

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 78 OF 2023

(Arising from Criminal Case No. 55 of 2023 in the District Court of Singida at Singida)

BARNABAS IZIRAEI YOHANA APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

8th May & 5th June, 2024.

MUSOKWA, J:

The appellant was charged and thereafter convicted by the District Court of Singida (trial court) on his own plea of guilty to the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2022 (Penal Code). It was alleged that on 21st January, 2023 at Karakana area, Misuna Ward, Mungumaji Division, within Singida District and Region, the appellant had sexual intercourse with the victim aged 15 years who shall be referred to herein as XY. The victim was a standard five pupil at Minga Primary School. The appellant pleaded guilty to the charge and was sentenced to serve thirty (30) years imprisonment.

Before this court, the appellant is challenging both the conviction and sentence on the following grounds of appeal reproduced hereinafter verbatim: -

1. *That, I agreed the charge without knowing the substance of the charge.*
2. *That, I was caught by surprise by the trial court as nothing was clear when the charge was read, as I agreed my name and the address and nothing more.*
3. *That, before the trial court, I asked the trial magistrate to remind me about the charge I was facing, she refused and gave a chance the prosecution side to proceed, thus I was coerced to plea then conviction and sentence, something which is injustice.*
4. *That, I don't know the victim of the crime, I have never saw her before, and she was not in the court on the material date, thus I was convicted and sentenced for the mere story brought before the trial court.*
5. *That, the prosecution side narrated the whole story of rape before the trial court, without tendering the source of their story as evidence, for example my statement given under the procedure recognized by the law, or the victims statement and then marked as exhibit before the trial court, under such circumstance the trial court violated the principle of fair trial.*
6. *That, the prosecution side alleged that the appellant confessed when interviewed in police station, but he was not given a chance to call his relative or a lawyer, something which was clear violation of the law governing taking of such statement.*

- 7. That, the accused arrest was effected on 21/01/2023 at 02:00 PM and his statement which was not tendered before the trial court was taken at 22/01/2023, four hours had elapsed since his arrest, something which was injustice.*
- 8. That, the trial court erred in law and fact not being neutral ground for both sides, as it didn't give clear elaboration of the accused charge and make him aware of the consequences of a plea, instead it proceeded while accused remained in the huge darkness, something which was injustice.*
- 9. That, taking into consideration, the way the trial was conducted before the trial court, the accused was tricked within the court procedure, hence conviction and sentence entered was illegal.*

The hearing of this appeal was conducted on 8th May 2024, whereby the appellant appeared in person and the respondent enjoyed the legal services of Ms. Victoria Njau, learned state attorney. Upon the appellant waiving his right to begin, the respondent proceeded with the submission in response to the grounds of appeal.

With the leave of this court, Ms. Njau, argued the 1st, 2nd, 3rd and 8th grounds of appeal collectively. Similarly, the 6th and 7th grounds were argued collectively. However, the 4th, 5th and 9th grounds of appeal were argued separately.

The learned state attorney vehemently attacked the 1st, 2nd, 3rd and 8th grounds of appeal. Ms. Njau rebutted the allegation made by the appellant

that once the charge was read to him at the trial court, he did not comprehend the contents therein and that he only admitted to his personal particulars. The respondent's counsel averred that these grounds are unfounded and baseless. Ms. Njau referred to pages 1 and 2 of the typed trial proceedings. The records indicate that upon the charge being read over to the accused, the prosecution carefully explained the contents therein in a language that the appellant is familiar with. Ms. Njau stated that thereafter, the appellant admitted to the commission of the offence of rape which he was charged with. Further that, the appellant proceeded to explain in detail the manner in which he raped the victim and also explained the reason that instigated the commission of the offence. In light of the foregoing facts, it was the assertion of the respondent's counsel that the plea that was entered by the appellant was unequivocal.

The learned state attorney progressed with her submission by addressing another allegation raised by the appellant. The appellant alleged that the trial magistrate denied his request, that the exercise of reading over the charge to him be repeated. According to Ms. Njau, this claim was totally unfounded as it was not evidenced anywhere in the typed trial proceedings. Neither the request by the appellant nor a corresponding denial by the trial magistrate was recorded. The respondent's counsel

asserted that the appellant is attempting to impeach the court records. In support of her position, Ms. Njau preferred the case of **Alex Ndendya vs Republic**, Criminal Appeal No. 207 of 2018. In this case, the Court of Appeal of Tanzania (CAT) partly held at page 12, that the court records cannot be contested or easily altered.

On the 4th ground of appeal, the appellant avers that he does not know the victim and he has never seen her before. Further that she was required to appear before the court but failed to do so. In her response, Ms. Njau admitted that the victim was not before the trial court on the date the charge was read out to the accused. However, the learned state attorney argued that the victim was named in the charge as per pages 1 and 2 of the typed trial proceedings. Adding that, while the appellant had the opportunity to explain to the trial court that he did not know the victim, yet, the appellant, did not use the said opportunity. For that reason, the respondent's counsel argued that this ground is merely an afterthought.

Regarding the 5th ground of appeal, Ms. Njau made reference to page 4 of the typed trial proceedings and conceded that indeed the cautioned statement was not tendered in court. Despite this, however, there is no law that compels the prosecution to tender any documents in court once

an accused person has entered a plea of guilty. The state attorney cited the CAT case of **Paskali Kamara vs Republic**, Criminal Appeal No. 457 of 2018, specifically on pages 12 and 13 to support her point.

In this regard, the learned state attorney submitted that the 6th and 7th grounds of appeal which are centered on the manner in which the cautioned statement was procured, are irrelevant. Therefore, in response to the 6th and 7th grounds of appeal, Ms. Njau resorted to adopt the earlier submissions against the 5th ground of appeal.

Ms. Njau further contended that as provided under section 360 (1) of the Criminal Procedure Act, Cap. 20, R.E. 2022(CPA), no appeal shall be allowed upon a plea of guilty, unless if the said appeal is against the sentence only. Lastly, arguing on the 9th ground of appeal, Ms. Njau emphatically stated that the procedure that was followed at the trial court upon confession of the alleged offence by the appellant was flawless. The respondent's counsel asserted that the said procedure was in accordance with section 228 (1) and (2) of the CPA. Reiterating that this appeal is based upon an unequivocal plea of guilty, Ms. Njau prayed to maintain the decision of the trial court and dismissal order of the entire appeal for being devoid of merits.

The appellant was brief in his rejoinder whereby he restated the grounds of his appeal. In emphasis, the appellant challenged the procedure by which the cautioned statement was procured claiming that it was unlawful as he was denied the presence of a relative. The appellant reiterated his claim that the trial magistrate did not permit the charge to be read over to him for the second time, contrary to his request. Instead, the conviction was entered followed by the sentence. Further, he alleged that the victim was not brought before the trial court, contrary to his request. The appellant prayed that this court should consider his grounds of appeal and determine the matter in his favor.

Upon scrutiny of the petition of appeal and the records thereto, this court is called upon to determine whether the impugned plea of guilty was unequivocal. As a general rule, section 360 of the CPA bars an appeal against conviction that has been entered based on a plea of guilty, except as to the extent or legality of the sentence. The section provides as follows: -

*360.-(1) An appeal shall not 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 the case of **Richard Lionga @ Simageni vs Republic, Criminal**

Appeal No. 14 of 2020, at pages 7, 8 and 9, the CAT stated that: -

*"For a plea of guilty to be unequivocal and therefore valid, it must pass the test that this court set in the case of **Michael Adrian Chaki v Republic, Criminal Appeal No. 339 of 2017**(unreported). In that case, the court stated:*

"...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 the particulars thereof must be properly framed and must 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 comprehends what he is actually faced with, otherwise injustice may result.*
- 3. When the accused is called upon to plead 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 Criminal Procedure Act.*
- 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 (see *Akbarali Damji vs R.2 TLR 137* cited by the court in *Thuway Akoonay vs Republic (1987) T.L.R 92*);*
- 6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."*

Furthermore, the CAT partially held that: -

"Where an accused pleads guilty to the charge, before conviction, the law is that, the prosecution is duty bound and it must audibly and understandably narrate facts establishing the offence as alleged in the statement and particulars of 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 any other exhibits, all meant to ensure that the accused clearly understands without any doubt, what it is that he is alleged to have done wrong and contrary to law."

This court must ascertain whether the conditions specified in the case of **Richard Lionga** (supra) were met in the present matter. To that effect, a thorough perusal of the records of the trial court, is necessary. The charge, to which the appellant was charged, reads as follows: -

"CHARGE

STATEMENT OF OFFENCE

RAPE; Contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code Cap. 16 R.E. 2022.

PARTICULARS OF OFFENCE

BARNABA S/O IZIRAEI YOHANA on 21st day of January, 2023 at Karakana area, Misuna Ward, Mungumaji Division, within Singida District and Region. Did have sexual intercourse with one XY a girl of 15 years and a standard five pupil at Minga Primary School.

According to the trial court records above, the charge is clear and the appellant herein stands charged with the offence of statutory rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. In this regard, the appellant herein was arraigned on a proper charge that explicitly discloses an offence recognized by law. Furthermore, the records of the proceedings in the trial court indicate that the charge was read over to the appellant and the contents therein were explained to him before he was asked to plead thereto. The records read as follows:

"DATE: 11/5/2023

CORAM: R.C. MIGAN-SRM

PP: SONGORO/ANYIMI-KI-SA

ACCUSED: PRESENT

CC: HAWA

PP: This is the fresh charge; I pray to read it to the accused person.

COURT: The charge is read over and explained to the accused person with full language (sic) understood who are (sic) asked to plea thereto. [emphasis added]

Thereafter, the accused entered his plea of guilty. It is further on record, and as correctly observed by the counsel for the respondent, that the appellant upon entering his plea of guilty, proceeded to explain in great length the manner in which the offence was committed. Notably, among

the details provided by the appellant, unprompted, after entering his plea of guilty are recorded as follows: -

"It is true, I slept with her...she is my fiancée; I am planning to marry her...we did it at the ghetto"

Accused's Signature...signed 11/5/2023

Court: Accused entered a plea of guilty to the charge."

SGD: R.C. MIGAN - SRM

11/5/2023

Upon the appellant pleading guilty to the charged offence, appending his signature thereto, and the trial magistrate recording the plea of guilty, the state attorney prayed to read the facts of the case. The CAT in the case of **Richard Lionga** (supra), citing the six (6) conditions to be met for a plea of guilty to be considered unequivocal, stated as follows: -

"A careful scrutiny of the above criteria shows that an unequivocal plea of guilty is constituted of two crucial stages of pleading. That is, first, the accused must plead guilty to the charge as indicated at criterial 1, 2, 3 and 5 and, secondly, he must plead guilty to the facts constituting the offence charged as per criteria 4 and 6."

In examining the records of the trial court in the present matter, it is evident that the first crucial stage for a plea to be considered unequivocal was met. The appellant herein pleaded guilty to the proper charge. Following thereto, this court shall determine whether the second crucial

stage was also complied with. The appellant must further plead guilty to the facts constituting the offence charged.

The trial court records provide that the state attorney narrated the facts of the case and the appellant was required to plead to the facts constituting the charged offence. The relevant part of the proceedings will partially be reproduced herein under: -

"FACTS OF THE CASE

- 1. The accused's names and address are as reflected in the charge sheet.*
- 2. That, the accused is charged with the offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E 2022.*
- 3. That, on 21st of January, 2023 at Karakana area, Misuna Ward Mungumaji Division within the District and Region of Singida, the accused Barnaba s/o Izrael Yohana did have sexual intercourse with one **XY**, a girl of 15 years and a standard five pupil at Minga Primary School.*
- 4. On the above date, at about 07:00 am in the morning, the victim was sent to the shop by her mother to buy beans, she went to the shop but did not find beans. She decided to go to another shop. On the way back home, she met with the accused person and greeted her. He asked her if she is in a hurry but the victim said she is not in a rush. Then, Barnaba entered her to the house that is near the shop...then they left the area and she went home.*
- 9. That, as she arrived at home the victim found her mother and her aunty-Rosemary Daudi and interviewed her where has she been. She replied that, when she was going to the shop to buy beans, she met with Barnabas Izrael Yohana, and took her to the house that was near the shop...*

10. That, her parents told her to take them to that house and they went together to that house only to find the accused has already left.

11. That they headed to police station at Singida central, and they were issued a PF3 to go to the Hospital for medical examination...

12. That, on 21/1/2023, the accused was arrested and taken to police station whereas he was interviewed, and he confessed to have sexual intercourse with the victim.

13. That, today 21/5/2023, the accused was arraigned before this court, whereas charge was read over to him and he pleaded guilty to the charge.

That is all.

SGD: R.C. MIGAN – SRM
11/5/2023

COURT: Accused is asked if the facts are true and correct and whether he admits the same.

ACCUSED: Facts are correct and true and I admit all facts as narrated.

Signatures: -

Accused.....signed 11/5/2023

SA.....signed 11/5/2023.

COURT: Section 228(1) of CPA Cap. 20 R.E. 2022 C/with."

SGD: R.C. MIGAN – SRM
11/5/2023

From the records above, the facts of the case were narrated and the appellant admitted the facts constituting the charged offence to be correct and true. Accordingly, the second crucial stage in determining whether the plea of guilty was unequivocal was also complied with. Subsequently,

the appellant was convicted on his own plea of guilty and the sentence of thirty (30) years imprisonment was properly passed.

Based on the foregoing reasons and being guided by the aforementioned decision of the CAT, I am of the settled view that the plea entered by the appellant at the trial court was unequivocal. The appellant was, therefore, properly convicted and sentenced according to the law.

Consequently, and for the reasons stated herein, I hereby dismiss this appeal in its entirety for being devoid of merits.

It is so ordered.

Right of appeal explained.

DATED at DODOMA this 5th day of June, 2024



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

**I.D. MUSOKWA
JUDGE**

Judgment delivered in the presence of the appellant and in the presence of Ms. Patricia Mkina, learned state attorney representing the respondent.



A handwritten signature in black ink, identical to the one above, appearing to read "I.D. Musokwa".

**I.D. MUSOKWA
JUDGE**