

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 321 OF 2017

**ABDALLAH JUMANNE KAMBANGWA.....APPELLANT
VERSUS
THE REPUBLICRESPONDENT**

JUDGMENT

MURUKE, J.

The appellant was charged and convicted by District Court of Temeke with the offence Cruelty to Children contrary to section 169A (1) and (2) of the Penal Code [Cap 16, R.E. 2002]. He was sentenced to pay fine of 200,000/=together with five (5) years imprisonment. Being dissatisfied appealed to this court advancing five (5) grounds as listed in the petition of appeal.

During hearing, the appellant was represented by the learned advocate Alex Enock while learned State Attorney, Honorina Munishi represented the respondent. The Appellant's counsel abandoned ground 1, 3, and 5.

For the reasons that I will explain I will deal with the second (2) ground only. Submitting on the second ground, the counsel for the appellant stated that, it is true that where the accused plead

guilty to the offence, the appeal lies on sentence only as per section 360(1) of the Criminal Procedure Act. However as in the case of **Laurent Mkunga v. Republic 1983 T.L.R 166** one can appeal on the imperfect or ambiguous plea. According to the records, accused plea was recorded that, "Ni kweli nimemchoma mtoto wangu huyo mikono yake." According to him those words legally were not supposed to be recorded. What was supposed to be recorded are the words "it is true" or "not true". He referred this court in the case of **Musau Muya v. Republic (1962) EACR 643**. Where the court considered the words like "nilikosa" cannot constitute a plea of guilty. In the circumstances, appellant plea was not unequivocal which could lead the conviction and the sentence of the appellant. In that regard we pray for this court to allow appeal on second ground as the plea was equivocal.

On reply the learned state Attorney, Honorina Mushi, stated that, in the trial court records the plea was free from ambiguous. Even reading the facts, accused admitted all the facts as read out by the prosecution. According to the learned state Attorney the cases cited by the appellant's counsel are different from the fact of this case. Further she submits that, there was no problem in law, so the appellant was not supposed to appeal in terms of section 360 (1) of the Criminal Procedure Act, Cap 20. R.E. 2002.

Upon perusal of the trial court records, on 2nd October, 2017 the magistrate recorded the plea of the accused as reflected hereunder;

"2/10/2017

Coram. Hon. Batulaine RM

P.P. Joyce and Mkonongo

C.C. Dora

Accused present.

Court. *Charge read over and explained to the accused person who was asked to plea thereto.*

ACCUSED PLEA. Ni kweli nimemchoma mtoto wangu huyo mikono yake

Accused. Sign

Court. EPG.

Sgd. Hon. Batulaine – RM

2/10/2017"

As submitted by the learned counsel for the appellant of which I subscribe to his submission, the accused plea as it appears that, "*Ni kweli nimemchoma mtoto wangu huyo mikono yake*" **is equivocal.** In the book of **B.D. Chipeta, Magistrate Manual, (3ed) 2010**, at page 30, define an equivocal plea as follows;

"An equivocal plea simply means an ambiguous or vague plea, that is a plea in which it is not clear whether the accused denies or admits the truth of the charge. Pleas in such term as "I admit" "nilikosa" or "that is correct" and the like, though prima facie appear to be pleas of guilty may not necessarily be so. In fact, invariably such pleas are equivocal. It is for this reason that where an accused person replies to the charge in such or similar terms, facts must be given and accused asked to deny or admit them. Only by doing so can a magistrate be certain that accused's plea is one of "not guilty" or "unequivocal plea of guilty"'"

The same principle was explained in the case of **Baraka Lazaro v. Republic Criminal Appeal No. 24 of 2016 CAT Bukoba**, (unreported) it was held that;

*"where a conviction proceeds on a plea of guilty. We have in mind what was stated in the case of **Yonasan Egalu and 3 others v. Rex** (1942-1943) IX-X E.A.C.A. 65. It was held in that case as follows:-*

" That in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it

is most 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 constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally”.

When we relate the above with the situation in our present case, we agree with Mr. Matuma that the appellant’s complaint that the plea was equivocal merits and we allow it”

Now where the court is satisfied that the conviction was based on an equivocal plea if the accused, the court may order retrial as held in the case of **Baraka Lazaro v. Republic (supra)**. **B.D. Chipeta, in his book Magistrate Manual (supra)** stated at page 31 that;

Where a magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon, on appeal the conviction will almost certainly be quashed and in proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction.

In this case therefore, as it was held in the case of **Samson Daniel Mwang’ombe v. Republic (2016) Tanganyika Law**

Society Report 411, having found the accused plea was equivocal, I hereby allow the appeal, quash conviction on the purported plea of guilty and set aside part of unserved sentence. I further order the case be remitted to the trial court for the appellant to plead afresh and the matter to proceed there in accordance with the law.

It is so ordered.




Z. G. Muruke

JUDGE

30/04/2018

Judgment delivered in the presence of appellant in person, and Sada Mohamed for the respondent




Z. G. Muruke

JUDGE

30/4/2018