant's appeal because the trial court properly convicted him on his own unequivocal plea of guilty. In amplification, the learned State Attorney argued that not only did the appellant enter his plea of guilty but also, he admitted to the facts read afterwards which established the ingredients of the offence he stood charged with. In addition, Ms. Taji argued that the facts read over to the appellant to which he admitted were supported by the confessional statement (exhibit PE1), extra judicial statement (exhibit PE2) and a PF3 (exhibit PE3) whose contents were read over and admitted without any objection from the

appellant all establishing the commission of the charged offence.It was argued thus that since the appellant was convicted on his plea of guilty, he had no right to appeal except to the extent it related to legality of the sentence as dictated by section 360(1) of the CPA. To reinforce her submission, the learned State Attorney cited to us our previous decision in **Frank Mlyuka v. R**, Criminal Appeal No. 404 of 2018 (unreported).

At the Court's prompting, Ms. Taji contended that notwithstanding the appellant's claim in mitigation that he committed the offence under the influence of the devil and drunkenness, such statement did not amount to withdrawing his plea after conviction. With the foregoing, she invited us to dismiss the appeal for being baseless.

In his rejoinder, the appellant claimed that he was forced to plead guilty to the charge but did not raise that claim before the first appellate court by reason of ignorance. He urged the Court to allow his appeal.

Like any other appeal involving appellant's conviction on own plea of guilty, the issue the appellate court is always confronted with is whether the accused's plea was unequivocal and unambiguous to have attracted conviction and if so, did the appellant have a right of appeal against conviction? This is so because there is no right of appeal against conviction

and this is what section 360 (1) of the CPA is all about. The only exception is where the appeal is against legality of sentence. This was not the case before the first appellate court neither is there any complaint against legality of the sentence before the Court.

The first appellate court addressed itself on the issue and upon examination of the accused's plea to the charge followed by admission of the facts in support thereof, it came to a firm conclusion that the appellant's plea was unequivocal having passed the test of such a plea underscored in various decided cases, in particular, **Laurent Mpinga v. R.** [1983] T.L.R. 166. The record shows clearly that the appellant's response after the charge was read over to him stated that "it is true I did rape XY, child of nine years old". The learned first appellate Judge was satisfied too that the trial court followed the procedure applicable in cases where an accused pleads guilty to the charge laid down in **Rex v. Yonasani Egalu and Others** (1942) EACA 65 cited with approval by the Court in **John Faya v. R**, Criminal Appeal No. 198 of 2007 (unreported). That procedure requires the trial court to explain to the accused every constituent of the charge on which he admits and that he fully understands them before entering a plea of guilty.

Furthermore, the learned first appellate Judge was satisfied that the appellant unequivocally admitted the facts read by the prosecution establishing the ingredients of the charged offence. As seen above, the two courts below were satisfied that the facts narrated by the prosecution established the ingredients of the offence triable by that court. The facts were supported by the appellant's confessional statement as well as the extra judicial statement aimed at proving sexual intercourse. Similarly, the victim's medical examination findings posted in the PF3 (exhibit PE 3) appeared to have revealed the existence of bruises and blood stains on her vaginal part suggesting that there was penetration into her vagina thereby completing the offence of rape committed against a female child. Ultimately, the High Court concluded that the conviction on the appellant's plea of guilty was proper as well as the sentence and dismissed the appeal. With respect, we have no hesitation agreeing with the learned first appellate judge in taking the view he took. Guided by the relevant law and principles applicable in cases involving conviction on the appellant's plea of guilty, the learned Judge was right in taking the view that the appellant's plea was unequivocal and unambiguous having passed the relevant test. To that extent we have no hesitation in agreeing with Ms. Taji that the

appellant had no right of appeal against conviction entered on his own plea of guilty the more so because he had no complaint against the legality of the sentence.

The above notwithstanding, we think that was not necessarily the end of the matter. There is one aspect which appears to have escaped the attention of both courts below with regard to the effect of the appellant's statement in mitigation. It is trite law that a plea of guilty is revocable any time before passing a sentence. See for instance: **Kamundi v. R.** [1973] E.A 540. There is no hard and fast rule on how that can be done but we think an accused can do that expressly or indirectly in mitigation. Once that is done, the trial court is bound to cancel the conviction and enter a plea of not guilty and proceed with the trial of the case in the usual way. A few examples from case law will serve to illustrate the point in cases where an accused person's mitigation suggests that the plea, he made was equivocal. In **The Director of Public Prosecutions v. Salum Madito**, Criminal Appeal No. 108 of 2019 (unreported), the trial court convicted the respondent on his own plea of guilty on two counts involving entering a game reserve and grazing cattle therein without permit. In his mitigation, he prayed for a lenient sentence claiming that he lost on his way which

resulted into his entry into the game reserve. He successfully challenged his conviction and sentence before the High Court which quashed the sentence and set aside the sentence. On a further appeal, at the instance of the **Director of Public Prosecutions (the DPP**), the Court dealt with the issue whether the respondent's plea was unequivocal considering the statement he made in mitigation. The Court took the view that the statement advanced in mitigation had the effect of raising a defence which could not have been ignored by the trial court. Such a statement, the Court stated, amounted to recantation of the plea of guilty.

When pressed for comment on the appellant's statement in mitigation, the learned State Attorney argued that such a statement did not change his plea. To the contrary, Ms. Taji argued that the appellant reiterated his plea of guilty attributing his wrongful acts to the devil and drunkenness. According to her, neither did the alleged devil nor the imbibing indulging of the drink constitute the appellant's defence to the charged offence warranting change of his plea. We have no doubt we understood her correctly suggesting that the appellant's claim on influence of the devil and drunkenness was just an afterthought in line with what the Court stated in **Kalos Punda v. R**, Criminal Appeal No. 153 of 2005

(unreported). That case involved attempted rape on which the appellant was convicted on his own plea of guilty like in the instant appeal. In mitigation, he claimed to have been driven by a devil. The Court found itself unprepared to buy the appellant's statement which it branded as an afterthought and it rejected it. We shall address ourselves in this appeal whether the appellant's statements in mitigation raised any semblance of defence known in the eyes of the law capable of changing his plea of guilty.

Admittedly, the issue did not feature before the first appellate court neither was it raised expressly by the appellant understandably so because he is a lay person with no legal representation. Be that as it may, mindful of our decision in the **DPP v. Salum Madito** (supra), we cannot gloss over it. We are bound to deal with it because we think had it been addressed by the first appellate court, the outcome of the appeal before it would, perhaps not been the same. Indeed, our decision just referred to aside, we drew inspiration from at least two decisions of the High Court addressing similar aspect.

In **Philemon s/o Byabachwezi v. R.** (1972) H.C.D. n 49, the appellant had been convicted and sentenced on his own plea of guilty on

the offence against Fauna Conservation Ordinance. In the second count he was charged with hunting and killing a Warthog without licence. In his mitigation, he said that he only killed the animal because it was damaging his crops. El Kindy, J took the view that what the appellant stated in mitigation suggested that he was raising a mistake of fact as a defence which the trial court should have regarded as withdrawing his plea of guilty.

Similarly, in **Rajabu Ramadhani v. R.** [1980] TLR 50, the appellant had similarly been convicted by the trial court on his plea of guilty on the offence of cattle theft. It was common ground that the appellant had been apprehended skinning the slaughtered cow. He stated in mitigation that he was invited by some people who told him to be the owners of the cow. Guided by the decision of the Court of Appeal for East Africa in **Kamundi v. R** (supra) Chipeta, J stated:

> *"It is certainly true that the facts as narrated by the public prosecutor and admitted by the appellant without qualification did, prima facie, and all things being equal constitute the offence charged and justified entering a conviction against the appellant at the stage. But what the appellant said in mitigation clearly changed the*

situation. His statement in mitigation was a clear indication that he had not committed the offence but merely and innocently lent assistance to the real culprits who had claimed the cow to be their property.

In those circumstances, what should the learned trial district magistrate have done? In my view, the open course for the learned magistrate to have taken at that stage would have been to take the statement of the appellant in mitigation as a recantation of his earlier admission, and then record a plea of "not guilty" to the charge. Thereafter the case would have proceeded to a full trial in the usual way."

We respectfully subscribe to the two decisions. It is beyond peradventure that both reflect a correct legal position which, nonetheless, eluded the attention of both the trial and first appellate court.

The record in this appeal reflects the following:

> *"MITIGATION BY ACCUSED: your honour it was the devil. I was drunk when I committed those offences. Now I am sober. I pray for a lenient sentence. I live with my grandfather and grandmother..." (at page 6 of the record of appeal).*

As seen earlier, in **Kalos Punda v. R**. (supra), the Court refused to accept the appellant's statement in mitigation that he committed the offence on the devil's influence, whatever that meant, as revoking his plea. In **DPP v. Salum Madito** (supra) the accused's (respondent) statement advanced a defence akin to mistake of fact. In our view, since the law does not recognise influence of the devil as one of the defences available to an accused person, we rightly rejected the appellant's claim as an afterthought.

Discarding the appellant's blame on the devil, it appears to us that the appellant's claim in mitigation stating that he committed the offence in the state when he had allegedly lost sobriety as a result of drunkenness intended to raise the defence of intoxication in terms of section 14(2) of the Penal Code which stipulates:

> *(2) Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of he did not understand what he was doing and- (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or (b) the person charged was by reason of*

intoxication insane, temporarily or otherwise, at the time of such act or omission.

Regardless of its genuineness, the appellant's statement suggested that he acted under the influence of intoxication having lost sobriety when he committed the offence. The trial court should have treated that statement as recantation of his plea. In that score, the trial court should have entered a plea of not guilty and proceeded with the trial of the case in the usual way. Unfortunately, the legal position from the decided cases we have referred to above eluded the High Court and hence dismissing the appeal and sustaining the appellant's conviction from a plea of guilty which turned out to have been recanted. In the aftermath, the appellant's conviction cannot stand. It is hereby quashed and sentence set aside.

That said, we find merit in the appeal and allow it and quash the order of the High Court which dismissed the appellant's appeal and substitute it with an order allowing it. Going forward, we direct that the record be remitted to the trial court expeditiously for the appellant's trial in the usual way by the District Court of Kondoa before another Magistrate with competent jurisdiction.

In the meantime, the appellant shall remain in custody as a remand prisoner awaiting his trial before the District Court.

It is so ordered.

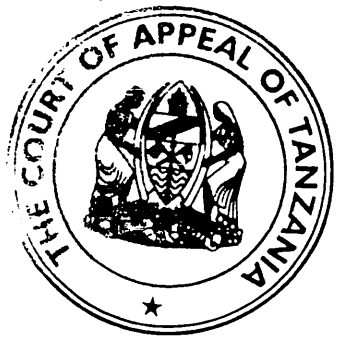
DATED at **DODOMA** this 23rd day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of the Appellant in person and Mr. Matibu Salum, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL