IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 95 OF 2022

(Arising from Criminal Case No.60 of 2022 at District Court of Simanjiro at Orkesumet)

ALANYUNI LENGAI @ LALAI LENGA.....APPELLANT

Vs

THE DPP..... RESPONDENT

JUDGMENT

Date of last order: 3-4-2023

Date of judgment:16-6-2023

B.K.PHILLIP,J

The appellant herein was arraigned at District Court of Simanjiro at Orkesumet on two counts, to wit; First count; Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap 16, R.E 2019). Second count; Impregnating a school girl contrary to section 60A (3) of the Education Act, Cap 353 as amended by Act No.2 of 2016, read together with Government Notice No. 265 of 2003. The trial Court found him guilty of the second count on his own plea of guilty and sentenced him to 30 years imprisonment.

Aggrieved by the aforesaid conviction and sentence, he lodged this appeal on the following grounds;

(i) *That the trial magistrate erred in law in convicting and sentencing the appellant thirty years basing on equivocal plea of guilty.*

(ii) *That the trial magistrate erred in law and fact by failure to consider the lapse of time from 2020 when the offence was committed and 2022 when the same reported to the police.*

(iii) *That, the trial magistrate erred in law and in fact to convict the appellant while the victim is married by another person.*

(iv) *That, the trial magistrate erred in law and fact by failure to take into account the fact surrounding the case that led to convicting and sentencing of the appellant.*

At the trial court the prosecution's case was as follows; that on date and month which was unknown in 2020 at Narosoito Village within Simanjiro District in Manyara Region appellant did have a sexual intercourse with the "victim" (name withheld for purpose of concealing his identity) a girl aged seventeen (17) years old without her consent. That on the same dates and months appellant did impregnate the victim who was a student at Narosoito Primary School.

The court's records show that the charge was read in court and explained to the appellant who denied the first count and pleaded guilty to the second count. Thereafter the facts of the case on second count were read aloud in court and were admitted by the appellant as true . Consequently, the trial magistrate convicted the appellant on his own plea of guilty and sentenced him to 30 years in prison.

Now, back to the appeal at hand, the appellant was represented by learned advocate Denis Moses whereas learned state attorney Daud Basaya appeared for the respondent. The appeal was disposed of by way of written submissions.

Mr. Moses started his submission by pointing out that he decided to abandon the 4th ground of appeal. He went on submitting for the 1st ground of appeal as follows; that the trial magistrate erred in law for convicting the appellant basing on an equivocal plea of guilty on reason that he failed to consider the legal procedure of plea taking especially when dealing with unrepresented accused who does not understand Kiswahili and English language, and facing an offence which attract severe punishment. He contended that the appellant who was not represented and a lay person who does not know Swahili language at all, he was supposed to be enlightened on the nature and magnitude of the charge facing him and severity of the sentence. Unfortunately the trial court did not do so. Mr. Moses referred this court at page 3 of the typed proceedings.

Moreover, Mr. Moses submitted that there is nothing from trial court's record showing that there was an interpreter whereas the appellant was not conversant with the language of the court, that is, Swahili/English at all. He contended that in both law and in jurisprudence there are standards generally acceptable and used in determination of an equivocal plea of guilty. Relying on the provisions of section 228 (2) of the Criminal Procedure Act, (Cap 20 R.E 2022),Mr. Moses argued that when an accused admits the charge his admission has to be recorded in the language he understands. He added that the spirit behind this requirement is to

make a person accused of committing an offence understands the charge he supposed to answer. He added that the court also is required to indicate in the proceedings the language used to read and explained the charge to the accused person. To cement his argument, he invited this court to be persuaded by the decision of this court in the case of **GeofreyKenedy @ George Vs R, Criminal Appeal No.115 of 2020, HC at Bukoba** and **Ayubu John Vs R, Criminal Appeal No.103 of 2020 HC at Bukoba** (both unreported). Mr. Moses insisted that the trial magistrate's failure to make inquiry of the language the appellant was conversant with when making his plea to the charge goes to the root of the plea made by the appellant thus, it is fatal.

Mr. Moses further contended that another thing which makes the plea entered by appellant to be equivocal is the trial magistrate's failure to explain to the appellant the magnitude of the charge and severity of the sentence. He contended the same is fatal since it goes to the root of the plea made by appellant because the charge which the appellant was charged with attract a severe punishment of 30 years. Mr. Moses pointed out that there is nowhere in court's records showing that the trial court explained to the appellant the charge and the severity of the sentence. He added that the intention behind informing the accused person all those information is to make him aware of the consequences of what he is admitting. To buttress his argument, he cited the cases of **GeofreyKenedy @ George (supra), Ayubu John (supra)** and **Elijah Njihia Wakianda Vs Republic (2016) EKLR.**

Furthermore Mr. Moses contended that appellant's admission to the second count and denial to the first count was due to the fact he did not understand the charges facing him and there was no effort made by the trial magistrate to explain to him the charges in the language understood by him. He insisted that under the circumstances, any plea made by the appellant was equivocal. To support his position, he cited the case of **Philipo s/o Faustine @Chitembele Vs R, Criminal Appeal No.666 of 2020, CAT at Dar es Salaam** (unreported). He was emphatic that the appellant did not understand the charge that was facing him that is why he denied the first count and admitted the second count. That was attributed by the fact that he did not understand Swahili language and there was no effort made by magistrate to explain to him the charges facing him and severity of the sentence in a language understood by him.

With regard to the 2nd ground of appeal, Mr. Moses submitted that the lapse of time from 2020 when the offence alleged to have been committed and when the same was reported to police in 2022 creates some benefit of doubts for the accused. It is trite law that in our jurisdiction the prosecution is required to prove the case beyond reasonable doubts and if the doubt is reasonable, it is the accused person who benefit from it. He contended that court's record shows that the victim said she was impregnated in 2020 while she was in Primary School and later on proceeded with her studies to Simanjiro Secondary School. Mr. Moses was of the view that the trial magistrate failed to examine why the appellant was not named at earlier when the victim was still in primary school. Why the appellant was mentioned in 2022 when the victim was in form two at Simanjiro Secondary

School, wondered, Mr. Moses. He pointed out that there was nothing in the record which shows that the appellant run away to avoid being arrested and this creates some doubts on what happened in between. To support his position, he cited the cases of **Elipokea Simon Vs R, Criminal Appeal No. 120 of 2017** and **Yust Lala Vs The Republic. Criminal Appeal No. 337 of 2015 CAT at Arusha (unreported)** in which the court held that;

> *"In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt. Since she was not staying with the appellant, we find it doubtful that with such a serious offence, she could for all that period fail to tell her mother about it".*

He insisted that trial magistrate erred in law and in fact in convicting the appellant without considering the fact surrounding the case that led lapse of time in raising up this matter.

Mr. Basaya was supporting the appellant's conviction.With regard to the 1st ground of appeal he submitted that it is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged. To bolster his argument, he cited the case of **Adan Vs Republic (1973) EA 445.** He went on submitting that the statement of facts by the prosecution serves two purposes, **one,** to enable the magistrate to satisfy himself that the plea of guilty was really unequivocal and the accused has no defense.**Two,** it gives the magistrate the basic materials to assess the sentence. He pointed out that he is aware of the provision of section 360 (1) of the Criminal Procedure Act (Cap 20 R.E 2022) which provides that no appeal

on plea of guilty shall be entertained except on the extent or legality of the sentence. That the plea must be complete, unequivocal and unambiguous. Expounding on this point Basaya submitted that for a plea to be unequivocal for purposes of conviction there are conditions which the trial court must ensure that they exist conjunctively at the time of conviction. The same were stipulated in the case of **Onesmo Alex Ngimba Vs The Republic, Criminal Appeal No.157 of 2019 CAT at Mbeya,** to wit;

i) *The appellant must arraigned on a proper charge. That is to say, the offence ,section and the particulars of thereof must be properly framed and must explicitly disclose the offence know to the law.*

ii) *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 occur.*

iii) *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 ingredients of the offence.That is in terms of section 228 (1) of the CPA*

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

v) *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.*

vi) *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.*

Referring to the conditions stated herein above , Mr Basaya contended that in this case trial court complied with all the conditions required to be considered in case an accused pleads guilty to an offence and

convicted the appellant on the second count on his unequivocal plea of guilty. He maintained that all the of above conditions were reflected on the trial court proceedings. He referred this court to pages 1 to 5 of the proceedings.

