THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 24 OF 2023

(Originating from Nachingwea District Court at Nachingwea in Criminal Case No. 29 of 2022)

ABDALLAH ISSA POLONGANI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17th & 31st July 2023

LALTAIKA, J.

The appellant herein, **ABDALLAH ISSA POLONGANI** was arraigned in the District Court of Nachingwea at Nachingwea charged with the offence of **Rape c/s 130(1) and (2)(e) and 131 of the Penal Code Cap 16 RE 2019.** It was the prosecution story that It was alleged that on 4/11/2021 at Mwenge Village, Nachingwea District, Lindi, the appellant had carnal knowledge with a girlchild aged 10 (anonymized as XXD).

When the charge was read and explained to the accused, he pleaded guilty. The court proceeded to convict him as charged and sentenced him to 30 years imprisonment. The appellant strongly protested against the appeal. He has appealed to this Court by way of a petition of appeal with four grounds as paraphrased hereunder:

1. *That the appellant's plea of guilty was a result of misapprehension or mistake.*
2. *That the trial Magistrate erred in law and fact by not considering the appellant's plea of guilty as an essential mitigation factor.*
3. *That the trial Magistrate erred in law and fact by convincing and sentencing the Appellant while the charge was defective.*
4. *That the trial Magistrate erred in law and fact by convicting and sentencing the Appellant while the charge was not proved beyond reasonable doubt.*

When the appeal was called on for hearing on the **17th of July 2023** the appellant appeared in person, unrepresented. The respondent, Republic, on the other hand, enjoyed skillful services of Mr. Melchior Hurubano, learned State Attorney.

The appellant indicated that he was not learned in law and had nothing to add into his grounds of appeal. Nevertheless, he reserved his right to add some remarks after the learned State Attorney had submitted should the need arose.

Taking the podium, Mr. Hurubano declared that he was going to address each of the four grounds of appeal. The next part of this judgement summarizes the learned State Attorney's submission.

On the first ground, Mr. Hurubano clarified that it was contended that the appellant did not comprehend the charge and entered his plea based

on misapprehension or mistake. According to the learned State Attorney, the appellant's plea was self-explanatory and not equivocal. Mr. Hurubano cited ***The Magistrate's Manual*** (3rd edition, 2010) by **BD Chipeta,** where it was stated

> *"Unequivocal plea simply means an ambiguous or vague plea that is a plea in which it is not clear whether the accused denies or admits the truth of the charge. In pleas in such terms as 'I admit. Nimeskosa or that is correct and the like though prima fascie appear to be pleas of guilty may not necessarily be so."*

In this case, Mr. Hurubano reasoned, the appellant's plea was unequivocal. When the charge was read to him, he responded with, "Shitaka hilo ni la kweli. Nilifanya mapenzi na Mhanga [name omitted]," meaning he was reproducing what was written in the charge.

Additionally, Mr. Hurubano asserted, during the preliminary hearing, the appellant confirmed his understanding of the facts presented by the prosecutor. The learned State Attorney referred to the case of **MICHAEL ADRIAN CHAKI v. REPUBLIC** Crim App 399 of 2019, stating that the criteria for an unequivocal plea were met. Thus, Mr. Hurubano argued, the allegation that the appellant did not understand the charge lacks merit, and the ground of appeal should be dismissed.

Regarding **the 2nd ground**, Mr. Hurubano clarified that the appellant claimed that his plea was not considered for a reduction of the sentence. The learned State Attorney argued that this ground is without merit since the appellant was sentenced as per the minimum **statutory sentence of 30 years.**

On the 3rd ground, Mr. Hurubano again clarified that the appellant contended that he was convicted on a defective charge and believed that **section 131(3) of the Penal Code should have been cited**. The learned State Attorney countered this argument by explaining that section 131(3) is applicable when an accused is charged with raping a child below the age of 10, leading to a life imprisonment punishment.

In the present case, Mr. Hurubano reasoned, the victim was 10 years old, making the appellant's claim baseless. The learned State Attorney pointed out that this issue cannot be a subject matter in the present appeal as section **360(1) of the Criminal Procedure Act** states that no appeal can result in the event of conviction of own plea except on the sentence. Therefore, this ground should be disregarded.

On the 4th ground, the appellant complained about a lack of proof beyond reasonable doubt. The learned State Attorney reiterated the argument made in response to the 3rd ground, stating that since the appellant pleaded guilty, there was no need for the prosecution to prove the case beyond reasonable doubt. However, in case the court finds the appellant's plea was not unequivocal or that he did not comprehend what he was pleading to, the learned State Attorney requested the court to order a retrial. He mentioned that the prosecution had gathered evidence to prove the case, including the appellant's cautioned statement, the doctor's statement, the clinic card to prove age, and credible witnesses. If the court

deems the arguments valid, the appellant should be returned to Nachingwea for retrial.

The appellant, on his part, mentioned that at 9:00 in the night, some people came to wake him up at his place. Upon waking up, he saw two women and a mgambo (village guard). When he inquired about the matter, they informed him that he was needed in the office. He woke up his younger brother and was then told that he had been accused of raping a young girl. They proceeded to the police station.

According to the appellant, the police subjected him to physical violence. The young girl was present during this incident, and, out of fear, she agreed with their accusations. Subsequently, he was detained for three days. On the following day, he was brought before the court and denied the offence. When asked if he had sureties, he mentioned having only his uncle. However, he was informed that two sureties were required, and he couldn't meet this condition that day. Later, his uncle managed to bail him out, and he attended court sessions while on bail.

On a significant day, he was acquitted with a lesser sentence. However, despite the acquittal, the police arrested him again and took him back to prison as a remandee. Later, he appeared in court, where he was once again acquitted and returned home. However, after a month and a half, he was re-arrested and detained for six days. The same charge was read over to him, but they assured him that he wouldn't be imprisoned. Suddenly, they asked him to provide mitigation, but he expressed his hesitancy due to being a Muslim and feeling afraid of the court. Eventually, he was

incarcerated in Nachingwea Prison. This incident saddened many people in his village. His prison number was 29, and the date of his acquittal was 18/3/2022. Additionally, he mentioned that he had never been to school, and he knew the victim as they lived in the same village.

I have **dispassionately considered the grounds** of appeal and the learned State Attorney's submission. I have also examined the lower court's record. I have observed that the appellant's plea of guilty was indeed equivocal. That is probably why the learned State Attorney chose to conclude his submission by an earnest prayer that this court orders retrial.

However, I have also observed not very positive signs of the appellant's mental health. He felt very nervous when he rose up to speak. That sudden change of mood is considered strange because he has been in this court at least two times before. He also looked confident before the learned State Attorney spoke. He looked extremely sad as he recounted how he was acquitted and then rearrested. **I cannot see any proof of such acquittal and rearrest in the court file.** This leaves me in limbo. However, the learned State Attorney, having also observed (silently I suppose) quite a few irregularities, insisted in his conclusion that an order for retrial be issues.

I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, **STANSLAUS RUGABA KASUSURA & ATTORNEY**

GENERAL VS PHARES KABUYE [1982] T.L.R. 192. See also **FATEHALI MANJI VERSUS REPUBLIC** (1966) EA 344.

Premised on the above, I hereby **nullify and set aside the Judgement of Nachingwea District Court at Nachingwea in Criminal Case No. 29 of 2022 and all orders emanating therefrom.** Further, I order that the matter be tried by a different magistrate with competent jurisdiction. Pursuant to my observation of the appellant, I must emphasize that the learned Magistrate must conduct an inquiry to find out whether the accused is mentally sound. In case the court finds the same in the affirmative, it should take the necessary steps as required by law.

It is so ordered.

E.I. LALTAIKA
JUDGE
31.07.2023

Court

Judgement delivered under my hand and the seal of this court this 31st day of July 2023 in the presence of Mr. Hurubano, learned State Attorney and the appellant who has appeared unrepresented.

E.I. LALTAIKA
JUDGE
31.07.2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
31.07.2023