

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA**

AT MBEYA

CRIMINAL APPEAL NO. 147 OF 2023

**(Originating from the District Court of Rungwe at Tukuyu, in Criminal Case
No. 67 of 2023)**

STANLEY s/o VENANCE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 26 October 2023 & 9 November 2023

SINDA, J.:

The appellant, Stanley Venance, was charged with and convicted of the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (a) both of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Rungwe at Tukuyu (the **District Court**) convicted him on his own plea of guilty. He was sentenced to 18 years imprisonment.

The particulars of the offence are that on 9 July 2023, at Igalamo village within Rungwe District in Mbeya Region for sexual gratification by use of his hands touched the vagina of XYZ, a girl of 20 years, without her consent.

The appellant challenges his conviction and the corresponding sentence on five grounds whose thrust is as follows:

1. That the appellant was erroneously convicted not under a proper law;
2. That the trial magistrate erred in law and fact when he convicted the appellant only at a single and last plea of guilt without giving him another chance to determine what he said;
3. That the learned trial court had massively lost sight of the point of law and fact to convict and sentence the appellant without giving the appellant the right to know and to understand the charge against him so that he can intelligently answer them, due to the fact that the appellant is illiteracy thus led him to enter into a plea of guilty during the plea stage;
4. That the appellant was convicted and sentenced on the expense of a defective charge; and
5. That the trial court erred in law and fact to convict and sentence the appellant solely on emotion contrary to the law.

At the hearing of the appeal on 26 October 2023, the appellant appeared in person, unrepresented. The respondent was represented by Ms. Julieth Katabaro, learned State Attorney who was assisted by Ms. Lilian Chagula, learned State Attorney.

The appellant requested the Court to consider his grounds in the petition of appeal as presented in the Court. He opted for Ms. Katabaro to reply to them first so he could rejoin in case such need arose.

Submitting on the first ground of appeal, Ms. Katabaro contended that in the District Court, the appellant was properly convicted for the offence of grave sexual abuse under section 138C (1) (a) and (2) (a) both of the Penal Code. Ms. Katabaro further contended that the District Court convicted the appellant using an appropriate provision of the law where section 138C (1) (a) of the Penal Code illustrates the ingredients of the offence of grave sexual abuse and section 138 (2) (a) of the Penal Code provides for the punishment for the offence of grave sexual abuse. Ms. Katabaro prayed the ground of appeal be dismissed.

Turning to the second, third and fifth grounds of appeal that the plea was equivocal, and the District Court convicted and sentenced the appellant solely on emotion contrary to law. Ms. Katabaro further contended that the District Court recorded the admission by the appellant in the words he used in accordance with sections 228 (1) and (2) of the Criminal Procedure Code Cap. 20, R.E 2022 (the CPA).

Ms. Katabaro argued that the District Court entered a plea of guilty after the charge was read out and explained to the appellant and the appellant admitted to the offence of Grave Sexual Abuse. Ms. Katabaro further argued that the prosecuting attorney narrated the facts of the case to the

appellants and the appellants admitted to the facts of the case as narrated by the prosecution.

The learned state attorney submitted that the appellant pleaded guilty when the charge was read out and explained to the appellant. The appellant replied that "*it is true*" and the District Court recorded the plea of guilty. Then, immediately the appellant admitted the facts of the case unreservedly as narrated by the prosecuting attorney. The appellant responded that "*the narrated facts are true*" and the trial court proceeded to convict and sentence the appellant.

Ms. Katabaro further submitted that the appellant signed the records to show he understood what was read to him. Ms. Katabaro added that the records of the typed proceedings of the District Court illustrated that the District Court followed the procedures of recording the plea of guilty as laid down under sections 228 (1) and (2) of the CPA and that the District Court was not based on emotion contrary to the law.

Ms. Katabaro argued that the District Court, before passing the sentence, asked the appellant if he had any past records. She added that the District Court also observed the mitigating factors as stated by the appellant and aggravating factors as provided by the prosecution for the District Court to consider. Ms. Katabaro further argued that as the appellant was a first offender, he was sentenced to 18 years, which is the minimum sentence for the offence of grave sexual abuse. Ms. Katabaro urged the Court to find the second, third and fifth grounds of appeal devoid of merit and dismiss the appeal.

The respondent opposed the fourth ground of appeal that the appellant was convicted and sentenced at the expense of a defective charge. Ms. Katabaro claimed that the law requires that a charge must have essential ingredients as provided under section 132 of the CPA. Ms. Katabaro further claimed that as required under section 132 of the CPA a charge will not be defective if it contains a statement of the offence, the relevant provision of the law and the particulars of the offence.

She further stated that the charge in relation to the offence that the appellant was convicted and sentenced in the District Court was correct and contained all the elements of a charge. Ms. Katabaro further stated that the charge disclosed that the appellant was charged with the offence of grave sexual abuse as provided under section 138C (1) (a) of the Penal Code. She added that section 138C (2) (a) of the Penal Code provided the punishment for the offence of grave sexual abuse.

Lastly, the learned State Attorney submitted that the appellant had no right to appeal because he pleaded guilty. Ms. Katabaro stated that section 360 (1) of the CPA restricts an appeal against conviction on a plea of guilty except as to the extent or legality of the sentence. She prayed for the appeal to be dismissed in its entirety.

In a brief rejoinder, the appellant stated that he did not commit the offence.

I have considered the District Court's records and the parties' arguments. The main issue is whether the plea of guilty made by the appellant was equivocal.

I agree with the learned State Attorney that, as a general rule, section 360 (1) of the CPA restricts an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence imposed. However, Ms. Katabaro stated that section 360 (1) of the CPA restricts an appeal and said there are exceptions to the general rule, but she did not state if this case meets the exceptions.

Section 360 (1) of the CPA 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".

Notwithstanding a conviction resulting from a plea of guilty, an appeal against a conviction on a plea of guilty may be entertained by an appellate court under certain circumstances. In ***Laurent Mpinga vs Republic*** [1983] TLR 166, the court held that:

"An accused person who has been convicted by any court of an offence on his own plea of guilty may appeal against the conviction to a higher court 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."*

The question is whether the appeal at hand meets the exception provided in the case of ***Laurent Mpinga vs Republic*** (supra). In my view, the second and third grounds of appeal before this court fall under item one listed above. The Court, therefore, has to see whether the appellant's plea was equivocal as complained or otherwise.

To properly determine the issues in this appeal, I must reproduce the charge and the appellant's plea of guilty as recorded by the District Court on 4 August 2023.

The statement of the offence provided that **"GRAVE SEXUAL ABUSE Contrary to section 138C (1) (a), 2 (a) of the Penal Code, Cap. 16 R.E 2022"**.

The particulars of the offence stated that the appellants *"on 9 July 2023 at Igalamo village within Rungwe District in Mbeya Region for sexual gratification by use of his hands touched the vagina of XYZ a girl of 20 years without her consent"*.

When the charge was read out and explained to the appellant before the trial court on 4 August 2023, he readily pleaded *"It is true"* after that the presiding Principal Resident Magistrate recorded the response as a plea of guilty. There and then, the prosecuting attorney narrated the facts of the case.

As explained by Ms. Katabaro, the process of taking and recording pleas has to conform with the provision of section 228 of the CPA. Section 228 of the CPA provides that:

"(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".

Having closely examined the record of the District Court, the appellant's plea was recorded as *"It is true"* in respect to the offence of grave sexual

abuse after the charge was read to him. The expression "*It is true*", without further clarification by the appellant, is deficient and unable to form the basis for conviction. The phrase is insufficient for the District Court to enter a plea of guilty as it is difficult to understand what the appellant meant.

In ***Safari Deemay v. Republic***, Criminal Appeal No. 269 of 2001, (Court of Appeal of Tanzania (CAT), unreported), the CAT held 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 "it is true."

The words "*It is True*" in this appeal are insufficient to have conclusively assured the District Court of an admission of the truth of the charge in terms of the requirements of section 228 (2) of the CPA.

In addition, The CAT in ***Richard s/o Lionga @ Simageni vs The Republic***, Criminal Appeal No. 14 of 2020 (CAT at Dar es Salaam, unreported) dealt with the conditions for a plea of guilty to be unequivocal and valid. In that case, the CAT held that for a plea of guilty to be unequivocal and therefore valid, it must pass the test that the CAT set in the case of ***Michael Adrian Chaki vs The Republic*** (supra), where it stated that:

"There cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:

- 1. The appellant must be arraigned on a proper charge. That is to say, the offence, section and particulars thereof must be properly framed and explicitly disclose the offence known to law;*
- 2. The court must satisfy itself without any doubt and must be clear in its mind that an accused fully apprehends what he is actually faced with, otherwise injustice may result;*
- 3. When the accused is called upon to plea 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 clear; and*

6. *Before or conviction on a plea of guilty is entered, the court must satisfy itself without any doubt trial the facts adduced disclose or establish all the elements of the offence charged."*

The above conditions reveal that there are two critical stages in the proceedings for accepting an unequivocal plea of guilty:

1. The accused must plead guilty to the charge as indicated by conditions 1, 2 and 3; and
2. The accused must plead guilty to the facts constituting the offence charged as provided under conditions 4 and 6.

The issue now is whether the narrated facts, which the appellant admitted to, satisfied conditions 4 and 6 in the case above. Briefly, it was narrated that *"on 9 July 2023 at evening time was at Igalamo village within Rungwe District in Mbeya Region. That the accused at the said time and place for his sexual gratification by use of his hands touched the vagina of XYZ a girl of 20 years of age without her consent. That the accused was arrested following the incidence and he was taken to the police station. On 4 August 2023 he was brought before the court to answer the charge he is now facing".*

The appellant's response to the narrated facts is reflected at page two (2) of the typed proceeding of the trial court. **"Accused:** *The narrated facts are true."*

In the case of ***Richard s/o Lionga @ Simageni vs The Republic***, Criminal Appeal No. 14 of 2020 (CAT at Dar es Salaam, unreported) the CAT made the following observation:

"Where the accused pleads guilty to the charge, before conviction, the law is that the prosecution must narrate the facts establishing the offence. That is, the prosecution must explain clearly and adequately the circumstances in which and how the offence was committed in specific and intelligible terms. The prosecution must detail the substance of the evidence and where applicable tender documentary and other exhibits, all meant to ensure that the accused clearly understand without any doubt, what is that he is alleged to have done wrong".

See also: ***Michael Adrian Chaki v The Republic***, (2021) TZCA 454 TANZLII and ***Adnan vs. The Republic***, (1973) EA 445.

It is my view that the facts narrated by the public prosecutor after the recording of the plea of guilty were merely a repetition of the charge and not facts. In my opinion, the facts narrated by the prosecution did not amplify the particulars of the offence in the charge, as such, not fulfilling all the conditions in ***Michael Adrian Chaki v The Republic*** (*supra*). In my view, that was unlawful, and the plea of guilty entered is equivocal. The equivocal plea vitiates the conviction and sentences passed against the appellant.

As a result, I allow the appeal and order that the matter be remitted to the District Court for trial before another magistrate.

In the meantime, the appellant shall remain detained in prison as a remandee pending his trial.

The right of appeal was explained.

DATED at MBEYA on this 9th day of November 2023.


A. A. SINDA
JUDGE

The Judgment is delivered on this 9th day of November 2023 in the presence of the appellant who appeared in person and Ms. Katabaro counsel for the respondent.




A. A. SINDA
JUDGE