IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 16 OF 2023

(Originating from Criminal Case No. 62 of 2022 of Same District Court)

ALEX AYUBU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14/8/2023 & 18/9/2023

SIMFUKWE, J.

The appellant, Alex Ayubu was arraigned before the district court of Same charged with the offence of rape contrary to **section 130(1)(2)(a)** and **section 131(1)(2) of the Penal Code, Cap 16 R.E 2019.**

It was the prosecution case at the trial that on 20/05/2022 at about 11:00 hrs at Marindi village within Same District in Kilimanjaro region the appellant did have carnal knowledge of one Tajiel d/o Yohana aged 87 years old, without her consent.

The appellant pleaded guilty to the offence. The usual procedure to be taken when an accused pleads guilty to the charge proceeded whereby the facts of the case were read over to the appellant who admitted the

same. The trial court found that, facts which were narrated by the prosecution which were admitted by the appellant, constituted the offence charged. He was then convicted on his own plea of guilty and sentenced to 30 years of imprisonment. He was aggrieved with both conviction and sentence; hence, he preferred this appeal on the following grounds:

1. *That, the learned trial Magistrate grossly erred both in law and fact in failing to consider that the outline (sic) facts even though admitted by the accused (now the appellant) to be true do not show the constituents or ingredients of the offence of rape rather they merely raise a suspicion and it is a trite law that, suspicion however strong and grave cannot be the basis of a conviction in a criminal charge.*
2. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that the Appellant's plea was a result of misapprehension.*
3. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant on an equivocal plea of guilty.*

During the hearing of this appeal, the appellant was unrepresented while the respondent/Republic was represented by Mr. John Mgave, learned State Attorney. The appeal was heard by way of written submissions.

Supporting the third ground of appeal, the appellant submitted that the trial magistrate wrongly treated the alleged plea and convicted him despite the same being equivocal. He continued to state that when the charge was read over to him, it is not certain whether the same was explained to him in a language understandable to him, taking into account

that, he came from the Village and Pare tribe. Therefore, not well conversant with either "Kiswahili" or English language. The appellant was of the view that there was a need for the trial magistrate to explain or cause to be explained the charge in a language which the appellant was well conversant and fluent. Failure of which rendered his plea equivocal. He insisted that the trial magistrate wrongly relied upon ambiguous plea of guilty.

On the first ground of appeal, the appellant complained that the trial magistrate failed to note that, the outlined facts even though admitted by the appellant to be true did not constitute the ingredients of the offence of rape, rather they merely raised a suspicion. That, it is trite law that, suspicion however strong cannot be a basis of the appellant's conviction.

It was elaborated further that the said outlined facts were not well explained to the appellant and let him answer the same in a manner that the court could satisfy itself that the appellant understood well each and every ingredient of the charged offence. He referred the case of **DPP Vs Paul Reuben Makujaa [1992] TLR 2,** which held that:

> *"Whenever there is an indication that the accused intends to plead guilty, court should take effort to carefully explain to him each and every ingredient of the offence and a plea of guilty should only be entered if his reply to such explanation clearly shows that he understood the nature of the offence and he is without qualification admitting it... "*

On the strength of the above authority, the appellant implored this court to amplify the findings in the above cited authority in resolving the noted shortfall in this case.

On the second ground of appeal, the appellant faulted the trial court for failure to note that the appellant's plea was a result of misapprehension. He supported his contention with the case of **David K. Gathi vs Republic**, Criminal appeal No. 118 of 1972 in which the Court underscored that:

> *"The courts are concerned not to convict an accused person on his own plea unless it is certain that the accused understands the charge and intended to plead guilty and that he has no defence to the charge."*

In his final analysis, the appellant prayed this court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

In reply to the first ground of appeal which is to the effect that the admitted facts did not disclose the ingredients of the offence; Mr. Mgave submitted that the trial magistrate properly considered the outlined facts which were admitted by the appellant to be true and the said facts disclosed the ingredients of the offence of rape.

Mr. Mgave went on to quote the particulars which were read to the appellant as seen at page 2 of the typed proceedings of the trial court and argued that the said facts were read to the accused person in Swahili language that he understood. That, the wording of the facts expressly state the committed offence, mentioned the accused person and what he did. Thus, the said statement established the ingredients of the offence of rape which are penetration, lack of consent and that it was the accused who committed the said offence as per **section 130(1) (2) (a) of the Penal Code** (supra).

Mr. Mgave continued to submit that the trial court proceedings at page 2 show that the charge was read to the appellant in the language he understands the best which is Swahili language. That, he was asked if the facts were correct and the appellant replied as follows:

> "*Your honor (sic) the facts are true and correct, that on 20/5/2022, I did have carnal knowledge with Tajiel Yohana a woman of 87 years old because he was taking my crops*."

Mr. Mgave was of the view that the above facts are clear demonstration of understanding what was read and explained to the appellant by the court and that the said facts were well understood. That, if the same were not understood, the appellant could not have elaborated as he did at page 2-3 of the trial court typed proceedings. Thus, denying that he was able to understand the charge is an afterthought since the same was not raised during the trial so that an Interpreter could be brought to aid him understand Swahili.

Responding to the 2nd ground of appeal that the plea of guilty was a result of misapprehension of facts, the learned State Attorney stated that the appellant's argument is baseless because there is no record showing that there was misapprehension on part of the appellant. Mr. Mgave was of the opinion that, the trial court would have considered his plea to be equivocal if he had raised the issue of misapprehension. He continued to state that in case of any misapprehension, the appellant would have specified the said misapprehension for this court to go through it. It was insisted that what was read and explained to the appellant was

understandable that caused his plea to be perfect. Thus, the appellant herein cannot deny to have unequivocally pleaded guilty to the charge.

Lastly, the learned State Attorney resisted the third ground of appeal that the appellant was convicted based on an equivocal plea of guilty. He averred that the appellant's plea of guilty that convicted and sentenced him was unequivocal and he is barred from appealing against conviction as provided for under **section 360(1) of the Criminal Procedure Act**, Cap 20 R.E 2022.

It was further indicated that for one to appeal against conviction on plea of guilty, the criteria stated in the case of **Kalos Punda vs Republic, Criminal Appeal No. 153 of 2005** (Tanzlii) at page 8 of the judgment which cited the case of **Laurent Mpinga vs Republic [1983] TLR 166;** must be met:

1. *That even taking into consideration the admitted facts, the 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 the appellant pleaded guilty as a result of mistake or misapprehension,*
3. *That the charge laid at the appellant's door disclosed no offence known at law and,*
4. *That upon the admitted facts, the appellant could not in law have been convicted of the offence*

Mr. Mgave maintained that, if none of the above criteria have been violated, it means the plea was complete and unequivocal and the conviction was proper to the accused person. The learned State Attorney argued that in this case, at page 1 of the typed proceedings of the trial

court the charge was read over and explained to the appellant who replied that:

"It is true I did had (sic) carnal knowledge with the victim without her consent."

Also, immediately after the facts were read to the appellant at page 2 of the proceedings, the appellant admitted the narrated facts to be true and correct. That, on 20/5/2022 he had carnal knowledge with TAJIEL YOHANA a woman of 87 years old because she was taking his crops.

Mr. Mgave went on to articulate that he could have agreed with the appellant that the plea was equivocal if the charge was read to him and just replied that it was true or that the facts were true. However, the appellant did not end there, as he went further stating the date he committed the offence and said that he did have carnal knowledge with the victim without her consent because she took his crops. He reiterated that as per page 2 of the trial court proceedings, the ingredients of the offence were admitted by the appellant after understanding the facts and charge against him. Thus, the appellant was convicted on his own plea of guilty which was unequivocal. Mr. Mgave emphasised that the appellant's complaint is an afterthought since the trial court proceedings reveal that the appellant understood not only the charge that was read over and explained to him, but also the facts.

Winding up his submission, the learned State Attorney submitted that this appeal is without merits. He prayed the court to dismiss it in its entirety and uphold the conviction and sentence of the trial court.

