IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWAMBEGELE, J.A., RUMANYIKA, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 150 OF 2023

SAMWEL MANYWELE @ MUHAMI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Agatho, J)

dated 8th day of October, 2021

in

Criminal Appeal No. 36 of 2019

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JUDGMENT OF THE COURT

30th April & 7th May, 2024

ISMAIL, J.A.:

Samwel Manywele @ Muhami, the appellant herein, was arraigned in the Resident Magistrate's Court of Tanga at Tanga (the trial court) facing a single count of rape, contrary to the provisions of sections 130 (1), (2) and 131 (1) of the Penal Code. Particulars of the offence inform that the offence with which the appellant was charged allegedly occurred on 14th February, 2019, at Magodi Village within Mkinga District in Tanga Region. The victim of the incident was ABC (in pseudonym).

On a plea of guilty, the appellant was convicted of rape, consequent to which a custodial sentence of 30 years was imposed on him. His attempt to overturn the conviction and the sentence fell to naughty as his appeal to the High Court was found to bear no fruits. He has now scaled his grievances a ladder up to this Court.

A brief account of what constitutes the case against the appellant is gleaned from the facts of the case which were read to him on 6th March, 2019, and they appear at pages 4 and 5 of the record of appeal. They are to the effect that, on 14th April, 2019, at around 12:00 noon, the appellant was at Magodi Village in Mkinga District, Tanga Region, herding cows. He then saw the victim who was on her way to draw water from a well. He trailed her and, at some point along the way, he felled the victim before he tied her hands using a piece of cloth (kitenge) that he grabbed from the victim. The appellant then demanded that he be treated to sexual intercourse with the victim. The victim resisted and cried for help. The resistance did very little to daunt the appellant. Sensing that the victim's noisy cry would spell danger, the appellant covered the victim's mouth while stripping her of her under pant. He then proceeded to enter her until he was done. Midway through the act, a Mr. Ally Shimu came and found the appellant with the victim. The appellant left the victim on the ground as he scampered for safety in the nearby forest.

Ally Shimu helped the victim and led her to the Ward Chairman for Magodi Ward by the names of George Hassan, the latter of whom advised her to go to Mtandikeni police station where she was issued with Police Form No. 3 (PF3) for her medical examination. The appellant was allegedly arrested on 15th February, 2019, at Mazingi area within Mkinga District. He was conveyed to Mtandikeni police station where he was interrogated before he was arraigned in court on 6th March, 2019.

The Resident Magistrate's Court of Tanga at Tanga before which the appellant was arraigned on a rape charge convicted the appellant on his own plea of guilty. He, in consequence, was handed a lengthy custodial sentence of 30 years, as highlighted above.

The conviction and sentence passed by the trial court rattled the appellant, hence his decision to institute an appeal to the High Court of Tanzania at Tanga. The petition of appeal instituted in the High Court had three grounds of appeal, mainly punching holes in the plea of guilty that he contended was not unequivocal. He was also critical of the adequacy of the particulars of the charge sheet. The appeal in the High Court was argued by way of written submissions. While dismissing the appeal, the High Court (Agatho, J) made the following findings:

> *"The trial Court proceedings (on pages 1-3) are clear as the accused (appellant) understood what he was*

admitting because the charge was read over and explained to him.... There is nothing technical about rape. The accused took his penis and inserted in the [vagina] of the victim without her consent. When the charge was read over and explained to him he admitted to have raped the victim. Again, when the facts were read over the appellant admitted the facts that he raped the victim without her consent."

In the end, the learned Judge found nothing unblemished in the trial court's decision.

The High Court's findings bemused the appellant. Feeling hard done by the decision, he preferred an appeal to this Court. On 8th May, 2023, he filed a two-point memorandum of appeal, followed by a supplementary memorandum of appeal which was filed on 24th April, 2024. The latter too had two grounds of appeal. The consolidated grounds of appeal are as paraphrased hereunder:

1. *That, the High Court erred in law by dismissing the appellant without a thorough evaluation of the petition of appeal;*

2. *That, the 1st appellate Court's Judge failed to take notice that PF3 which would prove penetration and a cautioned statement containing the appellant's confession were not tendered to prove the offence of rape;*

3. *That, the High Court Judge erred in law by failing to realize that the charge sheet was not read in a language that the appellant understood; and*

4. *That, the 1st appellate court erred in law and in fact by upholding the appellant's conviction without considering that the trial magistrate did not cite the provisions under which the conviction was grounded.*

When the matter came for hearing, the appellant appeared in person, unrepresented, while the respondent was represented by Ms. Petrida Muta, learned State Attorney. After a brief address by the Court, the appellant opted to go by the memoranda of appeals he earlier filed and to let the respondent's counsel address the Court in response. He reserved the right to rejoin to the submissions by the respondent.

Ms. Muta began by informing the Court that she was supporting the appeal. She changed her stance midway after probing by the Court and argued that the conviction passed against the appellant was predicated on an unequivocal plea of guilty. Ms. Muta argued that, from the trial court's proceedings, it was clear that the appellant pleaded guilty to the charge and facts of the case. Seeing nothing flawed in the conduct of the proceeding during trial, the learned counsel urged the Court to uphold the conviction and the attendant sentence.

For his part, the appellant argued the appeal with no particular reference to the grounds of appeal. On the cautioned statement and the PF3, the appellant argued that the same were not tendered and, in their absence, it could not be said that he committed the offence.

Regarding the plea, the argument by the appellant was that the same was not unequivocal, and that he did not plead guilty to the offence. He contended that the language used when the charge and facts of the case were read was not understandable to him, and that he only came to know that he had been convicted and sentenced when he was in prison.

The appellant introduced a new aspect that relates to his age. His contention was that he was at the age of 17 years when he was arraigned in court. He refuted the allegation that he was 20 years old at the time. Overall, he prayed that his appeal be allowed and that he be set free.

From these brief submissions by the rival parties, the broad question for our determination is whether the conviction and sentence, both of which were founded on the appellant's plea of guilty, were properly grounded. As we delve into the heart of this broad issue, it is apposite to restate what is otherwise an established legal principle. It is to the effect that appeals against convictions on a plea of guilty are generally outlawed. They can, in limited circumstances, be entertained

where, upon admitted facts, the accused person could not, in law, have been convicted on the offence with which he is charged; or where the appeal is against the sentence imposed on him. This is a codified position stipulated in section 360 (1) of the Criminal Procedure Act (CPA) and it states as follows:

> *"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."*

The clear postulation of the law is that, whereas sentences are amenable to appeal with a minimum of legal impediment, appeals on convictions are a rarity which should only be entertained in fitting circumstances. These circumstances were propounded in the landmark decision of the High Court in **Laurence Mpinga v. Republic** [1983] TLR 166. Subsequent decisions of this Court have acknowledged this principle and built upon it. They include **Kalos Punda v. Republic**, Criminal Appeal No. 153 of 2005; and **Msafiri Mganga v. Republic**, Criminal Appeal No. 57 of 2012 (both unreported). In the latter case, we held as follows:

> *"... one of the grounds which may justify the Court to entertain an appeal based on a plea of guilty is*

where it may be successfully established that 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. This goes to insist therefore that ***in order to convict on a plea of guilty, the court must in the first place be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal."*** [Emphasis supplied].

The quoted excerpts breed a narrow question which is as to whether the plea of guilty from which the conviction, the subject of the instant appeal, was predicated upon facts that are incapable of supporting the conviction. A review of the proceedings of the trial court, dated 6th March, 2019, the date on which the appellant was called upon to make a plea on the charges levelled against him, bring out what we consider to be an answer to this question. For ease of reference, we think it is useful to reproduce the substance of the said proceedings, as hereunder:

"Date: 06/03/2019
R.E. Mkisi – PRM

Pros: Ms. Mwaihesya – S/A
Accused: Present
C/C: Jonathan

Pros: This is fresh case, pray to read to accused person.

Court: *Prayer granted.*

Accused plea*: True, I mate with victim on the way and raped her.*

Pros: *Investigation incomplete. Pray Mention date.*

Court*:* *Accused person entered plea of guilty.*

R.E. Mkisi – PRM

06/03/2019

Pros: *Pray to read facts of this case.*

Court: *Prayer granted.*

FACTS:

Names and address of accused as in the charge sheet. Accused person one Samwel S/O Manywele @ Muhami aged 20 years charged with offence of Rape C/S 120 (1) (2) (a) and 131 (1) of the Penal Code Cap 16 R.e. 2002.

Accused on 14/02/2019 at Magodi Village within Mkinga District and Region of Tanga while he was herding cows at 12.00 hour he suddenly saw victim Mwantumu Ally going to fetch water from a well.

He followed her back and dropped her down then grabbed piece of cloth which Mwantumu wore (Kitenge), then he tied her 2 hands and told her that he wanted vagina. Victim alarmed for help, its when accused covered her mouth while removing her inner cloth (tight) then raped her without her consent until he pissed. While continuing raping the victim, one man by the names, Ally Shimu did arrive and saw accused raping victim. Suddenly accused when saw Ally Shimu he left the victim down and ran inside the forest.

Ally Shimu helped victim to move from place of scene up to the Ward chairman by names George Hassan where they advised victim to go to Mtandikeni Police Station to report, where she was given PF3 to go to Hospital. On 15/02/2019 around 05.00 hours was arresting from Mazingi area in Mkinga District while hearding cows and was taken to Mtandikeni Police Station.

He interrogated and admitted to Rape victim without consent on 14/02/2019.

That's all.

R.E. Mkisi – PRM

06/03/2019

Court to accused person: *I admit all of the facts of the case that I raped without her consent.*

R.E. Mkisi – PRM

06/03/2019

Court Findings: *After accused entered plea of guilty. This court hereby finds accused person Samwel S/O Manywele @ Muhami guilty on his own plea of guilty and he is hereby convicted.*

R.E. Mkisi – PRM

06/03/2019

Previous record of accused: Nil

R.E. Mkisi – PRM

06/03/2019

Mitigation: Nil (I have nothing).

R.E. Mkisi – PRM

06/03/2019

SENTENCE:

After accused person Samwel S/O Manywele @ Muhami entered plea of guilty. Due to his own plea of guilty and admission of the facts of his case. This court is hereby punishing the accused person as first offender who had nothing to mitigate before this court and he knows and believe what he committed to be the offence herein court. This court is hereby punishing the accused to serve in jail for a term of thirthly (30) yeas as the law provided from the offence he charged with.

It is so ordered.

Mkisi – PRM

06/03/2019"

Regard must be had to the fact that, conduct of the proceedings during plea taking is governed by the provisions of section 228 of the CPA. Of significance to the instant matter is sub-section 2 which obligates the trial court to record the accused admission of the truthfulness of the charge in as nearly as possible the words that the accused used, followed by conviction and passage of a corresponding sentence or an order against him. The statutory position set out in section 228 (2) of the CPA was given an elaborate interpretation by the defunct Court of Appeal for East Africa in the persuasive decision in **Adan v. Republic** [1973] EA 445, which originated from Kenya. In the said decision, Spry V.P., reasoned as follows:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as*

possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record the charge of plea to "not guilty" and proceed to hold a trial. ***If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.*** *"* [Emphasis is supplied].

From the foregoing, the following question arises: was this procedure followed in the proceedings that culminated in the appellant's conviction? The appellant's gravamen of complaint is that the charge and the facts that came after his plea of guilty were read in Kiswahili language that he was not proficient in, and that vital evidence such as the PF3 and the cautioned statement were not tendered to prove the appellant's blemished responsibility. In criminal law, the burden of establishing the

accused person's culpability lies with the prosecution and this involves proof of existence of all ingredients of the offence with which the accused is charged. This must be evident from the facts that are read out to the accused person and the obvious logic for imposition of this requirement is that facts of a case stand as a substitute of formal evidence which would be adduced were the accused to plead not guilty to the charge. This position was articulated in **Josephat James v. Republic**, Criminal Appeal No. 316 of 2010 (unreported) wherein the Court held:

> *"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 is that of the prosecution to state the facts which establish the offence with which an 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."*

Our reading of the proceedings for the day, as reproduced above, do not give any different impression than the fact that the charge and the facts of the case were read out and explained in Kiswahili and that the

appellant got the sense of what the charges were about. This is reflected in the style of the plea which gives a firm impression that he knew the nature of what faced him. The words *"I admit all fact [s] of the case that I raped [the] victim without her consent"* demonstrate the extent of appreciation of the accusation that he faced. They revealed the ingredients of the offence the appellant was accused of. From this, it cannot be said that there was any semblance of equivocation in the appellant's plea of guilty. In our considered view, this is a plea which was bred out of a thorough understanding of the nature of the accusation levelled against him, and it conformed to the requirements of section 228 (1) and (2) of the CPA. It is in view thereof, that we find no basis in the appellant's consternation and we reject it out of hand.

On the failure to attach a copy of the PF3 and the appellant's cautioned statement, our considered view is that these were not of any decisive importance where the appellant pleaded guilty to the offence and admitted to the facts of the case. The admission to the facts of the case was what any court would require as a foundation for conviction and sentence. The PF3 which would prove penetration would be important if the appellant pleaded not guilty and the question of penetration was a subject of contention. Similarly, the cautioned statement would have an impact in the proceedings had the appellant pleaded not guilty and

evidence of confession was required to prove his culpable role. We consider these documents to be of trifling significance in the establishment of the appellant's guilt conduct. We, therefore, find the appellant's complaint hollow and untenable.

The appellant has raised the question of his age at the time of his arraignment. His argument was that he was of a minority age and not 20 years of age as alleged by the prosecution. This contention was not raised during trial or at the 1st appellate stage. Knowing its importance in determining the fitting sentence, the same ought to have been raised before these subordinate forums and not at this stage where consideration for decision is mainly based on what is in the record of appeal. We consider the appellant's contention nothing better than an afterthought. It is not part of the court record whose authenticity and sanctity are something that must be guarded. This stance was accentuated in **Selemani Juma Masala v. Sylivester Paul Mosha & Another**, Civil Reference No. 13 of 2018 (unreported) in which it was held:

> *"... we must emphasize that the Court record cannot be impeached easily as it is taken to be authentic until the contrary is proved. For this stance, see our previous decisions in* ***Iddy Salum @ Fredy v. Republic****, Criminal Appeal No. 192 of*

2018 (unreported), ***Haldan Sudi v. Abieza Chichili*** *[1998] TLR 527 cited in* ***Ex-D.8656 CPL Senga Idd Nyembo & 7 Others v. Republic,*** *Criminal Appeal No. 16 of 2018 (unreported)."*

In **Haldan Sudi** (supra) the Court quoted the decision in **Shabir F.A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported) in the latter of which we observed as follows:

> *"There is always the presumption that a court record accurately represents what happened."*

There is one more grievance by the appellant. This touches on the failure by the trial court to cite provisions of the law under which the conviction was founded. We do not think that this a contention which should detain us. The charge sheet that founded the trial proceedings quoted section 131 (1) of the Penal Code as one of the charging provisions. This provision prescribes the penalty that may be imposed on an accused person convicted of rape. This sufficed to inform the appellant the basis for imposition of the custodial term imposed on him. In any case, we venture to think, the appellant was not prejudiced by the omission to cite the provision in the sentence. Flowing from this reality, the appellant's contention is, in our view, destitute of merit.

Overall, we are convinced that the appellant has not made out anything that can convince us to deviate from the provisions of section

360 (1) of the CPA. We hold that the impugned judgment is simply a decision against which an appeal cannot be taken. In sum, we find the appeal barren of fruit and, accordingly, we dismiss it.

DATED at **TANGA** this 7th day of May, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2024 in the presence of the Appellant in person – linked via Video facility from Maweni Prison and Mr. Paul Kusekwa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL