

**IN THE HIGH COURT OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

CRIMINAL APPEAL NO. 25 OF 2020

(Originating from Criminal Case No. 50 of 2019 of
Pangani District Court)

DAUDI BAKARI @ NYAGALUAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MKASIMONGWA, J.

Daudi Bakari @ Nyangalu (Appellant) stood before Pangani District Court Charged with Rape Contrary to Sections 130 (1), (2)(e) and 131 (1) of the Penal Code. It was alleged by the prosecution that:

“Daudi Bakari @ Nyagalu on diversity date and time on March, 2019 at Choba area within Pangani District in Tanga Region, did have carnal knowledge with Rehema d/o Bakari @ Nyagalu a girl aged 14 years a pupil of Funguni Primary School”

In the Alternative the Appellant was charged with Impregnating a school girl Contrary to Section 60A (1) and (3) of the Education Act as amended by Section 22 of the Miscellaneous Amendment Act No. 2 of 2016. In the later count the Prosecution alleged that:

“Daudi S/O Bakari @ Nyagalu on diversty dated and time on March, 2019 at Choba area within Pangani District in Tanga Region did have impregnating one Rehema d/o Bakari Nyagalu aged 14 years a pupil of Funguni Primary School”

The accused/appellant was convicted of the Rape on his own plea of guilty and accordingly sentenced to life imprisonment plus six strokes corporal punishment. He was again ordered to pay Tshs. 500,000/= compensation to the victim.

The Appellant is aggrieved by the conviction hence this appeal a petition of which lists five grounds as follows:

1. That, the Appellant’s plea was equivocal the conviction entered in the trial court was result of a mistake of misapprehension.
2. That the reeve of the trial erred in law and in fact relied upon to convict appellant whereas the age of the victim a material element in the charge which the appellant was facing in court was not mentioned in the facts tendered.
3. That, the medical report PF3 a vital document to form part of the facts before the trial was not shown.
4. That upon the admitted facts the charge laid against the Appellant disclosed no offence known.
5. That the Appellant’s plea was imperfect, ambiguous and unfinished for that reason, the trial court erred in law in treating it as a plea of guilty”

On the date of hearing of the Appeal the Appellant appeared in person whereas the Respondent Republic was represented by Ms.

Mhangwa, the learned State Attorney. In the first place, the learned State Attorney argued that, the Appellant appeals against a conviction which a conviction was from his own plea of guilty. The law that is Section 360 (1) of the Criminal Procedure Act provides to the effect that where an accused person is convicted on his own plea of guilty he or she may only appeal against the sentence imposed on him/her. In the Appeal at hand the appellant does not appeal against the sentence but the conviction. This is not supported by the law. As such the Appeal should be dismissed.

On the other hand the Appellant contended that he confessed to have committed the offence out of threats by the Police Officers. He sometime witnessed when a fellow was inserted with "bicycle spoke" on his genital organ to death and that he was threatened to be done the same. As the plea of guilty was not from his free will, the conviction entered was not proper. The Appellant prayed the court that it allows the Appeal.

The court posed a question whether the facts adduced by the prosecution to the court upon entering a plea of guilty exhibited commission of the statutory rape. In response to the issue, Ms. Mhangwa (SA) admitted that indeed the facts are silent as to the age of the victim, under such a situation it cannot be held that the accused had admitted to have carnal knowledge a girl who was 14 years old. Ms. Mhangwa submitted that in the circumstances, the court ought to have ordered the matter to proceed by conducting a full trial. As that was not done, the proceedings were null and the learned State Attorney prayed for nullification of the proceedings

and for order for retrial be issued. On his part the appellant had nothing to state in respect of the issue raised by the court.

I have considered the submissions as well as the record of the case. It is evident that the accused was arraigned before the court charged with alternative two counts shown herein above. Where a person stands before the court charged with an offence, the court is mandatorily required to state the substance of the charge to him and shall ask the accused whether he admits or denies the truth of the charge. If the accused admits the truth of the charge, the court shall record the admission as nearly as possible in the words he uses and the court shall convict him and pass sentence upon or make order against him unless there appears to be sufficient cause. As a general rule, no appeal shall be allowed in the case an accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent of legality of the sentence (Section 360 (1) of the Criminal Procedure Act 1985). This Section was sometime judicially considered by this court in the case of **Lawrence Mpinga v. R (1983) TLR 166**. There the court held that:

“An accused person who has been convicted of an offence “on his own plea of guilty” may in certain circumstances appeal against the conviction to higher court. Such an accused person may challenge 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 mistaken 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."*

In the petition of the Appeal filed, the Appellant listed five grounds of appeal and he adopted ground No. 1, 2, and 4 challenging the conviction for it was based on an ambiguous, imperfect and unfinished plea of guilty. Going by the record, when the charge was read over and explained to the accused/appellant and upon being asked to plead thereto the Appellant was heard and recorded pleading as follows"

"It is true that I raped"

The court consequently entered this as a plea of guilty. As a matter of procedure, the Public Prosecutor was then invited to adduce the facts of the case. Part of the facts reads as follows:

"The accused is accused of rape c/s 130 (1), (2) (c) and 131 of the Penal Code Cap 16 R.E 2002.

From March, 2019 before the accused was living at Choba in Pangani District. On that period you raped Rehema Bakari a student of Pangani Primary School. On 17/09/2019 the incident was reported at Pangani Police Station.

On 18/09/2019 the accused was interrogated by a police G.7902 DC DEONATUS and confessed to commit the offence of rape of Rehema Bakari. On 19/09/2019 the accused was sent to a justice of the peace, Hon Jordan Mulinda a Primary Court Magistrate and confessed to commit the offence charged. And today the accused you are brought to the court and confessed to commit the offence you are charged with"

When asked whether the facts adduced were true or not, the Appellant was recorded saying that:

"All what is read and explained to me is true that I raped Rehema"

The accused/appellant was consequently convicted and sentenced as aforeshown.

In my considered view a "Plea of guilty" is a voluntarily made formal and conclusive admission of all elements of the charge. The admission must, however, be clear, perfect and finished. Where the accused person pleads guilty the prosecution does not need to lead any evidence to prove. Section 130 (1) (2) (e) of the Penal Code, under which the Appellant was charged reads as follows,

"130 (1) it is an offence for a male person to rape a girl or a woman

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions;

(a) – (d) Not relevant

(e) With or without consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from him.”

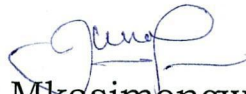
Flowing from the section above one may comprehend that an offence of rape established by it, is comprised of the following elements:

1. That, a male does sexual intercourse with a girl/or a woman.
2. With or without her consent when she is under eighteen years of age.
3. Who is not his wife who is fifteen or more years of age and not separated from him.

In my opinion an acceptable plea of guilty in respect of this offence is that in which the accused, is heard at list admitting to having sexual intercourse with a woman or girl/under the age of eighteen and that the later was not his wife aged fifteen years or more not separated from him. Similarly, the facts adduced by the Public Prosecution should have stated to that effect. In the instant case neither the accused person's plea nor the facts adduced by the public prosecution took on board the necessary elements of the offence with which the accused was charged. This left the plea of guilty recorded by the trial court being ambiguous, imperfect or unfinished and the facts admitted by the accused person not in law capable of sustaining conviction as entered by the court. Suffice it to say here that the appellant was wrongly convicted.

In event I find merit in this appeal and the same is hereby allowed. The conviction is quashed and sentence as well as the order for payment of compensation are set aside. The Appellant shall be forthwith released from jail if he is not therein for other lawful causes.

Dated at Tanga this 20th day of October, 2020.



E. J. Mkasimongwa

JUDGE

20/10/2020

Date: 20/10/2020

Coram: F. J. Kabwe, DR

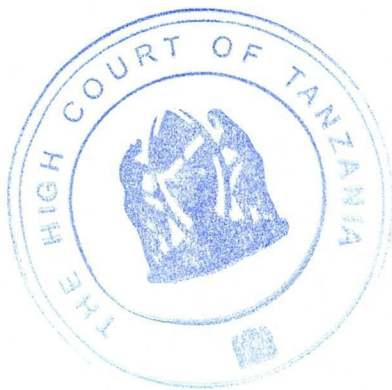
Appellant: Present via Video Conference

Respondent: Ms. Mkumba S/A for

C/C: Alex

Court: Judgment delivered in the Chamber Court via video conference in the presence of Ms. Mkumba S/A for the Respondent and Appellant via Video conference.

Righ of Appeal explained.



Sgd: F. J. Kabwe
DEPUTY REGISTRAR
20/10/2020