Having carefully considered the arguments of both parties, the grounds of appeal and the record of the trial court, the issue for determination is

whether *the plea of the appellant before the trial court was unequivocal.*

It is settled law that no appeal shall be allowed to the accused person who has pleaded guilty to the charge and has been convicted on such plea except as to the extent or legality of the sentence. See; **section 360 (1) of Criminal Procedure Act** (supra). However, various case laws have propounded some exceptions of which the accused can appeal against his own plea of guilty. One of the cases is **Josephat James vs Republic (Criminal Appeal 316 of 2010) [2012] TZCA 159 [Tanzlii]** in which the Court of Appeal from page 4 to 5 reiterated circumstances under which the accused can appeal against his/her own plea of guilty as stated in the case of **Kalos Punda vs Republic** (supra)

In the case at hand, the appellant's grievance on the first ground of appeal falls under the first exception that the outlined facts though admitted do not constitute ingredients of the offence of rape.

In contest, Mr. Mgave for the respondent after making reference to the typed proceedings of the trial court, argued that the narrated facts of the case constitute ingredients of the offence of rape as provided for under **section 130(1)(2)(a) of the Penal Code** (supra).

In order to ascertain this issue, I have to examine the impugned facts. At page 2 of the trial court's proceedings, the facts which were read to the appellant were to the effect inter alia that:

> *"…That the accused person on 20th day of May,2022 at about 11:00hours in Malindi village within Same District and Kilimanjaro region the accused had carnal knowledge*

of TAJIEL D/O YOHANA, a woman of 87 years old without her consent."

At page 2 to 3 of the trial court typed proceedings, the appellant replied to the narrated facts by stating that:

" Accused: Alex s/o Ayubu

Your honour the facts are true and correct, that on 20/5/2022, I did have carnal knowledge with Tajiel Yohana a woman of 87 years old because he (sic) was taking my crops. I did take her pants and we had carnal knowledge but she did not consent.

Signature of accused: *sign"*

Section 130(1)(2)(a) of the Penal Code (supra) provides that:

"130. -(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;"

From the above provision, the elements of the offence of rape are: ***one,*** having sexual intercourse with a woman and ***second;*** without her consent.

Fitting the above elements into the facts which the appellant admitted, it goes without saying that all the elements are reflected in the facts which were admitted by the appellant. First, the appellant admitted that he had sexual intercourse with one Tajiel d/o Yohana. Second, he admitted that he had sexual intercourse with the victim without her consent. I am of the opinion that all the admitted facts constitute the elements of the offence of rape.

The next issue for determination is the complaint that the trial magistrate failed to note that the Appellant's plea was a result of misapprehension. The learned State Attorney disputed this argument and argued that the admitted facts show that the appellant understood the facts. That, the appellant did not explain facts which he misapprehended.

This ground has been partly answered on the first ground of appeal. That, the facts which the appellant admitted suggest that he understood the same and he even reiterated the facts read to him while admitting the same. As rightly submitted by the learned State Attorney, if the appellant did not apprehend the narrated facts, he could not have elaborated as he did at page 2-3 of the typed proceedings.

Concerning the appellant's allegation that he comes from the village in pare tribe thus not well conversant with either Kiswahili or English. With due respect to the appellant, such concern that he is not conversant with Kiswahili language was not raised before the trial court. Thus, raising such

issue at this stage is an afterthought as rightly submitted by the learned State Attorney.

According to the record, the appellant's plea suggests that the appellant understood Kiswahili language as at page 1 the appellant's plea was recorded in Kiswahili. In his plea the appellant was quoted to have said that: *"Ni kweli nilifanya mapenzi yaani '(ashakum si matusi)' nilimtomba bibi huyo bila kupata ridhaa yake."*

Lastly, under the third ground of appeal the appellant blamed the trial magistrate for convicting and sentencing him on an equivocal plea of guilty. Mr. Mgave did not agree with this contention. He strongly argued that the appellant's plea was unequivocal.

As stated under the first and second grounds of appeal, the appellant's plea was unequivocal since all the admitted facts constitute the elements of the offence of rape. Moreover, the trial magistrate complied to **section 228 (2) of the Criminal Procedure Act (supra)** which is to the effect that:

> *"(2) Where 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."*

In the circumstances, I find no cogent reason to interfere with the conviction and sentence meted against the appellant by the trial court as his plea was unequivocal. The sentence of thirty years is the mandatory prescribed statutory sentence for the offence of rape which the appellant

was convicted of. I therefore dismiss this appeal in its entirety. Order accordingly.

Dated and delivered at Moshi this 18th day of September 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

18/09/2023