**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE DISTRICT REGISTRY OF BUKOBA**
**AT BUKOBA**

**CRIMINAL APPEAL NO. 11 OF 2022**
*(Originating from Biharamulo District Court in Criminal Case No. 01/2022)*

**FESTO ABDUL.....APPELLANT**

***VERSUS***

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

**JUDGMENT**

*07th September & 09th September 2022*

***Kilekamajenga, J.***

In this case, it is alleged that, on 06th February 2021, the appellant impregnated a standard seven pupil of Mzani Primary School. The appellant was later arrested and charged with the offence of impregnating a primary school pupil contrary to **section 60A (3) of the Education Act, Cap. 353 RE 2019**. Before the trial court, the charge was read and explained to the appellant in his language and he pleaded guilty. The trial court convicted and sentenced the appellant to serve thirty years in prison. The appellant, thereafter, preferred the instant appeal armed with five grounds of appeal thus:

1. *That the plea of the accused person was unequivocal plea of guilty as the appellant was not conversant with Swahili language.*
2. *That, the appellant being a lay person he was not capable of understanding the charge against him.*
3. *That the charge was not clearly explained to the appellant.*
4. *That the trial court erred in law by convicting the appellant based on his plea without the prosecution side prove their case.*

5. *That the trial court erred in law in sentencing the appellant 30 years imprisonment while he was 17 years old.*

In fending the appeal, the appellant appeared in person and without legal representation. The learned Senior State Attorney, Mr. Emmanuel Luvinga appeared for the respondent, the Republic. The appellant, being a lay person, simply urged the court to adopt his grounds of appeal. The learned Stated Attorney objected the appeal arguing that the grounds have no merit. On the first and second ground, Mr. Luvinga argued that, the proceedings of the trial court do not show whether the appellant did not understand Swahili so as to require the service of an interpreter. He argued further that, the appellant entered an unequivocal plea and therefore, the argument that the appellant did not understand Swahili was just an afterthought.

When submitting on the third ground, Mr. Luvinga stated that, the argument that the appellant was a lay person and therefore did not understand the charge was also an afterthought as the charge was correctly read and explained to the appellant in his own language. On the fourth ground, Mr. Luvinga averred that, the argument that the prosecution did not prove the case to the required standard has no merit because the appellant pleaded guilty suggesting that the case was proved against him. After the plea of guilty, the facts of the case were read which he also admitted them. The learned State Attorney referred the court to the case of **Joel Mwangambako v. R**, Criminal Appeal No. 516 of 2017, CAT

at Mbeya (unreported) which discussed **section 360 of the Criminal Procedure Act, Cap. 20 RE 2019**. The same case also listed the circumstances under which the appellant may challenge the conviction and sentenced entered after a plea of guilty. When responding on the fifth ground, Mr. Luvinga submitted that, the charge shows that the appellant was eighteen years old at the time of commission of the offence. Therefore, the appellant cannot, at this stage, allege to be seventeen years old. The counsel finally urged the court to dismiss the appeal.

When rejoining, the appellant still reiterated the prayer to consider the grounds of appeal and set him at liberty.

Before venturing into the grounds of appeal advanced by the appellant, I wish to reiterate further that, a conviction entered after the accused's plea of guilty cannot be appealed against. Where an accused enters a plea of guilty leading to conviction and sentence, he/she may only challenge the sentence and not otherwise. This principle of the law is provided under **section 360(1) of the Criminal Procedure Act, Cap. 20 RE 2019,** which provides 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.'*

Furthermore, through judicial decisions, it has become an established principle of the law that, an accused who was convicted and sentenced based on the plea of guilty may only appeal against that decision if the case presents some circumstances stated in the case of **Lurence Mpinga v. Republic** [1983] TLR 166 thus:

> *'...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.'*

To add-up to the above list, in my view, the appellant who was convicted based on the plea of guilty may also appeal against the conviction and sentence where:

1. The trial court violated any law in sentencing the appellant;
2. Where the trial court lacked jurisdiction to try the offence.

In the instant case, the charge against the appellant was read in the language that the appellant understood and the following plea was recorded:

> *'It is true I impregnated one Shukuru Justine who is a standard seven pupil.'*

In terms of the law, the appellant's plea was unequivocal, perfect and complete and captured the contents of the charge against him. There is no doubt, the appellant's plea complied with **Section 228(1)(2) of the Criminal Procedure Act, Cap. 20 RE 2019** which provides that:

> *228.-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
> *(2) Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.*

The procedure further demands the prosecution to adduce facts of the case after the plea of guilty. Such facts must capture the necessary information constituting the offence and thereafter the accused must be drawn to such facts and be asked to respondent whether or not he admits such facts. In the case of **Alfred Boman v. Republic** [2013] TLR 27, the Court of Appeal of Tanzania insisted the above procedure that:

> *'It is important that when a case is called on for preliminary hearing, a charge must be read over to the accused person who must be asked to plea thereto in the language he understands. If the court finds that the accused plea is unequivocal, the prosecution shall proceed to narrate the facts of the case forming all the ingredients of the offence with which the accused person is charged. Thereafter, the accused should be required to admit or deny every such ingredient.'*

Where the accused admits the facts and where such facts contains all the ingredients of the offence charged against the accused, the prosecution is not bound to produce further evidence to prove the offence. It is therefore necessary for the trial court to ensure that the charge against the accused is correct before plea taking. The prosecution, on the other hand, must ensure that the facts narrated to the accused contain all the necessary ingredients of the offence. To emphasise on this point, I wish to refer to the findings of the Court of Appeal in the case of **Onesmo Alex Ngimba v. The Republic, Criminal Appeal No. 157 of 2019**, CAT at Mbeya (unreported) which stated that:

> *'In our view, as the fact that the age of the victim was 6 years old was admitted, there was no legal requirement to call any witness or tender any documentary exhibit to prove the age of the victim. We must insist that legally, witnesses may only be called to testify under section 228(3) of the CPA in proving existence of disputed facts. In law, if an accused person pleads guilty, that is, where he unequivocally admits committing the charged offence, proof of any fact in respect of the offence committed is not required.'*

Where the accused denies the facts adduced by the prosecution, the trial court shall record the accused's plea, enter a plea of not guilty and proceed with the normal procedure of preliminary hearing. Under such circumstance, the case will proceed for full trial which includes calling witnesses for the prosecution and

defence. But, where the accused admits the facts of the case, the court shall thereafter make a finding and enter conviction accordingly.

In this case, the facts narrated by the prosecution contained all the elements of the charged offence and the appellant admitted them. He was thereafter convicted and sentenced based on the plea of guilty. However, the appellant raised an issue of age on the fifth ground of appeal. The appellant alleged that, he was sentenced to serve thirty years in prison while he was seventeen years old. In other words, he urged the court to consider whether the sentence of thirty years in prison was appropriate for him. This ground of appeal prompted my perusal of the record and found that, the appellant was eighteen years old when he committed the offence. He was charged under **section 60A (1) and (3) the Education Act.** For academic reasons, I wish to reproduce the whole section that:

> *60A.-(1) It shall be unlawful under any circumstance for:*
> *(a) any person to marry a primary or secondary school girl or a school boy; or*
> *(b) a primary or secondary school boy to marry any person.*
> *(2) Any person who contravenes any provision of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term of thirty years.*
> *(3)* ***Any person who impregnates a primary school or a secondary school girl commits an offence and shall, on conviction, be liable to imprisonment for a term of thirty years.***
> *(4) Any person who aids, abates or solicits a primary or secondary school girl or a school boy to marry while pursuing primary or secondary education commits an offence and shall, on conviction, be liable to a fine*

*of not less than five million shillings or to imprisonment for a term of five years or to both.*

*(5) Every Head of School shall keep record and submit to the Commissioner or his representative a detailed quarterly report of cases of marriages and pregnancies under subsection (1), (3) or (4) and legal actions taken against the offenders.*

*(6)* ***Notwithstanding anything in this section, the provisions of the Penal Code relating to sexual offences against girls or children under eighteen shall, where appropriate, apply mutatis mutandis in relation to primary and secondary school girls and boys under the age of eighteen.***"(Emphasis added).

Nonetheless, I do not know why the appellant was just charged with one count of impregnating a standard seven pupil instead of also charging him for the offence of rape. I do not believe if the standard seven pupil (victim) was above the age of eighteen so as not to attract the offence of rape. However, the above provision of the Education Act invites courts to consider the provisions of the Penal Code in respect of sexual offences where **section 131 of the Penal Code, Cap. 16 RE 2019** provides:

*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).

It is therefore evident that, so long as the appellant was eighteen years old when committed the offence, though he is not a child in terms of **section 4 (1) of the Child Act, Cap. 13 RE 2019**, he ought to benefit from the provision of section 131(2)(a) of the Penal Code and be sentenced to corporal punishment. For this reason alone, I partly allow the appeal and set aside the sentence meted against the appellant. I, however, order the appellant to receive **six strokes** as corporal punishment according to the law and thereafter be discharged from prison. It is so ordered

**DATED** at **BUKOBA** this 09th Day of September, 2022.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**09/09/2022**

**Court:**

Judgement delivered this 09th September 2022 in the presence of the learned Senior State Attorney, Mr. Emmanuel Luvinga and the appellant present in person. Right of appeal explained to the parties.

**Ntemi N. Kilekamajenga.**
**JUDGE**
**09/09/2022**