IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 2248 OF 2024

(Originating from Criminal Case No. 06 of 2024 of the Iramba District Court at Kiomboi)

JACKSON MUSSA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last Order: 16/05/2024

Date of Judgment: 30/05/2024

LONGOPA, J.:

The appellant, one **Jackson Mussa,** is appealing against the decision of the District Court of Iramba at Kiomboi which convicted and sentenced the appellant for the offence of rape C/S 130(1), (2)(e) and 131 (1) of the Penal Code, Cap 16 R.E. 2022.

The facts are that on 4th day of January 2024 at Kinyambuli village within Mkalama District in Singida Region, the appellant willfully and unlawfully did have sexual intercourse to the victim a girl aged 6 years old. On 18/01/2024 when the appellant arraigned in Court did plead guilty to the charge and admitted all the facts narrated by the prosecution hence conviction on his own admission of plea of guilty.

The appellant being dissatisfied by the whole of the decision of the District Court filed a petition of appeal against both conviction and sentence on three main grounds, namely:

> *1. That, the trial court erred in law and in fact by convicting and sentencing the appellant basing on equivocal and ambiguous plea of guilty.*
>
> *2. That, the learned trial Court Magistrate erred in law and in facts by convicting and sentencing the appellant without satisfying itself as the appellant fully comprehends what he was actually faced with.*
>
> *3. That the learned trial Court erred in law and in facts by convicting and sentencing the appellant as a result of misapprehension caused by difficult in understanding the courts language.*

It was the appellant's prayer that this Court be pleased to quash the decision of the trial court and set aside the sentence as the appellant did not commit the alleged felony.

The parties appeared before me on 16/05/2024 for viva voce hearing of the grounds of appeal. The appellant appeared in person thus fended for oneself while the respondent was represented by Mr. Yusuph Mapesa, learned State Attorney.

It was submission of the appellant that he was challenging the decision of the District Court as he did not commit any wrong, but he was

arrested and beaten. He argued that he has been sentenced to imprisonment for the offence he never committed.

According to appellant, he did not admit to the charges against him but surprisingly he was convicted and sentenced. It was his prayer to adopt all the three grounds of appeal contained in the petition of appeal to form part of his submission today. He prayed that this Court be pleased to allow the appeal and set aside the sentence.

On the other hand, respondent stated that it does not support the appeal. It was submitted that conviction and sentence of the appellant arose out of his own plea of guilty. The plea of guilty was unequivocal as per requirements of section 228 of the Criminal Procedure Act, Cap 20 R.E. 2022 and the case of **Samson Kayola and Another versus Republic** [1985] TLR 158 where the Court stated that where an offender admits to the charge and admits to facts of the case when read and explained then the Court shall proceed to convict and sentence the person.

The respondent reiterated that in the proceedings, pages 1 and 2 reveals that charge was read and explained to the appellant. The accused/ appellant admitted in the following words that: **"Ni kweli kabisa nilifanya mapenzi na huyo mtoto."** These words by the appellant indicates that the plea was unequivocal. Further, at page 3 of the proceedings, all the facts were read and explained to the appellant who admitted to the correctness of all the facts.

It was argued that for a plea of guilty to be unequivocal, the Court of Appeal in the case of **Jack Mahembega versus Republic**, Criminal Appeal No. 369 of 2020 at page 9 stated that there should be a proper charge, the accused understood the charge he is facing, the charge was read and explained together with all the ingredients of the offence, the facts of the case should disclose and establish all elements of the offence, the facts must be recorded and the court should be satisfy itself that all ingredients have been proved.

It was reiterated further that in **Laurence Mpinga v Republic** [1983] TLR 166, the Court stated that unequivocal plea of guilty bars the appellant to appeal against conviction except if the appeal is on sentence for the same being excessive. It was a respondent's prayer that the 1st and 2nd grounds of appeal should be dismissed for lack of merits.

In respect of third ground on failure to comprehend the language of the Court, it was submitted that the Court records reflect what transpired in court. The proceedings reveal that upon reading and explaining of the charge, the appellant responded in the language he understood. He knew the offence he was charged/ facing and the same was in the language he understood i.e. Kiswahili. The Court was satisfied that all ingredients existed, and it proceeded to convict the appellant.

It was respondent's submission that the law prohibits the appellant to appeal against conviction when he pleaded guilty except for excessive sentence imposed against such accused person. The charging section of

the Penal Code reveals that the penalty is stated to be thirty years. This is what is reflected in page 5 of the proceedings as the trial Court sentenced the accused person to 30 years imprisonment as per law. This sentence is very appropriate as the same does not contravene the law.

The case of **Masalu Ipilinga versus Republic**, Criminal Appeal No. 263 of 2019 was cited to reiterate that position taken by the Court of Appeal of Tanzania that Court records are assumed to reflect what transpired in Court. It was a prayer of the respondent that third ground lacked merits too this it was reiterated that this Court be pleased to dismiss the appeal and uphold both conviction and sentence.

Having heard rival submissions of the parties, it is pertinent for this Court to find out whether this appeal has merits. I have thoroughly perused the record of the trial Court regarding the matter. The available record entails the proceedings with all the exhibits tendered and judgment of the trial court.

On page 2 of the proceedings, it is revealed that the Charge was read over and explained to the accused person in a language understood and the appellant was asked to plea thereto. The accused person did respond in the following words: "***Ni kweli nilifanya mapenzi na huyo mtoto.***" The trial Court entered the same as a Plea of Guilty on the Charge. Simply, the plea was that "it is true that I had sexual intercourse with the child victim." The appellant admitted two main aspects: First, having sexual intercourse with the victim. Second, the victim is a child.

Similarly, on page 3 of the proceedings upon narration of all the facts of the case, the accused person was called upon to respondent to all the facts. It was the accused person's version of response that he admitted to all the whole narration. There was nothing contested by the appellant in the facts of the case narrated.

In the case of **Ramadhani Bakari Yusuph @ Dodo vs Republic** (Criminal Appeal 552 of 2021) [2023] TZCA 224 (5 May 2023) (TANZLII), at pages 8-9, the Court of Appeal of Tanzania guided that:

> *In **Abdallah Jumanne Kambangwa (supra)**, the Court stressed that, before convicting an accused on a plea of guilty, as is the case here, material facts of the case creating the elements of the charged offence have to be read over and, where need arises explained to the accused. Then, the trial court shall invite him to admit the facts narrated by the prosecution or deny them, as the case may be. This is so for the trial court to test and establish the equivocality or otherwise of the accused's plea. In **Baraka Lazaro v. R,** Criminal Appeal No. 24 of 2016 (unreported), the Court cited **Yonasan Egalu and 3 Others v. Rex** (1942) EACA 65 and held that: "Where a conviction proceeds on a plea of guilty... it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be **required to admit or deny every constituent and that what he says should be recorded in a form***

which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally. *" [Emphasis added]. See also: John Faya v. R, Criminal Appeal No. 198 of 2007 (unreported).*

From the record of the trial court, it is lucid that the appellant understood the content of the charge and its elements. The charge was read and explained to the appellant. It was upon understanding the contents of the charge the appellant stated categorically that the same was true that he had sexual intercourse with the child victim.

The plea and admission to the facts of the case was lucid without ambiguities. It was in my view an unequivocal plea of guilty. Thus, the trial court was right to convict and sentence the appellant for the offence of rape as he stood charged.

The elements of the offence of rape mainly are two. There must be penetration of the victim's vagina by a male sexual organ. The victim must be underage or there should be no consent if the victim is aged 18 years or more.

In **Godi Kasenegala vs Republic** (Criminal Appeal 10 of 2008) [2010] TZCA 166 (12 October 2010) (TANZLII), at page 12, the Court noted that:

Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of

eighteen years without her consent. Two, having sexual intercourse with a girl of the age of eighteen years and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt. This is the element of Penetration i.e. the penetration, even to the slightest degree, of the penis into the vagina: see, ***Masomi Kibusi v Republic,*** *Criminal Appeal No. 75 of 2005 (unreported).*

In the instant appeal as intimated above, the victim is child, thus the offence falls under category two of the rape i.e. having sexual intercourse with a girl of eighteen years or below with or without her consent. It is termed as statutory rape.

Further, in the case of **Masanyiwa Msolwa vs Republic** (Criminal Appeal 280 of 2018) [2022] TZCA 456 (21 July 2022) (TANZLII), pages 16-17, the Court of Appeal stated that:

Admittedly, for the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial court to believe his or her version of the facts on trial, must positively prove that a sexual organ of a male human being penetrated that of a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed; proof that the victim did not consent to the sexual act. See ***Athanas Ngomai v. R****, Criminal Appeal No. 57 of 2018 (unreported) and*

***Selemani Makumba v. R**, [2006] T.L.R. 379. In cases of rape of persons aged below 18 years, which is called statutory rape, a further condition on the part of the prosecution kicks in. Age must be proved. See **Alex Ndendya v. R**, Criminal Appeal No. 340 of 2017, **Winston Obeid v. R**, Criminal Appeal No. 23 of 2016, **Edson Simon Mwombeki v. R**, Criminal Appeal No. 94 of 2016 and **Alyoce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (all unreported).*

These elements exist in the instant appeal. Both the age of the victim and penetration of penis into a vagina of the victim existed. Exhibit PE 1 which is a Cautioned statement provides explicitly that:

*Nakumbuka mnamo tarehe 04.01.2024 saa 17:00 nilimchukua binamu yangu mtoto wa shangazi yangu H D/O I (names withheld) mwenye umri wa miaka 6, yupo darasa la awali shule ya Msingi Kinyambuli nikaenda naye kwenye shamba lililooteshwa mazao ya mahindi na maharagwe, nikamvulisha nguo zake alizokuwa amevaa ambazo ni suruali ya jeans ila hakuwa na chupi, pia alivaa gauni. Nilimlaza chini na kuanza kumbaka. **Nilipoingiza uume wangu ukeni kiliingia kichwa cha mboo tu lakini siyo uume wote, hivyo niliendelea kuingiza uume wangu taratibu ili nisije nikamuumiza akalia.... nilipoona sikojoi, niliamua kumvalisha***

nguo mtoto huyo, *na kurudi nyumbani japo tulikuwa karibu tu na maeneo ya nyumbani.*

The appellant explicitly stated that he inserted his penis on the victim child's vagina. This is even though appellant stated to have not ejaculated. It is the law that what is important is insertion of the male sexual organ into the female sexual organ. This confession tallies squarely with the plea that appellant did admit when the charge was read and explained. In the plea the appellant admitted that ni: **"Ni kweli nilifanya mapenzi na huyo mtoto."**

In the case of **Mathayo Ngalya @ Shabani V. R.**, Criminal Appeal No. 170 of 2006 (unreported) further elaborated the point by stating that:

> *The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the Penal Code Cap 16 as emended by the Sexual Offences (Special Provisions) Act 1998 provides;- "for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence." For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence.*

This element was also established by the Exhibit PE 2 which is PF 3 where a medical doctor who examined the victim child stated in Exhibit PE 2 that "I have examined above client, there is evidence of penile penetration. Hymen is perforated." According to the PF 3, the victim's vagina was penetrated by penis and the victim's hymen was perforated. Thus, the element of penetration was proved.

Further, the prosecution tendered birth certificate of the victim as Exhibit PE 2. It indicates that the victim child was born on 09/10/2017. As the offence was committed in January 2024, the victim had six years of age which falls within the statutory rape category. That being the case, it explicit that the child victim is below 18 years of age.

The prosecution established the case beyond reasonable doubt as all the elements necessary for proving that offence of rape was committed by the appellant against the victim child exists in the case as revealed from record of the trial Court.

To conclude the appeal, I am obliged to use the words of the Court of Appeal in **Nestory Nambamoja vs Director of Public Prosecutions** (Criminal Appeal No. 505 of 2019) [2024] TZCA 182 (15 March 2024) (TANZLII), at pages 5-6, the Court of Appeal stated that:

> *As we begin our deliberations, we find it fitting to emphasize the fact that generally,* ***the doors to appeal against the conviction of a person convicted of an offence on his own plea of guilt are blocked. In such circumstances, such a person can only appeal***

against the extent or legality of the sentence imposed as provided by section 360 (1) of the CPA *as held in* ***Luhinda Njemu v. Republic,*** *Criminal Appeal No. 300 of 2012 (unreported). However, under certain circumstances, an appeal may be entertained even though a person was convicted of the offence charged following a plea of guilty as set out in the decision of the High Court in the case of* ***Laurence Mpinga v. Republic*** *[1983] T.L.R. 166 which was subsequently approved by several decisions of the Court, including in cases of* ***Josephat James v. Republic****, Criminal Appeal No. 316 of 2010,* ***Ramadhani Haima v. Republic****, Criminal Appeal No. 213 of 2009,* ***Karlos Punda v. Republic****, Criminal Appeal No. 153 of 2005 and* ***Michael Adrian Chaki v. Republic****, Criminal Appeal No. 399 of 2019 (all unreported). According to these cases, those grounds are as follows:*

"1. That even taking into consideration the admitted facts, 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; 2. That the appellant pleaded guilty as a result of mistake or misapprehension; 3. That the charge laid at the appellant's door disclosed no offence known to law; and 4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged."

Having observed in the in the analysis that record reveals no mistake or misapprehension on the part of the appellant. The plea of guilty was unequivocal and the offence is well known in our laws of the land. The appellant did admit categorically to the offence without flicker of doubt. Thus, there is nothing to lament on part of the appellant regarding the conviction and sentence. Both conviction and sentence were in order and in accordance with legal requirements.

It is the finding of this Court that the appeal lacks merits for this Court to interfere with the findings both conviction and sentence of the appellant. I hereby dismiss the appeal in its entirety for being devoid of merits.

In the upshot, the conviction and sentence of the appellant was correct and in accordance with the law. I hereby uphold the decision of the District Court of Iramba at Kiomboi in Criminal Case No. 06 of 2024 against the appellant. The appeal stands dismissed.

It is so ordered.

DATED at **DODOMA** this 30th day of May 2024.

THE HIGH COURT OF TANZANIA

E.E. LONGOPA
JUDGE
30/05/2024