

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 156 OF 2022

IVON NJOCHANILO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Kinondoni
at Kinondoni in Criminal Case No. 165 of 2020)**

JUDGMENT

24th and 31st October, 2022

KISANYA, J.:

The appellant was arraigned before the Resident Magistrate's Court of Kinondoni at Kinondoni in Criminal Case No. 165 of 2020 and was convicted on his own plea of guilty to the offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap. 16, R.E. 2019] (now R.E. 2022).

It was the prosecution case that on diverse dates between 2019 and 30th April, 2020 at Goba Kontena area within Kinondoni District in Dar es Salaam Region the appellant did have carnal knowledge of one RR (name disguised to hide the identity), a boy of 6 years old against the order of nature. Subsequent to conviction, the appellant was sentenced to life imprisonment.

This appeal challenges the decision of the trial court on conviction and sentence for unnatural offence. It is premised on six grounds of appeal which can be merged into three grounds of complaints as follows:

1. That the trial court erred in holding that the appellant's plea was equivocal without addressing him on the seriousness and consequences of his plea.
2. That the trial court erred in failing to adjourn the case in order to ascertain whether the appellant was forced, induced or promised to admit to the charge for the interest of the complainant.
3. That the trial court erred in law and fact in convicting the appellant based on an equivocal plea of guilty because he was not asked to comment whether the facts of the case were true or otherwise.
4. That the prosecution did not prove its case beyond all reasonable doubts.

At the hearing of this appeal, the appellant appeared in person, whereas the respondent was represented by Ms. Yasinta Peter, learned Senior State Attorney.

Before the hearing could commence, the appellant was granted leave to add an additional ground of appeal to the following effect:

"That the trial court erred in law and fact to sentence the appellant to life imprisonment without considering that the offence was committed when the appellant was 16 years old."

When invited to submit in support of the appeal, the appellant urged this Court to consider all of his grounds of appeal. He also relied on the case of **Safar Deemay vs R**, Criminal Appeal No. 269 of 2011, CAT (unreported), moving this Court to allow his appeal.

In her response, Ms. Peter supported the conviction and sentence. She tackled the first and third grounds of appeal altogether by submitting that the charge was read and explained to the accused person in Kiswahili Language. It was her further submission that the appellant was recorded to have pleaded guilty to the offence as charged. Referring this Court to the case of **Kibori Ramadhan vs R** [1980] TLR 136, she submitted that the laid down procedure on dealing with the accused person who enters a plea of guilty were complied with.

When probed by the court on whether the facts of the case were read over to the appellant, the learned State Attorney conceded that the record is silent on that fact. However, she urged me to consider that the trial court recorded the facts which were not in dispute whereby the appellant signed the

same. It was her further argument that section 228 of the CPA requires the trial magistrate to ensure that the charge is read over and explained to the accused. In that regard, she submitted that the first and third grounds lack merit because the legal requirement was duly complied with.

On the second ground of appeal, the learned Senior State Attorney submitted that the law does not require the trial court to adjourn the case when the accused person pleads guilty to the offence.

As for the fourth, fifth and sixth grounds of appeal, the learned Senior State Attorney submitted that the offence was duly proved because the appellant pleaded guilty. That being the case, she was of the view that the prosecution was not duty bound to produce exhibits or prove age of the accused.

With regard to the additional ground of appeal, the learned Senior State Attorney submitted that the facts read by the prosecution indicated that the appellant was 19 years old. She therefore, contended that this ground is an afterthought on the reason that the said fact was not disputed before the trial court.

On the foregoing submissions, the learned Senior State Attorney implored this Court to dismiss the appeal in its entirety.

In his rejoinder, the appellant submitted that he was not in agreement with the submissions made by the learned Senior State Attorney. He reiterated his prayer that the grounds of appeal be considered by this Court.

I have examined the record and considered the grounds of appeal, submissions made by both parties and the applicable law. The main issue is whether this appeal is meritorious.

It is worth noting here that the appellant was convicted and sentenced after pleading guilty to the offence preferred against him. That being the case, this appeal is governed by section 360(1) of the CPA which stipulates:

"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 view of the above cited provision, an appeal which stems from a criminal case in which the accused person is convicted and sentenced after pleading guilty to the offence is limited to the extent or legality of the sentence meted upon the accused person or appellant.

As far as conviction is concerned, the appellant may challenge the same but on any of the grounds stated in the case of **Laurence Mpinga vs Republic** [1983] TLR 166, as follows:-

- 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."*

The above position in **Laurance Mpiga** (supra) was restated in the case of **Frank s/o Mlyuka and Another vs R**, Criminal Appeal No. 404 of 2018 (unreported).

Being guided by the above legal position, I am of the view that apart from the additional ground of appeal on the legality of sentence, the grounds of appeal worth of consideration are the first and third grounds which are based on the first and fourth grounds stated in case of **Laurence Mpinga** (supra).

I prefer to start with the first and third grounds of appeal in which the appellant contends that his plea was equivocal and that he was not asked to comment on the facts read by the prosecution. As rightly submitted by Ms. Peter, section 228 of the CPA is to the effect that the charge and the particulars of the offence should be read and explained to the accused person who pleads guilty. Reading from the record, I agree with the learned Senior State Attorney that the charge was read and explained to the appellant. This fact is reflected from the appellant's answer to the charge in which he admitted to have sodomized the victim. The appellant's response to the charge was in Kiswahili language.

However, that stage was by itself not sufficient to find the appellant guilty and convict him of the charged offence. The trial magistrate was then required to probe the prosecution to read the facts of the case laid against the appellant and before asking him comment on the said facts. I hold so basing on the case of **Khalid Athuman vs Republic** [2006] TLR 79 in which the Court of Appeal cited with the case of **Adan vs R** [1973] EA 445 where it was held that:

"The Magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused 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 task 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."

In our case, the prosecuting attorney informed the trial court that he was ready for the facts of the case. However, nothing to suggest the facts of the case were read over to the appellant. Yet, the learned trial magistrate went on to record that adopted facts were not disputed. Further to this, the trial magistrate caused the appellant to sign the undisputed facts without indicating whether the same were read out to the appellant. As if that was not enough the appellant was not given opportunity to explain or dispute the facts. It follows therefore, that the appellant did not enter a plea of guilty to the charge levelled against him. As held in the case of **Ndaiyai Petro vs R**, Criminal Appeal No. 277 of 2011, CAT at DSM (unreported), the trial court failed to satisfy itself on whether the appellant's plea was unequivocal.

In the light of the foregoing, I find merit in the third ground of appeal. Since it is uncertain whether the appellant's plea was unequivocal, I find no

need of considering the additional ground of appeal in which the appellant challenge the sentence meted upon him. This is when it is considered that the charge sheet and the facts adopted by the trial court shows that the offence was committed when the appellant was 19 years and not 16 years.

In the final analysis, I allow the appeal. Exercising this Court's powers of revision under section 373 of the CPA, I quash the proceedings, conviction and sentence of the trial court. I order for retrial of the case before another magistrate with competent jurisdiction. In the event the appellant is found guilty after the retrial, the trial court is directed to deduct the time which the appellant spent in prison serving the sentence which led to this appeal. In the meantime, the appellant shall remain in custody until when he is summoned to appear before the trial court.

It is so ordered.

DATED at DAR ES SALAAM this 31st day of October, 2022.



S.E. KISANYA
JUDGE

Court: Judgment delivered this 31st day of October, 2022 in the presence of the appellant and Ms. Dorothy Massawe, learned Senior State Attorney for the respondent.

Right of appeal explained.



S.E. KISANYA
JUDGE
31/10/2022