IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 14 OF 2020

RICHARD s/o LIONGA @ SIMAGENI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlyambina, J.)

dated the 5th day of December, 2019

in

DC. Criminal Appeal No. 139 of 2018

.....

JUDGMENT OF THE COURT

29th October & 11th November 2021

GALEBA, J.A.:

Richard s/o Lionga @ Simageni, the appellant was charged before the District Court of Kilombero sitting at Ifakara in Criminal Case No. 155 of 2016, and based on an alleged plea of guilty he was convicted on a single count of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code). He was consequently sentenced to thirty years imprisonment. According to the prosecution, on 22nd June 2016 at around 22:00 hours, the appellant raped a thirteen years girl whose identity we shall conceal and refer to her, just as ABC.

At the hearing of the case before the district court, on 13th June 2016, the appellant entered a plea of guilty, upon the charge being read over to him. According to the district court, upon the prosecution narrating the facts constituting his case, the appellant unequivocally admitted to have raped the girl. Based on that finding, and without any further ado, the court convicted him of the offence, and sentenced him as indicated above. His appeal to the High Court was dismissed for want of merit, with orders sustaining the conviction and sentence of the district court. Still aggrieved, he has lodged this appeal predicating it on six grounds of appeal, which upon a thorough review, they all boil down to one specific complaint that the plea upon which he was convicted, was equivocal. Whether he is right or he is wrong on that complaint, that will be our challenge to surmount in this appeal.

When the appeal was called on for hearing on 29th October 2021, the appellant appeared in person without legal representation, whereas Mr. Adolf Verandumi, learned State Attorney, appeared for the respondent.

At the outset however, we noted that there was no memorandum of appeal on record, although there was a supplementary memorandum which had been lodged on 7th September 2020. When we inquired from

the appellant as to the whereabouts of the original memorandum of appeal, he informed us that he gave it to the admission officers in prison for presentation to Court and that he is in possession of one copy for his records. Upon perusal of the copy that he had, we noted that the copy was not endorsed as having been presented for lodging in Court. Nonetheless, he indicated to us that the grounds of appeal in the supplementary memorandum are sufficient to dispose of his grievance in this appeal. He beseeched us to determine his complaint based on the supplementary memorandum of appeal and disregard the missing original memorandum. We, therefore, proceeded on that basis to determine this appeal.

As to whether he would submit on his grounds in the supplementary memorandum, the appellant requested the Court to consider his grounds as lodged in Court, and opted for the learned State Attorney to reply to them first so that he could rejoin in case any such need arose. We, accordingly, permitted Mr. Verandumi to address us on the grounds as presented.

At the outset, the learned Stated Attorney affirmed the respondent's position of supporting the appeal essentially because, like the appellant, the facts that were read after entering a plea of guilty in

respect of the charge, did not disclose all ingredients of the offence as required by law. Mr. Verandumi referred the Court to the case of **Michael Adrian Chaki v. R,** Criminal Appeal No. 399 of 2017 (unreported) to support the stance he took. After that brief, but focussed submission, the learned State Attorney implored us, to nullify the proceedings of the trial court and quash the conviction that emanated therefrom. He further beseeched us to set aside not only the sentence of thirty years imposed on the appellant by the district court, but also the judgment of the High Court for having been preferred against a nullity. As a way forward, counsel moved the Court to direct that the court record be remitted to the trial district court with directions that a fresh plea be taken and the matter be procedurally tried according to law.

In rejoinder, the appellant had nothing substantive to submit. He instead, restated his plea of being released from jail as he did not commit the offence.

In our view, the complaints of the appellant in the six supplementary grounds of appeal can be summarized into one single ground of appeal namely:

"That the appellant was unlawfully convicted based on an equivocal plea of guilty, thereby rendering the subsequent sentence illegal.

To appreciate the fabric of the appellant's complaint in the context of the above ground of appeal, it is, we think appropriate to quote, both the charge sheet and the relevant proceedings of 13th June 2016. First, the relevant substance of the charge:

*"**OFFENCE, SECTION AND LAW**:- Rape c/s 130(1) (2) (e) and 131 (1) of the penal code cap 16 of the laws R.E. 2002.*

***PARTICULARS OF OFFENCE**:- That RICHARD S/O LIONGA @ SIMAGENI charged on 22nd day of January, 2016 at or about 22:00hrs at Katindiuka IFAKARA area within Kilombero District in Morogoro Region did have sexual intercourse with one ABC a girl aged 13 yrs old."*

The charge sheet, particularly the particulars of offence, have been reproduced above to demonstrate the fact that those particulars, in terms of details are either more detailed or identical with the facts of the case that were narrated by the public prosecutor when the appellant allegedly pleaded guilty. We shall also reproduce the record of the trial court on 13th June 2016. Again, the significance of quoting *in extenso* the proceedings of that day, still is, to demonstrate the insufficiency and

inadequacy of the information contained in the facts that were narrated on the day that the appellant is alleged to have pleaded guilty. Here is the relevant record:

> *"Charge read over to the accused person who pleads as here below.*
>
> ***Accused person:*** *Ni kweli*
>
> ***SGD: CHARLES LIONGA @ SIMAGENI***
> ***13/6/2016***
> ***COURT****: Entered a Plea of guilty*
>
> ***T. A. LYON***
> ***RESIDENT MAGISTRATE I***
> ***13/6/2016***
> ***FACTS: <u>On 22nd day of June 2016 at 22:00hrs at Katindiuka – Ifakara in Kiiombero District, the accused raped the victim namely ABC, a girl aged 13 yrs.</u>***
>
> ***Accused:*** *Ni kweli*
>
> ***Accused thumb****:*
>
> ***SGD: CHARLES LIONGA @ SIMAGENI***
> ***ACCUSED: 13/6/2016***
> *PP's Signature:*
>
> ***SGD: ISP. DAVID KINYANGE***
> ***13/6/2016***
> *Court: The accused is hereby convicted on his own plea of guilty.*
>
> ***T. A. LYON***
> ***RESIDENT MAGISTRATE I***
> ***13/6/2016***

PREVIOUS CRIMINAL RECORDS AND MITIGATION - N/A

SENTENCE:

***COURT**: Having considered the nature of the offence and the accused being mentally well, I am convinced to sentence the accused to serve a term of thirty (30) years imprisonment. It is so ordered. Right of appeal explained.*

T. A. LYON
RESIDENT MAGISTRATE I
13/6/2016."

[Emphasis added in relation to the facts]

To align ourselves in a proper perspective and appropriate focus as to how we proceed to consider this appeal, we will first consider the established principles to determine the circumstances in which a plea of guilty may be deemed to be unequivocal for purposes of conviction before a criminal court.

For a plea of guilty to be unequivocal and therefore valid, it must pass the test that this Court set in the case of **Michael Adrian Chaki (supra)**. In that case the Court stated:

> *"...there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:-*

1. The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;

2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.

3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

4. ***The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged****.*

5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see Akbarali Damji vs R. 2 TLR 137 cited by the Court in Thuway Akoonay vs Republic [1987] T.L.R. 92);

6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged".

[Emphasis added].

This Court set the above conditions after considering several other decisions including **Rex v. Folder** (1923) 2 KB 400, **Laurent Mpinga v. Republic** [1983] TLR 166 and **Karlos Punda v. Republic**, Criminal Appeal No. 153 of 2005 (unreported) on the same point.

A careful scrutiny of the above criteria shows that an unequivocal plea of guilty is constituted of two crucial stages of pleading. That is, **first,** the accused must plead guilty to the charge as indicated at criterial 1, 2, 3 and 5 and, **secondly,** he must plead guilty to the facts constituting the offence charged as per criteria 4 and 6.

The issue we now turn to consider is whether the statement: "*on 22nd day of June 2016 at 22:00hrs at Katindiuka – Ifakara in Kilombero District, the accused raped the victim namely ABC, a girl aged 13 yrs*", satisfied conditions 4 and 6 in the case of **Michael Adrian Chaki (supra)** above. Where an accused pleads guilty to the charge, before conviction, the law is that, the prosecution is duty bound and it must

audibly and understandably narrate facts establishing the offence as alleged in the statement and particulars of offence. That is, the prosecution must explain clearly and adequately the circumstances in which and how the offence was committed in specific and intelligible terms. The prosecution must detail the substance of the evidence and where applicable tender documentary and any other exhibits, all meant to ensure that the accused clearly understands without any doubt, what is it that he is alleged to have done wrong and contrary to law. In the same case of **Michael Adrian Chaki (supra),** in this respect this Court stated:

> *"In a situation where the accused admits the allegations in the charge, it is deep rooted and invariable practice that the responsibility is on the prosecution to state facts establishing the allegations in the charge. In short, a plea of guilty relieves the prosecution the burden of calling witnesses to prove the charge but it does not relieve them from narrating facts correctly, clearly and sufficient enough to support the offence charged [see* ***Salehe Mohamed v. R*** *(supra)]. Actually, the facts narrated are in lieu of the otherwise evidence that the prosecution would be required to lead in court by calling*

witnesses so as to prove the charge beyond reasonable doubt."

We subscribe to the above position and hasten to observe that conversely, in this case, instead of disclosing the ingredients of the offence and the substance of the evidence in amplifying the particulars of offence in the charge, the prosecution when narrating facts, did nothing but restated the particulars of offence in the charge sheet. Notably, although the charge was read over to the accused and explained to him as recorded in the proceedings, thereby satisfying conditions 1, 2, 3 and 5, with respect, the rest of the criteria, that is conditions 4 and 6 were not fulfilled. In our view, that was unlawful, and the plea of guilty entered cannot be held to have been unequivocal upon which to ground a valid conviction.

The above conclusion calls on us to make deserving directions as to the way forward, taking into account the fact that the appellant never entered any lawful plea and was never legally tried.

Mr. Verandumi, submitted that the fit order to make in the circumstances, is to nullify the proceedings and the conviction, to set aside the sentence and the judgment of the High Court and to remit the record to the district court for retrial under section 4(2) of the Appellate

Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA). The appellant, naturally favoured a complete release from jail, for according to him, he did not commit the offence.

On our part, we think we cannot order a retrial because in the first place, the appellant did not stand any trial at all. Likewise, we cannot order an unqualified release of the appellant from prison because he was not tried in the district court. It is also inappropriate to invoke section 4(2) of the AJA because the complaints leading to the landing we are about to make, were raised in the supplementary memorandum of appeal, hence what we have determined is an appeal not a revision.

Finally, based on the record of appeal, the submissions of parties and the law applicable, we nullify the disputed plea and the proceedings in the trial court. Similarly, the conviction of the appellant for raping ABC based on the illegal plea is equally quashed. We further set aside not only the sentence of thirty years imposed on the appellant, but also the judgment of the High Court, for it emanated from a nullity.

For the foregoing reasons and in view of the orders we have just made, we allow the appeal and direct that the record in criminal case No. 155 of 2016 be remitted to the district court of Kilombero for hearing of that case, according to the law, starting from the initial stage

of reading over the charge to the appellant followed by all necessary trial procedures. We further order that in case, the appellant will be found guilty and convicted following the subsequent trial ordered, at the time of sentencing him, the time he spent in prison from 13th June 2016 up to the date of conviction in the trial we have just ordered to commence, shall be deemed to have already been served. He shall therefore serve the remaining period of the sentence that may be imposed. In the meantime, the appellant shall remain detained in prison as a remandee pending his trial.

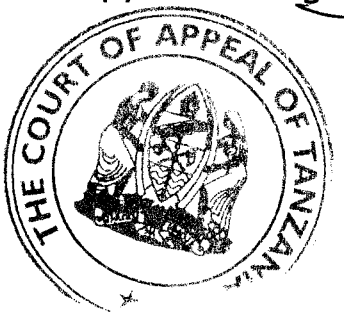
DATED at **DAR ES SALAAM**, this 8th day of November, 2021

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of November, 2021 in the presence of appellant linked via video conference from Ukonga Prison and Ms. Easter Kyara, counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL