

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: WAMBALI, J.A., KENTE, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 248 OF 2021

ATHUMAN ABDUL..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the Judgment of the Resident Magistrates' Court of Bukoba
at Bukoba with Extended Jurisdiction)**

(Luambano, SRM (Ext. Jur.))

dated the 4th day of March, 2021

in

Criminal Appeal No. 32 of 2021

JUDGMENT OF THE COURT

6th & 14th December 2023

KHAMIS, J.A.:

Athuman Abdul, the appellant herein, was convicted on his own plea of guilty by the District Court of Biharamulo for the offence of attempted rape contrary to section 132 (1) (2) (a) of the Penal Code, Cap 16 R.E 2002 [the Penal Code] and was sentenced to serve thirty years imprisonment. The particulars of the offence were that, on the 4th day of May, 2019 at 17.45 hours at Maendeleo Street within Biharamulo District, Kagera Region, he attempted to commit rape to one EDK by threatening her for sexual purpose.

The appellant was aggrieved by the conviction and the sentence and filed an appeal in the High Court of Tanzania at Bukoba. However, the appeal was transferred to the Resident Magistrates' Court of Bukoba at Bukoba (with Extended Jurisdiction) and assigned to Luambano, SRM (Ext. Jur.) who found the charge sufficiently proved and henceforth dismissed the appeal, upheld the conviction and the sentence.

In his self-crafted memorandum of appeal, the appellant raised three grounds of appeal on the basis of which he moved this Court to quash the conviction and set aside the sentence. The said grounds can be rephrased as hereunder:

1. That the trial court erred in law and fact to convict the appellant on equivocal plea of guilty as it never consisted the facts narrated by the prosecution and the procedural requirements prescribed by section 194 (1) (2) and (3) of the Criminal Procedure Act, Cap 20 R.E 2002 [now R.E 2022] were not complied with as the appellant was misled and prejudiced intentionally before he was asked to plead to the charge.
2. That the trial court's judgment was void for failure to specify the contravened sections of the Penal Code on conviction thus being

contrary to section 312 (2) of the Criminal Procedure Act, Cap 20 R.E 2002 [now R.E 2022].

3. That, the trial court and the first appellate court erred in law in relying on the appellant's plea of guilty whereas the burden of proof lies with the prosecution as provided in sections 111 and 112 of the Evidence Act, Cap 6 R.E 2002 [now R.E 2022].

At the hearing of this appeal on 6th day of December, 2023 the appellant appeared in person, unrepresented. The respondent Republic, enjoyed the legal services of Ms. Judith Mwakyusa, learned Senior State Attorney, assisted by Messrs. Noah Mwakisisile and Elias Subi, learned State Attorneys.

When given a floor to address the Court, the appellant adopted his grounds of appeal and prayed that the same be considered in determination of the appeal. He briefly contended that, the first appellate court erred to confirm the conviction by the trial court as the incident allegedly occurred when he was under the influence of alcohol and the trial magistrate neither warned nor explained to him the consequences of pleading guilty to the charge.

The appellant asserted that, immediately after the arrest, he was coerced to record a cautioned statement at the police station whose

contents were fabricated on him by the recording officer. He was also intimidated by policemen to make a plea of guilty.

Mr. Mwakisisile prefaced his submissions with the general statements that, the appellant pleaded guilty to the charge of attempted rape. That, the plea was taken in a language well known to him and that, when the facts constituting the ingredients of the offence were read over to him, he confirmed them to be true and correct. Thereafter, he addressed the grounds of appeal in seriatim.

On the first ground of appeal, the learned counsel contended that, the plea was unequivocal as it exhausted two essential steps, namely: a plea of guilty to the charge, and; admission of the facts to be correct and accurate. He referred us to page 4 of the record of appeal where the appellant was recorded saying: "*ni kweli nilitaka kumbaka EDK*". He also drew our attention to page 5 of the record of appeal in which the appellant stated: "*Yes, I admit all facts are true and correct.*"

The learned State Attorney asserted that, since the appellant unequivocally pleaded guilty to the charge, he was not entitled to challenge it by way of appeal as he did. Further, he asserted that he could only challenge the legality or severity of the sentence.

Relying on **Laurence Mpinga v. Republic** [1983] T.L.R 166 and **Jack Mahembega v. Republic**, Criminal Appeal No. 369 of 2020 [2023] TZCA 17821 [10 November, 2023, TANZLII], the learned counsel contended that, the appellant's case did not fall within the exceptions to the general rule which allow appeals arising out of conviction on own plea of guilty.

Mr. Mwakisisile submitted that, the charge sheet against the appellant established the offence of attempted rape as per section 132 (1), (2) (a) of the Penal Code, and that, a statement of the offence presented in the trial court established all ingredients of the said offence. However, on questioning by the Court, the learned counsel conceded that, the charge omitted to show the age and gender of the victim. He also conceded that, the trial court's proceedings did not show the name of the witness who produced a cautioned statement allegedly recorded by the appellant and received in evidence as exhibit P1.

On the second ground of appeal, the learned counsel admitted that on conviction, the trial magistrate omitted to specify the provision under which the appellant was convicted. That notwithstanding, he contended that the omission was not fatal and did not prejudice the appellant.

On the third ground of appeal, Mr. Mwakisisile strongly submitted that the appellant's act of pleading guilty to the charge sufficiently discharged the prosecution of the duty to prove the case. In the upshot, he invited us to find the appeal devoid of merits and dismiss it in its entirety.

When probed by the Court, Mr. Mwakisisile conceded that, on comparison of the facts which were read over in the trial court and the cautioned statement allegedly recorded by the appellant at the police station, there is a contradiction in that, the cautioned statement omitted to mention factual information which featured in the presented facts, namely: name of the victim was not disclosed; one Sweet Omary who allegedly showed up at the scene and stopped the appellant from raping the victim was not referred to; and; age of the victim was not hinted at.

In rejoinder, the appellant reiterated his earlier submissions and insisted that policemen forced him to record a statement and to plead guilty to the charge for the offence that he did not commit. He explained that, policemen threatened him with torture if he acted contrary to their instructions.

Having heard the parties' submissions and considered the grounds of appeal, we are of the view that the main ground for determination in

this appeal is whether the appellant's plea of guilty was unequivocal. The appellant contended that, he was coerced into recording the cautioned statement, threatened to offer a plea of guilty and the trial magistrate did not make him understand the charge he was facing and therefore the plea of equivocal.

It is trite law that an accused person should not be taken to admit an offence unless he pleads guilty to it in undoubted terms with realisation of the essential elements of the offence charged. The manner of recording pleas was laid down by this Court in **Khalid Athuman v. Republic** [2006] T.L.R. 79, thus:

"The courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she really understands the charge that has been laid at his/her door, discloses the offence known under the law and that he/she has no defence to it. A plea of guilty having been recorded a court may entertain an appeal against conviction if it appears that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged."

In **Samson Kitundu v. Republic**, Criminal Appeal No. 195 of 2005 [unreported], this Court cautioned that on consideration of the presumption of innocence on the accused in criminal cases, convictions should not be hurried by forcing a plea of guilty.

Addressing an avenue of appeal in cases of this nature, this Court in **Josephat James v. Republic**, Criminal Appeal No. 316 of 2010 [unreported] held that:

"1.) We are fully aware that notwithstanding a conviction resulting from a plea of guilty, under certain circumstances an appeal arising thereof, may be entertained by an appellate court. These would include situations where the appellant did not intend to admit he was guilty of it [Rex v Forde [1923] K.B 400 at 403]. Equally it may be entertained where:

- a) 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.*
- b) An appellant pleaded guilty as a result of mistake or misapprehension*
- c) The charge levelled against the appellant disclosed no offence known to law; and*

- d) Upon admitted facts, the appellant could not in law have been convicted of the offence charged. (See **Lawrent Mpinga v. the Republic** [1983] T.L.R. 166 (HC) cited with approval in **Ramadhan Haima's case** (supra).*
- 2) An appeal may also be entertained where an appellant was pressured into pleading guilty or the plea of guilty was procured as a result of a threat or promise offered by a person in authority in consideration of pleading guilty. Each case will depend on its own set of circumstances and facts."*

In the present case, the record of appeal shows that, the charge was read over and explained to the appellant in the language well known to him and in response, he made a plea stating that: "*Ni kweli nilitaka kumbaka EDK*". Thereafter, the facts read over to him by the public prosecutor stated as follows:

"Accused person Athuman Abdul stands charged for attempt rape contrary to section 132(1), (2) (a) of the Penal Code, Cap 16, Volume I R.E 2002. Accused person is charged that on 4/5/2019 at about 17.45 hours at Maendeleo Street in Biharamulo District in Kagera Region, the victim EDK was coming from the church to her home and

while on the way she met with the accused person who pulled her to the bush so as to rape her. While doing that one person called Sweet Omary passed there and heard the voice of that victim asking for help so as not to be raped by the accused person. The said person followed the accused and found the victim already undressed by the accused person so as to be raped and the accused started to run away. The said person accompanied by other citizen ran after the accused person and managed to arrest him. They took him up to the Police Station where he was interrogated and put into lock up.

When the accused person was interrogated, he admitted to attempt raping the said victim. On 6/5/2019 the accused person was brought to court and charged accordingly where he pleaded guilty."

The trial court's proceedings further show that, immediately after the facts were read over to him, the appellant replied that: *"Yes, I admit all facts are true and correct"*. Henceforth the trial magistrate convicted him on his own plea of guilty which was followed by the appellant's mitigation, thus:

"I pray for leniency because I was coming from drinking alcohol."

Prior to the admission of the facts as true and correct, the public prosecutor prayed to tender a cautioned statement allegedly recorded by the appellant which was accordingly admitted as exhibit P1.

We have scanned the record of appeal and found some discrepancies in the manner of arriving at the appellant's conviction as partly conceded by the learned State Attorney. In addition, we noted that, the facts read over by the public prosecutor were matchless to the contents of exhibit P1.

Whereas the victim's name was mentioned in the facts as EDK, the cautioned statement shows she was a stranger to the appellant and her name was unknown; the facts manifest that, upon meeting the victim, the appellant pulled her to a nearby bush and attempted to rape. However, the narration is negated by the cautioned statement which unveiled that, the appellant seduced the lady to engage in love making; besides, the facts displayed that, when the appellant was about to rape the victim, one Sweet Omary showed up and frustrated the mission. In contrast, the cautioned statement reveals that, when the appellant was about to penetrate the victim, a group of people flocked the scene and made it impossible for him to proceed; the facts arrayed that, when intervened, the appellant attempted to run away but was arrested by Sweet Omary

and the group. Contrarily, the cautioned statement set forth that, immediately after the incident, the appellant successfully ran to Gokero area where he was arrested by a policeman.

Apart from these contradictions which cast doubts on the strength of the prosecution case, the charge sheet and the facts presented by the prosecution did not disclose the age and or gender of the victim. We are of the view that, these missing particulars were very crucial because section 132 (2) (a) of the Penal Code under which the appellant was charged, makes it an offence for a person who attempts to rape a girl or a woman.

Having regard to the foregoing, we are of the view that, the charge and the facts presented did not constitute the offence of attempted rape under which the appellant was charged. In view of the seriousness of that offence, we are convinced that, the trial court's proceedings were prejudicial to the appellant leading to miscarriage of justice and thus the plea made was equivocal.

We wish to emphasize that in a plea of guilty the procedure adopted is for ascertaining if the plea is unequivocal. In this regard, the trial court must ensure that the facts given establish the offence charged. Thus where the facts given do not establish the offence charged, a plea of guilty

cannot then be accepted. The facts must be consistent with what is stated in a complaint/charge. In **Josephat James v. Republic** [supra] the Court stated, among others that:

"It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged. The duty of the prosecution is to state the facts which establish the offence with which the accused person is charged. The statement of facts by the prosecution serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence, and it gives the magistrate the basic material to assess sentence."

In the circumstances, a plea of guilty entered by the appellant was made without him appreciating the nature of the offence charged. So far as this case is concerned, the charge omitted to particularise crucial details creating the offence under section 132 (2) (a) of the Penal Code under which the appellant was charged and the facts narrated by the prosecution were contradictory to the charge, henceforth incapable of sustaining a plea of guilty.

Accordingly, we allow the appeal and consequently, nullify the proceedings of the trial and first appellate courts, quash the conviction and set aside the sentence.

Ordinarily, after nullifying the proceedings of the two lower courts, quashing the conviction and setting aside the sentence, we would have directed the file in Criminal Case No. 76 of 2019 to be remitted to the trial court for plea taking. However, considering the serious irregularities which caused a failure of justice, we refrain to take that direction.

In the result, we order for immediate release of the appellant unless otherwise lawfully held.

DATED at BUKOBA this 13th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in presence of the appellant in person and Mr. Kanisius Ndunguru, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.


A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL