IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 527 OF 2017

ALLY SANYIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Shinyanga)

(Ruhangisa, J.)

Dated the 19th day of August, 2016

in

DC Criminal Appeal No. 133 of 2015

.....

JUDGMENT OF THE COURT

16th & 27th August, 2021

WAMBALI, J.A.:

On 26th March, 2015 the appellant Ally Sanyiwa appeared before the District Court of Kahama at Kahama where he was charged with the offence of Incest by Males contrary to the provisions of sections 158 (1) (b) and 159 of the Penal Code [Cap 16 R.E. 2002] [now R.E.2019] (the Penal Code). The particulars of the offence indicated that on 20th March, 2015 at Chela Village within Kahama District in Shinyanga Region the appellant had prohibited sexual intercourse with his sister one Mecktilda d/o Sanyiwa.

As it were, when the charge was read over and explained to the appellant he pleaded guilty. Specifically, the appellant responded in the following words: -

"Ni kweli nilifanya nae mapenzi."

Following his plea of guilty the learned Senior Resident Magistrate entered a plea of guilty and directed the prosecutor to adduce the facts in support of the charge. The prosecutor complied and narrated the facts and tendered a cautioned statement of the appellant which was recorded by the police officer DC Peter at the police station Kahama on 24th March, 2015. It was accordingly admitted as exhibit P1. For the sake of clarity, we deem it appropriate to reproduce the relevant part of the proceedings as regards the facts, subsequent conviction and sentence meted on the appellant on that particular day thus: -

> *"Names personal particulars, offence section and the law are as per charge sheet. That on March, 2015 at 07:00 hours Mecktilda Sanyiwa who is a girl with albinism disappeared from the room that she was staying with her grandmother. Parents reported to village leaders and started to search her. They realized that she was married by Ally Sanyiwa of Ngobelo sub village. Mr. Sanyiwa*

Manumba who is the victim father went to Ngobelo sub village and found the lady was married by his brother Ally Sanyiwa. Accused had acknowledged that the victim was his blood sister. They spent a whole week while having sexual intercourse as husband and wife. Accused escaped and was later arrested at Mazimba village. On 23rd March, 2015 accused was taken to Police Kahama and on 24th March, 2015 he was interrogated at Police Kahama where he confessed to have sexual intercourse with his sister. Today when charged in court he has pleaded guilty to the charge.

PP: *I pray to tender in court cautioned statements of accused recorded at Police Kahama by DC Peter of Police Kahama on 24/3/2015.*

Accused: *I don't have objection.*

Court: *cautioned statement of accused dated 24/3/2015 are admitted as exhibit and marked P1.*

I so order.

Sgd G.E. Mariki, SRM
26/3/2015

Court: *Above facts are read and explained to the accused together with the*

contents of PF3 which are read to him and he is asked to state if he admits the facts.

Accused: *I admit all the facts after they are explained to me. They are very true and correct to the effect that I married my blood sister.*

Court: *accused admits all the facts and he is asked to sign hereunder.*

Accused *– sgd*

Prosecutor*- sgd*

G.E. Mariki, SRM

26/3/2015

COURT FINDINGS

Consequent to accused's own plea of guilty to the charge and admission of facts he is hereby convicted as stand charged. I so order.

G.E. Mariki, SRM
26/3/2015"

Upon conviction, the appellant was sentenced to twenty one (21) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court against both conviction and sentence. In its judgment, the High Court (Ruhangisa, J.) categorically held that the appellant's plea at the

trial court was unequivocal and that the sentence imposed on the appellant was within the punishment prescribed by the law.

Aggrieved, the appellant has accessed the Court seeking to upset the decision of the High Court on the following paraphrased grounds of appeal contained in the memorandum of appeal: -

(1) That the plea of guilty was equivocal, imperfect and ambiguous.

(2) That the charge and facts did not contain the age of the victim which is one of the basic ingredient of the offence charged.

(3) That the adduced facts varies with the particulars in the charge sheet on the place and date of the alleged incident of rape.

(4) That the appellant replied to the facts which was contrary to the basic allegation of the offence charged; i.e. the involving in sexual intercourse.

(5) That the prosecution case was not proved by the testimony and that the victim was not charged under section 160 of the Penal Code.

It is important to note that earlier on the appellant abandoned the fifth ground of appeal as originally he had presented six grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented and he fully adopted his grounds of appeal. Without further explanation on the substance of his complaints he urged us to allow the appeal.

On the other side, the respondent Republic was represented by Ms. Salome Mbughuni and Ms. Caroline Mushi, learned Senior State Attorney and State Attorney respectively.

When called upon to respond to the appellants ground of appeal, in the first place, Ms. Mbughuni submitted that the respondent Republic supported the conviction and sentence of the appellant. Particularly, with regard to the first ground of appeal, she submitted that there is no doubt as per the record of the trial court's proceedings in the record of appeal that the appellant pleaded guilty to the offence of incest by males after the charge was read over and explained to him. Indeed, she submitted, when the facts were adduced and asked to respond, the appellant replied that the same were true and correct. In this regard,

Ms. Mbughuni argued that the complaint of the appellant that his plea was equivocal is unfounded and thus the first appellate court correctly dismissed his appeal because in terms of section 361(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 [now R.E. 2019] (the CPA), except for the sentence, he is barred to appeal against conviction on his own plea of guilty. To this end, relying on the decision of the Court in **Frank Mlyuka v. The Republic,** Criminal Appeal No. 404 of 2018 (unreported) at pages 9 and 12 the learned Senior State Attorney pressed us to dismiss the first ground of appeal on the contention that the ingredients of an equivocal plea of guilt has not been demonstrated by the appellant, and therefore his plea was unambiguous.

To resolve this ground of appeal, we propose to start with revisiting the position of the law on this issue. It is the requirement of the law under section 360 (1) of the CPA that except as to the extent or legality of the sentence, no appeal shall be entertained for an accused who has pleaded guilt to the charge. The section 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."

Nonetheless, it is also the position of the law as propounded by the decisions of the courts that under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. To this end, in **Laurent Mpinga v. The Republic** [1983] TLR 166 a decision of the High Court which was affirmed by this Court in **Kalos Punda v. The Republic,** Criminal Appeal No. 153 of 2005 (unreported), it was stated as follows: -

"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."

Noteworthy, earlier on the Court in **Khaiid Athuman v. The Republic,** Criminal Appeal No. 103 of 2005 (unreported) adopted a similar proposition laid in the English decision of **Rex v. Folder** (1923) 2KB 400 which propounded that: -

> *"A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."*

On the other hand, section 228 (1) and (2) of the CPA deals with the plea of the accused who is arraigned before a court and sets the following procedure to be followed by trial courts: -

> *"(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 shali convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."

It is in this regard that in **John Faya v. The Republic,** Criminal Appeal No. 198 of 2007 (unreported) the Court emphasized that: -

"In every case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit every constituent of the offence and that what he says should be recorded and in the form in which will satisfy an appeal court that he fully understood the charge and pleaded to every element".

In the instant appeal, there is no doubt that the appellant's response to the charge was that it is true he had sexual intercourse with the victim **(Ni kweli nilifanya nae mapenzi).**

Moreover, we gather from the record of appeal that when the facts were adduced and he was called upon to respond he stated that

the same were true and correct as reflected in the statement we have reproduced above.

However, we have closely examined the response of the appellant to the facts which were adduced by the prosecution in relation to the charge. Basically, we think that the facts which were agreed by the appellant were inconsistent with the allegation in the particulars of the charge sheet to which he pleaded guilty. We say so because; firstly, though the particulars in charge alleged that the offence was allegedly committed on 20th March, 2015, the adduced facts simply indicated that the offence was committed in March, 2015 at 07:00 hours. On this point, we are mindful of the contention of the learned Senior State Attorney for the respondent that the omission of showing the exact date in the adduced facts was immaterial as the incident occurred in March, 2015.

Nonetheless, we hasten to point out that as the prosecution alleged in the charge sheet that the offence was specifically committed on 20th March, 2015, it was bound to prove that fact. We are supported in our stance by the decision of the Court in **Ryoba Mariba @**

Mungare v. The Republic, Criminal Appeal No. 74 of 2003 (unreported) in which in akin situation it was held that: -

> *"It was essential for the Republic which had charged Ryoba with raping one Sara Marwa on 20/10/2000 to lead evidence showing exactly that Sara was raped on that day, a charge the accused was required to answer."*

(See also **Christopher R. Maingu v. The Republic,** Criminal Appeal No. 222 of 2004 (unreported).

Most importantly, in the instant appeal, the facts which were narrated by the prosecution did not relate to the allegation in charge sheet to the extent of drawing the conclusion that the appellant entered a plea of guilty and admitted to the facts knowing the nature of the offence he faced. Thus, we hold that the admitted facts do not lead to the conclusion that the appellant's plea was unequivocal.

Secondly, though it was alleged in the charge sheet that the incident occurred at Chila Village within Kahama District, the adduced facts indicate that the incident occurred at Ngobelo sub village in which the appellant and the victim had prohibited sexual intercourse for the whole week. This fact in our view dented alleged plea of guilty.

Thirdly, the facts which the appellant agreed to be true and correct purportedly included the PF3 whose content were read over and explained to him before he was called on to respond. However, according to the same record, the PF3 was not tendered and admitted as part of the facts. On the contrary, what was admitted as exhibit P1 was the cautioned statement which is not indicated to have been part of the facts read over and explained to the appellant. It is indeed, unfortunate that even the first appellate judge in his judgment concluded that the necessary exhibits which were read over together with the facts are cautioned statement and the PF3 and that the appellant admitted to their contents. We have closely perused the original record of the trial court and despite there being no record that it was tendered and admitted, the same does not exist in the record. Thus, it is doubtful if the cautioned statement which was tendered and admitted as exhibit P1 was really read over as part of the facts as intimated by the first appellate judge.

Fourthly, apart from showing that the appellant admitted to the facts to be true and correct, he is also in record to have stated that he agreed to have married his blood sister. However, in our respectful opinion, this was not consistent with the charge which alleged that on

20th March, 2015 the appellant had prohibited sexual inter course with the victim. On the contrary, the allegation in the charge is not that they had sexual intercourse on diverse dates of March, 2015. Thus the particulars in the charge sheet are inconsistent with the facts he allegedly admitted after they were read over and that he agreed that he had married his blood sister.

In the circumstances, from the foregoing deliberation, we are of the considered opinion that taking into consideration the charge and the admitted facts, the plea was imperfect, ambiguous or unfinished as they are inconsistent with the particulars in the charge laid against the appellant. Therefore, for that reason we hold that the lower courts erred in law in treating it as a plea of guilty. In the premises, we hold that the appellant is entitled to lodge an appeal against both conviction and sentence as an exception to section 360 (1) of the CPA.

On the other hand, we are also aware that in his mitigation the appellant prayed for leniency of the sentence before the trial court and promised not to repeat again. However, given the facts which were adduced at the trial court which we have held to be inconsistent with the charge, we are settled that the decision in **Frank Mlyuka v. The**

Republic (supra) relied on by Ms. Mbughuni to convince us to hold that the appellant's plea is unequivocal is distinguishable with the circumstances of the case at hand.

In the instant appeal, we have carefully examined the proceedings of the trial court and that of the first appellate court. In this regard, in view of what we have observed above with regard to the inconsistent facts which were adduced and the response, the appellant did not fully understand the nature of the charge he was facing and thus it is not certain whether he had no any other intention but to plead guilty.

In the event, we hold that the appellant's plea was equivocal. Ultimately, we allow the first ground of appeal.

At this juncture, having allowed the first ground of appeal, we do not think it is necessary to consider the rest of the grounds of appeal which essentially seek to explain the substance of the same ground. In short, we hold that the first ground of appeal suffices to dispose of the appeal.

In the result, we nullify the trial and first appellate courts' proceedings, quash conviction and set aside the sentence imposed on the appellant. However, in the interest of justice, we remit the file in

Criminal Case No. 91 of 2015 to the trial court and order that the appellant be retried before another magistrate. We further order that pending retrial, the appellant shall remain in custody.

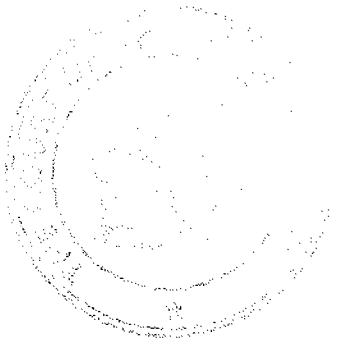
DATED at **SHINYANGA** this 26th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Reuben Jairo assisted by Wampumbulya Shani, learned State Attorneys for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL