IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 666 OF 2020

PHILIPO S/O FAUSTINE @ CHITEMBELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(De-Mello, J.)

dated the 26th day of October, 2020
in
(DC) Criminal Appeal No. 97 of 2020

JUDGMENT OF THE COURT

18th February, & 4th March, 2022

MWAMPASHI, J.A.:

The appellant Philipo Faustine @ Chitembele was charged before the District Court of Kilosa at Kilosa (the trial court) in Criminal Case No. 217 of 2019 with two counts namely; 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) and impregnating a school girl contrary to section 60A (3) of the Education Act [Cap. 353 R.E. 2002] as amended by Miscellaneous Amendments Act No. 2 of 2016.

It was alleged on the first count of rape that on 12.07.2019 at about 1600 hours at Chakwale village within the District of Gairo in Morogoro Region, the appellant had carnal knowledge of one "EF"

(name withheld) a 16 years old girl and a pupil of Ngunyami Primary School. As on the second count, it was alleged that on the same date, time and place the appellant did wilfully and unlawfully impregnate "EF" a primary school pupil.

When the charge was read out and explained to the appellant on 29.07.2019, the appellant pleaded not guilty to the first count but pleaded guilty to the second count. Upon the appellant pleading guilty to the second count, brief facts were given to that effect and having been admitted, conviction on his own plea of guilty and the sentence of thirty (30) years imprisonment followed suit.

Aggrieved and believing that his plea of guilty was not unequivocal, the appellant unsuccessfully appealed to the High Court. It was found by the High Court that the plea of guilty entered by the trial court could not be faulted. Undaunted, the appellant has now preferred this second appeal on the following four (4) grounds:

1. *That, the first appellate court erred in law and fact [in upholding] the appellant's conviction and sentence believing that he unequivocally pleaded guilty to the second count of impregnating a school girl while the facts adduced fell short of establishing the offence.*

2. *That, the first appellate court misdirected itself in law and fact in upholding the appellant's conviction and sentence believing that the plea was unequivocal while it defeats reasoning that the appellant who denied to had sexual intercourse with the girl admitted to have impregnated her.*
3. *That, the first appellate court misdirected itself in law and fact in upholding the appellant's conviction and sentence while it observed that the first count of rape which was not heard was supposed to be heard.*
4. *That, the first appellate court misdirected itself in law and fact in upholding the appellant's conviction and sentence without considering the fact that it was not proved that the victim was pregnant and that it was the appellant who was responsible.*

Before us, at the hearing of the appeal, the appellant appeared in person, unrepresented and when asked to argue his appeal he preferred Ms. Hilda Kato Mkunna, learned Senior State Attorney who was being assisted by Ms. Ashura Mnzava, learned State Attorney, representing the respondent Republic, to begin. He however reserved his right to rejoin should the need to do so arise.

Initially, Ms. Mkunna had intimated that she was opposing the appeal but in the course of her submissions and upon reflection while submitting on the second ground of appeal, she changed her stand and supported the appeal. She argued that looking at the particulars of the

two offences, it is implausible that the appellant could have denied raping the girl and admit impregnating her. It was contended that there was a reasonable possibility that the appellant did not understand the charge and that basing on the brief facts that were given, it cannot be certainly said that his plea was unequivocal. In that light, she submitted that there is merit in the appeal and did not see a reason to argue on the remaining grounds. She therefore urged the Court to allow the appeal, quash the conviction, set aside the sentence and remit the case back to the trial court for the appellant's plea to be taken afresh.

The appeal having not been opposed, the appellant had nothing in rejoinder. He only prayed for the appeal to be allowed.

For ease of reference and to appreciate what really transpired on 29.07.2019 when the appellant was arraigned before the trial court, his plea taken and consequently convicted on his own plea of guilty, we find it desirable to reproduce the relevant proceedings as hereunder:

"Date: *29.07.2019*
Coram: *Hon. T. Lyon – RM 1*
Pros.: *D.C. Chibago*
Accused: *Present*
C/C: *Hawa – RMA*

***Court**: Charge read over and explained to the accused in the language understood by him and asked to plea thereto.*

***1st Count**: Sio kweli [Not true]*

***2nd Count**: Ni kweli nilimpa mimba "'EF" [It is true I impregnated "'EF"]*

Court:

- *E.P.N.G on 1st Count*
- *E.P.G on 2nd Count*

Sgd: Accused

SGD: T. LYON – RM
RESIDENT MAGISTRATE I
29/7/2019

***FACTS ON 2nd Count**.*

***Public prosecutor**: On 12th day of July, 2019 at about 1600 hours at Chakwale village, the accused wilfully and unlawfully impregnated one "EF" aged 16 years old who is a pupil of Ngunyami Primary School.*

Accused: Ni kweli nilimpa mimba. [It is true I impregnated her]

Sgd: Accused

***Public prosecutor**: I pray to tender attendance register with PF3 of the victim.*

***Court**: Cautioned statement and attendance register read before accused and court.*

SGD: T. LYON
RESIDENT MAGISTRATE I
29/7/2019

***Accused**: I have no objection.*
***Court:** The attendance copy of register and cautioned statement Admitted as exhibit PE1 correctively.*

SGD: T. LYON
RESIDENT MAGISTRATE I
29/7/2019

***Court:** The accused is hereby convicted of impregnating a school girl on his own plea of guilty on the second count under section 60 A (3) of Education Act, Cap. 353 R.E. 2002 as amended by Misc. Amendment Act, No. 2 od 2016.*

SGD: T. LYON
RESIDENT MAGISTRATE I
***29/7/2019**."*

Having studied the grounds of appeal, particularly the first and second grounds, and having also considered the arguments from Ms. Mkunna and the appellant, we are of a settled mind that, the only issue for our determination in this appeal, is whether from what transpired on

29.07.2019 before the trial court, as above demonstrated, it can be safely concluded that the appellant's plea was unequivocal.

Simply, an unequivocal plea of guilty is a plea which is clear and not ambiguous or vague. Further, a plea of guilty is sanctioned under section 228(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which reads:

> *"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 appear s to be sufficient cause to the contrary".*

The import of section 228 (2) of the CPA was elaborately interpreted by the defunct Court of Eastern Africa in the case of **R v. Yonasani Egau and Others** (1942)9 EACA, 67 at page 69 wherein it was held that:

> *"In any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and what he says should be recorded in a form that will satisfy an appeal court that he*

fully understood the charge and pleaded guilty to every element of it unequivocally".

For the court to convict on a plea of guilty, the plea must be complete, unequivocal and unambiguous. In the case of **Michael Adrian Chaki v. R,** Criminal Appeal No. 399 of 2017 (unreported), the Court stated that an unequivocal plea of guilty must conjunctively meet the following conditions:

> *"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 the 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".*

In the light of the above guidelines, we have examined the relevant proceedings of the trial court and reached at a conclusion that as rightly conceded by Ms. Mkunna, the plea entered by the appellant cannot be said to be unequivocal. The fact that the two counts were so much connected as it was for the particulars of the two offences, it was improbable for the appellant to have denied the first count and admit the second. It appears the appellant did not well understand the charges facing him. No wonder his response to the facts that were given in respect of the second count, was just short that "*Ni kweli nilimpa mimba"* (It is true I impregnated her) which, to our view, is incomplete

and does not mean that he admitted and agreed that all the given facts were correct. It is not clear from that admission that the appellant agreed to the fact that "'EF" was a school girl which is one of the constituents of the offence in question. It should be emphasized that in such circumstances every constituent of the offence of impregnating a school girl not only needed to be explained to the appellant but the appellant was also required to admit every element of it unequivocally, which he did not.

In conclusion, we therefore find that the appellant's plea was not unequivocal and with due respect, we think that the learned High Court Judge on first appeal, fell into the error in confirming the trial court's finding that the appellant unequivocally pleaded guilty to the offence of impregnating a school girl. Had the learned High Court Judge properly examined the relevant proceedings, she would not have failed to see that the plea was not unequivocal.

From the above given reasons, we find merit in this appeal and proceed to allow it. Consequently, the trial court's plea of guilty order of 29.07.2019 and the conviction are quashed and the sentence is set aside. In the same vein, the subsequent proceedings and judgment of the High Court in Criminal Appeal No. 97 of 2020 are also quashed and

set aside. We further direct that the trial court should proceed with hearing of Criminal Case No. 217 of 2019 by taking the plea of the appellant afresh by another magistrate.

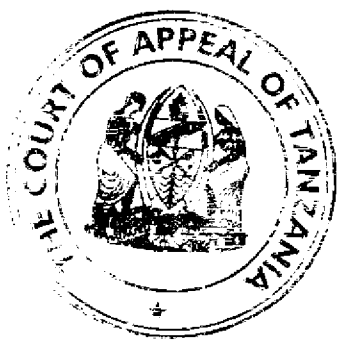
DATED at **DAR ES SALAAM** this 2nd day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 4th day of March, 2022 in the presence of Appellant linked via - Video Conference from Ukonga Prison and Respondent was not present is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL