IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 157 OF 2019

ONESMO ALEX NGIMBA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Dr. Levira, J.)

Dated the 4th day of July, 2017
in
Criminal Appeal No. 115 of 2016

.....

JUDGMENT OF THE COURT

7th & 16th February 2022

GALEBA, J.A.:

Onesmo Alex Ngimba, the appellant in this appeal, is challenging a decision of the High Court sitting at Mbeya which upheld his conviction and sentence of life imprisonment imposed on him by the District Court of Rungwe at Tukuyu in Criminal Case No. 54 of 2016. Upon a charge of rape contrary to sections 130(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code), the appellant was alleged to have had carnal knowledge of a young girl of 6 years, who, for purposes of concealing her identity we will refer to her as DM, or the victim. It was further alleged by the prosecution that the offence was committed on 31st

March 2016, around 18.00 hours at Ntokela Village in Rungwe District within Mbeya Region.

On 4th April 2016, when the matter was called on for orders before the District Court, and upon the charge being read over to the appellant, he voluntarily pleaded guilty to the charge. Consequent to the plea, the prosecution read over to him the facts constituting the offence of raping the victim, to which, he did, like with the charge, admit. Following his admission of both the charge and the facts constituting the offence, the District Court, without any further ado, convicted him instantly and imposed upon him a life sentence as indicated above. As the appellant was not satisfied by both conviction and sentence, he filed an appeal to the High Court contesting the legality of the orders passed by the District Court. On 4th July 2017, his conviction and the sentence imposed earlier on by the District Court were both upheld by the High Court, Levira J (as she then was), adding that his plea before the lower court was unequivocal. In fine, his appeal was dismissed for want of merit. He has therefore preferred this appeal to challenge the decision of the High Court.

The appeal before us is based on four grounds of appeal which may be paraphrased as follows: **One**, that the High Court erred in law when it believed that the District Court entered conviction after explaining the

charge and the ingredients of the offence to the appellant. **Two**, that the High Court erred in law by upholding a conviction and sentence based on exhibits P1 and P2 whereas the appellant was not advised of his right to be informed in case he desired to have the documents tendered by their authors. **Three,** that the High Court failed to note that the age of the victim was not proved before the District Court to be 6 years because the birth certificate was not tendered whereas proof of age is an ingredient of statutory rape and **four**, that the High Court erred in law, for not appreciating the fact that the ingredients of the offence were not explained to the appellant.

At the hearing of the appeal, the appellant appeared in person without legal representation, whereas the respondent had the services of Mr. Alex Mwita, learned Senior State Attorney teaming up with Ms. Sara Anesius, leaned State Attorney.

At the outset, the appellant moved the Court to adopt his grounds of appeal and allow the learned State Attorney to address the Court on his grounds first, so that he could rejoin should he wish to do so at an appropriate time. To address us in this appeal was Ms. Anesius, who argued grounds 1 and 4 together as they pose a common complaint and the 2nd and 3rd grounds were argued one independent of the other.

In contesting the merits of the 1st and 4th grounds, Ms. Anesius contended that the substance of the charge was read over and explained to the appellant who admitted committing the offence as recorded at page 2 of the record of appeal. She contended that in addition to pleading guilty to the charge, the appellant too, admitted as correct the facts detailing the manner the offence was committed. In short, the point that the learned State Attoney was seeking to drive home is that, the charge as well as the facts constituting the offence were both read and explained to the appellant before he was to be convicted and later on sentenced to life imprisonment.

According to section 228(2) of the Criminal Procedure Act [Cap 20 R.E. 2019], (the CPA), where a charge is read over to the accused person and the latter admits the charge, the court has a duty to enter a conviction without waiting trial of the offender. That section provides as follows: -

> *"Where 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."*

In terms of the above provision, where an accused person pleads guilty to the charge read over to him, the court has no option but to convict him and pass a sentence without trial. In the contested grounds, the appellant is complaining that the charge and the facts were short of disclosing ingredients of the offence of statutory rape.

