IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 457 OF 2018

PASKALI KAMARA.....1st APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Arusha)
(Maige, J.)

dated the 14th day of November, 2018

in

Criminal Appeal No. 127 of 2017

.....

JUDGMENT OF THE COURT

28th September & 13th October, 2022.

FIKIRINI, J.A.:

The appellant, Paskali Kamara, was arraigned before the District Court of Longido at Longido for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code. The particulars of the offence were that on 11th July, 2017, at Gilai Merugoi, Kitumbeine Ward within Longido District in Arusha Region, the appellant did have carnal knowledge with a girl child aged two (2) years, who we shall refer to as a victim or IE, to conceal her identity.

Before the court, the appellant pleaded guilty to the charge. The prosecutor read out facts, and exhibits were tendered and admitted. When called to plead, the appellant admitted to the facts constituting the offence as narrated.

It is pertinent to give a brief background culminating in the present appeal. The prosecution case was that, on a fateful day at about 19:00 hours, the appellant paid a visit to the victim's family in Gelai Merugoi Ketumbeine Ward, within Longido District, where the victim lived with her parents. While playing with the victim, after a while, the appellant disappeared with her. The victim's mother noted the victim's absence and, in the company of other neighbours, embarked on searching for the victim. A little bit later, the victim was heard crying in the bushes. Neighbours and the victim's mother closed into where the cries were coming from and found the victim without her pants, and she was bleeding severely. On inspecting her private parts, they found her vagina raptured. The appellant was found at the scene without his trousers and pants.

The appellant was convicted on his own plea of guilty and sentenced to life imprisonment. Aggrieved by both the conviction and sentence, he

appealed to the High Court. After careful scrutiny of the grounds of appeal, the High Court dismissed his appeal. This is, therefore, a second appeal in which the appellant has raised three (3) grounds of appeal as follows:

1. That the 1st appellate judge erred in law and fact in holding that the appellant was properly convicted on his own plea of guilty.
2. The appellant's age was not ascertained as he was a child.
3. That, the appellant pleaded guilty as a result of misapprehension.

The appeal was argued before us on 30th September, 2022, during which the appellant appeared in person, unfended. Taking the floor the appellant informed us two things, *first,* that he had filed a supplementary memorandum of appeal consisting of two grounds: **one,** that the PF3 was irregularly admitted through the Public Prosecutor, and **two,** that all the admitted exhibits were not read out in court as per the procedure. *Second,* that he had with him what appeared to be written arguments which he prayed to be considered by the Court in support of his grounds of appeal. The Court accepted the appellant's arguments seemingly taken under Rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), from which he had nothing to add.

In short, the appellant argued that he did not understand the charges and facts read out, as shown on pages 3-4 of the record of appeal. The reason being *one*, those facts were neither itemized nor clearly illustrated to make the appellant understand the charges he was facing. Two, though the exhibit tendering seemed not to have been disputed, he stated that was not the case. In support, he cited the case of **R v. Yonasasi Egalu & 3 Others** (1942-1943) IX-XE, A.C.A 65.

On the age, he argued that the trial court should have satisfied itself of the appellant's age, which it did not do. Urging us to consider this ground positively, he referred us to the case of **Ismail Ramadhani Mwembaya v. R** [1998] T. L. R. 491.

His arguments on the two grounds in the supplementary memorandum of appeal, were that the prosecutor had two roles, that of a prosecutor and that of a witness when he tendered the exhibits, which were admitted. According to the appellant, this denied him the right to object and cross-examining. Supporting his preposition, he referred us to the case of **Thomas Ernest Msungu @ Mkeny v. R,** Criminal Appeal No. 78 of 2012 (unreported).

In addition, he challenged the two lower courts findings as they were based on exhibits P1, P2, P3 and P4, which were wrongly admitted. In support he cited the case of **Robinson Mwanjisi & 3 Others v. R** [2003] T. L. R. 218.

The appellant urged us to disregard the plea of guilty recorded and allow his appeal.

Responding to the grounds of appeal, Ms. Mollel, learned State Attorney, at the outset, opposed the appeal. Instead, she supported the conviction and sentence meted out. Addressing us on the 1st and 3rd grounds together, Ms. Mollel invited us to examine the charge sheet on page 1 of the record of appeal which reveal, *one,* the charge was read and explained to the appellant who pleaded guilty admitting to having had carnal knowledge of a girl, mentioning her name, *two,* after the plea of guilty, facts were read out as indicated on pages 3-4 of the record of appeal, *three,* all the exhibits related to the charge were tendered without any objection from the appellant who was called upon to plead to the facts read, and admitted to them. Further, on page 5 of the record of appeal

reveals, when the appellant was called upon to make his mitigation, he stated that it was his first time raping a child.

From the narrated sequence of what transpired before the trial court, Ms. Mollel contended that the appellant understood the charge and there was nothing showing that the facts were misapprehended as the appellant was portraying. She thus argued that pursuant to section 360 of the CPA, a plea of guilty once entered bars the appellant from challenging it by way of an appeal except legality of the sentence which in this case is pegged under section 131 (3) of the Penal Code.

On the second ground that the appellant's age was not ascertained, Ms. Mollel admitted that the trial court did not find further on the appellant's age if he indeed was twenty (20) years of age. However, countering his claim, she argued that the appellant's age was gathered from the personal particulars given and read out in court without any protest from the appellant that he was not twenty (20) years old. That was an afterthought, argued Ms. Mollel. Because had he protested to his age, the court would have required the prosecution to bring evidence to prove the appellant's age.

Responding to the grounds in the supplementary memorandum of appeal, on the first and second grounds that exhibits were irregularly admitted, Ms. Mollel argued that the prosecutor tendered exhibits as, at that stage, no witnesses were required after the appellant had pleaded guilty. Also, she argued that it was not a legal requirement to read aloud the contents of the admitted exhibits. Asked by the Court if not reading out the contents of the exhibits would not have amounted to denying the appellant knowing the contents before admitting that being the truth of the matter, she maintained that there was no legal requirement that the admitted documentary exhibits after a plea of guilty must be read aloud. Fortifying her proposition, she cited the case of **Mtumwa Silima @ Bonge v. R,** Criminal Appeal No. 11 of 2019 in which we said that failure to read an exhibit in court after a guilty plea does not vitiate the plea entered since that was not a legal requirement.

In the light of her above submission, she beseeched us to dismiss the appeal before us, contending that the plea entered was unequivocal from which no appeal can stem. Likewise, she argued that the sentence was according to the law; hence no merit in the appeal.

The appellant had nothing to rejoin.

We think it is relevant to start our discussion by reproducing section 228 (1) and (2) of the CPA, which governs plea taking. It provides thus:

> *"(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) 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."*

We shall now address the first and third grounds that the 1st appellate court erred in holding that the appellant was properly convicted on his own plea of guilty and that he pleaded guilty as a result of misapprehension.

It is settled law that for a plea of guilty to be unequivocal, plea it must satisfy the requirements set out in the above section. As found by the 1st appellate court, the conditions for an unequivocal plea of guilty were met hence no appeal against the conviction could lie to the court. The appellant can only challenge his guilty plea under certain circumstances as

elaborated in the decision of the High Court in **Lawrence Mpinga v. R** [1983] T. L. R 166 cited with approval in **Josephat James v. R,** Criminal Appeal No. 316 of 2010 (unreported) and **Frank Mlyuka v R,** Criminal Appeal No. 404 of 2018 (unreported) in which the Court echoed the position in **Lawrence Mpinga** (supra) thus:

> *"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, ambigious 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."*

In the present appeal, what transpired is that the charge was read over and explained to the accused person as indicated on page 2 of the record of appeal. He pleaded guilty to the charge by stating:

"It is true I had carnal knowledge of IE. I was caught having carnal knowledge with IE."

After the above statement, from the appellant's plea. It is evident from the above that the appellant knew what he was pleading to. We say so as he categorically pleaded to; *one*, having carnal knowledge with IE, and; *two,* he was arrested at the scene of crime without his trousers and pants, as the victim was crying and her vagina bleeding. In our view, the appellant's responses categorically indicate he committed the offence. We have equally considered the 1st appellate court's finding on this point. The 1st appellate court entertained no doubt that the plea of guilty by the appellant at the trial court was unequivocal, after the summarized facts read out stated all the ingredients of the offence.

Further to the plea, on page 3 of the record of appeal, facts constituting the offence were read over to the appellant and exhibits were tendered and admitted. Once again, on page 4 of the record of appeal, the court invited the appellant to respond, after he has heard the facts read and he responded thus:

"It is true. I admit the facts read to me by the prosecution."

He then appended his signature using his right thumb and Ms. Elizabeth Swai learned State Attorney appended hers. The appellant was thus convicted on his own plea of guilty and sentenced to life imprisonment. Going by what is availed on record, the plea entered by the appellant was unequivocal, unambigious and without any misapprehension as pointed out in ground three (3) of the appeal. The facts read out to the appellant revealed that on the fateful day, the appellant who was known to the victim's family, went to their home. The victim's mother did not doubt his visit as it was routine. While there, he busied himself playing with the victim. After a short while the appellant disappeared with the victim. Concerned the victim's mother informed neighbours and search ensued. In the process the victim's mother heard the victim crying from the bushes. They moved closer and found the victim crying without her pants and severely bleeding. On checking her private parts they found her vagina ruptured. The appellant was around at the scene of crime without his trousers or pants. He was apprehended right away and the victim was taken to Gelai dispensary for medical examination. PF3 indicated that the victim had been grievously harmed on her vagina. The appellant admitted committing the offence resulting in his cautioned statement being

recorded. Later, he was taken to the Justice of the Peace where he recorded an extra judicial statement. We are without any hesitation that the trial court rightly concluded that all the elements constituting the offence the appellant was charged with were established such that the plea of guilty entered was correctly arrived at.

Furthermore, in mitigation, the appellant fortified his plea when he stated:

> *"It was my first time to have carnal knowledge with a little girl child.....I, therefore, pray to be forgiven for the offence I have committed. That's all."*

In his written arguments, the appellant complained that the exhibits were irregularly admitted. As correctly stated by the appellant, exhibits were tendered by the prosecutor, because after a guilty plea and reading out facts, no witnesses were to be called. Under the circumstances, the prosecutor could tender exhibits as he did. This is the position we took in the case of **Mathias Barua v. R,** Criminal Appeal No. 105 of 2015 (unreported). Faced with an akin situation, we stated thus:

> *"We wish to point out that once it is shown on the record that the accused person on his own free will pleaded guilty to the*

offence unequivocally, then that is enough to support the charge with which the accused is charged. ***Tendering of the exhibit, be it an object or document, is not a legal requirement*** *though is desirable to do so, to ground a conviction."* [Emphasis added]

See also: **Mtumwa Silima @Bonge v. R,** Criminal Appeal No. 11 of 2019 (unreported).

In the light of the above decision, we find the decisions in **Robinson Mwanjisi & 3 Others** and **Thomas Ernest Msungu @ Mkeny** (supra) inapplicable.

All these examined together, we are without a flicker of doubt that the plea of guilty was unequivocal. The appellant understood the charge laid against him, and the facts were read to him by the prosecutor, and pleaded guilty. There was thus no ambiguity or misapprehension of facts. It, therefore, goes without saying that under section 360 (1) of the CPA, no appeal lies in the Court. We find the two grounds discussed together lacking in merit. The second ground is not related to the appellant's plea of guilty entered. Even if we were to consider it being a point of law, we find the ground baseless. On this we agree with Ms. Sekule that the appellant's age was stated in the charge sheet whose particulars were read to him

before he was called upon to plead. The appellant never disputed his age as reflected on page 1 of the record of appeal. We agree that this ground was raised as an afterthought. We dismiss it for lack of merit.

In conclusion, we agree with the High Court that the appellant's conviction on his own guilty plea was correct and proper from which no appeal could lie.

The appeal is devoid of merit and it is dismissed entirely.

DATED at **ARUSHA** this 7th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 13th day of October, 2022 in the presence of Appellant in person and Ms. Lilian Kowero, State Attorney, for the Respondent/Republic both appeared through Video Link is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL