

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 35 OF 2023

(Appeal from the decision of District Court of Same at Same dated 7th September 2022 in Criminal Case No. 107 of 2022)

RAMADHAN SIWARIEL MALIYA @ REMMY APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

3rd October & 7th November 2023

A.P.KILIMI, J.:

Ramadhan Siwariel Maliya @ Remmy hereinafter “the appellant” was arraigned at District Court of Same at Same in Criminal Case No. 107 of 2022 and pleaded guilty for the offence of unnatural offence c/s 154 (1) (a) and (2) of the Penal Code cap 16 R.E 2022. Consequently, the trial court convict him on his own plea of guilty and sentenced to life imprisonment.

The brief facts narrated by the prosecution at the trial were to the effect that, on 3/8/2022 at around 17:00hrs at sokoni street within same district and Kilimanjaro region, the accused did carnal knowledge of one MX

(in pseudonym to hide his identity) a boy of 16 years of age against the order of nature. Subsequently, the boy told the guardian who reported the matter to Same police station and the appellant was arrested on 5/9/2022 and upon cautioned at the police he confessed to have committed the offence charged.

As said above the trial court found his plea unequivocal, convicted and sentenced him as said above. Being in prison changed his mind and decided to appeal against his plea of guilty at the trial court. Thus, he labored to file an application for extension of time to file this appeal in this court vide Criminal Application No.5 Of 2023 wherein on 8th May 2023 the same was granted hence this appeal. Having a right to the road of justice of this court, the appellant has challenged the impugned decision of the trial court basing on the following three grounds;

1. The learned trial magistrate strayed into error of law when he failed to note that the Appellant's plea in the trial Court was not unequivocal, as he pleaded guilty as a result of mistake and misapprehension.
2. The learned trial magistrate strayed into error of law when he failed to consider the admitted facts as it was expected that the appellant would go further and state exactly what he admits in all narrated facts.
3. The learned trial magistrate erred in law and factual analysis when he failed to note that the facts outlined, though admitted by the appellant, do not show the ingredients of the offence of unnatural offence.

When the appeal was called on for hearing, the appellant appeared in person without legal representation, whereas Ms. Edith Msenga, learned State Attorney, appeared for the respondent.

The appellant submitted that, He has decided to appeal so that his case be heard, he further added he was informed that police officers were searching for him, then he decided to report himself at Police station. He also added, there he was beaten and to put his thumb on papers which he never read, He concluded that even at the court he was told by the prosecution side to agree the charge.

In response Ms. Edith Msenga contended that the plea of the appellant at the trial court was unequivocal, thus according to section 360(1) of CPA Cap.20 R.E.2022. The appellant was supposed not bring this case because the confession he made was unequivocal. She then referred the case of **Sokoine Mtahali @ Chimagwa vs Republic** [2022] TZCA 575 (TANZLII) and said the court explained under what circumstances the person's plea of guilty may bring his case against his plea, the learned Attorney then said according to the case at the trial no any circumstance fit to his appeal, because the appellant was explained the facts and he understood what transpired. That

is why he replied clearly that he did the act which amount to his plea of guilty to the offence charged. She further said in respect to second and third ground both are the same as the first ground. Thus, prayed this court to dismiss his appeal.

I have considered the ground of appeal; it is true as rightly pointed out by the learned State attorney 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. With respect despite of the exception above, there are other exceptions to this general rule, such as the plea was obtained fraudulently or by inducement or defective charge, to mention a few.

Notwithstanding, I have scanned the record of the trial court, I find appropriate before proceeding with the merit of this appeal to highlight the law in regard to plea of guilty to remain unshaken when is entered.

It is a trite law in a situation where the accused admits the allegations in the charge, it is deep rooted and invariable practice that the responsibility is on the prosecution to state facts establishing the allegations in the charge. In short, a plea of guilty relieves the prosecution the burden of calling

witnesses to prove the charge but it does not relieve them from narrating facts correctly, clearly and sufficient enough to support the offence charged. Actually, the facts narrated are in lieu of the otherwise evidence that the prosecution would be required to lead in court by calling witnesses so as to prove the charge beyond reasonable doubt. (See **Michael Adrian Chaki vs Republic** [2021] TZCA 454 (TANZLII)).

