

**IN THE COURT OF APPEAL OF TANZANIA  
AT SHINYANGA**

**(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)**

**CRIMINAL APPEAL NO. 562 OF 2019**

**ZENGO BENJAMIN ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Shinyanga)**

**(Hon. Mkeha, J.)**

**Dated the 7<sup>th</sup> day of November, 2019**

**in**

**Criminal Appeal No. 19 of 2019**

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**JUDGMENT OF THE COURT**

*25<sup>th</sup> & 31<sup>st</sup> October, 2022*

**MWARIJA, J.A.:**

In the District Court of Maswa at Maswa, the appellant, Zengo Benjamin was charged with the offence of rape contrary to section 130 (1) and (2) (e), 131 (1) and (3) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal Code). It was alleged that on 8/2/2019 at about 10:00 hrs at Zebeya Village in Maswa District within Simiyu Region, the appellant raped a child aged two years who, for the purpose of hiding her identify shall hereinafter be referred to as "L.J." or the "victim". On 11/2/2019 when the charge was read over to him, the appellant is recorded to have pleaded guilty in the following words:

*"Kweli, nilikosea sana kubaka yule mtoto."*

Furthermore, when the facts were read out to him, it is on record that the appellant admitted them as being true and correct. Following the plea of guilty and admission of the facts as being correct, the learned trial Resident Magistrate found the appellant guilty and consequently, sentenced him to life imprisonment in terms of the provisions of s. 131 (3) of the Penal Code.

As it turned out later, the appellant decided to appeal to the High Court challenging his conviction and the sentence meted out to him by the trial court. His appeal, Criminal Appeal No. 19 of 2019 was unsuccessful hence this second appeal.

The facts giving rise to the appellant's arrest, arraignment, conviction and consequently his imprisonment, as narrated in the trial court, are as follows: The appellant was until the material time a resident of Zebeya Village in Maswa District. He was staying in the house of one Stella Mboje who had employed him as the herder of her cattle. Apart from the appellant, the said Stella Mboje was also staying with her grandchild, the victim. On 8/2/2019 at about 10:00 hrs, Stella Mboje heard the victim crying in the appellant's room. According to the facts as stated by the prosecution, after having heard the victim crying, Stella

Mboje rushed to the scene to find out what had happened to the former. As she was approaching the appellant's room, she saw the victim going out of the room still crying and shortly thereafter, saw the appellant also getting out of the room. Upon seeing the victim's grandmother, the appellant hastily started to beg her for pardon, asking her not to call and inform other people about the act which he had done. The victim's grandmother proceeded to inspect the victim and saw whitish fluid in her private parts.

Having seen that, she decided to call one Joseph Mboje and in addition raised an alarm which was immediately responded to by the Village Executive Officer (VEO) and the Hamlet Chairman. The appellant was put under custody and later police officers arrived and took him to Maswa police station where his cautioned statement was recorded. The victim was taken to Maswa District Hospital and upon being examined by a doctor, she was found to have bruises in her vagina, the evidence that she was penetrated. The victim's medical examination report (P.F.3) and the appellant's cautioned statement, which were not objected to by the appellant, were admitted in evidence as exhibits P1 and P2 respectively. Exhibit P2 was not however, acted upon by the trial court. The learned trial Resident Magistrate disregarded it on account that, although it is shown that the same was recorded on 8/2/2019 at 17:19 hrs, the time at

which the appellant was arrested was not disclosed in the facts so as to ascertain whether or not the statement was recorded within the prescribed time.

As stated above, when the facts were read over to the appellant, he admitted that the same were correct. He is recorded to have stated as follows:

*"All the facts read by the Public Prosecutor are true and correct. I did wrong. I pray to be pardoned, it was my first time to have sex."*

It was thus on the basis of his plea of guilty that he was convicted.

In his appeal to the High Court, the appellant's main complaint was that his plea before the trial court was not unequivocal and therefore, his conviction was erroneously arrived at. The learned first appellate Judge did not find merit in that complaint. Having considered the provisions of s. 360 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019, now R.E. 2022] (the CPA) which bars institution of appeal against conviction founded on a plea of guilty and the case of **Laurence Mpinga v. Republic** [1983] TLR 166 in which the Court stated the grounds upon which an appeal against conviction of that nature may be entertained, which include the ground that the plea must have been equivocal, the learned Judge was of the view that, from his own words, the appellant

did not only understand the nature of the charge but also unequivocally admitted that he raped the victim. He found further that, from exhibit P1, the victim was indeed raped. He thus dismissed the appeal.

Before this Court, the appellant has challenged the decision of the High Court raising four grounds as follows:

- "1. That, the first appellate court erred in law and in fact to uphold the conviction and sentence of the trial court without considering that penetration as important ingredient of the offence of rape was not elaborated.*
- 2. That, the first appellate court erred in law and in fact to uphold the conviction and sentence without confirmation of the sentence as ordered by the trial court.*
- 3. that, the first appellate court erred both in law and in fact in upholding the appellant's conviction and sentence while the admitted facts i.e. the plea of appellant was imperfect, ambiguous and unfinished.*
- 4. That, the appellate court grossly and incurably erred both in law and in fact to uphold conviction and sentence while [the plea of guilty by] the appellant was a result of a mistake."*

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Shaban Mwigole assisted by Ms. Verediana Mlenza, both learned Senior State Attorneys. When he was called upon to argue his appeal, the appellant opted to hear first, the respondent's reply submission to his grounds of appeal but reserved the right to make a rejoinder submission thereto, if the need to do so would arise.

In her submission, Ms. Mlenza started by replying to grounds 1, 3 and 4 together. She argued that, in terms of s. 360 (1) of the CPA, a conviction based on the accused person's plea of guilty is not appealable except on the grounds stated in the case of **Laurence Mpinga** (supra), including the ground that the plea was imperfect, ambiguous or unfinished, which is one of the grounds upon which this appeal has been predicated.

According to the learned Senior State Attorney, this ground, which has been raised as the 3<sup>rd</sup> ground of appeal, is devoid of merit because the appellant's plea was clearly unambiguous. She stressed that by the words "*kweli nilikosea sana kubaka yule mtoto*" after the facts had been read over to him, the appellant understood the nature of the charge and in effect, admitted that he had carnal knowledge of the victim. In that regard, Ms. Mlenza went on to state, the appellant's admission included

the fact that he inserted his male organ into the victim's female organ and the 1<sup>st</sup> ground is for that reason, also devoid of merit. As for the 4<sup>th</sup> ground of appeal, the learned Senior State Attorney argued that, the contention by the appellant that the plea of guilty was based on a mistake, is without merit because he was consistent in his plea from the time of reading the charge, the narration of the facts and during mitigation that he committed the offence.

On the 2<sup>nd</sup> ground, Ms. Mlenza submitted that the sentence meted out by the trial court to the appellant is mandatory and did not thus require confirmation by the High Court. She added that, in effect, the statement by the learned trial Resident Magistrate that the sentence was subject to confirmation by the High Court, was based on misconception.

On the basis of those arguments, the learned Senior State Attorney urged us to find that the appellant's conviction was well founded and thus prayed for dismissal of the appeal.

In rejoinder, the appellant did not have any substantial arguments to make. He reiterated on how he related to the victim's grandmother, that he was the herder of her cattle and according to him, the incident happened at the time when he was employed in that capacity.

We have duly considered the submissions made by both the learned Senior State Attorney and the appellant. It is the position of the law, as submitted by Ms. Mlenza, that a person who has been convicted on his plea of guilty is barred from appealing against conviction. He may only appeal against the sentence. This is by virtue of the provisions of s. 360 (1) of the CPA which states that:

*"360 – (1) An appeal shall not 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."*

It is also trite position that under certain circumstances, an appeal based on the plea of guilty may be entertained. In the case of **Laurence Mpinga** (supra), cited by the learned Senior State Attorney and which was also considered by the first appellate court, a convicted person may appeal on 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."*

As can be gleaned from the memorandum of appeal, the appellant's complaints are based on the circumstances stated under paragraphs 1, 3 and 4 indicated above. The 2<sup>nd</sup> ground challenges legality of the sentence.

To start with the 2<sup>nd</sup> ground of appeal, we agree with the learned Senior State Attorney that the same is based on misconception. Being a statutory minimum punishment provided by the law for the offence of rape the learned trial Magistrate had jurisdiction to pass the sentence of life imprisonment. The offence involved a child whose age is below ten years, thus attracting a mandatory sentence of life imprisonment. For this reason, the same did not require to be confirmed by the High Court. Section 170 (1) (a) of the CPA is clear on that aspect. It provides as follows:

*"170 – (1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences –*

- (a) *imprisonment for a term not exceeding five years; **save that where a court convicts***

***a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment."***

*[Emphasis added].*

This ground is therefore, devoid of merit

We now turn to consider the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds, starting with whether or not the appellant's plea was imperfect, ambiguous and unfinished. Having gone through the record, we agree with the learned Senior State Attorney that the complaint by the appellant is unfounded. The appellant consistently admitted, from the stage at which the charge was read out to him and at the mitigation stage after being convicted, that he committed the offence. He did not end up admitting the offence but went on to state the nature of the offence which he committed. He was also remorseful for what he had done. Apart from his admission of the facts and his understanding that what he did was wrong as recorded at the time of making his plea, it is also clear from what he stated during mitigation that his plea was not ambiguous. He stated as follows:

*"Naomba msamaha, sitarudia tena."*

The 3<sup>rd</sup> ground of appeal is therefore, devoid of merit.

Similarly, since from his own words, the appellant understood the nature of the charge and admitted to have committed the act of raping the victim, his complaints in the 1<sup>st</sup> ground that the facts did not show that the victim was penetrated and the 4<sup>th</sup> ground that his plea of guilty was based on a mistake are also devoid of merit.

On the basis of the foregoing reasons, we find that this appeal has been brought without sufficient reasons. We consequently hereby dismiss it.

**DATED** at **SHINYANGA** this 28<sup>th</sup> day of October, 2022.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 31<sup>st</sup> day of October, 2022 in the presence of Mr. Zengo Benjamin the Appellant in person and Ms. Verediana Mlenza, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**