

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT SUB REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 113 OF 2022

*(Original from the decision of the District Court of Mpanda at Mpanda in Criminal Case
No. 118 of 2022)*

IDRISA S/O SAID BAYANGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

22nd June, 2023 & 30th June, 2023

MRISHA, J.

In the District Court of Mpanda at Mpanda (the trial court) the appellant **IDRISA SAIDI BAYAGA** was charged with the offence of Incest by Males contrary to section 158(1) of the Penal Code [Cap 16 R.E. 2022]. It was alleged that in between April, 2022 and 9th day of November, 2022 at Nyerere area within Mpanda District in Katavi Region the appellant had sexual intercourse with one **STELA D/O IDRISA**, a girl aged eleven (11)

years old who to his knowledge, was his daughter. On 21st day of November, 2022 the appellant was arraigned before the trial court whereby the charge was read over and fully explained and the appellant who thereby pleaded not guilty to the above count.

On the same date the preliminary hearing was conducted and the appellant denied all facts except his personal particulars and released on bail.

On 22nd day of November, 2022 when the matter was coming for hearing, the charge was read over and explained to the appellant who was asked to plead there to; this time the appellant pleaded guilty to the charged offence; this led to the readings of facts of the case.

However, facts of the case were read to the appellant without him being given a chance to air his comments on the correctness or otherwise of the said facts. He was then found guilty in respect of the offence, convicted on his own plea of guilty and sentenced to serve a term of thirty (30) years in prison coupled with an order to pay compensation of 300,000/= Tshs to the victim. The appellant is aggrieved by both conviction and sentence passed by the trial court; thus, the appellant has lodged the present appeal armed with four grounds of appeal as follows: -

- 1. That, the trial court grossly erred both at law and fact by changing the Plea of not guilty which the appellant pleaded into plea of guilty by deceit.*
- 2. That, the trial court misdirected itself by convicting the appellant depending on a plea of guilty which was equivocal.*
- 3. That, the trial court erred at law and fact by failure to explain to the accused person all the ingredients constituting the offence before requiring him to admit or deny every ingredient/element.*
- 4. That, the trial court erred both at law and fact by convicting the appellant for plea of guilty despite the fact that the appellant did not admit a correct fact constituting the ingredients of the offence charged with.*

When the appeal came on for hearing before me on 28th day of April, 2023, the appellant was unrepresented whereas the respondent Republic was represented by Ms. Safi Kashindi, learned State Attorney. Submitting in support of his appeal the appellant simply implored this court to adopt his memorandum of appeal and form part of his

submission in chief and allow his appeal, quash the conviction and set aside sentence and set him free so that he be released from custody.

Ms. Safi Kashindi, learned State Attorney addressed the Court and she began by supporting the appeal basing on the procedural irregularity committed during hearing of the case at the trial Court. She referred to this court the provisions of section 360(1) of the Criminal Procedure Act, Cap 20 R.E. 2022 which state that *"An appeal shall not 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"*.

She contended that the plea was taken on 22nd day of November, 2022 where the appellant pleaded guilty to the offence charged, but according to the records of the trial court at page 6 of the proceedings, the plea was not legally procured, hence it was an equivocal plea, which is not allowed.

To bolster her argument, the learned counsel referred three cases which are the case of **Laurent Mpinga v Republic**, [1983] TLR at 166, **Carlos Punda v Republic**, Criminal Appeal No. 153 of 2005

(unreported) and the case of **Michael Andrian Chaki v Republic**, Criminal Appeal No. 399 of 2019 (unreported).

The above-mentioned cases give circumstances on which a plea may become equivocal. In this case the plea which was made by the appellant was equivocal which literally means unfinished plea. The provisions of section 228(2) of the Criminal Procedure Act, Cap 20 R.E. 2022 provides a procedure where the accused person admits to the truthfulness of the charge and his admission should be recorded as nearly as possible in the words he used and the magistrate shall convict the accused person and passed the sentence. Additionally, Ms. Safi Kashindi argued that the plea taken by trial court, as appearing at page 6 of the trial court proceedings, is contrary to section 228(2) of the CPA. To support her argument, she made a reference to the case of **Republic v Tilu Petro**, [1988] TLR at 395.

Moreover, the learned State Attorney referred to page 7 of the trial Court proceedings and stated that there is nowhere it is shown in the proceedings that the accused person was asked to admit the facts narrated by the prosecution and therefore submitted that the fourth

ground of appeal has legs to stand basing on the irregularity made by the trial Court.

She further argued that the equivocal plea pleaded by the appellant can be remedied by the facts narrated by the prosecution to the appellant and where the appellant admit to the facts then the plea will change to be unequivocal plea. To support her argument, she cited the case of **Gilbert v Republic**, 1970 HCD at 281 also the case of **Pendo Mathias v Republic**, 1970 HCD at 209.

She concluded her submission by arguing that the facts in relation to the case was narrated but was not admitted by the appellant; therefore, the plea remains equivocal which makes the appellant's appeal to have merit.

Having anxiously and closely considered the records of the trial court, grounds of grievance as well as submissions by the parties, the issue that clearly emerges and cries for determination is whether the present appeal is meritorious.

I wish to beginning with the second ground of appeal which is a complaint to the effect that the appellant was convicted on a plea of

guilty which was equivocal. The respondent Republic has supported this ground of appeal by arguing that the plea taken was not legally procured as per the law due to the fact that it was unfinished plea.

It is enlightening to state that the position of the law in this matter is settled and clear that an accused person can only be convicted on his plea of guilty if his plea is unequivocal. This position had been taken by the Court of Appeal in the case of **Keneth Manda v Republic**, [1993] TLR 107. In the above-mentioned case, the Court held that: -

"An accused person can only be convicted on his plea of guilty if his plea is unequivocal. That is where it is ascertained that he has accepted as correct facts which constitute all the ingredients of the offence".

Evaluating the plea of guilty by the appellant as found on the record of trial court's proceedings at page 6, it appears that when a charge was read over and explained to the appellant and requested to plea, the appellant pleaded guilty to the charge. In his own word he was quoted to have said that:-

Accused: *"It is true I raped her"*

Court: *Entered a plea of guilty to the charge.*

As rightly pointed out by Ms. Kashindi, learned Senior State Attorney, the plea of the accused was unfinished because the accused statement was not completed. Section 288 of the Criminal Procedure Act, Cap 20 provides that: -

"288(1) the substance of the charge shall be stated to the accused person by the courts, and he shall be asked whether he admits or denied 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 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]

Having closely examined the record, I have found that the expression, *"It is true I raped her"*, used by the appellant after the charge was read to him was insufficient for the trial court to have been unambiguously informed of the appellant's clear admission of the truth of its contents. Taking into account that the facts of the case narrated have not been admitted by the appellant.

Once the appellant has pleaded guilty and then admitted the facts of the case that disclose all the elements of the charged offence, his plea would be considered to be unequivocal. Indeed, the applicable procedure when the accused person pleads guilty to a charged offence, as stated in numerous decisions of the Court of Appeal, involves no production of proof of the charge, but a procedure for ascertaining if the appellant's plea is unequivocal. This position was stated in the case of **John Faya v Republic**, Criminal Appeal No. 198 of 2007; also sees the case of **Constantine Deus@ Ndinjai v Republic**, Criminal Appeal No. 54 of 2010 (both unreported).

Moreover, as pointed out by the learned Senior State Attorney, the remedies for equivocal plea, when the accused person plead guilty to the offence charged, was for the prosecution side to narrate facts of the case to the accused and admits those facts which are true. An accused person can only be convicted on his own plea of guilty if the court is satisfied that he has accepted as correct facts which constitute all ingredients of the charged offence. This position was illustrated in the case of **John Charles v Republic**, Criminal Appeal No. 554 of 2017 (unreported).

"We wish to reaffirm that accused can only be convicted on his plea of guilty if the court is satisfied that his plea is unequivocal. That is where it is ascertained that he has accepted as correct facts which constitute all ingredients of the charged offence".

Once the accused pleads guilty to the charge, the duty of the prosecution is to read the accused facts supporting the charge in terms of section 228 of the CPA after which the accused is required to admit or deny the facts. Upon admission, the court will enter a verdict and if the accused is convicted, the court will invite the prosecution to address it on any previous criminal records before sentence is imposed, which will be followed by mitigating factors from the accused; then the sentence will be meted upon the accused.

In the instant case, the appellant pleaded guilty to the charged offence, followed by narration of the facts supporting the charge in terms of section 228 of the CPA; however, there is nowhere in the proceedings it is shown that the appellant was asked to admit or deny the facts which was narrated to him by the prosecution; that was a procedural irregularity. This position is fortified in the case of **Pendo Mathias v Republic** (supra), whereby

Georges C.J(as he then was) when dealing with the question whether accused plea was unequivocal or not had said that: -

"Quite offer an equivocal plea can be remedied by fully statement of all facts needed to constituted the offence and an admission by an accused person that the facts are true".

The fact that the appellant's was unfinished plea (equivocal) and the fact that the appellant was not availed a chance to admit or deny the facts narrated to him by the public prosecution; that plea was equivocal which is not allowed in law. Therefore, ground number four of the appeal has merit.

For the foregoing reasons, the appeal is allowed. Consequently, I quash the conviction entered upon the appellant, all the proceedings of the lower court, set aside the sentence and order passed by the trial court. Given the circumstances of this case, I think that an order for retrial will be proper in order to meet the ends of justice, as I hereby do. Hence, I direct the records of the trial Court to be remitted to the trial Court for it to deal with the appellant, subject to the above condition.

Considering that the appellant has spent time in prison, I direct the trial to be expedited, and in the event that he will be found guilty, then the period

of time spent by the appellant in remand prison as a remandee, and the time he will be spending therein awaiting his trial, should be considered by the trial court in the course of assessment and pronouncement of its sentence.

Order accordingly.


A.A. MRISHA
JUDGE
30.06.2023

Dated at Sumbawanga this 30th **Day** of June, 2023.




A.A. MRISHA
JUDGE
30.06.2023

Date - 30/06/2023

Coram - Hon. L. Ndelwa, Ag. DR


Appellant - Present

Respondent - Absent

B/C - M. Kawawa

Court: Judgment is delivered this day of 30 June, 2023 in the presence of accused person.




L. Ndelwa
Ag. Deputy Registrar
30/06/2023

Right of appeal is full explained.