IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 29 OF 2010
(From Original Criminal Case No. 34 of 2004 in the District Court of Nkasi)

PETER TOATOA ..... APPELLANT
Versus
THE REPUBLIC ..... RESPONDENT

17th December, 2014 & 15th January, 2015

JUDGMENT

MWAMBEGELE, J.:

The appellant Peter Toatoa pleaded guilty to the offence of rape contrary to sections 130 (1) & (2) (e) and 131 of the Penal Code, Cap. 16 (henceforth "the Penal Code") of the Revised Edition, 2002 as amended by section 5 of the Sexual Offences Special Provisions Act, Cap. 101 of the Revised Edition, 2002. The District Court of Nkasi sitting at Nkasi (Dyansobera, RM) convicted him on his own plea of guilty and meted out a sentence of life imprisonment on him. Both conviction and sentence aggrieved the appellant. He thus proffered an appeal in this court filing a five ground memorandum of appeal. The grounds of appeal, paraphrased for clarity, read:

1. That, the trial Court of law was wrongly entered the instant case on a plea of guilty to the charge while knowing that the offence with which the accused faced is serious one.

2. That, the trial court of law was supposed to question itself the possibility of an accused person (Then appellant) to plea guilty to the charge at hand before convicting entered according to the nature of offence a full trial was necessary to be conducted as far as the accused in the dock seemed to have had knowingless the matter. Also it is upon the learned trial magistrate to examine the accused in the dock whether is a person be able with what were adducing by the prosecution's case at the material time when the charge represented in the trial court. Furthermore the plea of guilty with the shot words as it is "TRUE" could not found the guilty. In conformity with the above finding of fact vide the case of ***Jackson Sumuni Vs R*** (1967) HCD n. 152 and ***Rajabu Ayub Vs R*** (1972) HCD n. 172.

3. That, the learned trial magistrate before drawing his Judgement he was required to ask the accused person some question so as to understand and be ware to not the ingredients and some particulars involving this offence.

4. That, the pleas or plea should not be taken as evidence against the accused, this matter was held in the case of SAIDI HATIBU VS. REP. (1984) T.L.R 280 since the facts did not establish offence charged

the conviction can not stand according this matter also was held in the case of ***R Vs Andrew Massy*** [1984] TLR 346.

5. That, from the above grounds of appeal I therefore pray that this appeal be allowed conviction and the sentence imposed be set aside and order to my immediately release at the date to be fixed for hearing of this appeal.

When the appeal came up for hearing on 17.12.2014, the appellant appeared in person, under custody and unrepresented. He therefore had to paddle his own canoe to defend this appeal. In arguing the appeal he opted to adopt and rely on the reasons advanced in the memorandum of appeal. In my view, the appellant; a lay person, was quite right to take that course, for the memorandum of appeal has been prepared in a discursive form; citing relevant authorities where necessary. On the other hand, Ms. Lugongo; the learned State Attorney who appeared for and on behalf of the respondent Republic, supported his appeal. The learned State Attorney started with the bottom line that she was alive to the provisions of section 360 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 which prohibits appeals on convictions from own plea of guilty. However, she had the view that, in the case at hand, the appellant was allowed to appeal against conviction as the ingredients of the offence were not fully narrated to him. She cited and availed to court an unreported decision of the Court of Appeal of ***Andambike Mwankuga Vs R***, Criminal Appeal No. 144 of 2010 as an authority for the proposition that if the conviction of the appellant is on his own plea of guilty, each and

every ingredient of the offence should be explained to him and he should be required to deny or admit each and every ingredient.

In the present case, the learned State Attorney went on to submit, the appellant was charged with the offence of rape of which penetration is an important ingredient. The facts constituting the ingredients of the offence as narrated to the appellant after he pleaded guilty, lacked this important ingredient. What was unveiled by the facts of the case, the learned State Attorney charged, was that the appellant took off the underwear of the appellant and had sexual intercourse with the victim. Penetration as an important ingredient of rape was not narrated and as if that was not enough, the appellant was not called to deny each and every constituent of the facts, she submitted. In the premises, the learned State Attorney prayed that the matter be remitted to the District Court so that the appellant is arraigned afresh.

In a short rejoinder, the appellant appeared not to be happy with the prayer of the learned State Attorney to the effect that he should be arraigned afresh. He prayed that he be released prison as he has stayed there for ten good years.

Like the learned State Attorney, let me start with the bottom line that our criminal law prohibits any appeal against conviction on the accused person's own plea of guilty. This is the tenor and import of the provisions of subsection (1) of section 360 of the CPA. Let the subsection speak for itself:

> "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."

Therefore, an accused person who pleads guilty to the charge is barred by law from preferring an appeal against conviction, except to the extent of sentence. However, this court articulated in ***Laurence Mpinga Vs R*** [1983] TLR 166 some exceptional circumstances under which an accused person may be allowed to appeal against conviction. In that case, this court [Samatta, J. (as he then was); later became Chief Justice of Tanzania] set out these circumstances, which I quote from the headnote, as follows:

> "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."

Does the plea of guilty in the present case fall in all fours with the conditions (or one or some of them) set out in the ***Laurence Mpinga*** case above? To answer this question and for easy reference, I feel it apposite to make reliance on what transpired in court on 24.08.2004 when the appellant is said to have pleaded guilty to the charges leveled against him. On that date, when the charge was read over and explained to the appellant, he is recorded as pleading:

"Ni kweli."

After such plea, the court entered it as a plea of guilty to the charge. Thereafter, the prosecution narrated the following facts comprising or purporting to comprise the ingredients of the offence:

"On 09/08/2004 at 1700 HRS at Korongwe village, Nkasi District the accused while coming

from his strolls, he went to Linus Mbalamwezi, found Cesilia Mbalamwezi who was his niece. The accused took her claiming to go and buy her sweets. They went to the bush. The accused undressed the girl's underpants, and had sexual intercourse with her and ejaculated. The accused then shaved her hair on the head, smeared the 'majivu' to her and took from her neck lace and left her. The girl went back home, found her parents looking for her. She explained how the accused carnally knew her, she was found with underpants, had *majivu* [ashes] on the face and no hair on her head. The victim's mother looked into her private parts and found her to be carnally known. The victim mentioned the accused to be her ravisher. The police were informed and accused apprehended and taken to the police station. The accused admitted before the OCS and said that he was sexing outside the vagina until he ejaculated. The accused admitted to have undressed her underpants, shaved her hair and smeared her with that sort of dust.

The victim's mother was given PF3 and the victim was medically examined and found to be carnally known. The Doctor filled in the PF.

This PF3 read (reads) Exhibit P1. This is his caution statement exhibit P2"

The accused person; the appellant herein, was asked if the facts were true and if he admitted them and he is recorded as replying:

"All the facts are correct and I admit them".

And having stated so, somewhat unusually, the appellant was made to thumbprint under his statement as recorded by the trial court. Thereafter the court proceeded to convict him on his own plea of guilty. After seeking previous criminal record of the accused person from the prosecution and mitigation from the appellant, the court sentenced him to life imprisonment.

I have dispassionately considered what transpired in court on the material day and, as will be clear shortly, it is my well considered opinion that the appellant's plea at the trial was but an unequivocal plea of guilty to the charge of rape preferred against him. I shall demonstrate. When the charge was read over and explained to the appellant, he is recorded as saying in his own language that it was true. The facts constituting the ingredients of the offence which unveiled, *inter alia*, that he took off the undergarment of the victim and had sexual intercourse (the facts narrate also that he had carnal knowledge of her) and ejaculated, were narrated to him which he admitted as correct and thumbprinted under the statement of facts to endorse what he admitted.

The learned State Attorney is of the view that penetration; one of the very important ingredients of rape, did not feature in the facts which were narrated to the appellant. With due respect to the learned State Attorney and for reasons that I will state shortly, I am not ready to swim her current.

As rightly pointed out by the learned State Attorney, penetration is one of the mandatory ingredients of the offence of rape which must be proved before grounding a conviction on an accused person. Penetration of the penis into the vagina, however slight, is enough to prove this important ingredient in the offence of rape. This is the tenor and import of the provisions of section 130 (4) (a) of the Penal Code which provide:

> "penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"

In the recent past, courts in Tanzania have developed a principle which has departed from the orthodox principle in rape cases where a rape case could not be proved unless the witnesses, more especially the victim, graphically proves this ingredient; by calling a spade a spade; not a big spoon. The prevailing position is that in proving that there was penetration in a rape case, it is not always expected the victim will graphically describe how penis was inserted into the victim's vagina. There are more than adequate unreported decisions of the Court of Appeal which

provide the current position on the interpretation of the provisions of section 130 (4) (a) of the Penal Code. These cases include ***Hassan Bakari @ Mamajicho Vs R*** Criminal Appeal No. 103 of 2012, ***Minani Evarist Vs R*** Criminal Appeal No. 124 of 2007, ***Ndikumana Philipo Vs R*** Criminal Appeal No. 276 of 2009, ***Minani s/o Selestin Vs R*** Criminal Appeal No. 66 of 2013, ***Matendele Nchanga @ Awilo Vs R*** Criminal Appeal No. 108 of 2010, ***John Martin @ Marwa Vs R*** Criminal Appeal No. 22 of 2008, ***Joseph Leko Vs R*** Criminal appeal No. 124 of 2013, ***Jumanne Shaban Mrondo Vs R*** Criminal Appeal No. 282 of 2010, ***Baha Dagari Vs R*** Criminal Appeal No. 39 of 2014, ***Nkanga Daudi Nkanga Vs R*** Criminal Appeal No.316 of 2013, ***Athuman Hassan Vs R*** Criminal Appeal No. 84 of 2013 and ***Simon Erro Vs R*** Criminal Appeal no. 85 of 2012; all unreported. The cases above and the development of the law on this subject have been discussed at some considerable length by the Court of Appeal speaking through Juma, J.A in ***Baha Dagari*** (supra). In that case, their Lordships stated:

> "Several decisions of this Court have expounded the scope of section 130 (4) (a) in so far as proof of penetration in sexual offences is concerned. This scope is now settled that in proving that there was penetration it does not in all cases expect the victim of alleged rape to graphically describe how the male organ was inserted into her female organ."

The new development of the interpretation of the provisions of section 130 (4) (a) of the Penal Code has been developed taking into consideration, *inter alia*, cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. Thus in ***Joseph Leko*** (supra) it was instructively pronounced:

> "Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience iistening, and the age of the person giving the evidence. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters. The cases of ***Minani Evaristi v. R,*** CRIMINAL APPEAL NO. 124 OF 2007 and ***Hassani Bakari v. R*** CRIMINALAPPEALNO.l03 OF2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the recent development in the interpretation of section 130(4) (a) of the Penal Code."

Thus words like "[he] removed my underwear and started intercoursing me" in ***Matendele Nchanga @ Awilo*** (supra), "sexual intercourse" or "have sex" in ***Hassan Bakari @ Mamajicho*** (supra), "[he] undressed me and started to have sex with me" in ***Nkanga Daudi Nkanga*** (supra), "k*anifanyia tabia mbaya*" in ***Athumani Hassan*** (supra), *"alinifanya matusi"* in ***Jumanne Shabani Mrondo*** (supra) or "he put his *dudu* in my vagina" in ***Simon Erro*** (supra) or "did sex me by force", "this accused raped me without my consent", "While this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" in ***Baha Dagari*** (supra) were, though not explicitly described, have been taken by the court to make inference to penetration of the penis of the accused person into the vagina of the victim.

Reverting to the instant case, the words used by the Public Prosecutor in narrating the facts comprising the ingredients of the offence used the following words:

> "the accused undressed the girl's underpants and **had sexual intercourse with her** and ejaculated".
> [Emphasis mine].

And when describing what the victim told her parents, the Public Prosecutor stated:

> "she explained how the accused **carnally knew her** ... the victim's mother looked into her **private parts** and **found her to be carnally known** ... the victim was medically examined and ***was found to be carnally known***".
> [Emphasis added for clarity].

And the court before sentencing the accused used, *inter alia*, the following words:

> "the accused **carnally knew a girl** aged four years ... such **unprotected sexual intercourse** is likely to transmit [AIDS]".
> [My emphasis].

In the light of the authorities I have cited above, by the use of the words "had sexual intercourse with her", "was found to be carnally known", "the accused carnally knew a girl aged four years" or "such unprotected sexual intercourse" in the present case, it was unambiguous that the accused person's penis was inserted into the vagina of the victim. The learned state attorney's contention to the effect that penetration in the instant case was not proved is therefore rejected.

As for the sentence, the appellant was sentenced to life imprisonment. This is the minimum prescribed by the law. The provisions of section 131 (3) of the Penal Code state in no uncertain terms that

"... whoever commits an offence of rape to a girl under the age of ten years shall on conviction be sentenced to life imprisonment".

The facts constituting the ingredient of the offence, which the appellant admitted as correct, had it that the victim under ten years of age. The provisions of section 131 (3) of the Penal Code, as quoted above, are crystal clear that whoever commits an offence of rape to a girl under the age of ten years shall, on conviction, be sentenced to life imprisonment. The sentence of life imprisonment meted out to the appellant was therefore appropriate. I find no legal basis to meddle with it.

In the upshot of what I have endeavoured to state hereinabove, this appeal is without merit and is consequently dismissed in its entirety.

DATED at SUMBAWANGA this 15th day of January, 2015.

J. C. M. MWAMBEGELE
JUDGE