IN THE HIGH COURT OF TANZANIA

AT IRINGA

(APPELLATE JURISDICTION

(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 33 OF 2013

(Original Criminal Case No. 105 of 2000 of the District Court of Mufindi District at Mafinga

Before N.A.S. Mwakasanga – P.D.M.)

FRANK KIFWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

24/3/2014 & 11/4/2014

JUDGEMENT

MADAM SHANGALI, J.

The appellant Frank Kifu @ Kifwe youngman aged 22 years of age was arraigned before Mufindi District Court on two counts namely; first count of Rape contrary to Section 130 (1) and 131 (1) of the Penal Code, as amended by the Sexual Offence Special Provisions Act No. 4 of 1998 and second count in alternative of Indecent Assault contrary to Section 135 (1) and (2) of the Penal Code, Cap. 16, R.E. 2002.

On 16/6/2000 the accused person (appellant) was convicted on his own plea of guilty on the first count and sentenced to serve thirty (30) years imprisonment.

The appellant was not satisfied with the conviction and sentence imposed against him. Since that period i.e. June, 2000 the appellant has been serving the sentence while striving for his appeal to this court to be filed and determined. Eventually this appeal was filed on 4th November, 2013.

In his memorandum of appeal the appellant has listed six grounds of appeal which may conveniently and legally be condensed to two grounds namely; **One**, That the trial court erred in law in convicting him on ground that he had pleaded guilty without ascertaining whether or not the plea was equivocal or unequivocal. **Two**, whether the appellant understood the nature and ingredients of the charge laid against him and whether the alleged facts constituted the offence of rape.

The record of the proceedings of the trial District Court is very short. When the charge was read over and explained to the appellant, he is recorded to have pleaded guilty to the first count by saying "*It is true that I raped Flora Sijombe a ten year old little girl*". From there a plea of guilty was recorded and facts in respect of that offense were outlined. The record do not show what happened to the second alternative count and

it appears that it was not read over and explained to the appellant. Apparently the record is also silent as to who exactly outlined the facts of the case before that court. Having recorded the facts and exhibits the trial District Court proceeded to convict and sentence the appellant.

In this appeal the appellant appeared in person and unrepresented while the respondent/Republic was represented by Mr. Manjoti, learned Senior State Attorney.

During the hearing of this appeal Mr. Manjoti, learned State Attorney opted to challenge the appeal and support the decision of the trial District Court. He pointed out that in law the appellant have no right to appeal against a conviction based on his own plea of guilty. He cited Section 360 (1) of the Criminal Procedure Act, 1985 which provide that no appeal shall be entertained by the High Court where the accused person has pleaded guilty and convicted on his own plea by a subordinate court. I entirely agree with the learned Senior State Attorney with that position of the law.

However, having considered the circumstances of this appeal and having access to and guidance from the legal proposition outlined in the case of **Lawrence Mpinga Vs. Rep** (1983) TLR 166, I am convinced that this is a proper case where the appellant may be allowed to challenge the conviction.

First of all one interesting aspect from the record of proceedings of the trial District Court is the fact that the trial District Magistrate was too fast and eager to either finish up the case or convict and sentence the appellant. As a result he failed to observe procedural legal steps in conducting a trial where the accused has opted to plead guilty. In the first place the charge sheet had two counts. First count of rape and second alternative count of indecent assault. The charge was not fully and completely read over and explained to the appellant. For the reasons better known to the trial District Magistrate it was only the first count which was read over to the appellant. The record of proceedings is silent on what happened to the second alternative charge. Mr. Manjoti, learned Senior State Attorney argued that the trial District Magistrate opted to abandon the alternative count once the appellant pleaded guilty to the first count.

In my considered opinion the person who drew the charge sheet opted to include that alternative lesser offence because of the available prosecution evidence against the appellant. Secondly the appellant had a choice between the two counts laid against him. He was not given that chance of choice and the trial District Magistrate remained silent on why he decided to abandon the alternative count without reading it to the appellant. The question is whether the appellant would have pleaded guilty to the serious offence of rape given an opportunity of pleading against the lesser offence of indecent

assault.

Another shortcoming from the trial District Magistrate procedural rush is the fact that having entered a plea of guilty against the appellant, he proceeded to record the facts without showing who was adducing or submitting the alleged facts. Even the PF.3 (*Exhibit P.1*) and caution statement of the appellant (*Exhibit P.2*) were tendered by unknown person. The two documents were not admitted by the trial District Court and the alleged caution statement was not read over to the appellant.

For the avoidance of doubt let me re-produce all the facts recoded by the trial District Magistrate.

"*FACTS OF THE CASE*

Accused is a resident of Mji mwema Street Mafinga Township. He is living with his parents, near the house of Florah Sijombe a girl aged 10 years.

Accused called up Florah Sijombe with an intension of sending her to collect something for him. She was with her friend called Zahara Yusuph also aged 10 years. Both went to accused person's residence.

Accused called Florah Sijombe in his room and raped her.

On 4/6/2000 Florah Sijombe started staggering and had agony pains on her private part. She was sent for examination and she was found with wounds and was transmitted virus of venereal disease and her hymen consumed.

The little girl told her parents that accused raped her. Accused was arrested and charged accordingly.

I tender the PF.3 in court as Exhibit P.1. Caution statement of accused Exhibit P.2".

Relying on the above shallow facts the appellant was convicted and sentenced on the serious charge of Rape. The question is whether the above stated facts sufficiently constituted the ingredients of the offence of rape. The date when the alleged offence was committed was not stated. The facts only states that the appellant called Florah Sijombe in his room and raped her. No other explanation was given on what constituted the alleged act of rape. For the purpose of giving facts to establish the offence of rape, the act of sexual intercourse must be well explained and not to simply give a general statement alleging rape without elaborating what

actually took place and on what date. The fact that on 4/6/2000, Flora Sijombe was seen staggering or walking with difficulty because of pains in her private parts does not establish that she was actually raped or rather raped by the appellant.

In a conviction on a plea of guilty all ingredients of the offence must be admitted – See the cases of **Bukenya Vs. Uganda** (1967) EA, 341; **Ismail Bushaija Vs. Rep**. (1986) TLR; **Mathayo Ngalya @ Shabani Vs. R**. – Criminal Appeal No. 170 of 2006 CA; **EX – B 9690 SSGT. Daniel Mshambala Vs. Rep**. – Criminal Appeal No. 183/2004 (*CA unreported*) Mwanza and **Buhimila Mapembe Vs. Rep**. (1988) TLR 174.

In the case of **Buhimila Mapembe** (*Supra*) it was held that before convicting on any plea of guilty it is highly 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 element of it unequivocally especially where the offence is a technical one. Such legal directions and advice is relevant to the case at hand for the offence of rape is serious, technical and carries very harsh sentences.

Having said so, I am convinced that the appellant's plea was not unequivocal. The decision and the procedure employed by the trial District Magistrate is wanting in judicial objectivity. Consequently this appeal is allowed, conviction

against the appellant quashed and the sentence of 30 years imprisonment set aside.

Since the appellant has been languishing in prison over this case for about fourteen (14) years now, I am not in position to order for a retrial. The appellant is to be released from prison forthwith unless held lawfully on another matter.

M. S. SHANGALI

JUDGE

11.4.2014

Judgement delivered todate 11/4/2014 in the presence of Mr. Alex Mwita, learned State Attorney for the respondent/Republic and in the presence of the appellant in person. Right of appeal Explained.

M. S. SHANGALI

JUDGE

11.4.2014