IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 179 OF 2020

(From the decision of the District Court of Kyela at Kyela in Criminal Case No.118 of 2020, Hon. C. R. Msenjelwa, RM.)

RECHO D/O ABDALLA.....1ST APPELLANT

JENIFER D/O YASSIN.....2ND APPELLANT

AZA D/O ISSA.....3RD APPELLANT

HUSNA D/O YASSIN.....4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 22/06/2021
Date of Judgement: 13/07/2021

MONGELLA, J.

In Criminal Case No. 118 of 2020 in the District court of Kyela at Kyela, the appellants were jointly and together charged with the offence of sexual exploitation of children contrary to section 138B (1) (a) of the Penal Code, Cap 16 R.E. 2019. The brief facts of the offence as narrated by the prosecution during preliminary hearing are as follows:

That on 2nd July 2020 at Mbugani area within Kyela District in Mbeya region, the accused, for the purpose of causing children to be sexually

abused did show pornographic pictures to nine male children (names withheld) aged below ten (10) years. The said event took place at the house of the 3rd appellant, Aza d/o Issa.

The accused persons stored the said pornographic pictures in a USB flash drive and inserted the same in a television in order to show the pictures/video to the victims. The incident was discovered by residents of Mbugani area after finding the victim children having carnal knowledge of each other against order of nature. Upon being inquired by the said residents, the children stated that they learnt the awful acts from pornographic pictures/video shown to them by the accused persons. The said incident was thus reported to Kyela police station by the victims' parents and the Kyela District Social Welfare officer, one Justin Silas.

The police conducted investigation which led into apprehension of the accused persons. They were thereafter charged in the District court and convicted on their own plea of guilty. They were all sentenced to 15 years imprisonment. In addition to the custodial sentence each of them was ordered to pay compensation to the tune of T.shs. 100,000/- to three of the victims (names withheld). Dissatisfied by the decision of the District court, they filed this appeal on two grounds, namely:

1. *That the trial court Magistrate erred in law and facts when he sentenced the appellants with a heavier punishment without considering the nature of the offence committed.*

2. *That the trial Magistrate erred in law and facts for determining the case without understanding that the appellants' plea was equivocal.*

The appellants fended for themselves while the respondent was represented by Ms. Mwajabu Tengeneza, learned state attorney. During the hearing, the appellants opted to hear first from the learned state attorney while reserving their right to rejoin.

Arguing on the first ground, Ms. Tengeneza supported the sentence passed by the trial court. She argued that the provision establishing the offence under which the appellants are charged provides the sentence to be not less than 5 years and not exceeding 20 years. She was thus of the stance that the sentence of 15 years imprisonment was very well within the range provided under the law.

In further support of the sentence passed she argued that the Hon. trial Magistrate took into account a number of factors in passing the sentence. The factors taken into account included the appellant's mitigating factors and the repercussion the offence committed had on the victim children. Speaking of the repercussions, she submitted that as a result of the offence, the children learnt to engage in acts of sodomy until when they were discovered. She concluded that the sentence is a proper sentence provided under the law.

With regard to the second ground, Ms. Tengeneza argued that the appellants' claim that their plea was equivocal was an afterthought. She

contended that the trial court record indicates that the appellants understood what they were charged with and pleaded guilty. Narrating the sequence of events, she submitted that on the first day the charge was read over to them, they pleaded not guilty. On 31st August 2020 they were brought to court and the charge reminded to them. On this date they again pleaded not guilty whereby the facts were read and a date for hearing was set. When the matter came for hearing on 4th December 2020 the appellants were again reminded of the charge. This time they pleaded guilty to the charge. Following the change of plea, the facts of the case were read and the appellants agreed to the facts.

Given the above narrated sequence of events, Ms. Tengeneza argued that the law is clear, as provided under section 360 (1) of the Criminal Procedure Act, Cap 20, R.E. 2019, to the effect that a person convicted on own plea of guilty can only appeal against sentence and not conviction. She further referred the court to the case of ***Kalos Punda v. The Republic***, Criminal Appeal No. 153 of 2005 (CAT at Mtwara, unreported). Ms. Tengeneza concluded by praying for the court to confirm the conviction and sentence of the trial court and dismiss the appeal.

In rejoinder, the appellants claimed that they were forced to plead guilty by the Hon. Magistrate whereby he promised to help them if they pleaded guilty. They prayed for mercy of the court.

After considering the grounds of appeal and the submission by both parties I wish to start with the second ground for purposes of having a better flow.

On the second ground of appeal, the appellants claim that their plea was equivocal and the Hon. trial Magistrate erred in determining the case without understanding that their plea was equivocal. I have thus thoroughly gone through the trial court proceedings to ascertain the truth of the matter.

The record shows that the charge was read over to the appellants on four different occasions. First, it was on 5th August 2020 when they were arraigned in court for the first time. As submitted by Ms. Tengeneza, the record shows that they pleaded not guilty to the charge. Second, it was on 31st August 2020 when the matter came for preliminary hearing. On this date the appellants also pleaded not guilty to the charge. Third, it was on 9th September 2020 when the matter was scheduled for commencement of hearing, though the hearing did not take off. On this occasion the 1st and the 2nd appellants gave an equivocal plea and the 3rd and 4th appellants pleaded not guilty. The trial court entered plea of not guilty for all accused persons. When the matter came for hearing on 4th December 2020 the charge was reminded to them and they pleaded as follows:

> *"**1st accused:** "Ni kweli tuliwaonesha picha za ngono watoto hao waliotajwa"*
> ***2nd accused:** "Ndio tuliwaonesha picha za ngono watoto hao waliosomwa"*
> ***3rd accused:** "Ni kweli tuliwaonesha picha za ngono watoto kama ilivyoelezwa"*
> ***4th accused:** "Ni kweli tuliwaonesha watoto picha za ngono kama ilivyosomwa"*

Considering the appellants' plea as quoted above, I subscribe to Ms. Tengeneza's argument that the appellants changed their plea and unequivocally pleaded guilty to the charge. In addition, I am even more satisfied that their plea was unequivocal considering the fact that the appellants admitted all the facts read to them. This is evidenced on page 19 to 20 of the typed proceedings. The trial court thus rightly convicted them on their own plea of guilty to the charge. As rightly contended by Ms. Tengeneza, section 360 (1) of the Criminal Procedure Act prohibits appeals on conviction based on the accused's own plea of guilty. It specifically states:

> *"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."*

In the case of ***Kalos Punda v. The Republic*** (supra) the Court of Appeal while quoting in approval the decision in ***Laurent Mpinga v. Republic*** [1983] TLR 166 set the criteria under which a plea of guilty can be interfered. These are:

> *"(a) that even taking into consideration the admitted facts, 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;*
> *(b) that the appellant pleaded guilty as a result of mistake or misapprehension;*
> *(c) that the charge laid at the appellant's door disclosed no offence known to law; and*

(d) that upon the admitted facts the appellant could not in law have been convicted of the offence charged."

As contended by Ms. Tengeneza, to which I subscribe, none of the above criteria features in the appellants' plea. The same can therefore not be interfered. In rejoinder, the appellants claimed that they were forced by the Hon. Magistrate to plead guilty to the charge on a promise to be helped. I find this assertion an afterthought as well. This is simply because, first there was no proof to that effect or any thorough explanation from the appellants as to what exactly transpired. Second, the allegation is not reflected in the grounds of appeal. In the 2nd ground of appeal, the appellants simply claimed that the Hon. trial Magistrate did not understand that their plea was equivocal. To this juncture, I find no merit in this ground of appeal and dismiss it accordingly.

With regard to the first ground of appeal, the appellants claim that the sentence passed by the trial court was excessive and did not consider the nature of the offence committed. Ms. Tengeneza argued that the sentence was within the range of punishment provided under the law. She submitted that the sentence provided under the law is not less than five years and not more than twenty years.

It should be recalled that the appellants were charged with the offence of sexual exploitation of children contrary to section 138B (1) (a) of the Penal Code, Cap 16 R.E. 2019. I thus think Ms. Tengeneza referred to an old law under the revised edition of 2002. Under section 138B (1) (a) of the Penal Code, Cap 16 R.E. 2019 the punishment provided is not less than 15

years and not more than 30 years. This provision was amended through section 179 of the Law of the Child Act, No. 21 of 2009. In the revised edition of 2019 this amendment was taken on board and included in the Penal Code. In addition, the amendment provided for compensation to the victim of such amount of money to be determined by the court. For ease of reference these provisions state:

> *138 (1)* ***Any person who***
> *(a)* ***Knowingly permits any child to remain in any premises for the purposes of causing such child*** *to be sexually abused or* ***to participate*** *in any form of sexual activity or* ***in any obscene or incident exhibition or show,***
>
> ***Commits an offence of sexual exploitation of children and is liable upon conviction to imprisonment for a term of not less than fifteen years and not exceeding thirty years without option of fine.*** [Emphasis added].
>
> *(2) The court may, in addition, order for compensation of such amount of money to be paid to the victim.*

Section 138B (1) (a) clearly provides for minimum sentence of 15 years imprisonment. It was thus correct for the Hon. Magistrate to pass the sentence of 15 years as he had no room to reduce the sentence. The sentence is therefore proper.

With regard to an order for compensation, the Hon. Magistrate ordered each appellant to pay compensation to the tune of 100,000/- to only three children. It should be recalled that the victims were nine in number.

The Hon. Magistrate however, did not provide any explanation as to why he only ordered payment of compensation to only three of them. In the circumstances, I order the appellants to jointly pay compensation to the tune of T.shs. 100,000/- to each of the victim children.

In the upshot the appellants' appeal is found to lack merit and is dismissed in its entirety. The order of compensation is varied to the extent stated in this judgment.

Dated at Mbeya on this 13th day of July 2021

L. M. MONGELLA

JUDGE

Court: Ruling delivered at Mbeya on this 13th day of July 2021 in the presence of the 1st, 3rd and 4th appellants and Ms. Bernadetha Thomas, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE