

IN THE HIGH COURT OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 36 OF 2023

(Arising from the judgment of the District Court of Korogwe at Korogwe in Criminal Case No.32 of 2023)

HASSAN SALEHE @ HAMISAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

K. R. MTEULE, J

5 December 2023 & 13 December 2023

In the District Court of Korogwe at Korogwe in **Criminal Case No.32 of 2023**, the Appellant together with two others were charged with an offence of unnatural offence, contrary to **Section 154 (10) (a) and (2) of the Penal Code [Cap 16 RE 2019]**. It was alleged that the accused persons one Zuberi Mohamed Amiri, Hassan Salehe who is the Appellant and Emmanuel Moses Mandi first, second and third accused persons respectively, on diverse dates between February 2023 to 18th April 2023 at Manga Mtindiro within the District of Korogwe in Tanga Region did have carnal knowledge against the order of nature to one AZ aged 16 years old.



The second accused person who is the Appellant herein was recorded to have pleaded guilty to the charge, hence he was convicted with the offence as charged and sentenced to serve life imprisonment in jail.

Dissatisfied with the decision, the Appellant preferred an appeal before this Court basing on the following grounds;

1. That, the learned trial Magistrate erred in law and in fact by convicting the Appellant basing on unequivocal plea of guilty.
2. That, the learned trial Magistrate erred in law and in fact by convicting the Appellant as the plea of guilty was unequivocally made.
3. That, the learned trial Magistrate erred in law and in fact by convicting the Appellant as the Appellant was not aware of what he was admitting and the consequences of admitting.
4. That, the case against the Appellant was not proved beyond reasonable doubt.

Hearing of the appeal was conducted by way of written submissions. The Appellant stood unrepresented while the respondent was represented by Jesca Thomas, State Attorney.

Cognisant of section 360 (1) of The Criminal Procedure Act [CAP 20 R.E 2022] which bars appeals from convictions based on pleas of guilty as a

general rule, the Respondent submitted that under certain circumstances an appeal may be entertained notwithstanding conviction on a plea of guilty. He referred to the case of **Laurance Mpinga v. Republic (1983) TLR 166 at page 168** which was also cited by the CAT in the case of **Ramadhani Haima V. Republic Criminal Appeal No. 213 of 2009 (unreported)**. The circumstances under which appeal on conviction based on a plea of guilty included the underlisted:-

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 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 to law; and
4. That, upon the admitted facts he could not in law have been convicted of the offence charged.

The appellant produced his plea in the trial court where he was recorded as having said; "Ni kweli nililawiti"

Referring to the case of **Msafiri Deemay vs Republic, Criminal Appeal No.269 of 2011 (unreported) (Arusha Registry)** the Appellant submitted that it was not enough for the appellant to say "Ni

kweli nililawiti". According to him, it was expected that the accused should have gone a step further to mention the name of the victim and in the facts the accused person was expected to explain as to why others were not responsible and not only to state "Ni kweli nimemlawiti hawa wengine waachieni hawahusiki"

The Appellant challenged the trial court's failure to ask him (then accused person) to elaborate in his own words as to what he was saying, "Ni kweli nililawiti". According to the Appellant, the plea of guilty was involuntarily made and he did not know the meaning of admitting nor the consequences of admitting as he was brain-washed by his co-accused into admitting the charge as they promised him if he would admit to the charge, they (the two co-accused) will be released and afterwards they would have helped him to finish his case but surprisingly, he was sentenced to serve life imprisonment. He emphasised that he did not admit to the charge by his free will neither did he know the consequences of admitting to the charge.

He therefore prayed for this Court to allow this appeal, quash the conviction, and set aside the sentence and set him at liberty.

In reply, Ms. Kaluse, SA, argued grounds No.1 to 3 altogether. She agreed with the Appellant's submission that the law as per **section 360 (1) of The Criminal Procedure Act [CAP 20 R.E 2022]** bars appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence. He also, subscribed to the position in Laurence Mpinga vs Republic [1983] TLR 166 which laid some of exceptions that conviction as listed by the appellant.

She disagreed with the appellant on a point that his plea was equivocal. She stated that according to at page 1 of the proceedings of the lower court, the charge was read over to all accused persons including the Appellant who was the second accused person and it was read in swahili language and explained to him whereby the Appellant pleaded as follows "Ni kweli nililawiti". She reminded the appellant that when the charge was read over to him the name of the victim was mentioned in the charge as "Amani Zuberi @ Mganda" even when the facts were read over to him as reflected under page 3 of the trial court proceedings the name of the victim was again mentioned as "Amani Zuberi @ Mganda" and the appellant again went on and pleaded as follows "Ni kweli nimemlawiti hawa wengine waachieni hawahusiki?"



Ms. Jesca Thomas referred to the case of **Joel Mwangambako V Republic, Criminal Appeal No. 516 Of 2017 Court of Appeal At Mbeya (Unreported) at page 11 and 12**, quoting the following words;

"...the appellant pleaded to the charge after it was read over and explained to him that "it is true I was found cultivating cannabis sativa plants." Also, we showed earlier that his response as to whether the narrated facts of the case were true or not was, "I have heard the facts of the case as given by the PP. That statement is truth."...Bearing that in mind and that the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said narrative, we find without demur that he was rightly convicted as his plea was unequivocal and unmistakable."

Jesca considered the appellant's response to the charge in the words "Ni kweli nililawiti" and the response to the facts "Ni kweli nimemlawiti hawa wengine waachieni hawahusiki" as constituting unequivocal plea of guilty. Ms. Jesca further referred to the words of the appellant during mitigation where he stated;



"I pray for my fellow to be released, they did not do it. I just wanted to test if it is true the boy is being sodomised". According to Jesca, all these are indication that the appellant entered a plea of guilty.

As to whether the Appellant was not aware of what he was admitting Ms. Jesca submitted that the trial court proceedings under page 1 clearly show that the charge was read in Kiswahili language which he understood and equally with the facts.

It is the submission of Ms. Jesca that the appellant's plea was an unequivocal plea because the plea was not imperfect neither was it ambiguous since the charge was read over to him in the language he understood, and the charge was also explained to him hence the appellant knew and was aware of what he was pleading to.

On the Appellant's argument of being brain-washed by his co-accused into admitting the charge, Ms. Jesca vehemently disputed this arguing that if there was any element of coercion or any other reason that made the appellant pleads to the charge, he would have addressed the same before the trial court magistrate.



She supported her argument with the case of **Mathias Barua V Republic Criminal Appeal No. 105 Of 2015, Court Of Appeal Of Tanzania At Tanga (Unreported)** at page 3.

On the last ground of this appeal that the case against the appellant was not proved beyond reasonable doubt, Ms. Jesca submitted that the Appellant has failed to address it in his submission. She argued that there was no need for prosecution to prove their case since the appellant pleaded guilty to the offence he was charged with and was convicted basing on his own unequivocal plea of guilty. She referred to the case of Joel Mwangambako v Republic (Supra) at page 13 it was held that;

"... Indeed, the applicable procedure when an accused person pleads guilty to a charged offence, as stated in numerous decisions of the Court, involves no production of proof of the charge but a procedure for ascertaining if the appellant's plea is unequivocal."

It is Jesca's submission that the Appellants' plea of guilty was unequivocal which was made voluntarily, and that the Appellant was aware of what he was admitting. She therefore prayed for this Court to

dismiss this appeal since it is baseless with no merit. She prayed for this court to uphold the decision of the trial court and sustain both conviction and sentence.

The Respondent did not rejoin. So this Ruling will be based on his submission in chief and on the reply submission by the respondent's state Attorney.

From the grounds of appeal, the main issue centres on **whether the appellant was convicted on equivocal plea of guilty**. It is undisputed facts that the Appellant was convicted on what was recorded as his own plea of guilty to the offence of unnatural offence contrary to **section 154 (10) (a) and (2) of the Penal Code [Cap 16 RE 2019]**. He is challenging the voluntariness of the plea of guilty. From the first three grounds of appeal, the appellant is claiming to have made equivocal plea of guilty, involuntary plea, and his unawareness of the substance and the consequences of what he was pleading. In his submission, he submitted that he was promised by the co-accused persons to plead guilty by exonerating them from the offence so that they can help him while at liberty. These assertions are vehemently disputed by the Respondent's State Attorney.



I have carefully considered the submissions of the parties and I have also deeply contemplated on the words of the accused person used while making his plea to the charge before the trial court and while admitting the facts of the case. My careful consideration is based on the authorities in **Msafiri Deemay Vs Republic, Criminal Appeal No.269 of 2011 (unreported) (Arusha Registry and Laurance Mpinga V. Republic(1983)TLR 166 at page 168** which was also cited by the CAT in the case of **RAMADHANI HAIMA.V.REPUBLIC criminal appeal No.213 of 2009 (unreported)**. In all these cases, careful consideration of plea of guilty was emphasised to ensure that accused persons, especially those unrepresented, should not be convicted on equivocal plea of guilty. Cognisant of this legal position, my careful scrutiny to the confession of the appellant noticed some unusual words in the appellant's plea. The word "nililawiti" which can unofficially translated as "I sodomised" appears to demand some more description to show who was sodomised. It was the duty of the magistrate to inquire further to understand what the appellant meant by stating "nililawiti". The word appears to be qualifying the plea by clarifying what he did. Since the appellant resorted to give clarification in his plea, the trial magistrate was to inquire to understand why such clarification and more description to ensure that the said clarification was not left



ambiguous. In my view, the word "nililawiti" was not descriptive sufficiently to iron out ambiguity as it is not under which circumstances the said act was done nor not known to whom was it done.

The ambiguous scenario was intensified by the words used to specifically admit with additional words demanding the co-accused persons to be released. The words "hawa wengine waachieni hawahusiki" needed to be investigated to know why was the accused person insisting on the release of the co-accused persons. Since in understanding the nature of plea of guilty whether it is equivocal or unequivocal, the important aspect is the intention of the accused person as to whether he understood the nature and consequences of his plea and whether he is making it voluntarily. The insistence on "hawa wengine waachiliwe" translated as "Let the others be released" in the plea of the appellant should have created doubt which should be investigated to know what was the motive behind such a demand. It was upon the trial magistrate to make that inquiry before convicting the accused person who is the instant appellant.

From the aforesaid, it is my view that the plea of guilty was equivocal and the accused person should not have been convicted on it. This

confirms the 1st, 2nd and the 3rd grounds of appeal to have merits and I see no reason to go to the details of the 4th ground as the first three grounds are sufficient to dispose of the matter.

Consequently, the Appeal is allowed. The conviction and sentence of Appellant in Criminal Case No.32 of 2023 from the District Court of Korogwe is hereby quashed and set aside. The matter is reverted to the trial court for the charge to be read over to the appellant who is the second accused person in the trial court and the plea be recorded afresh. It is so ordered.

Dated at Tanga this 13th day of December 2023



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**KATARINA REVOCATI MTEULE
JUDGE
13/12/2023**

Judgment delivered this 13th Day of December 2023 in the presence of Wilfred Mbilinyi, State Attorney for the Respondent and the Accused person present in person.



A handwritten signature in blue ink, appearing to be "KRM".

**KATARINA REVOCATI MTEULE
JUDGE
13/12/2023**