IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 37 OF 2022

(From the decision of the District Court of Rungwe at Tukuyu (Hon. A. E. Lugome, RM) in Criminal Case No. 77 of 2020)

MASTER ANTONY CHAPA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 24/05/2022
Date of Judgement: 30/05/2022

MONGELLA, J.

In the district court of Rungwe at Tukuyu, in Criminal Case No. 77 of 2020, the appellant was charged for unnatural offence contrary to section 154 (1) of the Penal Code, Cap 16 R.E. 2019. The particulars of the offence as presented in the charge are to the effect that: on unknown date between February and July 2020, at night time, at Isuba village within Rungwe district in Mbeya region, the appellant did have carnal knowledge against order of nature to one FA (initials used to conceal the identity of the victim), a girl aged 10 years.

The trial court record indicates that the appellant pleaded guilty to the charge and consequently convicted and sentenced to serve 30 years

imprisonment. He was however aggrieved by the decision; hence the appeal at hand on seven grounds, which during the hearing he prayed for the Court to adopt them as his submission. I shall therefore present the grounds of appeal as the appellant's submission, as prayed.

On the first ground, the appellant claims that the trial court erred in law in convicting and sentencing him without taking into account that the charge and all essential ingredients of the offence were not explained to him in a simple language known to him and the trial court failed to mention it.

On the second ground, the appellant faults the trial court for convicting and sentencing the appellant without taking into consideration that when the contents of exhibits PE I and PE II were read out before the court he was not given the chance to admit or object its contents.

With regard to the third ground, he challenges the trial court's conviction and sentence on the ground that there is nowhere in the proceedings showing that the appellant was given a chance to explain by his own words the alleged facts such as the "unknown dates" of occurrence of the offence charged.

Concerning the fourth ground, he claims that the plea of guilty entered by him was imperfect and unfinished and the trial court erred in considering it. He further faulted the trial court decision on the ground that no birth certificate or school register was tendered as proof.

On the fifth ground, he challenges the trial court for not taking into observation that the plea of guilty he entered resulted from mis-apprehension.

As to the sixth ground, he faults the trial court for failing to narrate one by one the facts to the appellant so that he would dispute or admit. He was of the view that the facts ought not to have been read as a whole and for him to admit them as whole without the same being explained by the trial court.

On the last ground, he faults the conviction and sentence on the ground that the trial court relied on the brief facts presented by the prosecutor while the prosecution never mentioned any law that was used to prepare the facts of the case. He added that the facts were not numbered, but read in paragraphs.

The respondent was represented by Mr. Lordgurd Eliamani, learned state attorney. He made a very brief submission whereby he conceded to the ground that the charge and facts were read in unknown language as it is not stated in the record which language known to the appellant was used. Mr. Eliamani further conceded to the complaint that the plea was not clear. He submitted that the appellant did not state to which facts he was pleading guilty to or admitted. However, considering that in the circumstances there was no trial, he prayed for the case to be tried *de novo*.

I have considered the grounds of appeal, the submission by the learned state attorney and the trial court record. Basically, as a general rule, the law, as provided under **section 360 (1) of the Criminal Procedure Act**, prohibits appeals on conviction entered on a plea of guilty, except as to the extent or legality of the sentence. It is only under special circumstances a plea of guilty can be interfered. The circumstances were explained by the Court of Appeal in the case of ***Kalos Punda v. The Republic***, Criminal Appeal No. 153 of 2005 (CAT at Mtwara, unreported) in which while revisiting the decision in *Laurent* ***Mpinga v. Republic*** [1983] TLR 166 it listed them as hereunder:

> *"(a) that even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;*
> *(b) that the appellant pleaded guilty as a result of mistake or misapprehension;*
> *(c) that the charge laid at the appellant's door disclosed no offence known to law; and*
> *(d) that upon the admitted facts the appellant could not in law have been convicted of the offence charged."*

Discussing the import of **section 228 (2) of the Criminal Procedure Act**, the Court of Appeal in the case of *Nebo Emmanuel* ***vs. The Republic***, Criminal Appeal No. 173 of 2019 (CAT at Mbeya, unreported) stipulated the conditions under which a plea of guilty can be valid for purposes of conviction without trial. While reiterating its position settled in the case of ***Michael Adrian Chaki vs. The*** *Republic*, Criminal Appeal No. 399 of 2019 (CAT at DSM, unreported) the Court stated the conditions to be that:

(a) *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;*

(b) *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.*

(c) *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.*

(d) *The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.*

(e) *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 clear.*

(f) *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."*

The same position was settled in the case of ***Onesmo Alex Ngimba* vs. *The Republic***, Criminal Appeal No. 157 of 2019 (CAT at Mbeya, published at Tanzlii); ***Philipo s/o Faustine @ Chilembele* vs. *The Republic***, Criminal Appeal No. 666 of 2020 (CAT at Mbeya, published at Tanzlii). From the authorities cited, it is clear that a plea of guilty can only be confirmed by the court upon the accused pleading guilty to the charge read to him by

stating what he exactly pleads guilty to and admitting the facts read out to him. In the matter at hand, the record shows that the appellant never stated what he was pleading to. He only stated that "*it is true*" but never stated what exactly he considered to be true in the charge. As ruled in the above mentioned cases, the accused is supposed to admit or deny each and particular ingredient of the offence. The appellant's plea as indicated on record does not meet the conditions set in the above mentioned authorities.

The appellant further complained on the language saying that the charge was read in the language not understood by him. It is not shown in the record which language was used to read the charge. Since the appellant challenges the language used claiming that he never understood the same, it becomes difficult not to accord him benefit of doubt.

Mr. Eliamani prayed for an order that the matter be tried *de novo*. A retrial can only be ordered under certain conditions, mainly where the retrial shall not accord the prosecution a chance to rectify its mistakes or fill gaps, especially on the evidence adduced. In the case of ***Director of Public Prosection*** *vs.* ***Wambura Mahenga @ Kisiroti & 2 Others***, Criminal Appeal No. 282 of 2017 (CAT at DSM, published at Tanzlii), the Court of Appeal while revisiting the landmark case of ***Fatehali Manji*** *vs.* ***Republic*** [1966] E. A 341 stated:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial...each case must depend on its*

own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

The Court further referred to its previous decision in the case of ***Selina Yambi and Others vs. Republic***, Criminal Appeal No. 94 of 2013 (CAT, unreported) whereby the same legal position, as above, was settled.

The Court of Appeal in ***Director of Public Prosecution*** (supra), at page 16, further insisted that the paramount factor to be considered in ordering for retrial is interest of justice, which in my view, has to be considered on both sides, that is, the appellant and the victim of the offence. Since there was no trial at all, as argued by Mr. Eliamani, to which I subscribe, and considering the offence charged, I find it fair for a retrial of the case to be ordered.

In the premises, I order the matter to be retried in the district court before another magistrate. The prosecution is hereby employed to see to it that the process of initiating retrial is expedited. In the event the appellant is found guilty of the offence, the time already spent in serving the sentence should be taken into consideration and deducted accordingly. Meanwhile, the appellant shall remain in custody.

It is so ordered.

Dated at Mbeya on this 30th day of May 2022.

L. M. MONGELLA

JUDGE

Court: Judgement delivered at Mbeya in Chambers on this 30th day of May 2022 in the presence of the appellant appearing in person and Mr. Davis Msanga, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE

Court: Right of Appeal to the Court of Appeal duly explained.

L. M. MONGELLA

JUDGE

30/05/2022