THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 27 OF 2023

(Originating from the District Court of Songwe at Mkwajuni, in Criminal Case No. 12 of 2023)

FRED NORASCO KASALAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 19/06/2023
Date of Judgement: 14/07/2023

Ndunguru, J.

The appellant, FRED NORASCO KASALAMA is behind bars serving a thirty years imprisonment sentence meted by the District Court of Rungwe District in criminal case No. 12 of 2023. The appellant was nineteen years old when he was charged with and convicted on his own plea of guilty of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2022.

It was alleged in the particulars of the offence that on between 18th day of December, 2022 and 27th day of February, 2023 at Saza

village within Songwe District in Songwe Region the appellant did have unlawful sexual intercourse with one ZRJ (her name withheld to protect her dignity) a girl aged sixteen (16) years old. When the charge was read out and explained to the appellant, he respondent: *"It is true I had sexual intercourse with her, more than five times. Her name is ZRJ"* then the trial Court entered a plea of guilty against the appellant.

Following the entered plea of guilty, the prosecutor read out the facts which the appellant also admitted as true. Then the prosecutor tendered two exhibits to wit; a PF3 and the appellant's cautioned statement. They were admitted as exhibit P1 and P2 respectively. Accordingly, as shown earlier, the appellant was convicted and sentenced.

Dissatisfied, he lodged this appeal predicating two grounds of appeal that:

1. *The trial court erred in law and fact when convicted and sentenced the appellant in the case that was not proved to the required standard.*
2. *The trial court erred in law and fact when it convicted and sentenced the appellant by considering equivocal plea of guilty.*

Basing on these grounds, the appellant prayed for his appeal to be allowed, the conviction and sentence to be quashed and set aside then he be set at liberty.

During the hearing of the appeal, the appellant was represented by Ms. Nyasige Kajanja, learned advocate whereas Ms. Prosista Paul learned State Attorney appeared for the respondent/Republic.

Amplifying in support of the appeal Ms. Kajanja abandoned the 1st ground of appeal and opted to argue the 2nd ground only. She submitted that the recorded plea of guilty was equivocal since the reply made by the appellant was an ambiguous. Ms. Kajanja held the view that the sentence *"Ni kweli nimefanya naye mapenzi zaidi ya mara tano"* does not necessarily mean to have sexual intercourse. According to her had the trial court considered the mitigation offered by the appellant when he said he has realized his mistake would have considered his plea equivocal then proceed to a full trial.

Ms. Kajanja added that the fact of the case which were adduced by the prosecution did not disclose the ingredients of the offence since they did not state about penetration which is a key ingredient of the offence of rape. In her further submissions, Ms. Kajanja argued that the appellant is recorded to have admitted the fact on the age of the

complainant which does not mean that the age was proved. According to her, in statutory rape like the one the appellant faced, prove of age of the victim is of most important before establishing conviction. To that argument, she cited the case of **Aman Yusuph v. Republic**, Criminal Appeal No. 124 of 2019 Court of Appeal of Tanzania at Arusha (unreported). Basing on her submissions, Ms. Kajanja implored this court to allow the appeal and order the case be remitted to the subordinate court for trial.

In reply, Ms. Paul resisted the appeal. She submitted that the appellant being convicted on his own plea of guilty ought to have challenged the sentence and not the conviction. She referred this court to section 360 of the Criminal Procedure Act, Cap 20 R.E 2022 (CPA) and the case of **Laurence Mpinga v. R.** (1983) TLR 186.

Alternatively, Ms. Paul challenged the argument by Ms. Kajanja that the plea was equivocal. She argued that there is no ambiguity in the phrase '*nilifanya mapenzi*' which in Kiswahili Dictionary means intercourse or sex. In her view the court understood the reply by the appellant to mean sexual intercourse and it is what the appellant meant.

As regard to the contention that penetration was not proved, Ms. Paul argued that the prosecution's facts of the case disclosed the offence

of rape and the admission by the appellant meant nothing than penetration. About the proof of age of the victim she stated that since the appellant admitted the facts which narrated the age of the complainant the court could not infer anything than the appellant's statement. Further that the appellant has also admitted the offence in his cautioned statement the conviction was thus correct. She therefore urged this court to dismiss the appeal or order retrial.

In her short rejoinder, Ms. Kajanja insisted that this is fit case to be ordered for retrial as the circumstances available are the same as stated in the case of **Laurence Mbinga v. R.** (supra) cited by the learned State Attorney.

I have considered the submissions by counsel for the parties, the record and the law. At the outset, I agree with Ms. Paul that the law bars appeal against conviction on plea of guilty except for sentence. This is per section 360 (1) of the CPA.

In this case it is on the record that the appellant was convicted and sentenced on his plea of guilty. Then serve for an appeal against sentence, no appeal could have been preferred against conviction.

Notwithstanding the estoppel as hinted above, it must first be established that the plea led to the conviction was unequivocal. In

different occasions, this court and the Court of Appeal of Tanzania has highlighted the circumstances under which an appeal on plea of guilty against conviction may be allowed. See the cerebrated case of **Lawrence Mpinga v. R.** (supra) and in the case of **Michael Adrian Chaki v. Republic** [2021] TZCA 454, TanzLII as also cited in **Aman Yusuph v. R.** (supra). In the **Adrian Chaki case,** the CAT set conditions which must be conjunctively met in order a valid conviction be founded on an unequivocal plea. These conditions are as follows:

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 must explicitly disclose the offence known to law;*
2. *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.*
3. *When the accused is called upon to plea to the charge, the charge is stated and fully explained to him before he 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 fact adduced after recording a plea of guilty should disclose and establish all the elements of the offence 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 clear (see* ***Akbarali Damji vs R.*** *2 TLR 137 cited by the court in* ***Thuway Akoonay vs Republic*** *[1987] T.L.R. 92);*
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 elements of the offence charged."*

Observing to the above conditions in relation to the matter at hand I am of the concerted view that the appellant's plea was equivocal. What is decerned from the charge and the reply by the appellant implies that the appellant did not understand the nature of the offence. This is due to the fact that while in the particulars of the offence was stated that *'the appellant unlawfully did have sexual intercourse with the victim'* but

he replied that *'it is true I had sexual intercourse with her, more than five times.'*

I am wondering if the appellant fully comprehended what he actually faced with. My view is based on the reason that the appellant was actually faced what in law we call statutory rape in which consent of the victim is immaterial, but the age. Then the appellant did not bother about the word *'unlawfully'* and about *'16 years'* than he concentrated on the phrase *'sexual intercourse'*. It was thus the duty of the prosecution and the trial court to satisfy that the appellant did understand the nature of the offence that does not only lie on sexual intercourse but also the age. Indeed, the age of the victim was therefore supposed to be specifically proved not by just mentioning it in the charge sheet and in the facts of the case. That is what the CAT observed in **Aman Yusuph v. R.** (supra), where it said at page 15 that:

> *"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."*

Owing to what I have endeavoured to explain, I find the appeal meritorious. I therefore quash and set aside the proceedings including conviction and the sentence. Following the fact that there was no trial, I order the case be remitted to the District Court of Songwe District for re-arraignment before another magistrate with competent jurisdiction. Meanwhile, the appellant be handled to the police for them to return him to Songwe District so that he can exercise his right to bail pending trial.

It is so ordered.

D.B. NDUNGURU

JUDGE

14/07/2023