IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 124 OF 2022

(Criminal Case No. 141 of 2021 of the District Court of Karatu -SRM)

PASCHAL MARTIN NIIMA .....APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

08th May & 16th June, 2023

TIGANGA, J.

Before the District Court of Karatu, at Karatu, the appellant namely Paschal Martin Niima, hereinafter the appellant, stood charged with an offence of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [Cap 16 R.E 2019] (Now 2022)

According to the particulars of the offence and the facts of the case as reflected on the record of the trial Court, the offence was committed on the diverse dates between September 2021 and 15th day November 2021 at Gongali Village- Mnadani area within Karatu District in Arusha Region, the

accused person had carnal knowledge of one "M.I" names put in initials against the order of nature.

When the appellant was arraigned before the trial Court, he pleaded guilty. Consequent to his plea, he was convicted on his plea and sentenced to life imprisonment allegedly to be a lesson to the surrounding community as well as the public at large.

Aggrieved by the conviction and sentence, the appellants appealed to this court against both the conviction and the sentence passed by the trial Court against him. In the bid to challenge both, the conviction and sentence, he filed three grounds of appeal as follows.

1. That, the trial Magistrate erred in law and in fact in convicting and sentencing the appellant on an equivocal plea of guilty.
2. That, the trial Magistrate erred in law and fact when he convicted and sentenced the appellant to the case in which the fact read up to the appellant did not amount to full disclosure of the element of the charged offence
3. That the trial Magistrate erred in law and fact when he convicted and sentenced the appellant to the charge which was not proved beyond reasonable doubt.

With the leave of the court and consensus of the parties, the hearing of the appeal was conducted by written submissions.

At the hearing of the appeal, the appellant appeared in person, unrepresented, while the respondent, Republic was represented by Ms. Akisa Mhando, learned Senior State Attorney for the Republic. Submitting in support of the first ground of appeal, the appellant said his plea of guilty was unequivocal because it was not made clear as to what he was admitting. In his view, the trial Court ought not to have ended there, especially in cases like this which attract capital punishment of life imprisonment. In the appellant's view, they were supposed to make an extra effort to make sure that, the plea of the accused is free from equivocation.

Arguing in support of the second ground of appeal, he submitted that the trial court erred in finding that the facts of the case disclosed the offence sufficient to convict the appellant. In his view, the facts could not assist the appellant to understand the nature and seriousness of the offence he was facing. More so he said, the facts did not disclose the ingredients of the offence with which the appellant stood charged. He submitted that the assertion that the accused said "NI KWELI NDIYO ILIVYOKUWA" is not true because the same did not come from his mouth after he understood the

elements and ingredients of the offence he was facing which in this case is un natural offence. He said in the offence of unnatural offence, the important ingredient is the word "against the order of nature" but this fact did not disclose that ingredient. The shortfall is that the facts did not mention the age of the victim, but it mentioned him to be a boy of a few years old. That in his view did not disclose the ingredients of the offence to which the appellant would not have been convicted, but to the contrary, given the nature of the facts, the plea by the appellant was not unequivocal to be based on to convict the appellant. To support his contention, he referred this court to the case of **Peter Shangwea vs The Republic**, Criminal Appeal No. 282 of 2015 CAT –Arusha (unreported) in which the court held *inter alia* that, the word it is true when used by the accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one..... He insisted that the appellant responded that "NI KWELI" which means "IT IS TRUE" he, therefore, urged the court to find that the plea was not complete to warrant the guilty of the accused.

Regarding the third ground of appeal which is to the effect that, the offence was not proved beyond reasonable doubt. The appellant submitted that there was no documentary evidence like PF3 tendered as an exhibit to

prove the case. In his view, while the charge indicates that the appellant is charged with the offence of unnatural, the fact adduced during the preliminary hearing does not show whether the appellant had carnal knowledge of the victim against the order of nature or otherwise. On the contrary, the fact only shows that the appellant had carnal knowledge of the victim. He in the end asked his appeal to be allowed as prayed.

Replying to the submission in chief Ms. Akisa Mhando started by reminding the court of the dictate of section 360(1) of the Criminal Procedure Act, which prohibits appeals in cases where the conviction is entered as a result of the accused's plea of guilty. However, she acknowledges the exception to that general rule as enunciated in the case of **Robert N. Mbwilo vs The Republic,** Criminal Appeal No. 154 of 2017 (Unreported) in which the generality in section 360(1) has been interpreted to provide four circumstances in which such a general rule can be departed from and highlighted those principles to be;

(i) When the accused's plea was imperfect ambiguous or unfinished.

(ii) When such a plea of guilty was a result of a mistake or misapprehension

(iii) The charge laid at the door of the accused person discloses no offence known at law

(iv) The facts of the case read to the accused person could not establish the offence charged.

She submitted that, the complaint in the first ground of appeal is crated as if the appellant is intending to impeach the record of the trial Court. In law, the court record is presumed to be genuine until when it is impeached and found otherwise. To support his contention he cited the case of **Halfan Sudi vs Abieza Chichili** [1998] TLR 527 where it was held that, the presumption is that the court record represents what actually transpired in court and it should not be easily impeached. Based on that principle, he called upon the court to assign the plea made by the appellant its literal meaning of "Ni Kweli" to be "it is true" which is loudly clear and it qualifies to be an unequivocal plea without any doubt. He submitted that in the case of **Robert N. Mbwilo vs The Republic,** (supra) the appellant pleaded as such and yet the Court found the plea to be unequivocal. She submitted that when the charge was read to the appellant, he had carnal knowledge of the victim who was a boy of tender age he pleaded guilty and when the facts were read to him he replied, "Ni kweli Ndivyo ilivyokuwa".

The respondent also cited the case of **Nebo Emmanuel vs The DPP**, Criminal Appeal No. 173 of 2019 (Unreported) in which the word used to demonstrate the incident was "carnal knowledge". In that case, still, it was found that, by using the word "carnal knowledge" the facts sufficiently disclosed the offence, therefore, it was right for the trial magistrate to proceed to convict and sentence the appellant based on that plea of guilty.

Submitting in opposition to the third ground, she attacked the ground and asked the court to find it to be baseless because in our jurisdiction, once an accused pleads guilty, then the procedure does not require the prosecution to produce documents or further evidence to prove the charge beyond a reasonable doubt. She cited the case of **Joel Mwangambako vs The Republic,** Criminal Appeal No. 516 of 2017 (unreported) in which it was held that, where it is established that a plea of guilty is complete, unequivocal and unambiguous, then the court can proceed to convict the accused without calling the prosecution to prove the charge. She in the end asked the court to find that the trial court was correct to find the appellant guilty and convict him on his own plea. She prayed that the appeal be dismissed for want of merits.

In rejoinder, the appellant insisted that the accused who pleads guilty may appeal against the conviction based on the criteria shown in the case of **Lawernce Mpinga vr The Republic** [1983] TLR 166 which promulgates the same principle creating the exception to the general rule provided under section 360(1) of the CPA.

He disclosed that the essential element of the unnatural offence is "having carnal knowledge against the order of nature" but in the case at hand, this was not disclosed by the fact of the case. In his view, in the absence of this important ingredient, the facts cannot be said to have disclosed the offence charged.

He distinguished the authority in the case of **Nebo Emmanuel vs The DPP** (supra) that, in that case, the appellant admitted and described how he penetrated the victim against the order of nature, while in this case, that description is missing. Therefore, he also asked the court to disregard the cited authority because the same has not been attached to the submission.

Otherwise, he required the court to abide by the provision of section 228 (1) and (2) of the CPA which requires the court to convict the accused if it finds that the plea is unequivocal, but to the contrary, the appellant in this case, was not convicted therefore, he was sentenced in abrogation of

the dictate of section 228(2) of the CPA. That marked the submissions by the parties, hence this judgment.

Now, from the foregoing, I am totally in agreement with the general principle regarding the appeal against the conviction entered on the plea of guilty, as provided under section 360(1) of the Criminal Procedure Act, [Cap 20 R.E 2022] (the CPA) which provides that; an appeal shall not be allowed in the case of any accused person who has pleaded guilty and has been convicted on such a plea by a subordinate Court except as to the extent or legality of the sentence. This provision has been interpreted in a plethora of cases one of them being the case of **Frank Mlyuka vrs The Republic,** Criminal Appeal No. 404 of 2018 (unreported). Nonetheless, it is also the position of the law as propounded by the decisions of the Court of Appeal that, under certain circumstances, an appeal to challenge the conviction may be entertained notwithstanding a plea of guilty.

To this end, in the case of **Laurent Mpinga vs. The Republic** [1983] TLR 166, a decision of the High Court which was affirmed by this Court of Appeal in the case of **Kalos Punda vs. The Republic,** Criminal Appeal No. 153 of 2005 (unreported), it was stated as follows: -

"An accused person who has been convicted by any court of an offence on his plea of guilty may appeal against the conviction to a higher court on any of the following grounds:

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 a 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."*

Not only that but also the Court of Appeal went on and held that:

"Noteworthy, earlier on the Court in ***Khalid Athuman vs. The Republic,*** *Criminal Appeal No. 103 of 2005 (unreported) adopted a similar proposition laid in the English decision of* ***Rex v. Folder*** *(1923) 2KB 400 which propounded that: -*

> *'A piea of guilty having been recorded; this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he*

could not in law have been convicted of the offence charged."

The court went further and held that,

"On the other hand, sections 228 (1) and (2) of the CPA deals with the plea of the accused who is arraigned before a court and sets the following procedure to be followed by a trial courts:

(1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words he uses and the magistrate ***shall convict him*** *and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary." [Emphasis Added]*

Further stressing on the point, the Court relied on its earlier decision in the case of **John Faya vs The Republic,** Criminal Appeal No. 198 of 2007 (unreported) and emphasized that: -

"*In every case in which a conviction is likely to proceed on a plea of guilty, 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 every constituent of the offence and that what he says should be*

recorded and in the form in which will satisfy an appeal court that he fully understood the charge and pleaded to every element".

In the case of **Joseph Mahona @ Joseph Mboje @ Magembe Mboje vs The Republic,** Criminal Appeal No. 541 of 2015 – CAT Tabora, it was held *inter alia* that;

> *"The procedure on how to record pleas of guilty was set out in **ADAN vs R.** (1973), EA445 at 446. There are five steps:-*
>
> *(i) The charge and all the ingredients of the offence should be explained to the accused in his language or in a language he understands.*
>
> *(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the accused does not agree with the fact or raises any question of his guilt, his reply must be recorded and a change of plea entered.***

(v) *If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded."* [Emphasis added]

In this case, when the charge was read to the accused person he responded " *Ni Kweli."* That was followed by his response to what was seemingly to be the facts of the case. However, the record does not show the facts which the appellant was responding to. The record shows the answers only but not the facts that he was responding to. That means the procedure as laid down in the case of **Joseph Mahona @ Joseph Mboje @ Magembe Mboje vs The Republic,** (supra) was flouted. That in my view, affected the plea made by the appellant and recorded by the trial Court, therefore there were no materials upon which the court could have found the accused guilty and convicted him. Instead, it was supposed to enter the plea of not guilty and require the prosecution to call the witness to prove the charge.

Further to that, as correctly submitted by the appellant, section 228 requires the court to convict the accused if it finds and got satisfied that the plea is unequivocal. In this case, immediately after the trial Court had recorded his plea, the record shows that it only found him guilty, but did not

convict him. This is reflected on the record, on page 2 of the proceedings of the trial court which reads to the effect that,

> *"Since the accused is admitting on his plea, this court finds him guilty of unnatural offence contrary to section 154(1)(a)(2) of the Penal Code [Cap.16 R.E 2019] as he was charged."*

In law, an accused person can not be sentenced without first being convicted. Failure to convict is fatal and vitiates the proceedings particularly the sentence passed without conviction. In the case of **Joseph Mwingira vs The Republic,** Criminal Appeal No. 235 of 2016, in which the Court of Appeal relied on its former decision in the case of **Hassan Mwambanga vs The Republic**, Criminal Appeal No. 410 of 2013 CAT where it was held *inter alia* that;

> *"It is now settled that failure to enter conviction by any trial court is a fatal and incurable irregularity which renders the purported judgment and imposed sentence a nullity and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction."*

That being the case, I find the plea of guilty was improperly entered, and since the appellant was not convicted of the omissions which vitiate the proceedings from when the plea of guilty was entered, I thus quash the purported conviction and set aside the sentence of life imprisonment

imposed by the trial court against the appellant. I thus substitute the plea of guilty to that of not guilty and direct the matter to be remitted to the trial court to be heard on merit by the prosecution calling their witnesses to prove the case against the accused person. The appeal is allowed to the extent explained above.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 16th day of June 2023

J.C. TIGANGA

JUDGE