

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

CRIMINAL APPEAL NO. 91 OF 2023

(Arising from the District Court of Misungwi in Criminal Case No. 62 of 2023.)

NTELANI ELIAS @ PAULO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

24th October, & 15th November, 2023.

MUSOKWA, J.

The appellant was convicted by the District Court of Misungwi on a plea of guilty on two counts. The first count was rape, contrary to sections 130 (1) and (2) (e); and 131 (1) of the Penal Code, Cap 16 R.E 2022 (Penal Code). The second count was impregnating a school girl contrary to section 60A (3) of the Education Act as amended by Act No. 2 of 2016. Consequent to the conviction on both counts, the appellant was sentenced to thirty years (30) imprisonment on the first count and five (5) years imprisonment on the second count. The sentences were to run concurrently.

Deducing from the facts as read out during the preliminary hearing, it is gathered that the appellant on 10th October, 2022 at Mwasonge village had unlawful sexual intercourse with the victim, a girl

aged seventeen (17) years. According to the record, the victim, a student of a secondary school in Misungwi District, was impregnated by the appellant. This culminated in the apprehension of the appellant by the police on 14th May, 2023. The appellant was arraigned before the Court on 18th May, 2023. On a plea of guilty to the charge, he was convicted and sentenced to imprisonment as aforementioned.

Aggrieved by the decision of the trial court, the appellant has preferred the instant appeal raising two grounds of appeal, as paraphrased hereunder:

- 1. That, the honourable magistrate erred in law and fact for convicting the appellant based on insufficient facts for the charged offences.*
- 2. That, the honourable magistrate erred in law and fact for convicting the appellant based on an equivocal plea.*

The appellant, at the hearing of the appeal, was represented by Mr. Msafiri Henga, learned counsel. Mr. Christopher Olembile along with Mr. John Joss, learned state attorneys, appeared for the respondent.

Submitting in respect of the first ground of appeal, the appellant's counsel stated that in criminal law, the prosecution is duty bound to narrate the facts of the case correctly in order to establish the offence. The learned counsel proceeded to state that in the circumstances an

accused person enters a plea of guilty, the prosecution is exonerated from the burden of proof and is no longer obligated to produce witnesses. This however, does not erase the key role of the prosecution to provide adequate facts of the case. Mr. Henga contended that the trial court proceedings clearly indicate failure by the prosecution to detail the facts of the charged offences as per the requirements of the law.

In support of his submission, the learned counsel referred to page two of the typed proceedings of the trial court. He pointed out that the facts of the case provided by the prosecution did not suffice to satisfy the ingredients of the offence of impregnating a school girl. He went on to state that the proceedings failed to ascertain the age of the victim and details of her status as a school girl. Mr. Henga argued that with the existence of the aforementioned anomalies, it is apparent that the facts of the case were not clear to the accused. The learned counsel cited the decision of the Court of Appeal of Tanzania (Court of Appeal) of **Richard Lionga @ Simageni vs. The Republic**, Criminal Appeal No. 14 of 2020. In emphasis, he reiterated that the accused was convicted based upon insufficient facts.

Addressing the court on the second ground of appeal, Mr. Henga submitted that for a plea to be unequivocal, the plea must entail all the

ingredients of the charged offence. The case of **Michael Adrian Chaki vs. The Republic**, Criminal Appeal No. 399 of 2019 decided by the Court of Appeal was preferred in support thereof. In concluding his submission in chief, the learned counsel for the appellant underscored that the plea of guilty entered by the appellant was not unequivocal as it was premised on insufficient facts. It was his prayer that the appeal be allowed, the decision of the trial court be quashed and set aside, and any other reliefs the court shall deem fit to grant.

Mr. Olembile prayed to argue the grounds of appeal collectively. The learned state attorney was in support of the appeal by submitting that the trial court erred to convict and sentence the appellant on a plea that was equivocal. Mr. Olembile stated that it is apparent on the record that after the charge been read out to the accused, the appellant herein, he entered a plea of guilty on both counts. However, the following stage of reading the facts to the accused in order for him to be aware of what he had pleaded guilty to; was not properly conducted. The learned state attorney submitted further that since the facts of the case were not in order, it is therefore unlikely that the appellant had precise knowledge of what he had pleaded guilty to. It was on this basis, he added, that the trial court entered conviction and sentenced the appellant. The learned

state attorney conceded with the arguments advanced by the learned counsel for the appellant that the plea entered was equivocal; and therefore, the trial court erred to convict and sentence the appellant on the same. Mr. Olembile prayed that the conviction and sentence be quashed and set aside. He further prayed the Court to order retrial under the circumstances, claiming that such order would best serve the interest of justice. In support of his prayer, the learned stated attorney cited the case of **Michael Adrian Chaki** (supra). Notably, the learned counsel for the appellant had no rejoinder.

In studying the grounds of appeal collectively, the appellant is contending that the conviction and sentence was based on an equivocal plea. The respondent concedes that the procedure that was adopted by the trial court violated procedural aspects of the law. Let me preface my analysis by stating that; the general rule is that no criminal appeal can lie against a conviction on a plea of guilty except as to the extent or legality of the sentence. This includes conviction founded on ambiguous plea of guilty. This legal principle is expressed under section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019 (CPA) and it states as hereunder:

*"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.**"*[Emphasis added]

In exceptional circumstances, an appeal from a plea of guilty may be entertained. These special circumstances were propounded in the landmark decision of **Laurence Mpinga vs. The Republic** [1983] TLR 166. The principles in the case of **Laurence Mpinga** (supra) have been cemented in numerous subsequent decisions; one of these is the Court of Appeal case of **Msafiri Mganga vs. The Republic**, Criminal Appeal No. 57 of 2012 (unreported). In this decision, the Court of Appeal made the following observation:

*"... one of the grounds which may justify the Court to entertain an appeal based on a plea of guilty is where it may be successfully established that 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. This goes to insist therefore that **in order to convict on a plea of guilty, the court must in the first place be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal.**"*[Emphasis added].

Borrowing the reasoning in the cited decision, the issue that requires determination is whether the plea of guilty recorded by the trial court is credible for a conviction to stand. As rightly argued by Mr. Henga and Mr. Olembile, the irregularity in the procedure adopted by the trial court indicates a failure on the part of prosecution to adduce facts of the case which disclose the necessary ingredients of the respective offence. Similarly, the said facts were admitted in a general manner by the accused or appellant herein. In the cited case of **Michael Adrian Chaki** (supra), the Court of Appeal sitting in Dar es Salaam held that: -

*"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."*[Emphasis added].

I find it prudent to emphasize that the process of recording a plea is not a mere formality that is part of court routine. It is, however, a

process of justice dispensation that must conform to the rules governing criminal justice. What is gathered from the trial proceedings of the instant matter does not reflect the imperative requirements of the law. The Court of Appeal, in the case of **Samson Marco & Another vs. The Republic**, Criminal Appeal No. 446 of 2016 (unreported); reflecting on the conduct of the trial court, observed as follows: -

*"What the prosecutor did was merely to repeat the same words appearing in the **particulars of the offence** of armed robbery without elaboration and relating to the ingredients constituting the charge facing the appellants.... We cannot on second appeal, say that facts narrated to support this ingredient of armed robbery, were clear to the appellants to support the position of the two courts below that there were unequivocal pleas of guilty. As this Court restated in *Msafiri Mganga v. R*, Criminal Appeal No. 57 of 2012 (unreported), **the narrated facts which an accused person admits to be true and correct, must in the eyes of the law, disclose the ingredients of the offence for which the appellant was charged with.**"*

[Emphasis added].

Based on the holdings of the cited cases and consistent with the submissions advanced by learned counsels for the appellant and respondent respectively; I affirm my conviction that the plea of guilty entered by the appellant was equivocal, as the appellant was not given a

full understanding of the ingredients of the offence. This turned the proceedings into a flawed process, the outcome of which does not meet the standards of a fair trial. For the purpose of transparency, let me reproduce the relevant part of the trial court proceedings. For obvious reasons, the name of the victim will not be disclosed but the word "victim" will serve the intended purpose. The record of the trial court provides as follows: -

"Court: *The charge is read over and fully explained to the accused person who is asked to plead there to:*

Sgd: E.A Marick-SRM
18/05/2023

Accused Plea:

1st Accused (sic): It is true I had sex with the victim.

2nd Accused (sic): It is true I impregnated her.

Court: *Enter a plea of guilty.*

Sgd: E.A Marick-SRM
18/05/2023

PP: *The accused has admit (sic) the offence we pray to read the facts.*

Facts

- 1. Name and address as per charge sheet.*
- 2. That on 10/10/2022 at afternoon hours at Mwasongwe village Misungwi District in Mwanza Region, the accused had unlawful (sic) with the victim as the result impregnated her.*

3. *That the accused was arrested on 14/10/2023 and he was interrogated under caution statement by WP 6534 D/CPL Neema and admitted the offence.*
4. *That today the accused has been brought before the court and pleaded guilty on the offence.*

*Sgd: E.A Marick-SRM
18/05/2023*

Court: *the fact which the accused has admit (sic) are read loudly on language which he understood and plea.*

Accused: *I admit fact number 1,2,3 and 4 to be correct and all fact are true as read:".*

Briefly, the first count being an allegation of statutory rape, the prosecution ought to establish the facts relating to the age of the victim. In addition, the facts ought to disclose that the victim is a student of a particular secondary school; and that indeed she was impregnated by the accused for the purpose of the second count. Apparently, this was not done. The Court of Appeal case of **Michael Adrian Chaki** (supra), is very instructive on this as it held that: -

"...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" [Emphasis added].

In consideration of the foregoing reasons and being guided by the holding in the case of **Michael Adrian Chaki** (supra), I allow the appeal; quash the conviction and set aside the sentence. I further direct the record of the trial court be remitted back to the trial court (before another competent Magistrate) and the appellant to be dealt with as if he had pleaded not guilty, that is to say, the trial court has to proceed with the case from where it had ended before the appellant purportedly pleaded guilty. In short, the trial court has to conduct the preliminary hearing and proceed with trial unless the appellant wishes to enter a fresh and unequivocal plea of guilty according to the prevailing laws.

I order accordingly.

Right of appeal explained.

DATED at **MWANZA** this 15th day of November, 2023.



I. D. MUSOKWA
JUDGE

Court:

This Judgment delivered today 15th November, 2023 in the presence of Mr. Msafiri Henga, Adv. for the Appellant and Mr. John Joss, State Attorney for the Respondent.



I. D. Musokwa
JUDGE
15.11.2023