IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

CRIMINAL APPEAL NO. 79 OF 2019

(C/F Criminal Case No. 145 of 2017 in the District Court of Mwanga)

NOEL PAULO @ KIZUNGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 18TH May, 2020

Date of Judgment: 10th August, 2020

Mwenempazi, J:

The appellant, Noel Paulo @ Kizungo was charged at the District Court of Mwanga in Criminal Case No. 145 of 2017 with unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code (Cap 16 R.E. 2002). According to the particulars of the offence, on 15th September 2017 at or about 15:30 hours, the appellant did have carnal knowledge of a boy (identity hidden) aged 8 years against the order of nature.

The appellant pleaded guilty to the charge when it was read out to him by replying "it is true". He also admitted the facts of the case as true and correct. On that basis, he was convicted as charged and sentenced to life

imprisonment. Aggrieved he filed this appeal based on seven grounds which are summarized hereunder; -

1. That the charge was not proved to the required standard.
2. That the conviction was based on an equivocal plea.
3. That the appellant did not understand the nature of the case facing him.
4. That the charge was fatally and incurably defective.
5. That the outlined facts do not show constituents of unnatural offence.

The hearing of the appeal was done by filing written submission. The appellant had no legal representation while the respondent was represented by Ms. Verdiana Mlanza learned state attorney.

Submitting in support of his appeal the appellant stated that the principle has always been that the accused person must know the nature of the case facing him however in his case the charge laid against him was tainted with defectiveness as it omitted to mention the subsection under which the appellant was charged with. He was of the view that the omission rendered the charge fatally defective.

Furthering his submission, the appellant stated that it is trite law that particulars of a charge shall disclose the essential elements or ingredients of the offence in order to give the accused a fair trial by enabling him to have fully knowledge of the offence facing him. He argued that in this case the charge disclosed only the statement of the offence but did not disclose the particulars of the alleged offence. He argued further that in his case the trial magistrate did not record any findings concerning the appellant's awareness to the charge laid before him and that he pleaded guilty to it unequivocally. He further supported his submission by citing the case of **Anastasia Patrice vs. Republic Criminal Appeal No.36 of 2000 CAT at Dodoma (200) (Unreported)**. In this case the court of appeal held that,

> *"...before entering a plea of guilty a court must be satisfied that the plea of the accused is unequivocal that is to say, that there is no ambiguity as to what the accused is pleading that the facts as given contain the ingredients of the offence and that the accused is consciously admitting all those ingredients of the offence"*

In light of the quotation above the appellant prayed for this court to find that his plea was equivocal because the charge laid before him did not disclose all the essential ingredients of the charged offence.

In his further submission the appellant argued that penetration being the main ingredient of the offence there was a need for the particulars of the offence to contain particulars of penetration so that the appellant would know and subsequently be aware of the offence facing him. He also submitted that in absence of disclosure of the nature of the case, it occurs that the charge and facts read to him were fatally defective.

Concluding his submission, the appellant insisted while citing the case of **Ibrahim bin Salehe vs. R 1 TLR 641** that it was not desirable to record a plea of guilty in a capital charge. He finally prayed for this court to find merit in his appeal and set him at liberty.

On her part, Ms. Mlenza, learned State Attorney who represented the Republic, submitted that since the appellant was convicted on his own plea of guilty, he therefore under section 360 (1) of the Criminal Procedure Act [Cap 20 RE 2002] cannot appeal the conviction but can do so on the sentence.

She submitted further that the records show that the appellant pleaded guilty to the charge and admitted the facts when they were read to him. She contended that the facts which were read disclosed all the ingredients of unnatural offence. For that reason, the learned state attorney submitted that the appellant's plea was unequivocal as he understood the nature of the offence he was facing. Referring to page1-2 of the typed proceedings, it was her submission that the facts that were read to the appellant contained all the ingredients of the offence.

Concerning the issue of the charge sheet omitting to show subsection and clause of section 154 of the Penal Code Ms. Mlenza admitted that it was true. She submitted however that the omission was curable as the appellant was not prejudiced since the particulars of the offence which were read over and explained to him enabled him to understand the nature of the offence he faced. She substantiated her argument by referring to the court of appeal direction in the case of **Ally Ramadhani Shekindo and Another vs. Republic Criminal Appeal No. 532 of 2017** (Unreported) at page 14 where the court stated that non citation or wrong citation of the provision in the statement of the offence is curable under section 388(1) of the Criminal Procedure Act [Cap 20 RE 2002].

Finally, she supported the lower court's findings and the sentence by stating that the appellant was convicted and sentenced fairly thus urged this court to uphold the trial court's decision.

In determining this appeal, two issues arise one is whether the appellant could appeal against the conviction and two whether the conviction and sentence entered by the trial court against the appellant was proper in law.

As Ms. Mlenza rightly submitted, the general rule is that it is not open for a convict to seek an appeal on his own plea of guilty as of right: See section 360(1) of the Criminal Procedure Act, Cap 20 R.E. 2019. However, in certain circumstances, an appeal may be entertained notwithstanding a plea of guilty as it was held in the case of **Laurence Mpinga v Republic [1983] TLR 166** where it was held 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.*

Applying the law to the matter at hand, I am convinced that the appellant understood the nature of the offence to which he pleaded guilty in no uncertain terms. Moreover, the summary of facts outlined by the prosecution clearly disclosed the offence charged and his response to the narrated facts was also free of ambiguity as he stated, ***"...I admit the fact that I had carnal knowledge of Samson against the order of nature"...*** he even went further and said that he gave the victim money and told him not to tell anyone about it. This statement shows that the appellant knew that he committed an offence and that is why he even gave

the victim money in an effort to make him silent. Furthermore, even in the mitigation, the appellant repeated the admission by stating:

"**I pray for less punishment, it just happened, I was tempted**" [emphasis added]

I am therefore satisfied that there is nothing in the record which indicates an imperfect, ambiguous or unfinished plea. The appellant clearly admitted the offence and prayed for less punishment. Thus, the grounds raised by the appellant are devoid of merit. The conviction and sentence imposed were proper in law.

With respect to sentence, section 154(2) of the Penal Code under which the appellant was charged provides for a life sentence if the victim of the offence is a child who is under the age of 10 years. In this case the victim was 8years old therefore the sentence imposed by the trial court was legal.

The appeal is thus dismissed for lack of merit.

DATED and DELIVERED at Moshi this 10th day of August, 2020.

T. MWENEMPAZI
JUDGE
10/08/2020