IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 56 OF 2020

SENI MASELE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of Kishapu District Court)

(Hon. J.P. Rwehabula)

dated the 19th day of May,2020

in

Criminal Case No. 95 of 2020

JUDGMENT

2nd November,2020 & 26th February,2021.

MDEMU, J.:

Seni Masele, referred to as the Appellant in this appeal, was charged in the District Court of Kishapu for rape contrary to sections 130(1) and (2)(e) and section 131 (1) both of the Penal Code, Cap.16 R.E 2019.

It is in the particulars of offence that, on diverse dates from 13th to 17th days of May,2020 at Mwamagembe village within the District of Kishapu,

the Appellant had carnal knowledge of one Penina Mayenga, a girl of ten (10) years.

Brief facts which can be gathered from the records are to the effect that, the Appellant was employed to scare away birds in the rice farm of the victim's father one Mayenga Luhende. Meanwhile, the victim was also doing the same act on the neighboring farm owned by his father. On the fatefully day, the Appellant abandoned his work place and followed the victim and thereby raped her. That was on 13th May, 2020. As the Appellant surrendered his head to be controlled by Satan, we are told that, he repeated the same act on 15th and 17th May,2020, the date that the evil act was discovered by the victim's father red handed. The Appellant was thereby arrested with the help of others and when interrogated by WP. 4723 D/CPL Grace, he admitted.

The Appellant on that note was thus charged, and through what we are told to be an admission, he was accordingly found guilty, convicted and sentenced to 30 years prison term. This was on 19th of May, 2020. Aggrieved by that decision, the Appellant preferred the instant appeal on four grounds which are; **one,** the trial magistrate gravely erred in both point of law and facts to enter conviction, pass the sentence basing on equivocal plea of guilt

entered by the Appellant, **two,** thirty years imprisonment imposed was not supplemented by exhibit thereof regardless the plea of guilty, **three,** the allegation that he had carnal knowledge is a framed one to defeat justice, **four,** sentence imposed is severe as compared to the Appellant's age.

The Appeal of the Appellant was heard on 2nd of November, 2020. On that date, the Appellant appeared in person, unrepresented. The Respondent Republic had the service of Mr. Nestory Mwenda, learned State Attorney who resisted the appeal. When the Appellant was given the floor to argue his appeal, he briefly prayed only to adopt all his grounds of appeal and nothing more to form part of his submissions.

In reply, Mr. Mwenda submitted that, they object the appeal on ground that, the Appellant raped a ten years' girl and pleaded guilty, thus his conviction. Mr. Mwenda was of further views that, as the Appellant pleaded guilty and thereby convicted, then in terms of section 360(1) of CPA, Cap. 20, he may not appeal save for legality of sentence only. On that note, he said, all grounds of appeal specifically 1, 2 and 3 are unfounded. He cited the case of **Frank Mlyuka v. Republic, Criminal Appeal No. 404 of 2018** and **Deogratius Kaijukuhakwa v. Republic, Criminal Appeal No. 306 of 2012** (both unreported) to bolster his assertion.

On another note, Mr. Mwenda observed that, the Appellant admitted both to the charge and the facts read to him through an interpreter. Furthermore, Mr. Mwenda stated that, the punishment of thirty-years' imprisonment is a minimum sentence as per the Minimum Sentences Act. On the plea, Mr. Mwenda observed that, the same is unequivocal and that, the facts analyzed on how the offence was committed.

Again, Mr. Mwenda commented on documentary exhibits saying that, their being missing on record is not fatal due to the fact that, the Appellant pleaded guilty. On this, he cited also the case of **Frank Mlyuka v. Republic, Criminal Appeal No. 404 of 2018** (unreported). With that stand, Mr. Mwenda concluded that, the appeal has no merits and prayed it be dismissed. That was the end of both parties' submissions.

I have gone through both parties' submissions together with the entire records available. Under normal circumstances, no appeal against conviction is allowed on the accussed's own plea of guilty save for the legality of a sentence imposed. There are however some exceptional circumstances that the Appellant may be allowed to appeal against conviction on his own plea of guilty. Those circumstances were set out in, among others, in the case of

Kalos Punda v. Republic, Criminal Appeal No. 153 of 2005 (unreported) where it was held: -

> *" 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."*

With that position of the law and as long as the Appellant's ground number one questions on unequivocality of a plea, then the Appellant's appeal is proper and worth to be determined. Now the issue is whether the

Appellant's plea of guilty was unequivocal. This calls upon me to define what really amounts to an unequivocal plea of guilty. In **Abdallah Jumanne Kambangwa v. Republic, Criminal Appeal No. 321 of 2017** (unreported) the Court of Appeal defined an equivocal plea as simply meaning:

> *"... 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.*

At this juncture, it is pertinent to see the directions given by, the Court of Appeal on how to take plea. This was the position in the case of **Waziri Saidi v. Republic, Criminal Appeal No. 39 of 2017** (unreported) where it was held that:-

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand.* ***The magistrate should then explain to the accused person all the essential ingredients of the offence charged.*** *If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain*

the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded" [Emphasis supplied].

