THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.19 OF 2023

(Originating from Newala District Court at Newala in Criminal Case No.18 of 2023)

SELEMANI MUSTAFA MTIPA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

19/7 & 29/9/2023p

LALTAIKA, J.:

The appellant herein, **SELEMANI MUSTAFA MTIPA** with his two co-accused namely Abdala Maulid Mdiliko and Muksin Hamisi Mdinye the first and third accused, respectively not part to this appeal were arraigned in the District Court of Newala at Newala. In fact, each accused was charged with his count of the offence of unnatural offence contrary 154(1) (c) of the Penal Code [Cap. 16 R.E. 2022]. However, as to the appellant was charged with the second count of unnatural offence.

When the charges were ready over and explained to the appellant, (then accused) he pleaded guilty to the offence. The learned trial Magistrate

proceeded to convict him on his own plea of guilty and sentenced to serve a term of thirty (30) years imprisonment.

Dissatisfied, the appellant has appealed to this court on four grounds as reproduced hereunder: -

1. *That, the plea was equivocal, the trial court erred in law in treating it as a plea of guilty.*
2. *That, the plea was a result of mistake or misapprehension.*
3. *That, the manner in which the proceedings at the trial court were conducted was irregular or and improper.*
4. *That, the facts of the case does not disclose the offence charged.*

On 16/5/2023 the appellant filed two (2) additional grounds of appeal which I also take liberty to reproduce hereunder: -

1. *That, your Lordship Judge, the trial Magistrate erred in law and fact by convicting and sentencing the appellant basing on the evidence wrongly tendered without considering the law, when exhibit P1 was tendered before the court of law see page 3 of the typed proceedings, the Medical Examination Report was not read over before the court as required by the law. Requirement of section 210(3) of the Criminal Procedure Act Cap 20 R.E 2022. This exhibit should be expunged from the court records.*
2. *That, your Lordship Judge, the trial Magistrate erred in law and fact when the prosecutor permit to tender the caution statement exhibit P2 did not ask to read over before the court of law, how did the Magistrate order that the statement to be read over? The court cannot be the first to order without requests. This exhibit also should be expunged from the court records. See page 3 of the typed proceeds.*

When the appeal was called on for hearing, the appellant appeared in person and represented by Mr. **Jebra Kambole** learned counsel while the respondent Republic enjoyed the services of **Mr. Melchior Hurubano**, learned State Attorney. The parties agreed the matter to be disposed of by way of written submissions.

On the part of the appellant, the written submissions were drawn and filed by Mr. Jebra Kambole, learned advocate. At the very outset the learned counsel prayed to withdraw the second ground to the additional grounds of appeal.

In the matter at hand, Mr. Kambole asserts that when the charge was read to the accused, he responded with a plea of **"It is True."** The learned counsel contends that such a response **is insufficient to constitute a plea of guilty**. He argues that the trial court was obligated to seek further clarification from the accused, emphasizing the need for a precise understanding of the accused's admission. Mr. Kambole underscored a chain of legal authority requiring the trial court to extract more information and determine the meaning behind the accused's assertion of truth.

Furthermore, Mr. Kambole posited that, according to established legal principles, a plea of guilty entails an acknowledgment by the accused of all essential legal elements comprising the charged offense. He submited that for a plea to be equivocal, the accused must supplement the guilty plea with a qualifying statement that, if true, could indicate innocence. He cites the case of **JOSEPHAT JAMES V R**, Criminal Appeal No.316 of 2010, delivered in 2012, and reiterates the importance of seeking additional explanations beyond a simple acknowledgment of correctness.

Building on his argument, Mr. Kambole refered to the case of **SAFARI DEEMAY'S V R** Criminal Appeal No.269 of 2011 (unreported), cautioning against hasty judgments, especially in grave offenses with severe penalties. He advocates for a more comprehensive inquiry by the trial court, suggesting that a mere "it is true" response is insufficient. Drawing on **ALLY SANYIWA VS REPUBLIC**, Criminal Appeal No.527 of 2017 (unreported), Mr. Kambole underscores the necessity of clarity in the accused's admission, particularly in cases involving sensitive charges.

Additionally, Mr. Kambole contended that the phrase "It is True" alone does not meet the requirements of **section 228(2) of the Criminal Procedure Act [Cap.20 R.E. 2019].** He asserts that a broader consensus of legal authorities supports the view that a mere acknowledgment without additional context does not constitute a valid admission or an invitation for a plea of guilty.

Expanding on this argument, Mr. Kambole maintained that the plea is equivocal due to the lack of essential details in the charge. He raised concerns about the absence of specific information such as the date, month, or year of the alleged offense, which he argues is essential for proper adjudication. He underscores the importance of adherence to **Article 13(6)(c) of the Constitution of the United Republic of Tanzania**, asserting that a well-functioning judiciary should not convict based on incomplete or vague charges.

Moreover, Mr. Kambole contends that the facts presented to the accused lack key elements of the offense and fail to support the charge adequately. He points to omissions such as the absence of details regarding the time, manner, and the individual against whom the offense was allegedly committed. He contends that these deficiencies render the plea equivocal, opening the possibility of misinterpretation.

Furthermore, Mr. Kambole argues that the accused's admission to a different offense than that stated in the charge adds another layer of ambiguity. He asserts that even if there is an admission, the facts do not disclose all elements of the offense, leading to further confusion.

Addressing procedural concerns, Mr. Kambole asserted that the accused should have been given an opportunity to admit or dispute the facts before the tendering of exhibits. He insisted that **this omission renders the plea equivocal,** as the accused may have admitted the charge without a clear understanding of the case against him.

In conclusion, Mr. Kambole urged the court to dismiss the case against the appellant, emphasizing the need for a fair trial and compliance with procedural requirements.

In response, **Mr. Hurubano initiated his submission** by addressing the issue of equivocality. He argued that, according to the typed proceedings of the trial court on page 1, the court properly read and explained the charge to the appellant, who then pleaded guilty unequivocally by saying **"NI KWELI"** to signify the truthfulness of the allegations.

Mr. Hurubano relied on the case of **PASKALI KAMALA VS REPUBLIC,** Criminal Appeal No.457 of 2018 CAT-Arusha, which emphasized that an unequivocal plea of guilty must meet the requirements of section 228(1) and (2).

Mr. Hurubano maintained that, in compliance with the aforementioned case and sections of the Criminal Procedure Act, the trial court sufficiently stated the substance of the charge to the appellant, who clearly understood and admitted the truth of the charges. He argued that the plea was unambiguous, as the phrase **"NI KWELI" has no synonyms that could introduce ambiguity.**

Addressing the need for further clarification by the trial court, Mr. Hurubano contended that such a requirement was irrelevant in this case. He asserted that the trial court had fulfilled its duty by fully explaining the charge to the appellant, and the appellant's guilty plea was voluntary and informed.

Mr. Hurubano disputed the relevance of the case of **KUSEKWA MISINZO VS REPUBLIC**, asserting that it was distinguishable from the present case. He argued that, unlike the cited case, the charge in this instance was adequately explained to the accused.

Regarding the absence of a specific date in the charge, Mr. Hurubano argued that such details were not essential for the prosecution in this case. He contended that, based on the circumstances, the Republic could establish the time of the offense during the trial. He also emphasized that medical evidence, showing penetration, was sufficient to prove the offense.

Responding to the appellant's acceptance of Police Form No.3 (PF3), Mr. Hurubano argued that the appellant's admission **was consistent with the charge of unnatural offense under section 154(1)(c) of the Penal Code**. He highlighted that the charge adequately disclosed the elements of the offense, and any discrepancy was related to the appellant's modus operandi, not the essential elements.

Mr. Hurubano challenged the appellant's argument that the charge lacked a specific place, contending that the mention of **Newala District within Mtwara region** was sufficiently descriptive. He asserted that the charge was clear about where the offense occurred.

Addressing the appellant's claim that the facts did not disclose the victim, place, and key element of permission, Mr. Hurubano argued that the facts were presented clearly and aligned with the elements of the offense of unnatural acts. He maintained that the appellant was charged under section 154(1) of the Penal Code, and reading the entire provision was necessary to understand the offense.

Mr. Hurubano further contended that the appellant's guilty plea was not a result of misapprehension, as the appellant expressed understanding during the proceedings. He referred to the appellant's mitigation as an indication of his awareness of the charges.

In conclusion, Mr. Hurubano asserted that the **appellant's plea was unequivocal.** He argued that the charge was adequately explained, and the appellant fully understood the nature of the offense. He urged the court to dismiss the appeal for lack of merit. Alternatively, if the court found the plea equivocal, Mr. Hurubano suggested **quashing the conviction and sentence, advocating for a retrial.** To support his argument, Mr. Hurubano cited several authorities including **JULIUS CHARLES @ SHARABARO AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No.167 of 2017 CAT at Dodoma and **NGASA MADINA VS REPUBLIC,** Criminal Appeal No.151 of 2005 (unreported).

In a brief rejoinder, Mr. Kambole reiterated the points raised in the initial submission, particularly emphasizing the manner in which the trial court recorded the plea. Additionally, the learned counsel addressed the absence of crucial details such as the victim's name, time, date, month, year,

and the place of the offense. Mr. Kambole argued that this criminal case, **with a minimum sentence of thirty years**, necessitates clear identification of the witness, particularly in sexual offenses where the witness is pivotal and cannot be unknown to the court. He asserted that the charge is defective, and the plea improper due to the lack of information about the victim. Mr. Kambole contended that if the omission is for the protection of the victim, such an order must be evident from the proceedings.

Regarding the absence of specific elements in the facts disclosed, Mr. Kambole disputed the respondent's claim that **section 154 of the Penal Code creates a single offense**. He argued that section 154(1) actually establishes three distinct offenses outlined in paragraphs (a), (b), and (c). According to Mr. Kambole, the appellant was charged under section 154(1)(c), and the facts presented should have proven the elements of permitting a male person to have carnal knowledge against the order of nature. However, he asserted that the facts read to the appellant did not encompass these essential elements.

In conclusion, Mr. Kambole addressed what he termed a new point raised by the learned State Attorney in his reply, focusing on the issue of mitigation. He contended that during mitigation, the appellant, being left with limited options, opted for an admission of guilt, which should not be construed as a genuine conviction. Therefore, the learned counsel requested the court to release the appellant.

After a careful consideration of the grounds of appeal, counsels' submissions, and the lower court record, I find it necessary to address key

issues raised. The offense facing the appellant falls under section 154(1) (c) of the Penal Code Cap. 16 R.E. 2022, categorized **as "unnatural offenses."** This designation is contextual, depending on the circumstances of the offense as outlined in section 154(1) (a), (b), and (c) of the Penal Code. In this case, the appellant was charged with permitting male persons to have carnal knowledge of him against his order of nature.

The general rule, as per section **360(1) of the Criminal Procedure Act (supra)**, is to the effect that no appeal is allowed for an accused who has pleaded guilty and been convicted, except for issues related to the legality of the sentence. However, exceptions exist, and the Court of Appeal has articulated conditions for an appeal, as seen in the case of **LAURENCE MPINGA v. R.** [1983] T.L.R 166. See also **KARLOS PUNDA v. REPUBLIC**, Criminal Appeal No. 153 of 2005 (unreported)

The plea entered by the appellant should meet specific criteria, including proper charge framing, the accused's understanding, explicit explanation of the charge, and disclosure of all elements of the offense. The court must ensure that the plea is unequivocal, with the accused fully comprehending the charges.

Upon my examining of the appellant's plea, it became apparent that the trial court failed to adhere to **section 228(2) of the CPA**. The plea was recorded in English ("It is true") instead of Kiswahili ("Ni kweli"), potentially causing a misrepresentation of the appellant's statement. The admission of facts also lacks crucial details, such as the names of the individuals involved,

the location of the incidents, and the dates. These omissions render the appellant's plea equivocal, challenging the validity of the conviction.

On irregularities in the trial proceedings, the appellant's objection to the admission of exhibits P1 (PF3) and P2 (cautioned statement) is deemed non-fatal. The Court of Appeal has clarified that, once an accused pleads guilty unequivocally, the admission of exhibits is not a strict legal requirement. See **JOEL MWANGAMBAKO VS REPUBLIC**, Criminal Appeal No.516 of 2017. Consequently, the third and second grounds of appeal, related to the admission of these exhibits, are dismissed.

In conclusion, considering the equivocal nature of the plea and procedural irregularities, I allow the appeal. The proceedings are nullified, the conviction is quashed, and the sentence is set aside. The case is remitted back to the trial court for retrial. The appellant shall remain in custody pending retrial for a competent court.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
29/9/2023

Court:

This judgement is delivered under my hand and the seal of this court on this 29th day of September 2023 in the presence of Mr. Melchior Hurubano,

learned State Attorney and the appellant who has appeared in person and unrepresented.

E.I. LALTAIKA
JUDGE
29/9/2023