The above in my view is the reflection and expound of the provision of section 228(2) of the CPA cap 20 RE 2022 which for clarity I reproduce hereunder; -

*"228(1) The **substance of the charge** shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*

*(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.**"*

[Emphasis added]

The appellant at the trial was charged for the offence of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, thus according to the law the substance of the said charge must be well stated to the accused person, which means all elements of the offence must be communicated to the accused person.

In **Richard s/o Lionga @ Simageni vs Republic** [2021] TZCA 671 (TANZLII) The court referred with approval its earlier decision in **Michael Adrian Chaki vs Republic** (supra) and stated that for a plea of guilty to be unequivocal and valid, must pass the following test;

- 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 dear 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 plead to the charge, the charge is stated and fully explained to him before he is 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 facts 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 dear (see Akbarali Damji vs R. 2 TLR137 cited by the Court in Thuway Acoonay 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 the elements of the offence charged.

[Emphasis mine]

From above law, in my view of the appellant's grounds above, one issue appears to answer all grounds raised above, and that is whether the facts narrated to the appellant constitute the all elements of the offence charged.

Principally elements of offence are derived from the provision creating an offence. The offence charged is unnatural offence, for ease of reference I quote the wording as hereunder;

*"154 (1) Any person who—
(a) has carnal knowledge of any person against the order of nature; or
(b) N/A
(c) N/A
(2) Where the offence under subsection (1) is committed to a child under the age of eighteen years the offender shall be sentenced to life imprisonment."*

In my interpretation of the above law the elements comes from the words "any person who has carnal knowledge of any person against the order of nature" "carnal knowledge" is a phrase derived from latin words "scientia carnalis" or "cognitio carnalis." These phrases were then translated to "carnal knowledge" or "knowledge of the flesh" in English. In our land carnal knowledge was explained in the case of **Paul Dioniz vs. Republic** Criminal Appeal No. 171 of 2018 CAT at Dsm (unreported) where the court observed that the term "carnal knowledge" used in the particulars of offence simply means "sexual intercourse".

Reading section 154 of the Penal Code cited above, it is obvious that elements constituting unnatural offence, penetration of the male's manhood

into another person's anus must be stated and however slight will be sufficient for the requirements of the offence to be committed.

To substantiate whether elements above was stated, I find appropriate to reproduce the facts narrated to the appellant at the trial;

"PP: Your honour we are ready to read the facts of the case.

Court: Prayer granted and facts be read over.

FACTS OF THE CASE.

*That the names of the accused are Ramadhani s/o Siwariel @ Remmy Mallya. That the accused stand charged of the offence of unnatural offence contrary to section 154(1)(a) and (2) of the penal code Cap 16 RE 2022. That on 3/8/2022 at around 17:00hrs at sokoni street within same district and Kilimanjaro region, the accused did had carnal knowledge of one Emmanuel s/o Francis a boy of 16 years of age against the order of nature. That the matter was conducted in the room of the accused. **That the accused did use oil to lubricate the anus of the boy for easier penetration and lavishing himself.** That the boy told the guardian who reported the matter to Same police station and the accused was arrested on 5/9/2022 and upon cautioned at the police he confessed to have committed the offence of unnatural offence against a boy of 16years old.*

Thus all.

***Court:** The fact are read over and explained to the accused person in a language he understand thus Swahili and the accused is asked*

if the fact are true and correct or he denies the fact read over and explained to him and he replies as follow:

Accused Ramadhani S/O Siwariel Mallya @ Remmy.

That the fact read over are true and correct. that I had carnal knowledge against the order of nature with Emmanuel s/o Francis at my room in sokoni street and I did confess at the police station.

I pray for forgiveness.

Signature of accused SIGN.

PP: *Your honour, we pray to tender the PF3 of the victim and cautioned statement of statement of accused to form part and parcel of the fact of the case.*

Court; *let the PF3 and cautioned statement be supplied to the accused person who is asked if he has any objection as to the PF3 and cautioned statement thereof.*

M.A. HAMZA-RMI

7/9/2022.

Accused: Ramadhani Sawariel Mallya @ Remmy.

Your honour, I don't have any objection as to the PF3 and the cautioned statement are all correct.

Signature of accused SIGN.

Court: *I hereby admit the PF3 and the cautioned statement of the accused to form part and parcel of the proceeding. The PF3 and cautioned statement are read over and explained to the accused person.*

M.A. HAMZA-RMI.

7/9/2022.

PP: Your honour, the facts and the PF3 also the cautioned statements reveal that the accused did commit the offence to wit unnatural offence. Thus all.

M.A. HAMZA-RMI.

7/9/2022.

Accused: Ramadhani sawariel mallya.

Your honour, the facts are true and I did confess at the police and they took my statement.

*Signature of accused **SIGNED***

Court; I hereby convict the accused person one Ramadhan s/o Siwariel Mallya@Remmy for the offence of unnatural offence c/s 154 (1) (a) and (2) of the penal code; cap 16 RE 2022 on his own of plea of guilt in respect of the charge in terms of section 228(2) of the CPA cap 20 RE 2022.

7/9/2022

M.A. HAMZA RMI

Previous conviction and Mitigation-N/A

SENTENCE.

I have considered the aggravating factors of the public prosecutor and what the accused have revealed to this court: I have also taken in to account the fact that the accused did the unnatural to the child of 16 years old. In that event, I hereby sentence the accused to life term of imprisonment. It is so ordered.

7/9/2022

M.A. HAMZA RMI"

According to the above record it appears the appellant pleaded twice first to the facts and second to the exhibits read to him. Be it as it may, let me start with the first part which is the facts narrated to him. In my perusal the important element of penetration was not stated by the prosecution. The prosecution ended to say that the accused did use oil to lubricate the anus of the boy for easier penetration and lavishing himself. The act itself of his male organ to be inserted on victim anus was not stated. According to the law above I am of considered opinion that, failing to state this crucial element renders the facts too flimsy to prove the charged offence. (See **Michael Adrian Chaki vs Republic** (supra).

In respect to next part, since the exhibits were tendered after the appellant was already asked to reply on the facts narrated to him, in my view cannot be taken as the facts of constituting the offence, therefore it was not necessary for the trial court to ask the appellant to plead again mere on exhibits tendered. Thus, when the appellant said "Your honour, the facts are true and I did confess at the police and they took my statement" did not amount to plead of guilty since the above are not facts constituting the offence rather than documents tendered which the appellant was obliged to object or admit them and that is all.

From the analysis above I have endeavoured to state, I am of settled view, since the facts narrated to the appellant fall short to elements of the offence charged, therefore the plea of guilty entered by the appellant at the trial court was flawed in the eyes of law, thus I hold no any plea of guilt entered at the trial court forthwith. Therefore, I find this appeal with merit and proceed to allow it accordingly.

Consequently, I nullify the plea entered and proceeding of the trial court, likewise, the conviction of the appellant is equally quashed and the sentence of life imprisonment imposed to the appellant is set aside.

Moreover, I order the record of the trial court be remitted to the District Court of Same for hearing of that case, according to the law, starting from the initial stage of reading over the charge to the appellant. However, if it happens the appellant is convicted at retrial, the time he spent in prison from the date he was convicted till this day of judgment should be excluded since shall be deemed to have already been served.

In the meantime, I order the appellant to be detained as a remand prisoner pending his trial.

It is so ordered.

DATED at **MOSHI** this day of 7th November 2023.



X

A handwritten signature in black ink, appearing to be "A.P. Kilimi", written over a light grey rectangular background.

JUDGE
Signed by: A. P. KILIMI