

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

CRIMINAL APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 31 OF 2022

(Originating from the District Court of LUSHOTO CRIMINAL Case No. 40 of 2019)

FANUEL SAID KAJIRU----- APPELLANT

VERSUS

REPUBLIC-----RESPONDENT

JUDGEMENT

Mansoor, J :

Date of Judgement- 30TH SEPTEMBER 2022

The facts are very brief. It was alleged by the prosecution that on 19th February 2019 at Mbalangai Village within Lushoto District in Tanga Region, the accused had attempted to rape a girl of 7 years old. The accused was found lying on top of this girl by the father of the girl, at the back of the cattle pound. The accused was arrested, and he was produced before a



Magistrate on 22nd February 2019. A charge for attempted rape under section 132 (1), and (2) (a) was framed against the accused to which he pleaded guilty. The learned Magistrate accordingly convicted the accused on his plea of guilty under section 228 of the Criminal Procedure Act and sentenced him to 30 years imprisonment. The appellant was aggrieved with the conviction and sentence, he filed the Petition of Appeal claiming that the plea was not unequivocal since he was not aware of what he was admitting. The appeal was disposed of by written submissions, the State opposed the appeal by stating that no appeal is 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 as stated in section 360 (1) of the Criminal Procedure Act, Cap 21 RE 2019. The state referred this court to the case of **Juma Seleman @Paul versus the Republic, Criminal Appeal No. 394 of 2016** and the case of **Njile Samwel @ John versus Republic, Criminal Appeal No. 31 of 2018**, the Court of Appeal



decisions in which the principle stated in section 360 of CPA were confirmed, that no appeal lies on a plea of guilty. The State argues that the plea was unequivocal since the charge was read over and explained to him and he pleaded guilty, and again the facts were read over to him, again he pleaded guilty.

The State further argues that the facts read over to the accused disclosed all the ingredients of attempted rape, and they referred the Court to the case of **Edwin Thobias Paul versus Republic, Criminal Appeal No. 130 of 2017** at page 8, that the factual circumstances which are of necessity must be stated in the charge, and that the charge read over to the accused stated all the facts and disclosed the offence, that on 19/2/2019, the accused had attempted to rape a girl of seven years old and the name of the girl was mentioned in the charge.

For clarity, I shall reproduce herein the proceedings held on 22 February 2019 before the District Magistrate:



Court: Charge read over and explained to the accused person who is asked to plead thereto:

Accused: It is true, I attempted to rape.

Court: plea of guilty entered.

PP. The accused person has pleaded guilty, I am ready for facts, that is all.

Facts: That on 19/02/2019 at Mbalangai Village within Lushoto District in Tanga Region did attempt to rape one Sarah d/o Francis, a girl of seven years by pulling her at the back of the cattle pound and undress her underpants. The parent of the victim Francis s/o Daudi found him lying on her attempting to penetrate to the victim vagina.

That is all

Court: the accused person is asked whether facts are correct.

Accused All facts are correct.



This is what transpired in Court and the Court convicted him on his own plea of guilty, and he was thus sentenced. The accused was not represented. It is by practice and procedure that once the accused is arraigned to Court, the charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or claims to be tried. If the accused pleads guilty, the Magistrate shall record the plea and may, convict him thereon. The accused having pleaded guilty to the charge, only if the charge was framed on the evidence of a prosecution witness examined in his presence, there would have been no illegality nor any irregularity in the trial and the conviction based on the plea of guilty would have been perfectly valid in law.

Section 228 of CPA is the section that permits the Magistrate to convict the accused on his own plea of guilty. This section reads:

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) If 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.

I read the records of the trial court and found that, the Magistrate did not record the accused's own words, as for sure the accused does not speak or understand English language and he could not have said "it is true, I attempted to rape." The Magistrate ought to have recorded as nearly as possible in the words he uses; The Magistrate was to record the words used by the accused in the language he has used it to convict on a plea of guilty. The Magistrate ought to have stated that the charge was explained to the accused in



Kiswahili language, or the language understood by the accused. I am certain that the accused being a man from the village in Lushoto does not speak or understand English language. The Magistrate fell into error when he recorded the plea of the accused in English language and not the words uttered by the accused or as nearly as the words uttered.

Again, the facts read over to the accused were incomplete, imperfect, ambiguous and unfinished, the facts were not enough to disclose the offence. There were no circumstances shown in the facts which would make anybody understand them. The facts simply states that only the girl's underpants were pulled off, but what about the accused, was he found naked as well? where was the victim's father during the incident? Did the girl cry out loud for help? How did the father appear to the crime scene without the call for help. What happened after the accused was found attempting to rape the girl. Was the matter reported to the police or to the leaders? Did the accused admit before the police, and if so the



statement of the accused should have been on record as well. The statement of the father of the victim should also been received by the court as evidence. These statements should have been read over to the accused, and he should have been asked if the statements were correct and true, his answers should have been recorded by the court in the way he uttered them or as nearly as possible in the words he used to plead guilty.

On reviewing the charge to which the appellant pleaded guilty, and the facts admitted and since nor the statements of the accused or the prosecution witnesses were put on record for the accused to understand what he was admitting, there was no unequivocal plea of guilty and this justify disturbing the exercise of discretion by the trial Magistrate. The accused did not have counsel. Section 33 (1) of the *The Legal Aid Act, Cap 21 R:E 2019* entitle persons charged with indictable offences to apply for legal aid certificates and to obtain full representation by counsel. The trial Court was aware that the



accused is charged with a serious offence attracting serious penalty of 30 years imprisonment, and he should have made sure that he gets legal aid representation. The fact that the accused is a lay person who was not afforded any chance of representation, is sufficient to require that the convictions be set aside, and a new trial ordered. The duty of a trial Magistrate respecting an inquiry into the facts on a plea of guilty is to satisfy himself that the accused understands the nature of the charge and its consequences and is unequivocal in his plea of guilty, but this must be complemented by the duty of the State to adduce facts which, taken to be true, support the charge and conviction. In the present case on the facts narrated by the State there was sufficient doubt on the elements of the offence to warrant striking the plea.

I shall borrow wisdom from the case of *Brosseau v. The Queen* (1969) S.C. R 181, A Canadian Case from Canada Supreme Court, in that case the accused was an Indian with a Grade II education. He was charged with capital murder to



which he originally pleaded not guilty. Later, after several interviews with counsel, he pleaded guilty to non-capital murder and was sentenced to life imprisonment. He later appealed on the ground that he did not understand that a conviction for non-capital murder entailed a sentence of life imprisonment and that he had agreed to plead guilty to the reduced charge because of his fear of hanging. Cartwright C.J. stated (pp. 188-9):

No doubt when a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so, and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading.

Cartwright C.J. approved the statement of Sidney Smith J.A. in *Rex v. Milina*, and concluded at p. 190:



Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.

In the present case, I am of the view that on the facts narrated by the Public Prosecutor, if believed, there is sufficient doubt on the elements of the offence of attempted rape to warrant the striking of the plea. A lot was missing in the facts narrated by the Public Prosecution.

For the above stated reasons, I allow the appeal and direct a new trial on the charge. Conviction and Sentence is quashed



and set aside, he shall be released from imprisonment unless held for any other lawful cause.

**PRONOUNCED IN OPEN COURT AT TANGA THIS 30th DAY OF
SEPTEMBER 2022**




L. MANSOOR

JUDGE

30th SEPTEMBER 2022

Judgement delivered in Court today in the presence of the Appellants, MR. Mangowi State Attorney for the Respondent Republic and MR. ABUBAKAR the Court Clerk.




L. MANSOOR

JUDGE,

30th SEPTEMBER 2022