Admittedly, for the court to assume the jurisdiction of convicting the accused based on a plea of guilty and punish him for the offence charged without trial, the plea must be complete, unequivocal and unambiguous. For a plea to be unequivocal for purposes of conviction, there are conditions that the convicting court must ensure that they exist conjunctively at the time of conviction. In the case of **Michael Adrian Chaki v. R,** Criminal Appeal No. 399 of 2017 (unreported), this Court stated that 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.

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".

We will, in turn meticulously examine at close range and with keen attention, the proceedings of the District Court dated 4th April 2016 to find out whether the above conditions were met, and determine whether the High Court was wrong to uphold the appellant's conviction and sentence.

Firstly, we have carefully reviewed the charge and it is notable that the charge is valid and well-drawn in compliance with section 132 of the CPA for it contains, a statement of the specific offence with which the appellant was charged, together with such particulars capable of affording him with reasonable information as to the nature of the offence charged. The offence charged in this case is that of rape, which offence, we need not overemphasize that, the offence is well known to law. That means the first condition was met because the appellant was arraigned on a proper charge.

Secondly, according to the record, after reading over and explaining the charge to the appellant, the court recorded; *"CROEA who is asked to plead"* at page 2 of the record of appeal. Though this Court does not encourage the use of such acronyms in court proceedings, but we understand CROEA to be the short form standing for the phrase; *Charge Read Over and Explained to the Accused*. Because that is the court record, it means the charge was read over to the appellant and explained to him before he was asked to plead. In **Halfani Sudi v Abieza Chichili [1998] TLR 527** this Court made it clear that there exists a presumption that a court record accurately represents what actually transpired in court and it should not be easily impeached. It is for that reason we cannot and the High Court would have not doubted the

authenticity of the record that the charge was read over and explained to the appellant as indicated. As the charge was read and explained to the appellant who was asked to plead, the court duly satisfied the 2nd, 3rd and 5th conditions as per the case of **Michael Adrian Chaki (supra).**

Thirdly, the facts that were read over to the appellant as recorded at page 3 disclosed the essential facts that it was the appellant who had carnal knowledge of the victim and that the latter was aged 6 years old. Before the sexual assault, the appellant called the victim to come to him and assist to peel potatoes which she did, but after that the appellant raped her and gave her Tanzania Shillings 300/=. The facts that the appellant admitted are also that when he was interrogated at the Police, he admitted to have committed the offence. In our view, such particulars satisfied the court leaving no doubt that they established all the elements of the offence charged, that is rape, thereby meeting the requirements of the 4th and the 6th conditions quoted above.

In addition to the above, after the appellant was convicted during mitigation, he made a prayer for a mild and less stiff punishment. He offered to serve a non-custodial sentence of community service in the following terms:-

"MITIGATION

CONVICT: *I pray for leniency sentence (sic); I did not know of the case here (sic). I pray so. I am ready to serve under community service.*

P. D. Ntumo - PRM

4/4/2016"

In our view, the fact that the appellant prayed for a lenient sentence in mitigation, unerringly pointed to his criminality in respect of the offence charged.

Based on the above observations, we are in agreement with Ms. Anesius, that indeed the charge and the facts were read over to the appellant and fully explained to him and his plea of guilty was complete and unequivocal. In the circumstances, the 1st and 4th grounds of appeal are hereby dismissed.

The complaint in the second ground of appeal was that the appellant was convicted based on exhibits P1 and P2 which were PF3 and the cautioned statement respectively, which were illegally tendered because they were not read before they were shown to the appellant for his comments. Ms. Anesius agreed with the complaint of the appellant in this ground but, she was quick to argue that the appellant was not convicted based on the exhibits, rather the conviction was consequent to his unequivocal and unqualified plea of guilty. She contended that even

without those exhibits still the accused would be convicted because the documents did not affect his voluntary admission of guilty.

In this case, after the appellant had pleaded guilty to both the charge and the facts at pages 2 and 3 of the record of appeal respectively, at page 4, the said exhibits were tendered unprocedurally, although the appellant had no objection to their admission. Thereafter, at page 5, the court found the appellant guilty and convicted him in the following terms: -

> *"**Court:** The accused has pleaded guilty and admitted to the accompanying facts. It is quite clear that he has understood the charge. The court convicts him on his own plea of guilty.*
>
> *P. D. Ntumo - PRM*
> *4/4/2016."*

In this case **firstly**, the documents tendered were not part of the facts that the appellant admitted. He admitted to have committed the offence at pages 2 and 3 of the record of appeal. **Secondly,** a careful scrutiny of the conviction clause above does not suggest that the conviction was based on the documents received. The record is very clear, it refers to the charge and the facts, which are contained at pages 2 and 3 and not the documents that came later. If the court would have

convicted the appellant based on the documents, it would have so recorded in the proceedings. **Thirdly,** the documents came after the plea of guilty had been entered and the facts admitted. That is to say, before the documents were tendered, a plea of guilty had been complete. In our view therefore, the exhibits did not affect the plea which had already been complete.

Nonetheless, we agree with the appellant that exhibits P1 and P2 were illegally tendered and therefore unlawfully admitted, but the same documents, as observed above, had no effect on the appellant's plea of guilty. Accordingly, the 2nd ground of appeal is partly allowed in that the exhibits were unlawfully admitted and it is partly dismissed because, the illegal admission of, and the exhibits themselves had nothing to do with the appellant's unequivocal plea of guilty.

As for ground 3, the complaint was that the age of the victim was neither proved nor was her birth certificate produced to prove it. Ms. Anesius in objecting to this ground, contended that the allegation is unfounded as there was no trial in this matter because the appellant entered a plea of guilty which meant that no trial was legally required.

Admittedly, the position taken by this Court is that where a person is charged of statutory rape under section 130(2)(e) of the Penal Code,

evidence must be led to establish that indeed the age of the victim was below 18 years at the time that the offence was committed. That is in terms of the decisions of this Court including **Alex Ndendya v. R,** Criminal Appeal No 340 of 2017 and **Wiston Obeid v. R,** Criminal Appeal No 23 of 2016 (both unreported). However, in this case, proof of age or of any fact for that matter, was not required because among facts admitted by the appellant at page 3 of the record of appeal was that: -

> *"On 31/3/2016 at about 6.00 pm at Nkotela Village the accused had carnal knowledge of one DM aged 6 years".*

In our view, as the fact that the age of the victim was 6 years old was admitted, there was no legal requirement to call any witness or tender any documentary exhibit to prove the age of the victim. We must insist that legally, witnesses may only be called to testify under section 228(3) of the CPA in proving existence of disputed facts. In law, if an accused person pleads guilty, that is, where he unequivocally admits committing the charged offence, proof of any fact in respect of the offence committed is not required.

In any event, in the case of **Frank Mlyuka v. R**, Criminal Appeal No 404 of 2018 (unreported), this Court stated that: -

"...tendering of exhibits where conviction is based on a plea of guilty, is not a legal requirement."

Therefore, in the context of the 3rd ground of appeal, there was no need or any legal requirement of tendering any documentary exhibit seeking to prove age of the victim. That said and done, we find the 3rd ground of appeal to be devoid of merit and we dismiss it.

In the event, save for the observations we made in the second ground of appeal, we dismiss this appeal for want of merit.

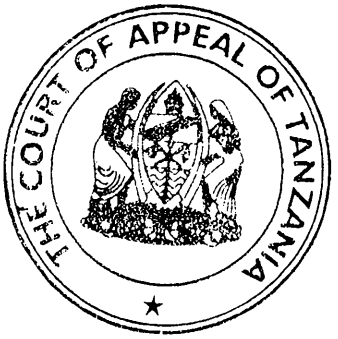
DATED at **MBEYA**, this 14th day of February, 2022

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered on this 16th day of February, 2022 in the presence of the appellant in person and Mr. Alex Mwita, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL