IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: JUMA, C.J., NDIKA, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 459 OF 2018

SOKOINE MTAHALI @ CHIMONGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 19th day of November, 2018
in
DC. Criminal Appeal No. 15 of 2018

.....

JUDGMENT OF THE COURT

20th & 23rd September, 2022

NDIKA, J.A.:

The appellant, Sokoine Mtahali alias Chimongwa, was convicted of impregnating a schoolgirl by the District Court of Moshi at Moshi upon his own plea of guilty on the first count. Consequently, he was sentenced to thirty years' imprisonment. His first appeal to the High Court of Tanzania at Moshi essentially on the ground that his plea was not unequivocal went unrewarded, hence this second and final appeal.

It is essential, at the outset, to look at what transpired during the appellant's arraignment on 26th May, 2017. The record shows that a charge

sheet containing two counts was read over and explained to the appellant. On the first count, the appellant was charged with impregnating a schoolgirl contrary to section 60A (3) of the Education Act, Cap. 353 R.E. 2002 ("the Education Act") as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No.2) Act, Act No. 4 of 2016. On that count, it was alleged that on 2nd January, 2017 at Kahe area within the District of Moshi in Kilimanjaro Region, the appellant impregnated a seventeen-year-old girl who was a pupil of Oria Secondary School. To protect her privacy, we have withheld her name and, therefore, we shall hereafter refer to her as "the complainant."

On the second count, laid under sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002, the appellant was charged with rape, the accusation being that on diverse days between August 2016 and January 2017 at the area mentioned above, the appellant had carnal knowledge of the complainant, a girl aged seventeen years.

After the charge was read over and explained, the appellant responded as follows on the first count:

> *"It is true that I impregnated the [complainant]. I know her. [I] had an affair with her. We had sexual intercourse. Her mother knows that I had an affair with her daughter. We are not married*

nor are we living together. I am taking care of her after she told me that she is pregnant."

His reply to the charge on the second count was apparently in stark contrast to that on the first count:

"It is not true ..."

The presiding Principal Resident Magistrate recorded the reply on the first count as a plea of guilty but that regarding the second count was entered as a plea of not guilty.

Then the prosecuting State Attorney narrated what she considered to be the facts of the case so far as the first count was concerned. Briefly, she stated that the complainant was a seventeen-year-old Form IV pupil of Oria Secondary School at the material time. On 2nd January, 2017 at 14:00 hours, at the appellant's invitation she visited his home at Kahe area in Moshi at his home and had an unprotected sexual intercourse with him. About four months thereafter, on 5th April, 2017 to be exact, she had a positive pregnancy test result following a mandatory pregnancy testing conducted at the behest of her school administration on all pupils in Form II through Form IV. It was established that she was four months' pregnant. On being quizzed by the police after a formal complaint was made, she named the appellant as the man who put her in the family way as she had sexual intercourse with

him on 2nd January, 2017, the day she believed to have conceived. Acting on her revelation, the appellant was arrested on 23rd May, 2017. On being interrogated, he admitted having made the complainant pregnant. On the same day, the complainant had another pregnancy test at the Mawenzi Regional Referral Hospital in Moshi which indicated that she was twenty weeks (five months) pregnant as shown by a medical examination report (PF3) issued by the hospital. The contents of the report were read out after it was received as Exhibit P1 without any objection.

After the facts were narrated, the appellant was asked to admit, dispute, or explain the facts. His response was:

> *"I admit the facts read to me by the prosecution in support of the charge. They are correct. I admit that I know [the complainant]. We started our affair [in] August, 2016. I know that she was schooling; she was a student at Oria Secondary School. [I] had sexual intercourse with her several times since August, 2016. In January, 2017, she told me that she was pregnant and I was responsible. I asked her what [we] shall do. She told me that I should not worry as she would mention her school mate .... I admit that I made her pregnant as we have had unprotected sexual intercourse."*

The presiding Principal Resident Magistrate took the view that the facts of the case as admitted by the appellant without any qualification established

the offence of impregnating a schoolgirl. Accordingly, she convicted him of the offence on his own plea of guilty and proceeded to sentence him as hinted earlier.

We feel compelled to interpose and remark that in the aftermath of the aforesaid conviction and sentence now the subject of this appeal, the District Court continued with the proceedings in respect of the second count to which the appellant pleaded not guilty as alluded to. After the court had conducted a preliminary hearing on 19th September, 2017 and set down the case for hearing, it discharged the appellant of the charged offence in terms of section 225 (5) of the Criminal Procedure Act, Cap. 20 R.E. 2002 ("the CPA"). That outcome was predicated on the ground that the prosecution was unable to proceed with the trial having failed to produce witnesses to adduce evidence in support of the charge on five occasions when the case came up for hearing between 3rd October, 2017 and 11th December, 2017.

As indicated earlier, the appellant's first appeal to the High Court of Tanzania at Moshi was unsuccessful. Fikirini, J. (as she then was) was satisfied that the facts the appellant admitted at his arraignment constituted the charged offence and, therefore, he was rightly convicted upon his own unequivocal plea of guilty.

In the present appeal, the appellant had initially raised five grounds of complaint in his memorandum of appeal. At the hearing of the appeal, he raised one additional ground with the leave of the Court. The most basic aspect of all the grounds is the same complaint made on the first appeal; that the assailed conviction was erroneously grounded on a plea that was not unequivocal.

Based on his written statement of arguments, the appellant contends that he was convicted upon an equivocal plea of guilty because the facts of the case that he admitted did not fully establish the charged offence. Apart from arguing that his plea on the second count essentially recanted all the facts he had admitted in respect of the first count, he denies having specifically admitted the allegation that he made the complainant pregnant on 2nd January, 2017. Moreover, it is his contention that he was neither aware of the complainant's alleged status as a pupil nor did he admit that she was a schoolgirl.

The respondent stoutly resists the appeal through Mr. Tumaini Kweka, learned Principal State Attorney, who was accompanied by Ms. Verediana Mlenza, learned Senior State Attorney, and Ms. Sabitina Mcharo, learned State Attorney. Briefly, Mr. Kweka argues that going by the proceedings

before the District Court it is manifest that the appellant's plea was an unambiguous admission of guilt because the admitted facts constituted the offence of impregnating a schoolgirl. Elaborating, he contends that the appellant clearly admitted that the complainant was a secondary schoolgirl, that she was pregnant at the material time and that he is the one who impregnated her.

Ms. Mcharo weighed in stressing that the impugned conviction was soundly based on a perfect and unequivocal plea of guilty that the appellant made. She referred us to our recent decision in **Onesmo Alex Ngimba v. Republic**, Criminal Appeal No. 157 of 2019 (unreported) where we reiterated the conditions for determining unequivocality of a plea of guilty cited in our earlier decision in **Michael Adrian Chaki v. Republic**, Criminal Appeal No. 399 of 2017 (unreported). It is her contention that the District Court followed the applicable procedure properly and that the admitted facts disclosed all the necessary ingredients of the offence thereby assuring the court that the appellant's plea was unquestionably unequivocal.

The appellant offered no rejoinder except that he reiterated his plea that his appeal be allowed and that he be released from prison.

We have studiously gone through the record of proceedings on the date the appellant was formally arraigned before the District Court and considered the contending submissions from both sides. At the outset, we find it compelling to reiterate that as general rule section 360 (1) of the CPA bars allowance of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence. That provision states 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."*

However, we are keenly aware that notwithstanding a plea of guilty an appeal against conviction may be entertained in four special circumstances stated by the High Court (Samatta, J. as he then was) in **Laurence Mpinga v. Republic** [1983] T.L.R. 166, a decision which has been cited by the Court with approval on many occasions. At page 168 of the report, it was held thus:

> *"Such an accused person may challenge the conviction 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."

Since the instant appeal questions the unequivocality of his alleged plea of guilty, it fits neatly within the ambit of the first special circumstance mentioned above.

Our jurisprudence instructs that before a court of law enters a plea of guilty and acts on it to convict an accused person of the charged offence, it must be satisfied that his or her plea is a perfect, unambiguous, and complete admission of guilt to the offence he or she is charged with – see, for instance, **Samson Kitundu v. Republic**, Criminal Appeal No. 195 of 2004 (unreported); and **Onesmo Alex Ngimba** (*supra*).

In **Adan v. Republic** [1973] 1 EA 445, a seminal decision by the Court of Appeal for East Africa in a case originating from Kenya to which we fully subscribe, the court considered the manner in which pleas of guilty should

be recorded and the steps which should be followed so as to assure of their unequivocality. At page 446, the court held thus:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused all the ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."*

With the above authorities in mind, we have examined the charge at hand and its particulars as well as the facts of the charged offence as given by the prosecuting State Attorney. We are satisfied that the statement of facts clearly disclosed and established all the essential ingredients of the offence of impregnating a schoolgirl. Furthermore, we agree with Mr. Kweka that the appellant's admission that he made the complainant pregnant at the time she was still a secondary schoolgirl amounted to a perfect and unequivocal plea of guilty to the offence charged. It is significant that in agreeing with the prosecution's statement of facts, the appellant did not assert any additional facts that could have raised a question as to his guilt to the charged offence. His contention that he was neither aware of the complainant's alleged status as a pupil nor did he admit that she was a schoolgirl flies in the face of the record of proceedings. We reject it. Moreover, we do not think that his plea of not guilty to the charge on the second count amounted to a refutation of the facts he had admitted in respect of the first count. The two counts, we think, were rightly treated and dealt with as separate charges. In the premises, we find no merit in the appeal against the appellant's conviction, which we hereby dismiss in its entirety.

We now turn to the legality or propriety of the sentence of thirty years' imprisonment imposed on the appellant, an issue that we raised *suo motu* at the hearing of the appeal.

Addressing us on the issue, Mr. Kweka submits that although the presiding Principal Resident Magistrate had wide discretion in terms of section 170 (1) and (2) of the CPA to impose a custodial term of up to thirty years stipulated by section 60A (3) of the Education Act, she erroneously mistook the prescribed punishment as mandatory penalty. As a result, Mr. Kweka argues, the maximum punishment imposed on the appellant, a mere first offender who had pleaded guilty to the offence and was unarguably contrite, was manifestly excessive. Accordingly, he moves us to intervene and revise the sentence in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2022 ("the AJA").

To begin with, we are in full agreement with Mr. Kweka that section 60A (3) of the Education Act under which the offence at hand was laid imposes a custodial term of thirty years as the maximum penalty. For clarity, we extract the said provision as follows:

> *"**60A**.-(3) Any person who impregnates a primary school or a secondary school girl commits an offence and **shall, on***

conviction, be iiabie to imprisonment for a term of thirty years. *"*[Emphasis added]

The above phrase *"shall, on conviction, be liable to imprisonment for a term of thirty years"* to which we have supplied emphasis, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating and aggravating factors.

The decision by the erstwhile Court of Appeal for East Africa in **Opoya v. Uganda** [1967] E.A. 752 on an appeal originating from Uganda is quite instructive. In that case at page 754 of the report, the court interpreted the phrase *"shall be liable to"* as follows:

> *"It seems to us beyond argument that the words "shall be liable to"* ***do not in their ordinary meaning require the imposition of the stated penalty but mereiy express the stated penalty which may be imposed at the discretion of the court****. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."* [Emphasis added]

See **Anthony Samwel v. Republic**, Criminal Appeal No. 48 of 2010; **Faruku Mushenga v. Republic**, Criminal Appeal No. 356 of 2014; **Nyamhanga s/o Magesa**, Criminal Appeal No. 470 of 2015; and **Bahati John v. Republic**, Criminal Appeal No. 114 of 2019 (all unreported) where this Court, citing **Opoya** (*supra*), took the same position. See also **Dauson Athanaz v. Republic**, Criminal Appeal No. 285 of 2015 and **Abdi Masoud @ Iboma v. Republic**, Criminal Appeal No. 116 of 2015 (both unreported).

Mr. Kweka is right that the presiding Principal Resident Magistrate had, in terms of section 170 (1) and (2) of the CPA, broad sentencing discretion and that she could have imposed the maximum punishment of thirty years' imprisonment in appropriate circumstances. However, in sentencing the appellant she mistook the prescribed penalty as the mandatory punishment. We wish to let the record at page 12 speak for itself:

> *"**SENTENCE:** The accused person is a first offender who readily pleaded guilty to the charge. In his mitigation he stated that he is ready for face any punishment for what he has committed. Throughout the proceedings he showed a sense of repentance. **If I would be allowed to impose a lesser punishment than what is stated by the law, I would do so. However, my hands are tied; the law shall [have] to***

follow its [course]. *He is therefore sentenced to serve 30 years jail term as per s. 60A (3) of the Education Act."*
[Emphasis added]

It is apparent from the above text that the presiding Principal Resident Magistrate sentenced the appellant upon an unfortunate misapprehension of the law resulting in her failure to exercise her discretion to impose a sentence that was commensurate with the circumstances of the case. Even though she was cognizant that the appellant, being a mere first offender who had pleaded guilty to the offence and was visibly repentant, deserved a lenient sentence, she ended up imposing on him the highest possible punishment on account of a wrong construction of the punishment provision. In the premises, we uphold Mr. Kweka's submission that the said imposed sentence was manifestly excessive. Since this aspect escaped the attention of the first appellate court, it is now our solemn duty to intervene pursuant to section 4 (2) of the AJA as we did in analogous circumstances in **Faruku Mushenga, Nyamhanga s/o Magesa** and **Bahati John** (*supra*). Accordingly, we set aside the sentence of thirty years' imprisonment imposed on the appellant. In lieu thereof, bearing in mind the appellant's mitigating factors and the fact that he has up to now served more than five years in jail since his

imprisonment on 26th May, 2017, we sentence him to such a term of imprisonment that will result into his immediate release from prison unless otherwise lawfully held.

Order accordingly.

DATED at **MOSHI** this 23rd day of September, 2022.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of September, 2022 in the presence of the Appellant in person and Ms. Veredian Mlenza, learned Senior State Attorney and Ms. Sabitina Mcharo, 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