Mr. Basaya further argued that the appellant understood the offences he was charged with that is, why he pleaded categorically on the second count by stated that *"it is true I impregnated her being a school girl".* Moreover Mr. Basaya contended that the proceedings show that the facts of the case were read over and explained to the appellant who made his response thereto and facts read over in court indicated clearly the elements of offence of impregnating a school girl, to wit; the appellant had sexual relations with the victim, the victim was under the age of eighteen years old and she was a student at Narosoito Primary School. The fact that the appellant impregnated her was proved by his action of taking care of the infant.

Furthermore, he submitted that upon being convicted for the second count and the court gave him the right to present his mitigation on the sentence. In his mitigation the appellant kept on reiterating his plea of guilty by stating that he impregnated the victim and her mother promised him that he will marry her thus, the mitigation he made proves that his plea of guilty was unequivocal.

Mr. Basaya refuted Mr. Moses' argument that the appellant was wrongly convicted on the purported plea of guilty because he neither understood Swahili nor English and he was unrepresented. He contended that the same is an afterthought. The appellant had an ample time to inform the trial court if really he did not understand the

language used in reading and explaining the charge to him but he did not do so. Mr. Moses urged this court to draw an adverse inference against the appellant that he understands Swahili language and therefore the conviction was proper. He referred this court to page 4 of the trial court's proceedings, to bolster his argument. In addition Mr. Moses drew the attention of this court to the fact that throughout his submission Mr. Moses failed to mention the language the appellant is conversant with and did not dispute the fact that the appellant was given the right to mitigation after conviction, and during the presentation of his mitigation he confessed that he impregnated the victim and prayed to be forgiven. Mr.Basaya argued that the pertinent question here is; which language the appellant used in his mitigation if he did not know the Swahili or English language. Also, Mr.Basaya maintained that the cases cited by Mr. Moses are not relevant to this appeal.

With regard to the 2nd and 3rd grounds of appeal Mr. Basaya submitted that these grounds are baseless and have to be regarded as afterthoughts. The trial court could not have considered the merit of the case after the appellant had pleaded guilty. If the appellant intended the trial court to consider the issue of lapse of time and the victim being married to another person he would have pleaded not guilty and leave a burden of proof to the prosecution where he could cross examine the prosecution witnesses on the said issues. Mr. Basaya further submitted that it is a cardinal principle of criminal law that once the accused is arraigned before the trial court the charge is read over to him and if he decides to plead guilty the court is not obliged to hear any evidence from either the prosecution or from accused but it has powers to

convict the accused and sentence him in respect of offence he has pleaded guilty to. In conclusion of this submission Mr. Basaya maintained that there is no appeal on plea of guilty except on the legality of sentence.

In rejoinder,Mr. Moses reiterated his submission in chief and added that while he agreed with requirements stated in the case of **Adan** (supra) on the functions of the statement of fact, it was his submission that case is distinguishable from the case at hand on the reasons that **one**, the appellant did not understood the language of the court which makes plea equivocal. **Two,** the trial magistrate did not explain to the appellant the magnitude of charge facing him and severity of the sentence he was facing by language he understood. To cement his argument, he cited the cases of **Godfrey Kenedy @ George** (supra) and **Ayubu John** (supra).

He further submitted that plea taking process is not a mere formality but a serious procedure which requires high degree of diligence. That relying on the appellant's mitigation as evidence that appellant understood the charges facing him is wrong. The fact that the appellant made his mitigations before the court after being convicted cannot relieve the trial court from explaining to the appellant the charge facing him and severity of the sentence in the language understood by him. He insisted that the principle of fair trial requires the accused to understand the language used in court to read and explain the charge to him and consequences of offence he admitted. He maintained that the cases cited by Mr.Basaya are distinguishable from the case at hand.

Having dispassionately analyzed the competing arguments made by the parties as well as perused the court's record, now ,I am in a position to determine this appeal. Before dealing with the grounds of appeal I find it apposite to point out that it is a common ground that the position of the law is that no appeal on plea of guilty shall be entertained except on the extent or legality of sentence.[See section 360 (1) of the Criminal Procedure Act ("CPA")].However, in case the accused person denies that he/she did not plead guilty to offence she/he can appeal to challenge the plea of guilty entered against him /her.

Now, back to the grounds of appeal, starting with the 1st ground of appeal, it is common ground that the conditions which have to be met before the trial court enters a plea of guilty for an accused person and convict him/her are the ones stipulated in the case of **Onesmo Alex Ngimba** (supra) which I have reproduced earlier in this judgment. Those conditions include the following conditions;

(a) 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 occur.*

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

(c) 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.*

(emphasis is added).

Reading the above conditions I have reproduced herein above, it is important for the accused person to understand the charge facing him when he is pleading there to and that he/she has to plead guilty for each ingredients of the offence. In this appeal the main argument raised by Mr. Moses is that the appellant's plea was equivocal not unequivocal plea of guilty on the reasons that appellant does understand Swahili or English language and that the court did not record in which language the charge was read over and explained to him. It is a common knowledge that in order for an accused person to understand the charge facing him/her it has to be read and explained in a language understood by him/her. In this case the court's record reveal that the trial magistrate did not indicate the language used in reading and explaining the charge to the accused person.The pertinent question here is; the mere fact the trial magistrate did not indicate the language used in reading and explaining the charge to the appellant automatically means that the appellant did not understand the charge? My answer to this question is "No". The court has to examine the court's record critically before reaching to such a conclusion. In this case the appellant was charged with two counts the first count was Rape. He denied it but the record shows that he admitted the second count.The fact that he denied the first charge which is so much connected to the second charge and coupled with the fact that the language used in explaining the charge to him is not indicated in the case file creates doubts on whether the appellant understood well what he was pleading guilty to. The facts of this case a very similar to the facts in the case of **Philipo Faustine** (supra).In that case the accused was charged with two counts the first count was rape and the second

count was impregnating a school girl. As it is in this case, the appellant denied the first count and the court's records showed that he pleaded guilty to the second count. On appeal disputing the plea of guilty, the Court of Appeal had this to say on whether or not the appellant plea of guilty was properly entered;

> *"The fact that the two counts were so much connected as it was for the particulars of the two offences, it was improbable to have denied the first count and admit the second. It appears appellant did not well understand the charges facing him. ..."*

From the foregoing and on the strength of the findings of the Court Appeal quoted herein above, I am inclined to agree with Mr. Moses that it is doubtful whether the appellant herein understood well the charge he was pleading guilty to since the same was so connected to the first charge of rape which he denied it.

In addition to the above, the record reveals that after reading the facts of the case the appellant did not plead guilty to each and every ingredient of the offence as stipulated in the case of **Onesmo Alex Ngimba,** (supra).The court's records show that the appellant made a general response that all facts read were true and correct.

With due respect to Mr. Basaya, his contention that the conditions stipulated in the case of **Onesmo Alex Ngimba,** (supra) were met is not correct. I have explained herein above the reason behind my stance.

Without prejudice to my findings herein above, I agree with Mr. Basaya that there is nowhere in the proceedings showing that the appellant informed the court that he did not understand the language of the court but that cannot be used as a justification to contravene the law.

Similarly, the mitigation made by the appellant cannot be used to justify the flaws done during the hearing of the case. After all, mitigation comes after an accused person has been convicted.So, it has no bearing in the conviction. It is only useful in sentencing the accused person.

In the upshot, this appeal is allowed. The trial court's plea of guilty order dated 6th May 2022 and conviction are quashed and sentence is set aside.I further direct that the trial court should proceed with the hearing of Criminal Case. No. 60 of 2022 by taking the plea of the appellant afresh by another Magistrate.

Dated this 16th day of June 2023.

B.K.PHILLIP

JUDGE