IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 124 OF 2020

(Originating from Criminal Case No 241 of 2020)

CHRISTOPHER S/O DANIEL @ MAGIGE .....APPELLANT

Versus

THE REPUBLIC .....RESPONDENT

JUDGMENT

23rd & 26th November, 2020

Kahyoza, J.

The District Court of Serengeti convicted **Christopher s/o Daniel @ Magige,** with the offence of rape contrary to section 130 (1) (2) (e) and sentenced him to thirty years (30) imprisonment under section 131 of the **Penal Code**, [Cap 16 R. E. 2019]. The appellant was convicted upon his own plea of guilty. Dissatisfied, the appellant appealed to this Court.

The appellant raised for grounds of appeal, are paraphrased as follows-

1) That, the magistrate erred in law and fact to convict and sentence the appellant on plea of guilty which was not unequivocal.
2) That, the trial magistrate erred in law and fact to convict and sentence the appellant without ensuring that the appellant appreciated the nature of the offence.

3) That, the trial magistrate erred in laws and fact to convict and sentence the appellant without the prosecution calling its witness.
4) That the trial magistrate erred in law and fact to convict and sentence the appellant unheard, in breach of the principle of natural justice.

The appellant appeared unrepresented and Mr. Peter State Attorney represented the respondent. The appellant had nothing substantive to add to his grounds of appeal.

The state attorney submitted generally that the appellant pleaded guilty to the Charge of rape. Following the accused's plea of guilty the trial court read the facts to the accused and the appellant pleaded guilty to the facts. He contended that the facts established all the elements of the offence of rape. The submitted that it is settled that a person convicted upon his own plea of guilty cannot appeal against conviction. He cited the section 360(1) of the **Criminal Procedure Act**, [Cap.20 R.E. 2019] (the **CPA**) to support his submission.

The state attorney submitted that the appellant would have a right to appeal only if he did not understand the charge. He averred that the appellant knew the nature of the offence he was charged. To support his position, he cited the case of **Khalid Athuman v. R** [2006] TLR 79 where it was held that-

> *The Courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she really understands the charge that has C been laid at his/her door, discloses an offence known under the law and that he/she has no defence to it. A plea of guilty having been recorded a Court may entertain an appeal against conviction if it appears; that the appellant did not appreciate the nature of the charge or did*

not intend to admit that he was guilty of it; or that upon the D admitted facts he could not in law have been convicted ofthe offence charged;

The appellant had nothing substantial to re-join.

The record showed that the appellant was 18 years old when he was charged. He was charged in 2020. The Particulars of the offence depicted further, that the appellant started committing the offence in 2018, at the time he was 16 years old. I invited the state attorney to address the Court regarding the legality of the sentence of thirty years imposed against the appellant, who committed the offence when he was below 18 years old or below 18 years old at the time he started committing the offence.

The state attorney submitted that he had nothing to submit regarding the appellant's sentence and left the issue to the Court to decide.

It is true that the section 360 (1) of the **CPA** prohibit a person convicted on his own plea of guilty to appeal. It states that

> ***"360****.-(1) 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."*

As a general rule that a person convicted upon his own plea of guilty can only appeal against the extent or legality of the sentence imposed by the subordinate court. However, this Court and the Court of Appeal have in a number of decisions expressed exceptions to that general rule. The two Courts have provided circumstances under which a person who convicted upon his own plea of guilty may appeal against

his conviction. some of such cases are **Laurence Mpinga v. Republic [1983] T.L.R. 166** and **Josephat James v. Republic, Cr. Appeal No. 316 of 2010, CAT, Arusha Registry (unreported)**. In the latter case of **Josephat James v. Republic** the Court of Appeal stated that under certain circumstances an appeal arising a plea of guilty may be entertained by an appellate court where:

> *(i) The plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;*
>
> *(ii) An appellant pleaded guilty as a result of a mistake or misapprehension;*
>
> *(iii) The charge levied against the appellant disclosed no offence known to law, and*
>
> *(iv) Upon the admitted facts, the appellant could not in law have been convicted of the offence charged. (See **Laurence Mpinga v. Republic, (1983) T.L.R. 166 (HC)** cited with approval in **Ramadhani Haima's case (Cr. Appeal No. 213 of 2009, CAT, unreported).***

In short, the appellate Court may entertain an appeal based on a plea of guilty is where it may be successfully established that the plea was imperfect, ambiguous, or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty.

I examined the facts adduced in this case. The facts established that the appellant had carnal knowledge of a girl of 16 years between 2018-2020. The appellant confessed to had carnal knowledge. Basically,

those were the facts which lead to the appellant's conviction. It is vital to prove the age of the victim when the accused person is charged with the offence of statutory rape. The facts did not show if the victim was examined to establish whether she was raped or not. I find that the plea was imperfect. It was not *an unequivocal plea of guilty.*

That apart, the charge sheet depicts that the appellant was 18 years old. Even if the appellant was properly convicted, the sentence imposed was not justified. The sentence for the offence of rape is provided under section 131 of the **Penal Code** that-

> *131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*
>
> *(2) Notwithstanding the provisions of any law, where the offence is committed by* ***a boy who is of the age of eighteen years or less****, he shall-*
>
> *(a) if a first offender, be sentenced to corporal punishment only.*
>
> *(b)* if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;
>
> *(c)* if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.
>
> (3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment. *(emphasis added)*

The appellant was less than 18 years when he committed the offence for first time sand he was 18 years at the time he was arrested in commission of the offence. Thus, it was illegal to impose a custodial sentence against him. This is a fit case for which the appellate court may interfere with the sentence. See **Samwel Yose @ Kijangwa v. Republic**, Criminal Appeal No. 208 of 2005 (unreported) the Court of Appeal highlighted the principles for which an appellate court may interfere with the sentence where a plea of guilty was entered. The said principles are as follows-

1) where the sentence is manifestly excessive or is so excessive as to shock;
2) where the sentence is manifestly inadequate;
3) where the sentence is based upon a wrong principle of sentencing;
4) where the trial court overlooked a material factor;

The Court of Appeal confronted facts like in the instant case in the case of **Paul Juma Daniel V Republic,** Criminal Appeal No 200 of 2017, and observed-

> *"It is clear from Section 131(2)(a) that when the offence of rape is committed by a boy who is eighteen years or less, he should only be sentenced to corporal punishment. In the present case the appellant who was eighteen years of age when he committed the offence was sentenced to an illegal sentence of thirty years' imprisonment and compensation of TZS 6,000,000.00 to the victim of the offence in contravention of the clear provisions of section 131(2) (a) of the Penal Code. That sentence cannot be allowed to stand and so we hereby quash and set aside as it was an illegal sentence. As to the way forward, we agree with the learned State Attorney that since the appellant has been in custody for more than four years serving*

an illegal sentence, we do not find it appropriate to impose the correct sentence."

Finally, I find the sentence imposed by the trial court illegal and set it aside. The appellant was required to be sentenced to corporal punishment. Since the appellant served an imprisonment for a term of four months, I find that sentence to be equivalent to the corporal punishment, which would have been imposed.

It is for the above stated reason, I set aside the sentence and order the appellant's release from prisons immediately unless held there for any other lawful cause.

It is ordered accordingly.

J.R. Kahyoza

JUDGE

26/11/2020

Court: Judgment delivered in the presence of the appellant via video link and in the absence of the State Attorney for Republic, duly informed. B/C Ms. C. Tenga.

THE HIGH COURT OF TANZANIA
MUSOMA

J.R. Kahyoza

JUDGE

26/11/2020