IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 33 OF 2022

(Arising from Criminal Case No. 163 of 2020 of Karagwe District Court (M.C Manjale -RM)

HAMDANI HAMADA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25/10/2022 & 28/10/2022
E.L NGIGWANA, J.

In the District Court of Karagwe at Karagwe, the appellant Hamdani s/o Hamada was charged with the offence of Incest by male contrary to section 158 (1) of the Penal Code cap. 16 R: E 2002, now R.E 2022.
The particulars of the offence allege that the appellant on 27/04/2020, at Migina Village within Kyerwa District in Kagera Region, did have carnal knowledge of his daughter aged 13 years.

When the charge read over and explained to him and asked to plead thereto, he responded by saying "It is true". The court entered the appellant's plea as Plea of guilty. Thereafter, the facts were read and explained to the appellant who was asked on the correctness and truth of the facts and he responded **"Facts are true and correct."**

The trial court was satisfied that the plea was unequivocal plea. Consequently, the appellant was convicted upon his own plea of guilty and sentence to serve a term of thirty (30) years imprisonment.

The appellant was aggrieved by that decision; therefore, has come to this court armed with eight grounds of appeal which I see no need to reproduce them here except the first ground which in my view, can dispose of this appeal. The same may be summarized as follows; "**that the trial court erred in law and fact to convict and sentence the appellant basing on equivocal plea.**"

When the matter came for hearing, the appellant appeared in person and unrepresented while Mr. Amani Kilua, learned State Attorney, appeared for the Respondent/Republic. In submission in chief, the appellant had a brief assertion that his grounds of appeal be adopted as his submission. He then prayed the court to allow the appeal, quash conviction, set aside sentence and set him free.

In reply, Mr. Kilua submitted that the appellant was convicted upon his own plea and according to section 360 (1) of the Criminal Procedure Act Cap. 20 R: E 2019, no appeal shall be allowed in a case of any accused person who has unequivocally pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence.

The learned State Attorney went on submitting that, for the plea to amount to unequivocal plea, the guidelines set in place by the Court of Appeal in the case of **Michael Adrian Chaki versus Republic**, Criminal Appeal No.399 of

2019 must be observed. He added that, it is unfortunately that in this matter, those guidelines were not observed by the trial court. He added that the charge was defective because it did not properly disclose the offence or ingredients of the offence.

The learned counsel further submitted that, where the charge is defective, the remedy is to quash conviction; set aside the sentence imposed and set the appellant free. He made reference to the case of **Jackson Venant versus Republic,** Criminal Appeal No.118 of 2018 CAT (Unreported).

I have considered the grounds of appeal, the appellant's submissions and submissions by the respondent side. Now, **the issue for determination is whether the appellant's plea was unequivocal plea or otherwise.**
Generally, 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. That is in terms of section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2022]
The same provides that;
"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."

However, for the court to convict the accused based on a plea of guilty and punish him for the offence charged without trial, the plea must be complete, unequivocal and unambiguous.

For a plea to be unequivocal for purposes of conviction, there are conditions that the convicting court must ensure that they exist conjunctively at the time of conviction. In the case of **Michael Adrian Chaki versus The Republic,** (Supra) the Court of Appeal stated that there cannot be an unequivocal plea on which a valid conviction may be founded **unless these conditions are conjunctively met:**

1. The appellant must be arraigned on a proper charge. That is to say the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;

2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.

3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

5. The accused must be asked to plead and must actually plead guilty to

each and every ingredient of the offence charged and the same must be properly recorded and must be dear.

6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged. See also ***Laurent Mpinga vs Republic*** *[1983] TLR 166 and* ***Karlos Punda versus Republic (Supra)***

I will now examine at close range and with keen attention, the proceedings of the District Court of Karagwe dated 06/05/2020 to find out whether the above conditions were met, and determine whether it was proper for the District Court convict and sentence the appellant.

Firstly, in the matter at hand, the charge was not well-drawn in compliance with section 132 of the Criminal Procedure Act, Cap 20 R: E 2019 hence defective charge because it does not contain particulars of the offence capable of affording the appellant with reasonable information as to the nature of the offence charged. In that premise, the first condition was met because the appellant was arraigned on improper charge.

Secondly, according to the record, after reading over and explaining the charge to the appellant, the court recorded the plea of the appellant as follows; **"It is true".** In the case of **Kato versus Republic (1971) H.C.D 334** it was held among other things that the word "***It is true***" when used by an accused person may not amount to a plea of guilty.

The Court of Appeal in the case of **Safari Deemay versus Republic,** Criminal Appeal No.269 of 2001 CAT (Unreported) had this to say;

"Great care must be exercised especially where an accused is faced with a grave offence....We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "It is true". A trial court should ask an accused to elaborate in his own words as to what he is saying it is true."

In the case at hand, the appellant was not asked to elaborate in his own words as to what he was saying it is true. However, the records revealed that after recording the words" It is true" the prosecution (D/Sgt David) stated the facts of the offence with which the appellant was charged but the facts did not clearly disclose the ingredients of the offence.

The facts revealed one of the ingredients that the appellant had sexual intercourse with the victim without her consent. However, according to the section 158 of the Penal Code, consent is not one of the ingredients of Incest by male.

The facts ought to have stated shown clearly that the appellant is the biological father of the victim, and he ought to have been called upon to admit such fact and the fact whether he had sexual intercourse with his daughter.

The appellant also complained that the he was not afforded an interpreter since he is not conversant with Kiswahili or English. Indeed, the record is silent on whether the charge was read to the accused person in the language

he understands. Despite the fact that the appellant had stayed in prison since May 2020 where the major medium of communication is Kiswahili, I have observed here in court that he still experiencing language problem. Under the circumstances of this case, it cannot be said with certainty that the charge and the facts of the case were read to the appellant in his own language.

In the upshot, the plea of the appellant was equivocal plea for failure to comply with the procedure laid down in the case of **Michael Adrian Chaki versus The Republic (Supra).** It is a principle that where the plea is equivocal, conviction must be quashed and sentence set aside, and then, the case file has to be remitted back to the trial court for the plea to be taken afresh but where the charge is also defective like in this case, the remedy is to quash conviction, set aside the sentence and set the appellant at liberty unless otherwise held for any other lawful cause. Indeed, I will do the same in this appeal.

In the event, the conviction and sentence merited against the appellant by the trial court are hereby quashed and set aside. It is subsequently ordered that the appellant be released with immediate effect unless he is held for a lawful cause not connected with an offence leading to this appeal.

Dated at Bukoba this 28th day of October, 2022.

E.L. NGIGWANA
JUDGE
28/10/2022

Judgment delivered this 28th day of October, 2022 in the presence of the Appellant, Mr. Amani Kilua learned State Attorney for the Respondent/Republic, Hon. E. M Kamaleki, Judges' Law Assistant and Ms. Sophia Fimbo, B/C

E.L. NGIGWANA

JUDGE

28/10/2022