THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 56 OF 2023

(*Originating from the District Court of Rungwe District at Tukuyu, in Criminal Case No. 209 of 2013)*

MPOLE MWANGATA MWAKILEMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 10/07/2023
Date of Judgement: 14/08/2023

Ndunguru, J.

It is about ten (10) years, Mpole Mwangata Mwakilembe (the appellant) is behind bars serving a life imprisonment for a conviction and sentence meted on his own plea of guilt for the offence of rape contrary to sections 130 (1) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002 (Now 2022). The conviction and sentence were entered by the District Court of Rungwe at Tukuyu in Criminal Case No. 209 of 2013.

Particulars of the offence were that on 18th day of November, 2013 at about 1600 hrs at Nsyasya village within Rungwe District in Mbeya

Region the appellant had unlawfully carnal knowledge to one RBM (her name concealed to preserve her dignity) a girl aged 4 years old. Having asked to plea, the appellant was recorded to have pleaded that:

> ***"It is true, I raped her, I lied her on the bed and then I proceeded to rape her, I undressed her, I didn't remove my trouser I just unzipped and take my penis and do rape her"***

The prosecutor having given the facts of the case whereupon the appellant was asked to admit or dispute, he replied that:

> **"The all statements are true facts. Nothing I can deny."**

Owing to the appellant's plea of guilty and admission of facts of the case the trial court convicted him and consequently sentenced him to life imprisonment.

Undaunted, the appellant is now before this court challenging both the conviction and sentence. He raised five (5) grounds of appeal which by their nature they can be truncated into two that; **one**, the trial court erred in law when convicted the appellant on plea of guilty which was imperfect and unfinished, **two,** the trial court erred in law when convicted and sentenced the appellant without availing him an

interpreter who had assisted to translate the language of the charge and facts into the language he understood (Kinyakyusa).

During hearing of the appeal on 10th day of July 2023, the appellant appeared in person, unrepresented whereas the respondent/Republic was represented by Mr. Rajab Msemo assisted by Ms. Lilian Chagula both learned State Attorneys. The proceedings were conducted with the aid of interpreter as the appellant pleaded to know a tribe (Kinyakyusa) language.

When the appellant was invited to expound his grounds of appeal, he prayed the State Attorney to begin.

Submitting against the appeal, Mr. Msemo opposed the appeal, he supported the conviction and sentence. In essence, he argued generally that the plea of the appellant was unequivocal since the charge and the facts of the case were read and explained to the appellant in the language (Kiswahili) he understood. According to him the appellant knew well the ingredients of the offence and he replied and explained how he committed the offence.

As to the complaint by the appellant that he did not know Kiswahili language Mr. Msemo submitted that the record does not show if he raised the concern before the trial court for it to procure an interpreter.

He held the view that the court record is always presumed to be accurate to represent what actually transpired in the court. His contention relied on the decision in the case of **Alex Ndenya v. R.** Criminal Appeal No. 207 of 2018 Court of Appeal of Tanzania at Iringa (unreported). He said that after going through the proceedings of the trial court they did not find a place where the appellant told the trial court the concern of language barrier. It was his view therefore that this court should consider the complaint of communication barrier at this stage unmaintainable.

Alternatively, Mr. Msemo implored this court to go through the whole proceedings and findings then reach to its own conclusion.

In his rejoinder submissions the appellant stated that he told the trial court about not knowing Kiswahili language, that the case was adjourned to the next date for that effect. However, on that next date to his dismay the case proceeded without knowing what was transpiring and consequently he was imprisoned. He prayed for his appeal to be allowed as he had been in prison for ten years.

Having considered the grounds of appeal and the submissions by the parties the issue for consideration is whether the appeal is meritorious.

Outrightly, I find it compelling to reiterate that as general rule section 360 (1) of the CPA bars allowance of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence. That provision states that:

> *"No appeal shall 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."*

However, I am aware that notwithstanding a plea of guilty an appeal against conviction may be entertained in four special circumstances stated in the cerebrated case of **Laurence Mpinga v. Republic** [1983] T.L.R. 166, where it was held thus:

> *"Such an accused person may challenge the conviction 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 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."

Since the instant appeal the appellant questions the unequivocally of his alleged plea of guilty, it fits squarely within the ambit of the first special circumstance mentioned above. Our jurisprudence instructs that before a court of law enters a plea of guilty and acts on it to convict an accused person of the charged offence, it must be satisfied that his or her plea is a perfect, unambiguous, and complete admission of guilt to the offence he or she is charged with; see, for instance, **Samson Kitundu v. Republic,** Criminal Appeal No. 195 of 2004 (unreported). Also the case of **Michael Adrian Chaki v. Republic** [2021] TZCA 454, TanzLII in which among others, it was held that:

"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*** *in terms of section 228 (1) of the CPA."* (Emphasis added).

With the above authorities in mind, I have examined the charge at hand and its particulars as well as the facts of the charged offence as given by the prosecutor. The appellant was recorded to have pleaded that:

> *"It is true, I raped her, I lied her on the bed and then I proceeded to rape her, I undressed her, I didn't remove my trouser I just unzipped and take my penis and do rape her"*

The above plea tasked my mind to appreciate what real the appellant was replying about if he was asked to plea to the charge and the facts of the offence. The plea is expressed as if there was evidence to which the appellant was asked to agree or deny. Looking at the charge sheet and the facts of the case they contained no statement about lying the victim on bed, or if the appellant undressed his trouser or he just unzipped it.

Most important to note, the plea of the appellant was whole recorded in English language whilst the trial magistrate indicated that the charge was read and explained in *Kiswahili* language which was understood by the appellant. I ask myself, if that was the case, what made the plea of the accused to be recorded in English. Section 228 (2)

of the CPA requires if the accused person admits the truth of the charge, his admission be *recorded as nearly as possible in the words he uses*.

In the case of **Safari Deemay v. Republic**, Criminal Appeal No. 269 of 2011 (CAT) (unreported), the Court of Appeal warned that:

> *"Great care must be exercised especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate, in his own words as to what he is saying "'is true".*

In the above authority though it was warned to exercise great care when the accused used short phrase to admit the charge, I am of the view in this matter that the care also was supposed to be exercised when the accused statement is long and unconformity with the charge due to the same reason that the appellant was faced with a grave offence which attracted life imprisonment.

As to the complaint that the appellant was denied with the right to the interpreter, I may agree with the learned State Attorney's view that

the record of the trial court does not indicate if he raised a concern about language barrier and that raising it at this appellate stage is an afterthought but, the circumstance and for justice not only to be done but also to be seen to have been done I consider the complaint to hold water. This is because, the appellant pleaded to know his tribe language (Kinyakyusa) during hearing of this appeal and during hearing of the appellant's application for extension of time, in both proceedings the appellant was heard by hide of interpreter. If I may rule out that the appellant knew Kiswahili language at the trial court but seem not to understand it at this court the exercise of the interpreter in the proceedings of this appeal would mean dramatizing of the Court's processes. In the event, I have seriously noted and convinced with the complaint of language barrier since in the preceding ground of appeal I have found the appellants plea to be unbecoming long, therefore, equivocal.

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 Rungwe District for re-arraignment before another magistrate with competent jurisdiction. Considering the time, the appellant had spent in prison, his re-

arraignment and trial if any be expedited. Meanwhile, the appellant be handled to the police for them to return him to Rungwe District as a remandee.

It is so ordered.

D.B. NDUNGURU

JUDGE

14/08/2023