In compliance to that procedural requirement, the records at page 2 of the proceedings provides for, as I hereby quote it; -

COURT

Charge read over to accused person who is asked to plead thereto;

"Ni kweli nililala naye"nikafanya naye mapenzi kidogo,

COURT; Entered plea of guilty to the charge.

From the above quoted record, there is no where it is shown whether the Magistrate explained to the accused/Appellant all the essential ingredients of the offence charged as provided in the cited case above. Such omission necessitated the given answer by the Appellant. The answer that to me seems ambiguous in which one may interpret into different many meanings. The answer *"Ni kweli nililala naye"nikafanya naye mapenzi kidogo,"* can even be given by one who attempted to rape, thereby agrees to have fallen a woman down together with him and managed to kiss her only.

In our case, we are told that, the victim is a child of ten years of age. When you think the possibility of her being inserted with a 60 years' male organ on three different days without noticing or suspecting hardships in walking or bad smell by her parents or guardians, one may not have right away an answer. That situation suggests impossibility rather than possibility. On that note, I cannot be certain that the Appellant understood the charge when he was required to plead. That follows, had the Appellant understood the ingredients of the offence he was charged with, maybe he wouldn't have agreed even to the facts read to him thereafter.

In the facts as found at page 3 through 4 of the proceedings, there are certain facts missing, which, in my view, if would have been included, would have added value to unequivocality of the plea. **One,** facts to the effect that the Appellant on 13th to 16th of May, 2020 raped the victim have deficiencies. It is not known from whom the information got accrued as it is not stated if the victim informed anyone. This is so because, it is only on the 17th of May, 2020 when the Appellant was found *infragrantor delicto* with the victim, if at all it is proved so. Such facts are reproduced as here under:

> *"On 13/5/2020 around 16:30 hours at Mwamagembe village Kishapu District and Shinyanga Region, the accused while guarding and scaring away birds on the rice farm owned by Mayenga Luhende, he went to the nearby farm owned by Mayenga Luhende which was guarded by his child called Penina Mayenga aged 10 years and a standard three pupil. The accused went direct to that child and forcedly, he attacked her and fall her down while using his left hand to avoid her mouth from shouting while his right hand undressing her and he undressed himself and started having sexual*

intercourse with her. The accused repeated that illegal act of having carnal knowledge with Penina Mayenga on 15/5/2020 around 17:00 hours in the same farm of rice."

Two, those assisted the father of the victim to arrest the Appellant are unknown as their names are not mentioned. **Three**, in the charge, it appears the rape dated 17th May, 2020 took place at 17:00 hours. In fact, it appears even the previous rapes took place at that hour. However, facts read to the Appellant do not disclose the hour through which rape got committed. It is just stated at page 3 that:

"lastly on 17/5/2020 the accused had sexual intercourse with Penina Mayenga in the same farm."

Should we assume that it was 17:00 hours stated in the charge or should we assume it was 16:30 hours as to the rape occurred on 13th May, 2020? Such assumptions in criminal jurisprudence are unpermissive.

Four, as per the facts, the Appellant confessed in his caution statement to have taken advantage of sexual intercourse to the young girl. The said statement did no find its way in evidence. This would have been relevant for nexus with what the prosecution asserts.

To that end, am bound to agree with the Appellant's first ground of appeal that, his plea was equivocal. Had the trial magistrate directed herself properly, she wouldn't have entered a plea of guilty thereby. At this juncture, the crucial question to determine is; what then should be done to the Appellant?

One, on the deficiencies of the prosecution facts as narrated, ordering trial of the Appellant will assist the prosecutions to do the following: - **First,** they will have facts at what point in time, that is what hour in the day the offence was committed. **Second,** they will name those persons who assisted the father of the victim to arrest the Appellant, much as it is not on record if they exist or not. **Third**, as we are not sure if the caution statement was taken, then, the same will have its way in evidence. It was to be stated *ab initio* that, it was taken and the same should have been tendered/ form part of the facts admitted by the Appellant.

Two, the Appellant was of 60 years old by the year 2020. There is unaccredited information from the prison officers that the Appellant is of unsound mind since when he entered the prison to date. Under the circumstances, together with what alluded above, I see no need of ordering trial of the Appellant to take place. Instead, I nullify proceedings, quash

conviction, set aside sentence thereby and order immediate release of the Appellant from prison, unless, he is held therein with some other lawful cause.

Order accordingly.

Gerson J. Mdemu
JUDGE
26/02/2021

DATED at **SHINYANGA** this 26th day of February, 2021.

Gerson J. Mdemu
JUDGE
26/02/2021