THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 32 OF 2023

(Originating from Criminal Case No. 209 of 2021 of the District Court of Mbarali T. Mlimba - RM)

JUMANNE JUMA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 9th May, 2023

Date of judgment: 15th May, 2023

NGUNYALE, J.

The appellant was arraigned before the District Court of Mbarali at Rujewa with two counts. One rape contrary to section 130(1)(2)(e) of the Penal Code [Cap 16 R. E 2019], it was alleged that on diverse dates from November, 2020 to May, 2021 at Ruiwa Village within Mbarali District in Mbeya region the appellant wilfully and unlawfully did have sexual intercourse to "SJ" a student of Ruiwa Secondary School aged 16 years old. Name withheld to protect her modesty. The second count was

impregnating a school girl contrary to section 60A of the Education Act [Cap 353] as amended by Act. No. 2 of 2016, particulars are not necessary as the count was withdrawn in later stage.

On the first day the appellant was arraigned and after the charge and its particulars being read, the appellant plead guilty to the first count and not guilty on the second count. The proceeding was adjourned to another date. On 5th October, 2021 when proceeding resumed, the prosecution read facts of the case to the appellant where he replied "facts are true I used salama condom to have sex intercourse to her". The prosecution tendered PF3 and cautioned statement of the appellant which were admitted collectively as exhibit PE1. From the facts stated, the court found the accused had admitted ingredients constituting the offence, consequently convicted and sentenced him to thirty years imprisonment. It further ordered him to pay compensation of Tsh. 500,000/= to the victim.

The above findings aggrieved the appellant who filed petition of appeal to this court consisting of four grounds;

1. *That the trial court erred in law when convicted and sentenced the appellant without regarding that the plea and admitted facts were imperfect and unfinished and for the reason the trial court erred in law in treating it as a plea of guilty.*

2. *That the trial court erred in law when convicted and sentenced the appellant without taking into account that the facts of the case were not numbered in order the appellant to admit one by one and by doing so doing the plea of the appellant was the result of misapprehension.*
3. *That the trial court erred in law when convicted and sentenced the appellant without giving the appellant chance to explain relevant facts by his own words failure to do so the plea from the appellant was the result of mistake*
4. *That the trial court erred in law when convicted and sentenced the appellant without reading contends of exhibit PE1 and PE2 failure to do so the appellant plea was the result of mistake as he didn't know which was written in this(sic) exhibits as he doesn't know to read and write.*

At the hearing of the appeal the appellant appeared in person whereas for Respondent appeared Mr. Stephen Rusibamayira assisted by Rajabu Nsemwa and Damitola Ngosso learned State Attorneys.

When the appellant was called on to support his grounds of appeal, he stated that the trial court did not do justice to him as he did not understand to what he was responding before the court. He added that he did not admit all facts. The victim and doctor did not attend. He prayed to be set free.

The respondent did not support the appeal, Mr. Nsemwa submitted that section 360(1) of CPA restricts appeal against conviction on plea of guilty. He added that the court entered plea of guilty after the appellant admitted that it was true he raped the victim, all facts were admitted. He further submitted that facts were clear and they were read to him.

Regarding exhibit PE1 not being read the State Attorney submitted that it was admitted without objection. From the submission he prayed the appeal to be dismissed.

In rejoinder the appellant restated that he did not commit the offence and God knows that fact.

I have considered the records of the appeal and arguments of the parties. I will dispose the appeal starting with the ground 2, 4 and ground 1 and 3 will be joined.

Before dealing with grounds of appeal I will start with section 360(1) of the Criminal Procedure Act [Cap 20 R: E 2022] which bars appeal against conviction on own plea of guilty. The State Attorney just said the above provision bars appeal but did not state if the present case does not meet the thread. At the outset, I agree with the learned State Attorney that section 360(1) of the CPA, as a general rule bars entertainment of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence imposed. However, an appeal against conviction on a plea of guilty may be entertained under certain circumstances as an exception to the general rule. In **Laurence Mpinga vs Republic** [1983] TLR 166 the court laid four factors on which own plea of guilty against the conviction can be made. The court held that;

"...an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the conviction to a higher court on any of the following grounds; ***one;*** *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,* ***two;*** *that he pleaded guilty as a result of mistake or misapprehension,* ***three;*** *that the charge laid at his door disclosed no offence known to law and* ***four;*** *that upon the admitted facts he could not in law have been convicted of the offence charged.*

Grounds 1 and 3 are in the ambit of **Laurence Mpinga** case (supra) to which appeal may lie against conviction. Therefore, the appeal is properly before the court

Now to the second ground it is complained that facts were not numbered, at first place there is no law which requires facts of the case to be numbered. What is required is that facts must be read and explained to the accused person. There being no complaint that facts of the case were not read to the appellant I find the complaint unmerited. The second is dismissed.

With regard to the ground 4th ground that the exhibit PE1 and PE2 tendered in evidence were not read out to the appellant, I find the same to be unfounded because exhibit tendered and admitted when a person has pleaded guilty to the offence need not necessarily be read as the

practice in full trial. In **Matia Barua vs Republic**, Criminal Appeal No. 105 of 2015 (unreported), the court held;

> *'The tendering and admission of an object or a document as an exhibit after an accused person has pleaded guilty to the charged offence is not a legal requirement even though it is desirable to do so.'*

[see also: Emmanuel Ambrous vs Republic, Criminal Appeal 55 of 2017 and **Frank Mlyuka vs Republic,** Criminal Appeal 404 of 2018 (both unreported).]

I therefore agree with the State Attorney that it was not necessary to read exhibits in this case after being admitted during plea of guilty taking into account that it was admitted without objection from the appellant. To that view the 4th ground is dismissed.

Pertaining to the first and third grounds, in law for a plea of guilty to be valid for purposes of conviction without trial under section 228 (2) of the CPA it must meet the conditions laid **Michael Adrian Chaki vs Republic** [2021] TZCA 454 TANZLII, that is;

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 explicitly disclose the offence known to law.*
2. *The court must satisfy itself without any doubt and must be dear 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 offences 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; and*
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.'*

In **Kato vs R.** [1971] E. A. 542 the erst while Court of Appeal of East Africa case of **R. v. Ynasani Egau** [1942] 9 E.A.C.A. 65 was cited, where the court held that;

'In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally.'

The above pronouncement presupposes that it is only if it can be clearly shown that an accused person admitted the properly drawn charge and all the ingredients which constitute the offence charged that a court can properly enter a plea of guilty. In this appeal facts of the case as recorded are as follows

'This is a criminal case accused is Jumanne s/o Juma, aged 24 yrs old, Safwa, pagani, peasant, resident of mapala.

That the accused is charged with the offence of rape C/S130(1)(2)(e) and 130(1) of the Penal Code [Cap 16 R: E 2019.

That on diverse dates from November, 2020 to May, 2021 at Ruiwa Village within Mbarali District in Mbeya region wilfully and unlawfully accused did have sexual intercourse to SJ a student of Ruiwa Secondary School aged 16 years old.

That accused was arrested and sent to Igurusi Police Station after interrogation he admitted to commit the offence. Then he was sent to Rujewa Police Station.

That on 01/10/2021 accused was sent to court where he admitted to commit the offence

That is all.

Accused: *Facts are true I used salama condom to have sexual intercourse to her.*

Court: *accused admits facts of the case.'*

The above facts as read by the prosecutor before the trial court and alleged to have been admitted by the appellant are not worth of calling facts which constituted the offence charged. In my view the prosecutor merely reproduced the particulars of the offence save for the arrest and interrogation made against the appellant as stated in the facts. Even if it has to be assumed that they were the facts but for purpose of statutory rape under section 130 (2) (e) of the Penal Code two ingredients were crucial to be established. Those are, that the victim was a child of tender

age and proof of age was even more critical in statutory rape. It was very crucial because it is a determining factor which differentiates between normal rape and statutory rape, punishment depends on the age of the victim.

In the instance appeal, the accused reply to the purported facts of the case was that "*Facts are true I used salama condom to have sexual intercourse to her".* This implies that he admitted to have sexual intercourse and therefore penetration was proved. The second ingredient of age was not admitted, this is more critical because neither the charge nor facts of the case disclosed that the victim was a child. In **Amani Yusuph vs Republic**, Criminal Appeal No 124 of 2019(Unreported) where a similar scenario was experienced, the court emphasized on the importance of proving the age. It stated;

> *'We must reiterate that in statutory rape cases that attract lengthy prison terms of thirty years to life imprisonment, proof of age should not be casual or superficial, even when the accused readily agrees to plead guilty.'*

In this appeal considering the facts recorded, I cannot conclude that the appellant understood that he was facing the offence of rape falling under statutory rape. Indeed, in statutory rape age of the victim was of real significance to make his plea of guilty unequivocal. This is relevant and true in view of our society where matured boys are not aware that having

sexual intercourse with a girl below eighteen year is an offence. The fact that the charge and the purported facts of the case did not mention the victim's age, I am constrained to hold that the appellant did not know that he was being accused of sexual intercourse with JS who was a child of 16 years old which is an offence.

In view of what I have endeavoured to discuss above, the appellant's plea of guilty was incomplete, ambiguous and unfished and in the circumstance of this case it cannot be held that the plea was unequivocal upon which to ground a valid conviction.

In the upshot, I allow this appeal. The proceedings, conviction and sentence are hereby quashed and orders set aside. The trial should start afresh before another Magistrate with competent jurisdiction. Meanwhile the appellant will remain in prison pending trial, the right to bail shall be considered before the trial court.

DATED at MBEYA this 15th day of May, 2023.

D.P. Ngunyale
Judge

Judgment delivered this 15th day of May 2023 in presence of the appellant in person and mr. Stephen learned State attorney for the respondent.

D.P. Ngunyale
Judge