IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: KWARIKO, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 369 OF 2020

JACK MAHEMBEGA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Musoma)

(Kahyoza J.)

dated the 10th day of July, 2020

in

(DC) Criminal Appeal No. 15 of 2020

.....

JUDGMENT OF THE COURT

9th & 10th November, 2023

GALEBA, J.A.:

On 13th January, 2020, Jack Mahembega the appellant in this appeal, was arraigned before the District Court of Serengeti at Mugumu (the trial court). It was in Criminal Case No. 15 of 2020, where he was charged of having committed unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap 16 R.E. 2019] (the Penal Code).

Briefly, according to the prosecution, on 9th January, 2020, the appellant was grazing domestic animals at Nyiberekera Village within

Serengeti District in Mara Region. Likewise, a young boy aged 6, whose identity, we will conceal in this judgment and refer to him, as the victim, was also grazing cattle in the same pastures. It is alleged that the appellant had carnal knowledge of the victim against the order of nature during the grazing.

When the case was called on for plea taking for the first time, the appellant allegedly, admitted the charge. He also admitted the facts constituting the offence. Consequent to those two steps, the trial court convicted the appellant and sentenced him to life imprisonment.

His appeal to the High Court was dismissed in its entirety, hence this second appeal in which the appellant raised four grounds of appeal. However, for reasons that will become obvious as we proceed, we will only determine the first and third grounds which are both to the effect that the appellant's plea of guilty was equivocal as the appellant did not admit the truth of the charge. Those two grounds are; **first,** that the appellant was convicted without pleading to the charge and without being asked if he understood it, and; **second,** that the appellant's plea of guilty was misapprehended, mistaken and ambiguous.

At the hearing of this appeal on 1st November, 2023, the appellant appeared in person, without legal representation, and the respondent Republic had the services of Mr. Abel Mwandalama, learned Principal State Attorney, Ms. Monica Hokororo, learned Senior State Attorney, Ms. Janeth Kisibo and Mr. Yese Krita Temba, both learned State Attorneys.

Prior to commencement of hearing, the appellant adopted his grounds of appeal, and prayed that we consider them in determining it. He also requested us to allow the respondent's side to respond to his grounds of appeal such that if any need arose, he would rejoin thereafter.

It was then Ms. Kisibo, who took the floor to address us in response to the complaints of the appellant. The learned State Attorney, submitted specifically objecting to each ground of appeal, and finally, implored us to dismiss the appeal for want of merit. When we asked the appellant whether he had any point to make in rejoinder, he stated that he did not admit any charge at the trial, and that the case against him was not genuine.

After hearing the appeal, we adjourned the matter for judgment. However, after deliberation and in the course of reviewing

the entire record, something caught our attention. It came to our notice that, according to the record of appeal, the offence referred to in the charge sheet was having carnal knowledge of the victim aged 6 years, against the order of nature. Even the appellant's plea at page 3 of the typed record, is likewise admitting the offence of having carnal knowledge of the victim against the order of nature, *viz*; "***Ni kweli nilimlawiti***", which phrase, in English means; "***It is true, I had carnal knowledge of him against the order of nature***". However, according to the record of the trial court at the inside of the front cover, containing the proceedings of the very date, that is, 13th January, 2020, which record is original and in free hand of the trial magistrate, it shows that the appellant pleaded; "***Ni kweli nilimbaka,***" which may be translated as; "***It is true I raped him.***" So, we discovered that, the typed record, had a plea which was not anywhere in the original record of the case.

Because of the above, we made a decision to recall parties so that they may address us on the competence of the plea at page 3 of the record of appeal, which was also complained of in the first and third grounds of appeal, in view of the above inconsistence between two records, the original in free hand, and the typed record.

At the reconvened session on 9th November, 2023, once again the appellant appeared in person, but the respondent Republic had the services of Mr. Abel Mwandalama, learned Principal State Attorney assisted by Mr. Tawabu Yahya Issa, learned State Attorney. We therefore required parties to address us as to their respective positions in view of the stated scenario.

In that respect, Mr. Mwandalama submitted that, the authentic plea, was the handwritten one in the original record of the trial court, where the appellant pleaded by saying that he raped the victim. In the circumstances, he was of the firm position that, there was no valid plea to the charge of unnatural offence. He contended that entering a plea of guilty in respect of the charged offence, was in the circumstances, improper. Finally, he conceded to the first and third grounds of appeal which challenge the validity of the appellant's plea, and prayed that we nullify the proceedings of the trial court, quash the appellant's conviction and set aside his sentence. As for the way forward, he implored us to order a retrial of the appellant before a different magistrate. As usual, and quite understandably, being a layman, the appellant had nothing to say, except for praying that we

unconditionally release him from prison, as he has stayed there for a long time.

Having thoroughly considered the complaints of the appellant and the arguments of the learned counsel for the respondent, particularly the above arguments at the reconvened session, in our view, this appeal will be disposed of in the context of the first and the third grounds of appeal, by determining one issue; whether the appellant admitted the truth of the charge.

Before getting to the actual determination of the issue raised, we think it is proper to briefly discuss the position of the law in appeals of this kind. We will do so in the context of section 360 (1) of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA), which provides that:-

> *"360-(1) 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."*

In other words, the general principle is that, where the accused unequivocally pleads guilty to the charge read and is accordingly convicted, he may only appeal against legality or severity of the

sentence but not to challenge anything relating to his conviction. However, that is the general rule, to which there exists exceptions. The exceptions were eloquently detailed in the case of **Laurence Mpinga v. R** [1983] T.L.R. 166, where it was stated that:-

> *"(i) an appeal against a conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand;*
>
> *(ii) 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, 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."

Other cases in which the above exceptions have been restated, include; **Njile Samwel John v. R,** Criminal Appeal No. 31 of 2018; **John Charles v. R,** Criminal Appeal No. 554 of 2017; and **Frank Mlyuka v. R,** Criminal Appeal No. 404 of 2018 (all unreported), just to mention, but a few. Although the scenario in the case before us, is not *per se* amongst the exceptions in the case of **Laurence Mpinga** (supra), we wish to state that the list of the matters in which a plea of guilty may be appealed against, are not limited to the four scenarios pointed out in the **Laurence Mpinga** case. We are of the firm position that, a person who admits to have committed a completely different offence, other than the offence specified in the charge sheet, may appeal against conviction, if convicted on allegation that he unequivocally admitted the charge, like the appellant in this case. Thus, we have no doubt in our mind that, this appeal challenging the conviction is competent before us, because grounds one and three are challenging the validity of the plea.

With that short background on the exceptions to the general rule on an appeal against conviction resulting from a plea of guilty,

our next task will be to underscore what does a valid plea of guilty entail, because in the above two grounds of appeal, the validity of the appellant's plea of guilty is challenged. The tests in determining whether a plea is complete and unequivocal, were enumerated in the case of **Michael Adrian Chaki v. R,** Criminal Appeal No. 399 of 2017 (unreported). In that case, the Court stated that:-

> *"...there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:-*
>
> 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.*

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."*

[Emphasis added]

In our view, the above case law is instructive, among other things, that for a trial court to convict a person on his plea of guilty, the convicting court must satisfy itself that the accused's plea is a complete admission of guilt to the offence he or she is charged with. See also; **Samson Kitundu v. R,** Criminal Appeal No. 195 of 2004 and **Onesmo Alex Ngimba v. R,** Criminal Appeal 157 of 2019 (both unreported).

With the above elucidation, it is appropriate at this point to address the real issue in this appeal. That is, did the appellant admit the truth of the charge that was read over to him? Just to be clear here, we will treat the original record in free hand as the authentic proceedings of the trial court and not the plea at page 3 of the typed record of appeal. As we do that, we wish, just in passing to revisit the procedural law relating to arraignment and plea taking in criminal trials.

When a suspect is first arraigned to the trial court to face his charge, the relevant law applicable is contained at sections 228 and 229 of the CPA. We will start with section 228 (1) and (2) of the CPA, which provides that:-

> *"228.-(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."

[Emphasis added]

The catch phrase in both subsections above, *is admission of the truth of the charge*. In this case, the charge subject matter of the present appeal is contained at page 1 of the record of appeal, and it is as follows:-

"CHARGE

STATEMENT OF OFFENCE: UNNATURAL OFFENCE c/s 154 (1) (a) and (2) of the Penal Code Cap. 16 Voi. 1 of the laws (R.E. 2002).

PARTICULARS OF OFFENCE: JACK MAHEMBEGA on 9th day of January, 2020 at Nyiberekera Village within Serengeti District in Mara Region, ***did have carnal knowledge of one (victim name concealed) aged 6 years against the order of nature.***

Dated at Mugumu this 13th January, 2020

Sgd

PP."

[Emphasis added]

When the above charge was read over to the appellant in compliance with section 228 (1) of the CPA above, he replied:-

*"**Accused Plea:** Ni kweli nilimbaka"*

This plea is according to the original record in free hand. It is significant to observe that, although the charge read over to the appellant was for having carnal knowledge of a boy against the order of nature, the appellant's response as indicated, was not an admission of the truth of the charge that was read over to him because, he admitted to have raped the victim, a completely different offence. So, he did not admit to have committed any offence against the order of nature.

It is also of particular interest to note that the offence of rape, which the appellant admitted to have committed, is created under section 130 (1) (2) and (3) of the Penal Code, and the offence can only, in both law and fact, be committed against a female person and never against a male. That section provides:-

> *"130 - (1) It is an offence for a male person to rape a **girl or a woman.***
>
> *(2) A male person commits the offence of rape if **he has sexual intercourse with a girl or a woman** under circumstances falling under any of the following descriptions:*

(a) ***not being his wife, or being his wife*** *who is separated from him without her consenting to it at the time of the sexual intercourse;*

(b) ***with her consent where the consent has been obtained by the use of force, threats*** *or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;*

(c) ***with her consent when her consent has been obtained at a time when she was of unsound mind*** *or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;*

(d) ***with her consent when the man knows that he is not her husband,*** *and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;*

(e) ***with or without her consent when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

(3) Whoever-

(a) being a person in a position of authority, takes advantage of his official position, and ***commits rape on a girl or a woman*** *in his official relationship or wrongfully restrains and commits rape on the girl or woman;*

(b) being on the management or on the staff of a remand home or other place of custody, established by or under law, or of a women's or children's institution, takes advantage of his position ***and commits rape on any woman inmate of the remand home****, place of custody or institution;*

(c) being on the management or staff of a hospital, school, day care center, children's home or any other institution, organization or agency where there is a duty of care, takes advantage of his

position ***and commits rape on a girl or woman;***

(d) being a traditional healer takes advantage of his position ***and commits rape on a girl or a woman*** *who is his client for healing purposes;*

(e) being a religious leader takes advantage of his position ***and commits rape on a girl or woman."***

[Emphasis added]

By referring to the above provisions of the law, the point we want to underscore, is that the victims of all forms of rape, including gang rape under section 131A of the Penal Code, must be persons of the female gender. That is so, because the biological organ vulnerable to the offence of rape is not available in persons of the male gender. Although that is the position as for rape, in terms of section 154 (1) (a) and (2) of the same Code, unnatural offence can be committed to persons of either gender, male or female. The simple reason for that is because, the biological organ susceptible to the offence, exists in both the males and females. That section provides that:-

"154.-(1) Any person who-

(a) has carnal knowledge of ***any person against the order of nature;***

(b) N/A;

(c) N/A;

commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.

(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."

Despite the above differences in the two offences, they are both crimes against this society's morality, and when proved, each is severely punishable.

In the case before us, although the charge that was read over to the accused person, was for having carnal knowledge of a boy against the order of nature, the appellant's response was not admitting that truth. If anything, the appellant admitted to have raped the victim, an offence which he was not charged with. In such a case, the procedure was for the trial court to enter a plea of not guilty, and

invoke the provisions of sections 228 (3) and 229 (1) of the CPA, and proceed with the trial. Those sections provide that:-

> *"228 (3) Where the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*
>
> *"229 -(1) Where the accused person does not admit the truth of the charge, the prosecutor shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge."*

According to the above provisions, it does not matter what the accused pleads or says in response to the charge. If he does not admit its truth, a plea of not guilty, must on all occasions, be entered, even if he was to keep quiet, – see section 228 (4) of the CPA. In other words, by the trial court entering a plea of guilty, after the appellant had admitted raping the victim who was a boy, the trial court slipped into an error of law which culminated in the appellant's unlawful conviction, giving rise to an illegal sentence.

On the part of the first appellate court, we noted at page 21 of the record of appeal, that it appreciated that the appellant pleaded to have raped the victim instead of committing unnatural offence.

Though it would have rectified the anomaly, we will nonetheless step into its shoes and do the needful hereunder.

Based on the above discussion, we allow the first and third grounds of appeal, and hold that the appellant's plea of guilty was invalid, because as amply demonstrated, he did not admit to have had carnal knowledge of the victim against the order of nature. Thus, we nullify the trial court's proceedings and all orders of that court. The appellant's conviction is quashed, and the sentence of life imprisonment that was imposed upon him is hereby set aside. As the proceedings and judgment in the first appellate court, emanated from an unlawful conviction of the appellant, the same are also nullified. In connection to that, because the appeal has been disposed of based on only the first and third grounds of appeal, we will not engage in a discussion geared to determine the merits of the second and the fourth grounds, for that, would be inconsequential.

In the upshot, we allow the appeal to the above extent; and as for the way forward, we direct that the original record in Criminal Case No. 15 of 2020, be remitted to the District Court of Serengeti for the appellant's fresh plea taking according to law, before a different

magistrate. In the meantime, the appellant shall remain in custody as a remandee, pending his trial.

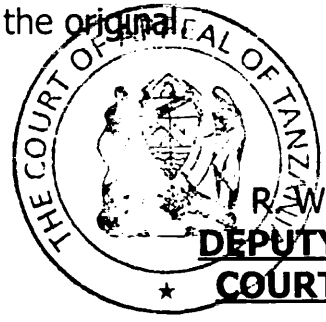
DATED at **MUSOMA** this 10th day of November, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered this 10th day of November, 2023 in the presence of the Appellant in person and Mr. Jonas Samwel Kivuyo, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL