

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
MBEYA SUB - REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 142 OF 2023

(Originating from the District Court of Mbarali at Rujewa, in Criminal Case No. 91 of 2023)

TONY s/o KULWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 20 December 2023 & 22 December 2023

SINDA, J.:

The appellant, Tony Kulwa, was charged with and convicted of an unnatural offence contrary to section 154 (1) (c) of the Penal Code (Cap 16 R.E 2022) (the **Penal Code**). The District Court of Mbarali at Rujewa (the **District Court**) convicted him on his own plea of guilty. He was sentenced to the term of thirty (30) years imprisonment.

The particulars of the offence are that on diverse dates between January 2023 to April 2023 at Chimala within Mbarali District in Mbeya Region, the

appellant did permit male persons to have carnal knowledge with him against the order of nature.

The appellant challenges his conviction and the corresponding sentence on 10 grounds whose thrust is as follows:

1. That the trial magistrate erred in law and in fact in convicting the appellant based on a defective charge sheet.
2. The trial magistrate erred in law and fact by convicting the appellant based on equivocal plea.
3. The trial magistrate erred in law and in facts by entering a plea of guilty while upon admitted fact the appellant could not in law have been convicted on the offence charged.
4. The trial magistrate erred in law and in fact by convicting the appellant on plea of guilty while the facts adduced do not disclose all elements of the offence.
5. The trial magistrate erred in law and fact by convicting the appellant on a plea of guilty without giving the appellant a chance to admit each and every fact as well as each element of the offence.

6. That the trial magistrate erred in law and fact by admitting collective exhibit PEI without reading them loud contrary to the law.
7. That the trial magistrate erred in law and fact by admitting a confession statement contrary to the law.
8. That the trial magistrate erred in law and fact by entering a plea of guilty while the said plea was entered out of mistake and misapprehension.
9. That the trial magistrate erred in law and fact by failing to consider defense during mitigation which will require change of plea
10. That the trial magistrate erred in law and fact during the finding state that the case was proved while it is not true.

At the hearing of the appeal on 20 December 2023, the appellant appeared in person and represented by Mr. Jebra Kambole, learned counsel. The respondent was represented by Mr. Augustino Magesa, State Attorney and Mr. George Ngwembe, State Attorney.

At first, Mr. Jebra Kambole prayed to withdraw grounds number 6, 7 and 9 in the petition of appeal.

Mr. Kambole submitted that generally according to section 360 (1) of the Criminal Procedure Act, Cap 20 R.E 2022 (the **CPA**). Appeal on plea of guilty is not allowed except as to the extent or legality of the sentence. He added that however, the Court on this notion has developed some exceptions which are referred to in several cases.

Mr. Kambole referred to the following cases to support his appeal **Michael Adrian Chaki vs The Republic**, Criminal Appeal No. 399 of 2019 (CAT at Dar es Salaam, unreported), **Ally Sanyiwa vs. The Republic**, Criminal Appeal No. 527 of 2017 (CAT at Arusha, unreported), **John Faya vs. The Republic**, Criminal Appeal no. 198 of 2007 (CAT at Mwanza, unreported), **Josephat James vs. The Republic**, Criminal Appeal No. 316 of 2010 (CAT at Arusha, unreported), **Kusekwa s/o Misinzo vs. The Republic**, Criminal Appeal No. 47 of 2020 (HC at Mwanza, Unreported) and **Selemani Mustafa Mtipa vs. The Republic**, Criminal Appeal No. 19 of 2023 (HC at Mtwara, unreported).

Mr. Kambole argued that the exception on appeal on plea of guilty was well explained in the case of **Michael Adrian Chaki vs The Republic**, (supra), on pages 7, 8 and 9 where the Court of Appeal (the **CAT**) explained four factors which may make a plea equivocal hence a plea of guilty may be challenged by way of an appeal. He further argued that in

the same case the Court went on to set six conditions to follow and which all of them must be met for a valid conviction to be found on an unequivocal plea.

Mr. Kambole further argued that those are the good principal to follow even in this matter. He stated that in the presence case the trial Magistrate when entered a plea of guilty against the appellant did not meet the said criteria or follow the mentioned conditions.

Submitting on the first ground of appeal that the charge is defective, Mr. Kambole contended that the charge framed is contrary to section 132 of the CPA which state that the charge must disclose the statement of the specific offence with which the accused person is charged together with such particulars as maybe necessary to give reasonable information as to the offence charged.

Mr. Kambole stated that the charge did not mention the victims or co-accused if any and that it could not give enough information for the accused to know the offence charged. The appellant was charged with permitting an unknown person to have carnal knowledge with him against the order of nature. The admission of facts lacks crucial details such as the names of the individuals involved. The appellant could not apprehend

what he was facing. He referred to ***Selemani Mustafa Mtipa vs The Republic*** (supra) to support his argument.

Turning to the second, third and fourth, fifth and eighth grounds of appeal that the plea was equivocal. Mr. Kambole contended that the plea must be recorded in the exact words in which the appellant pleads. However, in this case the accused plead in Swahili language was recorded in English language and apparently the trial court failed to adhere to section 228 of the CPA. He referred to ***Selemani Mustafa Mtipa vs The Republic*** (supra) where the court held that upon examination of the plea the trial court failed to adhere to section 228 (2) of the CPA that "*it is true*" while the accused said in Swahili "*ni kweli*".

He added that recording the actual plea was also insisted in ***John Faya vs The Republic*** (supra) where the Court of Appeal (the **CAT**) referred to the case of ***Hando s/o Akunaay vs The Republic*** 1951) Vol 18 EACA 307. The CAT directed that the actual words used by an accused in pleading guilty to the charge must be recorded verbatim.

Mr. Kambole further contended that the plea was unclear and unfinished because the District Court did not seek clarification with the appellant on who are these male persons the appellant permitted to have carnal

knowledge with him against the order of nature. Mr. Kambole stated that in cases which attract harsh punishment like life imprisonment the court must exercise with great care when entering a plea of guilty as explained in the case of ***Josephat James vs. The Republic*** (supra).

Mr. Kambole further submitted that the plea was unclear because the appellant said the facts are correct in page three (3) of the proceedings of the District Court (the **Proceedings**). The question to ask ourselves is whether the facts established constitute all elements of the offence. He submitted that the facts as narrated by the prosecutions did not disclose all elements of the offence because the facts did not disclose the names of the victims involved, how the appellant participated in the commission of the offence, the location where the offence was committed, the date, month and year of the commission of the offence.

Mr. Kambole further argued that the crucial of explaining the facts were elaborated in ***Michael Adrian Chaki vs The Republic*** (supra). He submitted these facts by missing those key elements even though the appellant said they are correct they did not establish the offence charged.

The learned advocate further contended that from the records the accused was not given a chance to admit each and every set of facts as

elaborated in the cases cited above. He added that the accused was supposed to admit each fact and not as a whole as explained ***Michael Adrian Mchaki vs. The Republic*** (supra).

Submitting on the tenth ground of appeal, Mr. Kambole maintained that the offence was not proved as stated by the trial magistrate on page 3 of the Proceedings. He urged the court to allow the appeal and the matter should start at trial de novo because the trial was not conducted.

The respondent opposed the first ground of appeal that the appellant was convicted and sentenced at the expense of a defective charge. Mr. Magesa claimed that the law requires that a charge must have essential ingredients as provided under section 132 of the CPA. Mr. Magesa 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.

He 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.

In connection with the second, the second, third and fourth, fifth and eighth grounds of appeal that the plea was equivocal. Mr. Magesa submitted that on page one of the Proceedings, it shows how the appellant pleaded guilty in accordance with section 228 of the CPA. He 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 unnatural offence.

Regarding that the plea was not recorded in exact words as per section 228 of the CPA. Mr. Ngwembe was of the opinion that the plea is written in English language as the Proceedings show in page 1 instead of Swahili language. The language of the court is English, as such it is not fatal to be written in English language. Section 13 of the Magistrate Court Act, Cap 11 R.E 2019 (the **MCA**) states that the language of the courts is both English and Swahili.

Concerning the issue, that plea was unclear. Mr. Ngwembe submitted that the plea was correct. The appellant counsel stated that the District Court should have stated who are the male persons. He submitted that under section 154 (1) (c) of the Penal Code there is no requirement to name such male persons. The offence was the appellant did permit male persons to have carnal knowledge with him against the order of nature.

He added in case the male persons where caught they would be charged as well.

Lastly Mr. Ngwembe submitted that it is true that the date, month and year were not mentioned but the place was mentioned i.e. Igumbilo area. He added that the fact that the date, month and year are not in the facts does not make the plea of guilty fatal. He prayed that the matter is referred back to the trail court for retrial.

In rejoinder, Mr. Kambole agreed with the state attorney that the matter should be referred back to the trail court for retrial. He further insisted that the charge must contain the name of the victims if not the reasons why the names are not there should be given so that the accused can understand the offence he is facing.

He further stated on a plea of guilty the court must record the exact words of the accused so that the appellate court can understand what transpired during the plea taking and the authorities cited are directing on that angle because the appellant was convicted for 30 years imprisonment.

Mr. Kambole further contended that it is necessary for the facts of the case to contain the date, month and year. The facts of the case must elaborate more than the charge. He added that the state attorney said

that the offence was committed at Igumbilo area. Mr. Kambole stated that the facts did not say so. The facts said the appellant was residing in Igumbilo, but the place where the offence was committed is silent. He urged the Court to allow the appeal and order retrial to another magistrate so that the proper plea will be taken.

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 Mr. Kambole 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.

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 The Republic*** (supra), 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, third and fourth, fifth and eighth 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 18 April 2023.

The statement of the offence provided that *"Unnatural Offence Contrary to section 154 (1) (c) of the Penal Code, Cap. 16 R.E 2022"*.

The particulars of the offence stated that Tony s/o Kulwa @Zuchu *"on diverse dates of January 2023 to April 2023 2023 at Chimala within Mbarali District in Mbeya Region did permit male persons to have carnal knowledge with you against the order of nature"*.

When the charge was read out and explained to the appellant before the District Court on 18 April 2023, he readily pleaded *"It is true I permitted male persons to have carnal knowledge with me against the order of nature"* after that the presiding Resident Magistrate recorded the response as a plea of guilty. There and then, the prosecuting attorney narrated the facts of the case.

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 I permitted male persons to have carnal knowledge with me against the order of nature"* in respect to the offence of unnatural offence after the charge was read to him. The appellant's plea, without further clarification by the appellant, of the names of the individuals involved, how he participated in the commission of the offence, the location where the offence was committed, and the date, month and the year of the commission of the offence, is inadequate to form the basis for conviction. The phrase is insufficient for the District Court to enter a plea of guilty as the omission renders the appellants plea equivocal.

In ***Safari Deemay v. Republic***, Criminal Appeal No. 269 of 2001, (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."

In addition, as argued by Mr. Kambole, the CAT in ***Michael Adrian Chaki vs The Republic*** (supra), 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 following test:

"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 " *The accused name is Tony s/o Kulwa @Zuchu, 18 years, Jita, Christian, Peasant, Resident of Igumbilo, the accused is charged with one offence of unnatural offence contrary to section 154 (1) (c) of the Penal Code [Cap 16 R.E 2022]. That on 12/04/2023 the Officer Commanding Station of Chimala Police Station ASP Petro Makala received an information that there was a male person at Chimala engaging himself in unnatural offence practices, he sent a Police Officer E. 6859 D/Surg. Charkes to Igumbilo area where the accused as, E. 6859 D/Surg Charles went to the area and found a male teenager who wore a gown and had plaited his hair, he asked him his name the accused introduced herself as Anna, he was arrested and sent to Chimala Police Station where he was*

interrogated and introduced himself as tony s/o Kulwa @Zuchu. On the same date the case was opened at Chimla Police station with number CHI/IR/IR/285/2023 with the offence of engaging in unnatural offence practices. Later the police officer E. 6859 D/Surg Charles interrogated the accused on the suspected offence, the accused admitted to engage himself in unnatural offence practices by allowing male persons to have carnal knowledge with him, after that the accused was sent to Rujewa police station for further legal actions. On 16/04/2023 police officers D/CPL Beatus and D/CPL Crista sent the accused to Mbarali District Hospital for examination which was conducted by Dr. Tressphord Sambi, the results showed that the accused was engaging himself in unnatural offence practices, then the accused was returned to Rujewa Police Station. Today on 18/04/2023 the accused has been brought before this court and has entered a plea of guilty to the charge”.

The appellant's response to the narrated facts is reflected at page three (3) of the Proceeding. **"Accused:** *The facts are correct."*

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***, (supra) and ***Adnan vs. The Republic***, (1973) EA 445.

I agree with Mr. Kambole that that from the records the accused was not given a chance to admit or denies each and every particular ingredient of the offence as elaborated in the cases of ***Michael Adrian Chaki v The Republic*** (supra). Also, the facts as narrated by the prosecutions did not disclose all elements of the offence because the facts did not disclose the names of the victims involved, how the appellants participated in the

commission of the offence, the location in which the offence was committed, the date, month and year of the commission of the offence.

It is my view that the facts narrated by the public prosecutor after the recording of the plea of guilty 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. I 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 22nd day of December 2023.

A. A. SINDA

JUDGE

A. A. Sinda

The Judgment is delivered on this 22nd day of December 2023 in the presence of the appellant who appeared in person and represented by Mr. Timoth Mwamakimbula and Mr. Magesa learned state attorney.



A. A. SINDA

JUDGE

A. A. Sinda