IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 377 OF 2020

NOEL PAULO @ KIZUNGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwenempazi, J.)

Dated the 10th day of August, 2020

in

DC Criminal Appeal No. 79 of 2019

JUDGMENT OF THE COURT

13th & 19th March, 2024

MGEYEKWA, J.A:.

The District Court of Mwanga convicted the appellant on his own plea of guilty of an unnatural offence contrary to section 154 (1) of the Penal Code. Particulars of the charge from which the appellant is said to have pleaded were that; on 15th September, 2017 at around 15:30 hours at Vuaga Usangi village within Mwanga District in Kilimanjaro Region, the appellant did have carnal knowledge of a boy aged 8 years against the order of the nature. The boy shall be referred to as the victim in order to conceal his identity.

When the charge was read out to him, the appellant is recorded to have pleaded guilty and admitted all the facts stated by the prosecution. From such plea and admission of the facts, the appellant was convicted and sentenced to life imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court at Moshi where the conviction and sentence were sustained.

Still lingering doubt on his guilt, the appellant preferred this second appeal. In the memorandum of appeal, he sought to impugn the decision of the High Court on two grounds of grievance as follows:

1. *That, the two courts bellow grossly misdirected themselves in believing that the appellant's plea of guilty was unequivocal.*
2. *The conviction and sentence against the appellant, based on the plea of guilt, wrongly proceeded despite no single proof from the prosecution that the offence was committed (e.g., a PF3). The same are, therefore, unsafe and should not stand.*

At the hearing of the appeal, the respondent was represented by Ms. Sabina Silayo, learned Senior State Attorney and Ms. Neema Moshi, learned State Attorney. The appellant appeared in person, unrepresented and urged us to consider his written submissions in support of the grounds in the memorandum of appeal and an additional ground of appeal in what appears to be a supplementary memorandum of appeal. In the additional

ground, the appellant complained that the first appellate court erred in law and fact for upholding the decision of the trial court while the charge sheet was defective.

Upon our anxious consideration of the grounds of appeal and the arguments for and against, we think the complaint in ground one on the alleged defective charge is misconceived and we dismiss it. In the same vein, we think it will be unnecessary for us to consider ground two, having taken the view that the determination of the appeal turns on the issue whether the appellant's plea was unequivocal to warrant conviction and sentence, subject of ground two in the original memorandum of appeal.

On the complaint regarding the completeness of the plea of guilty, the appellant contended that the record does not show if he pleaded guilty. He further submitted that it was important for the trial magistrate to ensure that the appellant understood the elements of the charge read out to him and resultant sentence. He thus urged the Court to allow his appeal as the conviction was wrongly grounded on the alleged plea of guilty.

In reply, Ms. Moshi expressed her firm position resisting the appeal. She began by stating that, in terms of section 360 (1) of the Criminal Procedure Act (the CPA), no appeal lies against a conviction grounded on a plea of guilty except under certain circumstances, such as illegality of a

sentence and if the appellant's plea was improper or ambiguous. Fortifying her submission, she referred to our earlier decision in **Charles Samwel Mbise v. Republic**, Criminal Appeal No. 355 of 2018 [2021] TZCA 151 (29 April 2021) TanzLII.

Relying on the above-cited authority, Ms. Moshi submitted that, in the instant appeal, the appellant's plea was unequivocal and so he was properly convicted and sentenced. Accordingly, in terms of section 360 (1) of the CPA, he had no right of appeal.

She valiantly contended that it is on record that the prosecution read out the charge, and the appellant responded: It is true. She went on to submit that thereafter, when facts were read out, the appellant admitted to those facts. She was positive that the plea by the appellant was clearly unequivocal. Reinforcing her submission, she cited the case of **Frank Mlyuka v Republic**, Criminal Appeal No.404 of 2018 [2020] TZCA 1738 (20 August 2020) TanzLII. She maintained that the appellant understood the charge because, in mitigation, he requested the trial magistrate to reduce the sentence meted against him.

Upon our consideration of the arguments on ground two of appeal, the issue for determination is whether or not the appellant's plea was unequivocal. We have in that section 360 (1) of the CPA bars appeals from subordinate courts where an accused was convicted upon a plea of guilty

except on the legality of sentence. For ease of reference, we reproduce section 360 (1) of the CPA:

> *"360 (1). No appeal shall be allowed in the case of any accused who has pleaded guilty and has been convicted on such plea by a subordinate court* ***except for the extent or legality of the sentence****".* (Emphasis added)

As intimated earlier, we are alive that notwithstanding the above provision, an appeal against a conviction on a plea of guilty may lie under certain circumstances as an exception to the general rule. See **Charles Samwel Mbise** (supra) and **Kalos Punda v. Republic**, Criminal Appeal No. 153 of 2005 (unreported). In the latter case, the Court relied on the case of **Laurence Mpinga v. Republic** [1983] TLR 166, which elaborated the circumstances warranting appeal against conviction on a plea of guilty. It held:

> *"...an accused person who has been convicted by any court of an offence "on his own plea of guilty" may in certain circumstances appeal against the conviction to a higher court. Such an accused person may challenge the conviction 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."

Equally, in the case of **Alexander Lukoye Malika v. Republic** [2015] eKLR, the Court of Appeal of Kenya identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

" A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleads guilty as a result of a mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, upon admitted facts, the appellant could not have been convicted of the offence charged."

We subscribe to the above decision as reflecting a correct position. In the same vein, the Court in **Josephat James v. Republic**, Criminal Appeal No. 316 of 2010 [2012] TZCA 159 (1 October 2012) TanzLII, held

that an appeal from subordinate courts on conviction upon a plea of guilty may also be entertained where an appellant was hurried into pleading guilty or the plea of guilty was procured as a result of a threat or promise offered by a person in authority in consideration of such plea. However, each case will depend on its own set of circumstances and facts.

To appropriately determine the issue in this appeal, we have to look at the charge that was placed before the appellant and the appellant's plea of guilty as recorded by the trial court on 19th September, 2017. It reads:

> **Court**: Charge read over and explained to accused person who is asked to plea (plea of the accused in his own words stated):
>
> **Accused**: It is true.
>
> **Court**: Entered as a plea of guilty for accused.
>
> Sgd
> M.B Lusewa,
> **SRM**
> 19/9/2017

Thereafter, the prosecutor read out the facts of the case and the appellant is recorded to have replied as follows:

> *"**Accused**: I admit personal details and the fact that I had carnal knowledge of a boy against the order of nature and did give him money and told him not to tell anyone about it."*

Subsequently, the trial court proceeded to convict and sentence the appellant as charged. In **Safari Deemay v. Republic**, Criminal Appeal No. 269 of 2011 (unreported), the appellant was recorded to have said: "It is true" after a charge of rape c/s 130 (l) (2)(e) and 131(1) of the Penal Code was read and a plea of guilty entered by the Babati District Court.

In quashing and setting aside all the proceedings, conviction and sentence, the Court warned:

> *"Great care must be exercised especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment, we are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true. A trial court should ask an accused to elaborate, in his own words as to what he is saying "'is true".*

The Court, in the above-cited decision, observed that the plea that, "it is true," without any further elaboration was not a proper plea of guilty.

As intimated earlier, when the charge was read out, the appellant stated, "It is true." It is clear that the expression "it is true" was imperfect, ambiguous and unfinished. In other words, it was hardly sufficient to have conclusively assured the trial court of an admission of the truth of the charge in terms of the requirement of section 228 (2) of the CPA. It is

doubtful whether that expression by itself, without any further elaboration by the appellant constituted a cogent admission of the truth of the charge.

Worse still, the appellant had no legal representation. In such circumstances, the trial court ought to have ensured that he understood every element of the charge read out to him. It ought to have warned itself that the appellant understood the nature and implication of the offence he was about to plead. The significance of the need for the court to be cautious when acting on a plea of guilty from an undefended accused person was stressed in **Simon Gitau Kinene v. Republic** [2016] eKLR, where it was held:

> *"Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened."*

We entirely subscribe to above view and firmly hold that in the cases involving unrepresented person, the trial court before entering a plea of guilty against the accused has to warn itself if he understood the nature and implication of the offence about which the plea of guilty has to be made.

Emphasizing the significance of the trial court to take extra care where the issue involves unrepresented layman, the Court observed in **Issa Reji Mafit v. Republic**, Criminal Appeal No. 337 of 2020 [2016] TZCA 218 (26 April 2016) TanzLII that:

> *"It would also appear to us to be the law that, where, like in this case, the accused is unrepresented layman, before drawing an inference that, he did not cross examine the witness because he accepted his evidence, to be true, the Court has to warn itself if the layman- accused knew the meaning and effect of not cross examining a prosecution witness."*

In the case at hand, the appellant pleaded guilty on the day when the case came for the first time for hearing, the prosecution had yet to file the facts of the case. The record does not show if the trial court did warn itself of the possibility of such layman appellant not knowing the nature and implication of his plea. Though the appellant admitted the facts of the case, given the imperfectness of his plea, it was unsafe to rely on it to convict the appellant. As the appellant's complained in this case that, he entered the plea without knowing its implication, we find it fair to give him a benefit of doubt.

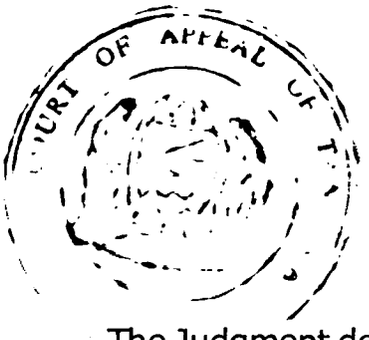
In the upshot, we find merit in the second ground of complaint and allow it. Consequently, we quash the conviction and set aside the

sentence. Going forward, we direct the appellant to stand trial to the charge on the plea of not guilty. The record of the trial court shall be remitted to it for an expedited trial before another magistrate with competent jurisdiction. Meanwhile, the appellant shall remain in custody awaiting his trial, unless admitted on bail.

DATED at **MOSHI** this 18th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL



A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of March, 2024 in the presence of appellant in person and Ms. Edith Msenga, learned State Attorney for the respondent - Republic, is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL