IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 411 OF 2015

AMOSI LESILWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

dated the 22nd day of July, 2015
in
DC Criminal Appeal No. 46 of 2014

JUDGMENT OF THE COURT

12th &14th .April, 2016

JUMA, J.A.:

The main issue in this second appeal is whether the plea of guilty which the appellant made when the prosecution read out to him the charge of incest by males, was so unequivocal that section 360 (1) (a) of the Criminal Procedure Act, Cap. 20 (CPA) can be invoked to prohibit an appeal against the conviction that was entered following that plea of guilty.

contrary to section 158(1) of the Penal Code, Cap 16. It was alleged in the particulars of the offence that at about 1:00 a.m. on 16th June 2014 at Mkoka village in Kongwa District, he had unlawful sexual intercourse with his own daughter, a fourteen year old Hosiana d/o Lesilwa. When he was called upon to plead to the charge after the substance of the same had been explained to him, the appellant replied: - *"Ni kweli ninakiri kutoka moyoni sitaki kusumbua mahakama"* (Translated: **"It is true, from my own heart I do not want to waste the court's time"**). The trial magistrate (M.I. Senapee-RM) entered a plea of guilty against the appellant.

Thereupon the public prosecutor outlined the facts to show how he had gained entry into the room where his daughter was sleeping. She woke up from her sleep, only to find the appellant undressing her trousers. Her attempts to shout for help did not succeed because the appellant used his own hands to cover her mouth and threatened to kill her. After calming her down, the appellant undressed her and proceeded to have sexual intercourse with her.

The following morning, the victim went to her religious leader and reported what had happened to her the previous night. The matter was reported to the police at Zoissa Police Station. The victim was issued with the Police Form (PF3) and referred to Mkoka Health Centre for medical examination. The public prosecutor also narrated that the medical officer who examined the victim concluded that she had been carnally known. The public prosecutor tendered the medical examination report as exhibit P1.

At the conclusion of the narration of the facts the appellant was asked if he agreed with what had been outlined. He replied:-

> *"I admit my personal particulars, other facts expect (sic) that I did not tell my daughter that I kill her (sic) and also I did not cover her mouth by using my hands."*

On the basis of the admitted facts, the trial magistrate accordingly convicted the appellant on his own plea of guilty. After presenting his mitigation praying for leniency on account that he had six dependent children, the appellant was sentenced to serve thirty (30) years in prison.

The appellant felt aggrieved by his conviction and sentence. He filed a Petition of Appeal in the High Court of Tanzania at Dodoma (DC Criminal Appeal No. 46 of 2014). In his Petition of Appeal to the High Court, the appellant relied on seven grounds of appeal, which included the complaint that his plea before the trial court was "imperfect, ambiguous or unfinished" and should not have counted as a plea of guilty. Mohamed, J. dismissed his appeal after finding that the plea was unequivocal and the appellant could under the law, only appeal against the legality of the sentence but not about his conviction. The appellant was not deterred by the provisions of the law prohibiting appeals against convictions predicated on pleas of guilty.

Before us, the appellant has in this second appeal preferred five grounds of complaints to contest the dismissal of his first appeal by the High Court. First, he complains that the first appellate Judge ignored the grounds of his appeal and was instead carried away by submissions which the State Attorney presented on behalf of the respondent. Secondly, the appellant complains that there is no evidence on the record showing his confessing the crime. He blamed the first appellate judge for failing to seek

the guidance of the case of **Mpinga vs. R.** (1983) TLR 166 where the High Court had set the criteria for an unequivocal plea of guilty. He finally reserved specific complaint to the trial District Court of Kongwa for failing to make him to understand the ingredients of the offence of incest by males.

At the hearing of this appeal 12/4/2016, the appellant was not represented by learned counsel. Fending for himself, he submitted that his plea was incomplete and should not have attracted the plea of guilty, his subsequent conviction and the sentence of thirty years imprisonment. He blamed the trial magistrate for failing to observe the injuries that had been inflicted on him to force his guilty plea. He also blamed the trial magistrate for taking his plea very late in the afternoon when he was hungry. The appellant bemoaned that he was not a free agent when he answered his plea.

The respondent Republic was represented by Ms. Chivanenda Luwongo learned State Attorney. She took the position to oppose this appeal, submitting that the appeal offends section 360 (1) of the CPA which directs that:

360.-(1) 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.

Expounding why she thought that the appellant had pleaded guilty before the trial court and his appeal violates section 360 (1) of the CPA, the learned State Attorney referred us to page 1 of the record where the particulars of the offence of incest by males were read out and accused the appellant of wilfully and unlawfully having carnal knowledge of HOSIANA d/o Lesilwa a child of 14 years who to his knowledge is his own daughter.

The learned State Attorney next referred us to page 2 of the record where on 20/6/2014 when the charge was read out to the appellant and he was asked to plead, his response was: *"...ni kweli ninakiri kutoka moyoni sitaki kusumbua Mahakama"* (already translated as: It is true, I sincerely admit and I do not wish to waste the court's time). This response, the learned State Attorney pointed out, is unequivocal plea of guilty.

Ms Luwongo went further and submitted that apart from pleading guilty, the appellant accepted the facts narrated by the prosecution to be

true. These facts, she added, disclosed the essential ingredients of the offence of incest by males. She finally drew our attention to the appellant's mitigation where again the appellant admitted the offence when he stated:

> *"...Your honour, it is my first time to commit this offence. I pray for the mercy of the court. Your honour, I have six children who depend on me. I promise that I will not repeat committing this offence."*

While wrapping up her contention that section 360 (1) of the CPA prohibits the appellant from appealing following his unequivocal plea of guilty during his trial, Ms. Luwongo placed reliance in the judgment of the Court in **Kalos Punda vs. R**, Criminal Appeal No. 153 of 2005 (unreported). The learned State Attorney submitted that this instant appeal before us has not satisfied the four criteria mentioned in **Kalos Punda vs. R** (supra) to open the way for this Court on second appeal to interfere with the appellant's plea of guilty. The four criteria, which originate from **Laurent Mpinga vs. R.** [1983] TLR 166, are:

> *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.*

In urging us not to interfere with the sentence, Ms Luwongo submitted that in terms of section 158 (1) of the Penal Code under which the appellant was charged and convicted for an offence involving a complainant of under the age of eighteen; the minimum sentence is thirty years imprisonment, which the appellant received.

From submissions of the appellant and those of the learned State Attorney, the first issue for our determination is whether the trial and the first appellate courts were correct to conclude that appellant was properly convicted on his unequivocal plea of guilty. This issue can best be addressed if we revert back to the statement of the offence and the facts of the case, specifically if they disclose the essential ingredients of the

offence of incest by males as provided for under section 158 (1) (a) of the Penal Code which states:

> *158.-(1) Any male person who **has prohibited sexual intercourse with a female person**, who **is to his knowledge his granddaughter**, daughter, sister or mother, commits the offence of incest, and is liable on conviction–*
>
> *(a) **if the female is of the age of less than eighteen** years, to imprisonment for a term of **not less than thirty years**;* [Emphasis added].

It seems from above provisions, a prohibited sexual intercourse with a female person and the knowledge that this female person is one's daughter; are essential ingredients making up section 158 (1) of the Penal Code. Where that female person is under the age of eighteen, clause (a) of sub- section (1) prescribes a minimum sentence of thirty years in prison.

We think Ms. Luwongo is correct to submit that the facts which were read out to the appellant and which he accepted with slight variation, disclosed to the appellant the essential ingredients of incest by males. The facts from page 3 to 5 disclosed to the appellant how he entered into the

room where his daughter was sleeping. When his daughter woke up and began to shout, he warned her with death should she make further noise. He undressed her trousers, and proceeded to have sexual intercourse with his daughter. When he was finished, he left for his own room.

The appellant also heard the facts on how the medical officer who examined the complainant found that she had been raped. That medical examination report was tendered by the public prosecutor as exhibit P1. It was not objected to by the appellant. Exhibit P1 disclosed that the complainant had reported to the medical officer that she had been raped by her own father.

Of greater significance, when the appellant was asked whether he disputed the facts narrated by the prosecution, he did not dispute the facts which disclosed the essential ingredients of the offence of incest by male. He replied:

> *"**Accused:** I admit my personal particulars, other facts except that I did not tell my daughter that I will kill her and also I did not cover her mouth by using my hands."*

We do not think that the belated claim that he had been beaten up and starved before he pleaded guilty is acceptable at this stage. He had the opportunities before the trial court and also during his first appeal to raise these concerns. There is no doubt in our minds that the appellant made his unequivocal plea of guilty after understanding the essential ingredients of the offence of incest by males as disclosed in the charge sheet and narrated in the facts of the case facing him. The learned State Attorney is correct to point out that even in his mitigation; the appellant was still so remorse that he readily admitted that he committed the offence.

Our inevitable conclusion is that the plea of guilty was neither based on misapprehension of the ingredients of section 158 (1) of the Penal Code nor misunderstanding of the facts read out to the appellant.

We are in full agreement with Ms. Chivanenda Luwongo, learned State Attorney that the plea, facts presented before trial court and the appellant's mitigation are all consistent with an unequivocal plea of guilty. Again, the learned State Attorney is right to submit that the sentence of

thirty years imprisonment which the trial court imposed is the mandatory minimum as prescribed by section 158 (1) of the Penal Code.

For the reasons we have outlined, the appeal against conviction and sentence is hereby dismissed in its entirety.

DATED at **DODOMA** this 13th day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL