IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 657 OF 2020

ELIAS SHANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Tabora]

(Bahati, J.)

dated the 6th day of November, 2020

in

Criminal Appeal No. 28 of 2020

.....

JUDGMENT OF THE COURT

22nd & 27th September, 2023

LILA, JA:

The Appellant is challenging dismissal of his appeal against conviction by the High Court. He was, initially charged before the Resident Magistrates' Court of Tabora and was convicted upon his own plea of guilty to the offence of unnatural offence contrary to section 154(1)(a) of the Penal Code and was sentenced to 14 years imprisonment. But, as the victim was of the age below eighteen years, the High Court enhanced it to life imprisonment consequent upon a successful appeal by the

Respondent against sentence in (DC) Criminal Appeal No 118 of 2016. That was on 12/9/2016. Hopping that he could kill two birds by a throw of a stone, he directed his mind towards challenging his conviction to the High Court which, if it was to succeed, the order to serve life imprisonment sentence would also collapse. He was late and having realised so, he sought and was granted extension of time to lodge an appeal on 24/4/2020. He subsequently filed his appeal, DC. Criminal Appeal No. 28 of 2020. Unluckily, his appeal failed, hence the instant appeal.

To recap, the charge alleged that the appellant had carnal knowledge of a girl aged eight (8) years against the order of nature on 23/3/2016 during noon hours at Majengo Village in Sikonge District within Tabora Region. To disguise her identity, we shall conveniently refer to the girl as the victim. The appellant was arraigned in court on 13/4/2016 and in response to the charge he said *"IT IS TRUE"* and the trial magistrate entered a plea of guilty. Following that plea, the prosecution was called upon to narrate the facts constituting the offence charged.

Thereafter, the magistrate inquired from the accused whether or not the facts narrated were at all true and he replied: -

"IT IS TRUE, I DID HAVE CARNAL KNOWLEDGE AGAINST THE ORDER OF NATURE WITH ONE..... (THE VICTIM)"

The trial court, then proceeded thus: -

"COURT'S FINDING

The facts which the accused has admitted without qualification do contain the ingredients of offence. I find him guilty of unnatural offence c/s 154(1)(a) of the Penal Code (Cap 16 R. E. 2002). I duly convict him on his own plea forthwith."

Ultimately, the appellant was sentenced to serve fourteen (14) years jail term by the trial court, after consideration of the appellant's previous criminal record given by the prosecution and his own mitigation. The sentence was, as indicated above, later enhanced to life imprisonment by the High Court on an appeal by the respondent.

The appellant's appeal to the High Court was barren of merits as it was dismissed the court holding that his plea was unequivocal. He was, again, aggrieved and sought to fault the learned judge upon a memorandum of appeal comprising three grounds framed thus: -

"1. That, the learned first appellate Judge erred in law to hold that the plea of the appellant was unequivocal plea of guilty.

2. *That, since the victim of the offence was medically examined, the alleged medical examination report (PF3) was not tendered in evidence to support the allegations.*
3. *That, the learned first appellate Judge erred in law to impose, upon the appellant, a sentence of life imprisonment in the absence of a cogent proof of the age of the victim."*

The appeal is essentially against the decision of the High Court in Criminal Appeal No. 28 of 2020 and is intended to challenge the validity of conviction although ground three of appeal extends to challenging the propriety of the life sentence, a matter that was already determined by the High Court in (DC) Criminal Appeal No. 118 of 2016. Fortunately, the learned judge was reluctant to accommodate such arguments when she explicitly, in our view rightly, refrained to do so at page 54 of the record of appeal. We shall, however, consider if the complaint about failure to prove age of the victim has any substance and, if true, its effect on his plea of guilty.

The appellant was unrepresented when he appeared before us for hearing of the appeal. Ms. Veronica Moshi and Ms. Alice Thomas, learned State Attorneys, represented the respondent. They stoutly resisted the appeal.

In exercising his right to address the Court first, the appellant simply adopted his grounds of appeal which he urged the Court to consider and let him regain freedom. He then left it for the learned State Attorneys respond to the appeal grounds.

Ms. Moshi, responding in respect of ground one (1) of appeal, was firm that a serious glance on the proceedings makes it crystal clear that the learned trial magistrate rightly observed the procedure of conducting plea proceedings right from when the appellant pleaded to the charge put to him, properly recorded his response to the facts narrated by the prosecution, examined them if they constituted all the elements of the offence charged and upon being so satisfied convicted him. She added that, after hearing his antecedents from the prosecution and his mitigation, the appellant was sentenced. On the whole she argued that there was nothing that would suggest that the appellant's plea was not unequivocal. She submitted that the appellant understood the charge and the facts narrated which constituted all the elements of the offence of unnatural offence that is carnally knowing against the nature of a girl. In view of that, his conviction was proper citing to the Court the case of **Onesmo Alex Ngimba vs. Republic**, Criminal Appal No. 157 of 2019 (unreported) to cement her position.

Failure to tender a Police Form No. 3 famously referred to as PF3 which is a medical report showing the doctor's findings after conducting medical examination of the victim, which is the crux of the complaint in ground two (2) of appeal was easily brushed off by Ms. Moshi stating that it is not a legal requirement when the conviction proceeds on a plea of guilty. He cited to us the Court's decision in the case of **Frank Mlyuka vs. Republic**, Criminal Appeal No. 404 of 2018 (unreported).

The validity of life sentence is challenged in ground three (3), the argument being that it cannot stand because there was no proof of age of the victim to be under the age of eighteen (18). In response, the learned State Attorney's argument was that age of the victim was mentioned in the facts to be eight (8) years to which facts the appellant admitted them as true hence no more proof was required. In conclusion, she submitted that, in terms of section 154(2) of the Penal Code, the prescribed sentence is life imprisonment. Her ultimate prayer was that the Court be obliged to find the appeal baseless and proceed to dismiss it.

The appellant's rejoinder materially constituted a plea to the Court, being the final court of the land, to consider his appeal complaining that he was too young when he was arrested, he could not foresee the outcome of pleading guilty to the charge as he was advised to do so by

police and that he acted on a promise that nothing bad would happen to him but would be set free.

Without losing sight, although we are obligated to consider the proceedings in the record of appeal so as to determine the appeal, we take the appellant's rejoinder arguments as somehow being a reassurance that he truly pleaded guilty to the charge. His complaint, at this stage, that he was misled by police is nothing but becoming wiser after the event which cannot warrant change of facts as they were recorded and which are the basis of determining the appeal. To accommodate it is to permit impeachment of the record which is always taken to be correct unless proved otherwise according to a laid down procedure. All the same, we cannot abdicate our duty of considering the grievances as presented in line with the facts and law.

The law on the right of appeal against conviction arising out of one's own plea of guilty, in terms of section 360(1) of the Criminal Procedure Act, (the CPA), is generally unshaken that it is not a matter of right. Only a grievance arising out of the extent of sentence meted may be appealed against unconditionally. However, over time, the Court's position has changed permitting, under certain proven circumstances, a plea of guilty

be challenged as being equivocal with the effect of rendering a conviction invalid.

In the case of **Michael Adrian Chaki vs. Republic**, Criminal Appeal No. 399 of 2019 (unreported), after considering various Court's decisions expounding principles to be considered where a case proceeds on a plea of guilty starting with the leading case of **Rex vs. Folder** (1923) 2 KB 400 which set the factors which may make a plea equivocal and which were followed by the High Court in the famous case of **Laurent Mpinga vs. Republic** [1983] TLR 166, the latter being followed in **Karlos Punda vs. Republic,** Criminal Appeal No. 153 of 2005 (unreported), the Court summed up six criteria which should cumulatively be met for a plea to be regarded as an unequivocal plea on which a valid conviction may be founded to be that:-

> "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 (see* ***Akbarali Damji vs. R.*** *2 TLR 137 cited by the Court in* ***Thuway Akoonay vs. Republic*** *[1987] T.L.R. 92);*

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."*

The above circumstances make it plain that a conviction on a plea of guilty would only stand where it is established that an accused person understood the charge which was itself proper and the particulars are clear, facts narrated constituted all the elements of the offence charged

and the appellant must admit them as true unconditionally. In practice, facts narrated are supposed to be a summary of the would-be evidence by the prosecution if the accused would have denied the charge and out of which a conviction would validly be grounded (see a persuasive decision in **Salehe Mohamed v. R** [1971] HCD No. 176 citing the decision of the defunct East African Court of Appeal in **Kato v. R.** [1971] E. A. 542). The question arising from the appellant's grounds of appeal for our resolution is therefore whether the complained anomalies exist and if so, whether they can be the legal basis to vitiate the appellant's plea of guilty and hence his conviction.

Going by the record of appeal, the complaints in grounds two (2) and three (3) of appeal, no doubts, are baseless. As rightly argued by the learned State Attorney, where an accused pleads guilty and admits all the facts narrated by the prosecution establishing all the ingredients of the offence charged, the need to prove such facts by tendering exhibits does not arise. The case of **Frank Mlyuka vs. Republic** (supra) is an authority on that although it is desirable to do so as the Court held in **Mathias Barua vs. The Republic**, Criminal Appeal No. 105 of 2015 (Unreported) stating that: -

> *"...We wish to point out that once it is shown on 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 exhibit be it an object or document is not a legal requirement though is desirable to do so, to ground conviction."*

In the two grounds, it seems that the appellant thought that more evidence was required to prove not only the age of the victim but also medical proof that the victim was carnally known. He is not right. The admitted facts are clear that the appellant was eight (8) years old and was carnally known by the appellant to which facts the appellant admitted. In the circumstances failure to tender documentary exhibits proving the victim's age and medical proof of her condition after the ordeal was inconsequential.

As for life sentence, the learned State Attorney was right that, in terms of section 154 (2) of the Penal Code, after the age was explained in the facts narrated and the appellant had admitted so, it was established that the victim was below eighteen (18) years for which the appropriate sentence was life imprisonment. The two grounds are without merit and are dismissed.

The appellant's complaint in ground one (1) of appeal is with regard to his plea complaining that it was not unequivocal and the learned judge was wrong for not appreciating that fact. We have examined the charge, the facts adduced and the appellant's plea and admission to the facts narrated. In the charge the allegation was clear that he had carnally known the victim. As proof that the appellant knew exactly what he was charged with, as rightly argued by Ms. Moshi, he pleaded guilty and after the facts were outlined by the prosecution which made it perfectly clear that he carnally knew the victim against the order of nature, he stated that: -

> *"IT IS TRUE, I DID HAVE CARNAL KNOWLEDGE AGAINST THE ORDER OF NATURE WITH ..... (THE VICTIM)."*

With such self-incriminating statement by the appellant, it is inconceivable to hear him now complaining that his plea was equivocal.

We are, for the foregoing reasons, satisfied that neither of the grounds raised by the appellant has merit. We entirely agree with the learned State Attorney that there is no valid cause as set out in the case of **Michael Adrian Chaki vs. Republic** (supra) to fault the learned judge's findings that the appellant's plea was unequivocal and the

narrated facts were sufficient to prove all the elements of unnatural offence with which he stood charged.

For the foregoing reasons, the appeal is without merit and we dismiss it in its entirety.

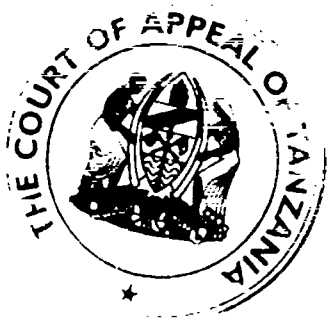
DATED at **TABORA** this 26th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 27th day of September, 2023 in the presence of Mr. Elias Shani, the Appellant in person and Ms. Alice Thomas, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL