IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 154 OF 2017

ROBERT N. MBWILO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court with Extended Jurisdiction at Mbeya)

(Herbert, SRM)

Dated 4th day of May, 2016

in

Criminal Appeal No. 12 of 2016

JUDGMENT OF THE COURT

28th October & 4th November, 2019

MKUYE, J.A.:

In the District Court of Rungwe District at Tukuyu, the appellant Robert Nicodem Mbwilo was convicted on his own plea of guilty of attempted rape contrary to section 132(1) of the Penal Code, Cap 16 R.E. 2002. It was alleged by the prosecution that on 14th day of December, 2015 at Isyonje village within Rungwe District in Mbeya Region, the

appellant did attempt to rape one Mbipa Malemba while she was asleep by undressing her skintight and underwear.

When the charge was read over and explained to the accused the appellant pleaded:

"it is true"

The presiding Resident Magistrate A.V. Tarimo entered a plea of guilty against the appellant. Thereafter the public prosecutor outlined the facts constituting the offence as hereunder:

> "1. *That the name and the address of the accused is as per charge sheet.*
> 2. *That on 14/12/2015 at about 1:00 am at Isyonje did attempt to rape one Mbipa Malemba a woman of 50 years old who was sleeping at her home.*
> 3. *That the accused started to undress the woman by putting off her skintight as well as underpants.*
> 4. *That the accused entered in the house of Mbipa Malemba where she was sleeping and he used force and succeeded to undress the complainant.*

5. *That the complainant managed to push the accused and started to yowl and the neighbours reached there and rescued her and they managed to arrest the accused while he was inside the victim's house.*
6. *Accused was sent to police station and when interrogated he admitted to do the act and his caution statement was taken.*

Exhibits

1. *Caution statement.*
2. *Torn underpant/skintight."*

Then the Court recorded:

> *"Facts admitted: 1,2,3,4,5,6.*
> *Facts denied – Nil"*

Thereafter the appellant is recorded as saying:

> ***"Accused:*** *I admit all the facts read to me and pray for forgiveness as it is a devil which led me to do that unknowingly".*

And thereafter, the appellant prosecutor and the court appended their signatures.

After the accused had admitted as correct the facts read over to him the prosecutor prayed to produce his cautioned statement and the underpant/skintight of the victim and upon there being no objection from the appellant, the same were admitted as Exh P1 and P2 respectively.

The trial court then proceeded to find the appellant guilty and convicted him accordingly. For clarity, we leave the record of appeal to speak for itself:

> *"Court: Having conducted a simple perusal upon the brief facts outlined by the prosecutor towards the accused which he admitted them, as well as accused's own words that he regrets for what he did as it is an evil soul which forced him to do that, together with the exhibits of cautioned statement and torn skintight which were well admitted by court; I am therefore of the settled decision that the accused person is guilty basing on his own plea of guilty. I therefore convict him as he is charged."*

In his mitigation, the appellant prayed for a lenient sentence promising not to repeat in committing the offence; and on account that he

was a first offender. However, the trial court sentenced him to the mandatory punishment imposed by law, which is thirty (30) years' imprisonment.

His appeal to the High Court at Mbeya vide Criminal Appeal No. 121 of 2016 (Herbert, SRM. Ext Jur.) was dismissed in its entirety. Dissatisfied with the dismissal of his appeal, the appellant has lodged this appeal to this Court on seven (7) grounds of appeal most of which are new. However, this Court, times without number, has held that it will not look at such grounds which were not decided by the lower courts. For instance, in the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported), we held that:

> *"It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

See also **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006; and **Abeid Mponzi v. Republic,** Criminal Appeal No. 476 of 2016 (both unreported).

Having gone through the grounds of appeal we are satisfied that grounds no 2,3,4 and 7 are new which this Court cannot entertain for lack of jurisdiction. We shall, therefore, deal with the remaining grounds of appeal Nos. 1, 4 and 6 hinging on the following aspects:

1) *The appellant's plea was equivocal as it was influenced by fear after having stayed in custody for a couple of days.*
2) *The sentence meted out to the appellant was excessive.*

At the hearing of the appeal, the appellant appeared in person, unrepresented; whereas the respondent Republic had the services of Mr. Ofmedy Mtenga, learned State Attorney.

The appellant adopted the remaining grounds of appeal and opted to let the learned State Attorney submit first and reserved his right to rejoin later, if need would arise.

Mr. Mtenga took off by supporting both the conviction and sentence meted out to the appellant. Responding generally to the grounds of appeal, he contended that the appellant, on 18/12/2015, when the charge was read over to him he said *"it is true".* And, when the facts constituting the offence were read over to him as shown at page 3 of the record of appeal, he again admitted that they were all correct and he infact prayed for leniency claiming that it was the devil which caused him to do so. Mr. Mtenga contended further that even when the cautioned statement and the underpant/skintight were tendered in court, he did not object for them to be admitted in evidence while praying for leniency. For that matter, the learned State Attorney argued, since the appellant pleaded guilty to the charge and admitted the facts thereof to be correct, he was properly convicted by the trial court on his own plea of guilty. In support of his

argument, he referred us to the case of **Laurence Mpinga v. Republic** [1983] TLR 166.

As regards the reason advanced by the appellant that he was influenced by the devil to commit the offence, Mr. Mtenga urged us to find such claim baseless. He refered us to the case of **Kalos Punda v. Republic,** Criminal Appeal No. 153 of 2005 p. 4-8 (unreported) wherein words *"it is not my will but I was forced by the devil"* were found to be baseless.

On the complaint that the sentence was excessive, Mr. Mtenga argued that the applicant ought not to appeal against sentence in the nature of the case. He said, the punishment meted out to him was proper as provided for under section 132(1) of the Penal Code, Cap 16 RE 2002. On prompting by the Court on the propriety of the sentence on such offence which is similar to the offence of rape, he was of the view that the sentence of 30 years' imprisonment on the offence of attempted rape was on the higher side as the appellant did not actually rape the victim.

In rejoinder, the appellant insisted for lenience as all happened due to the influence of the devil. He urged us to allow the appeal and release him from custody.

We wish to take off by restating the general principles of law that, before convicting the accused on his own plea of guilty, the trial court has to explain the ingredients of the offence he is facing, and what he says must be recorded in the form which will satisfy the court that the said accused well understood the charge and pleaded guilty to each of element thereof unequivocally.- See **Ambakisye Ngaranus Kaporinyi v. Republic,** Criminal Appeal No. 111 of 2010, (unreported). It is also the law in our jurisdiction that, no appeal shall lie from a conviction on a plea of guilty except on the legality of sentence as per section 360(1) of the Criminal Procedure Act, Cap 20 RE 2002 which 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".*

In the case of **Laurence Mpinga** (supra) which was cited with approval in the case of **Said Mswaje @ Mwanalushu,** Criminal Appeal No. 464 of 2007 (unreported), the High Court (Samatta, J as he then was), stated as hereunder:

> *"(i) An appeal against conviction based on an unequivocal plea of guilty cannot be sustained, although an appeal against sentence may stand.*
>
> *(ii) an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against conviction to a higher Court on any of the following grounds:*
>
> *1) That even taking into consideration the admitted facts, his 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 plea of guilty was a result of mistake or misapprehension;*

3) That the charge laid at his door discloses no offence known to law; and

4) That upon the admitted facts he could not in law have been convicted of the offence charged".

In this case, looking at the record of appeal, there is no doubt that when the charge was read over to the appellant by the trial court and upon been required to enter a plea, the appellant stated that *"it is true"* and the court entered a plea of guilty. When the facts constituting the offence were read over to him, he equally agreed them to be correct as it can be gleaned at page 4 of the record of appeal where he admitted all the facts which were read over to him and he went on praying for forgiveness under the pretext that it was the devil which caused him to do that.

Apart from that, the appellant did not object to the admission into evidence of the cautioned statement in which he admitted the commission of the offence as well as the underpants/skintight of the victim which were admitted as Exhibits P1 and P2 respectively. In addition, in his mitigation,

he prayed for a lenient punishment with a promise of not repeating the same. We do not agree with the appellant's complaint that his plea was influenced by fear for being in custody for a number of days. All these factors show that the appellant well understood the charge and the ingredients of the offence and therefore, consistent with unequivocal plea of guilty.

In the case of **Amos Lesilwa v. Republic,** Criminal Appeal No.411 of 2015 (unreported) the Court, when confronted with a situation where the appellant showed contrition during mitigation stated as follows:-

> *"There is no doubt in our mind that the appellant made 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".*

Even in this case, we entertain no doubt that the appellant's remorsefulness he had shown during his mitigation confirmed his unequivocal plea to the offence he had committed. Looking at the totality of events leading to the appellant's entering a plea of guilty there is no doubt that the appellant's plea was unequivocal as was rightly found by the trial court as well as the first appellate court.

As regards the sentence of 30 years' imprisonment that it was excessive, we equally agree with Mr. Mtenga that, that was the proper and minimum punishment in terms of section 132(1) and (2) of the Penal Code which provides for a punishment of 30 years' imprisonment to a person who attempts to commit rape.

However, the issue of excessiveness of the punishment in the offence of attempted rape seem to be raised not for the first time. It has been raised on several occasions. Way back in 2005, the Court in the case of **Kalos Punda** (supra) considered a similar issue and observed as hereunder:

"It appears to us that the Sexual Offence Special Provisions Act, 1998 does not provide for lesser sentences for attempted offences, in this case, attempted rape contrary to section 132(1) of the Penal Code to differentiate attempted rape from the offence of rape contrary to section 130 and 131 of the Penal Code. In practice, however, attempted offences ordinarily carry a less severe penalty as is the case with the offence of murder contrary to section 196 which carries a capital punishment of death but offences lesser than murder such as manslaughter, and, or attempted murder have lighter punishments"

Also in the case of **Edwin Thobias Paul v. Republic,** Criminal Appeal No. 130 of 2017 (unreported) the Court considered the similar issue and stated as follows:

"... we have felt imperative to pronounce ourselves that after carefully weighing the ingredients of the offence of attempted rape, particularly taking into consideration that something will have prevented the offender from implementing

his plan, we think that the minimum sentence of 30 years imprisonment is on the higher side. This is predominantly so when we take into account the fact that in all other offences of attempts, the sentences are fairly low. We have in mind offences like attempted murder which has no mandatory minimum sentence; attempted robbery which attracts a lower sentence than that of the offence of robbery; and several other such offences. It is astounding therefore, to find that the offence under consideration carries the same punishment like a fully fledged offence of rape in respect of victims over 18 years. ***Influenced by this situation, we are suggesting that maybe it is time the law makers considered this point so that they can do something about this aspect with a view to reducing it."***

[Emphasis added].

Indeed, we reiterate what we said in the above cited cases that perhaps it is now high time the relevant authorities took action on the issue which seems to recur in this Court. That notwithstanding, the sentence

meted out to the appellant being statutory, we cannot interfere with it at the moment.

That said and done, we find that the appeal lacks merit. We accordingly dismiss it in its entirety.

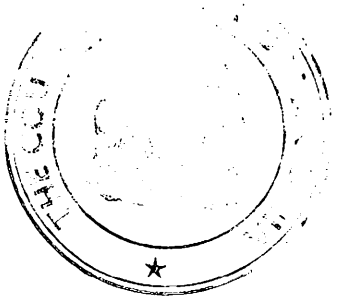
DATED at **MBEYA** this 2nd day of November, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 4th day of November 2019 in the presence of the appellant in person, unrepresented and Mr. John Kabegula learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL