**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**APPELLANT JURISDICTION**

**DC. CRIMINAL APPEAL NO. 28 OF 2021**
***(Originating from Iringa District Court in Criminal Case No. 104 of 2020)***

**LAURENT JULIUS MBUGI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*8/11 & 16/12/2021*

**JUDGMENT.**

**MATOGOLO, J.**

The appellant Laurent s/o Julius Mbugi was arraigned in the District Court of Iringa for an offence of rape c/s 130 (1)& (2) (e) and 131 of the Penal Code [ Cap 16 R.E 2019] as first count, and Defilement of Idiot or Imbecile c/s 137 of the Penal Code [ Cap 16 R.E 2019] as second count.

It was alleged in the particulars of offence that, on 22nd day of April of 2020 at Lupalama "B" village Kalenga Iringa Rural District within Iringa Region the appellant had sexual intercourse with one Fatuma D/o

Mohamed Toyo a girl of eighteen (18) years while knowing to be an idiot or imbecile.

The accused pleaded guilty to both offences, the appellant was convicted and sentenced to serve thirty years (30) imprisonment for the first offence and was sentenced to serve fourteen years imprisonment for the second count. It was ordered that, the sentences to run concurrently. Then appellant was aggrieved with the whole decision of the trial court. He preferred this appeal with eight (8) grounds of appeal as follows:-

1. That, the learned trial magistrate erred in law and facts to convict and sentence appellant relying only on his plea of guilty while such plea was equivocal and not conclusive.

2. That, the learned trial Magistrate erred in law and facts to inter the punishment to the appellant at the first date appearing at the court without giving another date for him in order to prove his plea of guilty if its equivocal or otherwise.

3. That, the learned trial magistrate erred in law and facts to convict and sentence the appellant based on defective charge when it's have two counts of offences while its duplicated offences which is not acceptable by the law to the same idiot victim to have been raped and defilement, hence the section. 137 of the Penal Code was violated.

4. That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant based on exhibits P1 (PF3 and

Cautioned statement of accused) which were not tendered by the clear person who made it, hence the judgment was not fair and just on the eye of laws when a wrong person tendered those documents.

5. That, the learned trial Magistrate erred in law and facts convict and sentence the appellant while the prosecution side fail to brought neither any one nor a victim before the court of law to corroborate the charge against appellant in sense that a victim always is a key witness in a sexual offence.

6. That, the learned trial Magistrate erred both in law and facts to convict and sentence the appellant without the prosecution side to brought any witness to argue/established the elements of rape or defilement if was being occurred to the victim or not.

7. That, the learned trial Magistrate erred in law and facts to convict and sentence the appellant without considering that the prosecution side fail totally to charge the appellant on presuming offences that the victim may be sane or insane before taking her to mental checkup before entering the judgment, using the sect. 137 and 130(1) of the Penal Code together in the same transaction to victim is not properly and acceptable by the statute and precedent.

8. That, the prosecution side failed totally to prove this case against the appellant beyond reasonable doubt.

The appellant prays that this appeal be allowed, quash the conviction, set aside the sentence and immediate released from prison forthwith.

At the hearing of this appeal the appellant appeared in person and Ms. Piensia Nichombe learned State Attorney appeared for the Republic. The appeal was argued through oral submissions. The appellant added one ground to the effect that he admitted the offence because he had fallen down on the way and lost conscious. Upon regaining conscious and brought in court the charge was read to him while his memory was not good that is why he admitted the offences.

In supporting of his appeal, the appellant submitted that, he got full memory while in the prison. He prayed to this court to consider his grounds of appeal and allow his appeal.

In reply Ms. Nichombe for respondent resisted the appeal and submitted that, the appellant has filed eight grounds of appeal and he added one ground of appeal. In all grounds of appeal, he is challenging the decision of the lower court. Ms. Nichombe argued the 1st ground of appeal separately, the 2nd, 4th 5th and 6th grounds she argued them together. She also argued 3rd 7th and 8th grounds separately.

With regard to the 1st ground, the appellant has alleged that his plea was equivocal. She submitted that, the appellant's plea was unequivocal. If you look at page 1 of the trial court proceedings on the first date appellant appeared in court and the charge read to him, he admitted to have sexual intercourse with Fatma. But also at page 2 appellant admitted to have

sexual intercourse with an idiot, if you read the proceedings at page 2, 3 and 4, while facts of the case being read, the appellant admitted the facts of the case to be correct.

She went on submitting that, the exhibits were tendered in court as shown at page 4, the same were read in court and appellant admitted that what was explained was correct. Appellant did not object for the documents to be admitted in court. At page 6 of the proceedings in mitigation, appellant prayed for mercy.

She said all these show that the appellant understood what transpired in court. He understood the offence that is why he even prayed for the mercy of the court.

She argued that, in the case ***of Rauji s/o Mhapa vs The Republic***, Criminal Appeal No. 88 of 2014 CAT at Iringa (unreported) at page 10 last paragraph of the judgment the Court of Appeal held that the appellant's plea was unequivocal as the charge was read and explained to him in Swahili language, the language which appellant was conversant.

The learned State Attorney was of a considered opinion that, the appellant's complaint that his plea was equivocal is baseless the same should not be considered.

Regarding 2nd, 4th and 5th grounds of appeal on failure by the trial court to give him opportunity on another date for him to prove his plea of guilty, failure to tender exhibits and failure by the prosecution to bring witnesses to prove the offence, Ms. Piensia Nichombe submitted that, Section 228(2) of the CPA clearly explains that once the charge is read and explained to the accused and he pleaded guilty, the accused is to be

convicted and sentenced. This is what was done to the appellant. After the appellant has pleaded guilty, and facts of the case were read to him to which he admitted to be correct. The documents PF3 and cautioned statement were tendered and admitted as exhibits which were read to him and he admitted to be true. The appellant was rightly convicted. There was no need to adjourn the case to another date and bring witnesses to prove the case. She prayed for these grounds to be dismissed.

As to 3rd ground of appeal that the court erred to convict him on a defective charge as there were two distinct charged offences. Hence Section 137 of the Penal Code was violated.

The learned State Attorney contended that, if you read the charge sheet the appellant was charged with two counts, the first count being rape and second count was an alternative count. The charge was not a duplicity. But the appellant was convicted in both counts.

However she said, due to the facts which were given the appellant was supposed to be convicted on one count. She said, as the victim of the offence had already attained 18 years old, the second count was a proper offence for the appellant to be convicted with.

She went on submitting that, this being the first appellate court she prayed to this court to go through the entire record of the lower court and come up with a proper provision under which appellant wound be convicted. Alternatively, under Section 388 of the CPA, may order a trial denovo.

Regarding 7th ground of appeal, this also is like 3rd ground. She also conceded on the anomalies caused regarding the sentence.

As to eighth ground that the prosecution did not prove the offence beyond reasonable doubt, she argued that, the prosecution had no such duty of proof after the appellant had admitted the offence. As to additional ground of appeal that at the time the charge was read to him he was not in full memory as he had fallen down and lost conscious.

Ms. Nichombe argued that, this is an afterthought. She said the issue of falling down and his plea has no relationship. The procedure for plea taking is explained under Section 228 of the CPA which was followed in this case. The appellant did not explain in court how he was affected after fall down.

She concluded by submitting that, leave alone grounds No. 3 and 7 she prayed to this court as 1st appellate court to go through the lower court proceedings and come up with its own finding.

In rejoinder, the appellant prayed for the sentence imposed against him to be reduced.

Having carefully read the court records and the appellant's complaint in his grounds of appeal, the crucial issues to be determined here is whether the appellant plea is unequivocal and whether the appellant was properly convicted in both counts.

With regard to the first ground of appeal while appellant alleging that his plea was equivocal, Ms. Piensia on her part argued that the plea was unequivocal one and cited the case of ***Ramji s/o Mhapa versus Republic,*** (supra).

It is trite law that, the accused plea should be taken as nearly as to the accused words. In order for an accused person to be convicted of an offence on his own plea of guilty the court must be satisfied that the accused has understood all ingredients of the offence and the manner the offence was committed. A person convicted of an offence on his own plea of guilty is barred from appealing against conviction, he can only appeal against the extent or legality of the sentence imposed. This is in terms of section 360 (1) of the Criminal Procedure Act, Cap 20 R.E 2019, the same was held in the case ***Michael Adrian Chaki versus Republic,*** Criminal Appeal No.399 of 2019 CAT at Dar es Salaam (unreported) at page 6.

In this case the charge was read to the appellant who pleaded guilty to both counts he was facing. Then the prosecution was called upon to narrate the facts of the case to the appellant which he admitted to be correct. However upon going through the trial court proceedings the facts that were explained to the appellant disclosed elements of the first offence only but do not disclose the elements on the second count, for that reason I agree with the appellant that, his plea with regard to the second count was equivocal hence the conviction against him in respect of that count is appealable. See the case of ***Leonard Raymond v Republic*** Criminal Appeal No. 211 of 2016 CAT at Mtwara (unreported) when the Court of Appeal of Tanzania referred the case of ***Laurent Mpinga v. Republic*** [1983] TLR 166 in which it was held:-

*" An accused person who had been convicted by any court of an offence on his own plea of guilty, may appeal against the conviction to a higher court in the following grounds;*

1. *That taking into consideration the admitted facts his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law treating it as a plea of guilty;*
2. *That he pleaded guilty as a result of a mistake or misapprehension;*
3. *That the charge laid at his door disclosed an offence not known to the law and;*
4. *That upon the admitted facts, he could not in law have been convicted of the offence charged'*

Basing on the above cited case the appellant's plea with regard to the second count was equivocal, the conviction based on that plea is illegal one. An appeal against conviction and sentence in respect of second count has merit.

But with regard to the first count, the plea was unequivocal, the statement of offence and particulars of offence are clear, for that reason the appellant cannot complain that, his plea was equivocal specifically to the first count. Thus, the first ground of appeal partially has merit as stated above.

With regard to ground of appeal No.2, 4, and 5 the complaint is that, the trial court erred to enter conviction without giving another date for him to prove his plea. In the instant case as I said earlier that the appellant pleaded guilty to the charge after it was read over and explained to him, also after the facts of the case were narrated to him he admitted to be true.

The law is clear that, once a person plead guilty to the charge, the trial court shall record such plea, then the prosecutor shall read the facts of the case and record the answer. This procedure is provided for under section 228 (1) and (2) of the CPA. Having perused the trial court proceedings, the trial magistrate followed all procedures as required under section 228(1) and (2) of the CPA. And as we have seen above that, the appellant pleaded guilty to the charge after it was read to him, the facts of the case were read and explained to the appellant to which he admitted to be correct then he was convicted. There was no reason for the trial magistrate to adjourn the case for another date in order to give room for the appellant to prove his plea of guilty or rethink of his guilty plea. This ground lacks merit.

With regard to the 3rd ground of appeal that, the trial court erred in law and facts to convict and sentence the appellant basing on defective charge having two counts of offences while its duplicated offences. The court records show that the appellant was charged with two counts, the first count was rape and the second count was defilement. The second count was preferred as an alternative count, which means he might have

been convicted either of the first count or on the alternative count but not on both counts. Ms. Piensia Nichombe learned State Attorney has conceded to that. She clearly submitted that as the victim was of 18 yeas age at the commission of offence the appellant was not supposed to be charged in both counts. The learned State Attorney correctly addressed that issue, the problem lies on the suggested remedy. Firstly she prayed to this court as a first appellate court to go through the trial court proceedings and come up with a proper provision under which appellant would have been convicted. Secondly, as an alternative way to order for a retrial. With due respect to the learned counsel, neither of the two options is suitable as far as the proceedings in question are concerned. This court cannot step on the shoes of the prosecutor and choose a proper provision for her. Secondly, this court also cannot order a retrial as doing so will assist the prosecution to arrange themselves and to fill up gaps. A retrial therefore cannot be ordered as is likely to benefit the prosecution for their mistake of drafting a defective charge.

With regard to the 4th ground of appeal the main complaint here is that, the trial court erred in law and facts to convict and sentence the appellant based on exhibits P1( PF3 and Cautioned statement of accused person) were tendered by a clear person who made it. The court records show that the exhibits were tendered by Ms. Alice Thomas State Attorney as it can be seen at page 4 of the trial court proceedings. But the same were admitted without being objected. The procedure permits a prosecutor to tender exhibits in court where an accused person has admitted the

offence by a plea of guilty. It does not need a person/witness who authored the document to be called to testify and tender the same. This ground has no merit.

Regarding grounds No.5 and 6 the complaint is that, the trial court erred to bring neither a victim nor the witnesses to prove the elements of rape and defilement. This ground of appeal has no merit, as I have stated earlier the appellant pleaded guilty to the charge so there was no need of calling witnesses to prove the case against him as after he has pleaded guilty, the trial court correctly followed the procedure and entered conviction against the appellant. With regard to ground of appeal No. 07, this is covered under ground No.3. Regarding the 8th ground of appeal the complaint here is that, the case against him was not proved beyond reasonable doubt. The proof of a case depends on the correctness of the charge laid in the accused door. The question here is whether the charge preferred against the appellant was competent. The first and the very important duty of the trial magistrate before an accused person is called upon to plea is to satisfy himself that the charge is proper one. Even if the accused plead guilty if the charge is bad in law a conviction cannot lie. This ground has merit because, the appellant although pleaded guilty and admitted the facts of the case and his plea was considered unequivocal, but he was wrongly convicted in both counts as this would amount to double jeopardy. The appellant should have been convicted in alternative but not in both counts.

Having discussed as herein above, I find this appeal with merit as far as sentences is concerned. The practice is that, where an accused person is charged with two counts in alternative only the serious offence can be sustained. In the case of ***James Mapema v. Republic[1986] TLR 146,*** it was held that-

> " *Where there is a double jeopardy the court can set aside the sentence for minor offence and leave the sentence of serious offence without quashing the entire convictions and sentences imposed".*

In this case the second offence carries sentence of imprisonment of not less than 14 years, while the first count carries sentence of 30 years imprisonment. For that case conviction in respect of the second count is quashed and sentence of 14 years imprisonment and order for payment of fine of Tshs. 500,000/= set aside. Appellant will continue to serve 30 years imprisonment. The appeal is therefore partly allowed

It is so ordered.

**DATED** at **IRINGA** this 16th day of December, 2021.

THE HIGH COURT OF TANZANIA

**F.N. MATOGOLO**

**JUDGE.**

**16/12/2021**

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| Date: | 16/12/2021 |
| Coram: | Hon. F. N. Matogolo – Judge |
| Appellant: | Present |
| Respondent: | Edna –State Attorney |
| C/C: | Charles |

**Edna Mwangulumba – State Attorney:**

My Lord I am appearing for the Republic the appellant present the matter is for judgment we are ready.

**COURT:**

Judgment delivered.


**F. N. MATOGOLO**

**JUDGE**

**16/12/2021**