IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 470 OF 2017

MOHAMED CLAVERY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Nyerere, J.)

dated the 9th day of July , 2010
in
DC Criminal Appeal No. 130 of 2009

.....

JUDGMENT OF THE COURT

3rd & 12th June, 2020

MWAMBEGELE, J.A.:

The appellant Mohamed Clavery was convicted on his own plea of guilty by the District Court of Kilombero sitting at Ifakara of the offence of rape of a girl aged fifteen years who, to protect her modesty, we shall simply refer to her as "BL" or "the victim". The particulars of the offence and the facts narrated to the appellant after he pleaded guilty had it that on 11.01.2009 at 14:00 hours at Utengule Village in the Kilombero District of Morogoro Region, he raped the said BL; a girl aged fifteen years.

Having accepted the facts of the case as correct, the District Court found him guilty, convicted him on his own plea of guilty and proceeded to hand him the mandatory minimum sentence of thirty years in jail. His first appeal to the High Court (Nyerere, J.) was barren of fruit, hence this second appeal. The appeal is predicated on four grounds of complaint which may be paraphrased as: **one**, the charge sheet was defective; **two**, the plea was equivocal; **three**, the facts constituting the elements of the offence were not explained to the appellant in his own language; and, **last**, the appellant did not admit to have raped BL and that he did not admit to each and every fact.

The appeal was heard vide a Video Conference; the Virtual Court hosted by the Judiciary of Tanzania during which the appellant appeared in person, unrepresented at Ukonga Prison and Mses. Aziza Mhina and Dhamiri Masinde, learned State Attorneys, appeared in the Courtroom joining forces to represent the respondent Republic.

When we gave the floor to the appellant to address the Court on his grounds of appeal, he, in essence, did not have anything useful to add, for he repeated the grounds as they appear in the memorandum of appeal.

However, we could sieve the following arguments from his submissions. In respect of the first ground, he submitted that the charge sheet was defective in that it mentioned section 130 (1) 2 (B) of the Penal Code which was non-existent. On this premise, he contended that the whole trial was a nullity. With respect to the second ground, he submitted that the plea was equivocal because the facts constituting all the ingredients of the offence were not read to him. He asked us to look at p. 2 of the record of appeal to verify what he submitted. Regarding the third ground, he referred us to p. 9 of the record where he allegedly complained on the age of the victim and that he should not have been charged under the sections appearing in the charge sheet. As regards the last ground, the appellant submitted that the elements constituting the essential elements of the offence were not explained to him one after another and that he did not admit to have raped the victim. On the strength of these submissions, the appellant implored us to allow his appeal and set him free.

Responding, Ms. Mhina expressed her stance at the very outset that she did not support the appeal by the appellant. She argued grounds two and four together in that, she said, they are intertwined. The other two grounds were argued separately.

On the first ground, the learned State Attorney conceded that the charge sheet was indeed defective in that section 130 (1) 2 (B) of the Penal Code, Cap. 16 of the Revised Edition, 2019 (henceforth "the Penal Code") is non-existent. However, the learned State Attorney was quick to submit that the ailment was curable under section 388 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2019 (the CPA) in that, after the appellant pleaded guilty to the charge, the facts constituting all the ingredients of the offence were read over and explained to him. In the circumstances, she submitted, the appellant knew the particulars of the offence facing him and therefore he was not prejudiced whatsoever by the shortcoming in the charge sheet. To buttress this proposition, the learned State Attorney cited to us our decision in **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 – [2019] TZCA 32 at www.tanzlii.org in which, faced with an identical situation, we observed at p. 18 of the typed judgment that such ailment was curable under the provisions of section 388 of the CPA.

As regards ground three, the learned State Attorney submitted that the complaint did not feature in the first appellate court and that it was therefore not decided upon. She submitted that the complaint has just

surfaced in this Court for the first time and for that matter the second appellant court will not have legal justification to entertain it. Labelling the ground as an afterthought, Ms. Mhina urged us to disregard it as we did in **Omary Iddi Mbezi & 6 Others v. Republic**, Criminal Appeal No. 214 of 2017 – [2020] TZCA 207 at www.tanzlii.org.

Regarding grounds two and four which is a complaint that the plea was equivocal because the appellant did not admit to have raped BL and that he did not admit to each and every fact, Ms. Mhina submitted that the complaint was baseless. She argued that as appearing at p. 2 of the record of appeal, the charge was read over to the appellant to which he pleaded "it is true, I raped her". The learned State Attorney added that after that plea, the Public Prosecutor narrated the facts of the case comprising the ingredients of the offence to which he pleaded "all facts adduced by the Public Prosecutor are correct". She submitted that the offence was statutory rape to which only penetration and age were to be proved. The learned counsel added that the age of the victim was mentioned as fifteen years and penetration was proved by the words **"did have sexual intercourse"** in the charge sheet and **"raped"** in the facts constituting the essential elements of the offence narrated to the appellant

after he pleaded guilty. In the premises, she submitted, the plea was not ambiguous; it was unequivocal and therefore the conviction of the appellant by the trial court and its confirmation by the first appellate court was apposite. That is, she added, the trial court and the first appellate courts were satisfied that the appellant confessed to each and every constituent of the charge and that the plea was but unequivocal. She buttressed this argument by our decision in **Samson Marco & Another v. Republic**, Criminal Appeal No. 446 of 2016 – [2020] TZCA 176 at www.tanzlii.org in which we so held.

On the strength of the above arguments, the learned State Attorney besought us to dismiss the appeal.

Rejoining, the appellant reiterated his prayer in the submissions-in-chief that the trial was a nullity and that he should be set free by allowing his appeal.

We will determine this appeal in the manner and style adopted by the learned State Attorney in her arguments; that is, by consolidating the second and third grounds of appeal and determining the rest of the grounds separately.

We start with the premise that, as a general rule, no appeal against conviction is allowed on an accused person's own plea of guilty as of right. The provisions of section 360 (1) of the CPA provide in no uncertain terms that:

> *"No appeal shall be allowed in the case of any accused who has pleaded guilty and has been convicted on such plea by a subordinate court except to the extent or legality of the sentence."*

However, the provisions of section 360 (1) of the CPA notwithstanding, the Court has held in a number of cases that under certain circumstances, an appeal against conviction on one's plea of guilty may be entertained – see: **Khalid Athumani v. Republic** [2006] T.L.R 79 and **Kalos Punda v. Republic**, Criminal Appeal No. 153 of 2005, **Josephat James v. Republic**, Criminal Appeal No. 316 of 2010, **Ramadhani Haima v. Republic**, Criminal Appeal No. 213 of 2009 and **Baraka Lazaro v. Republic**, Criminal Appeal No. 24 of 2016 (all unreported). In **Khalid Athumani v. Republic**, for instance, we reproduced at p. 82 the following excerpt from an English case of **Rex v. Forde** [1923] 2 KB 400 a statement by His Lordship Avory, J. at p. 403:

"A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."

Whether the present appeal falls within the exceptions explained in the above cases to which an appeal is appropriate, will become apparent later in this judgment.

We now advert to the grounds of appeal. The first ground is a complaint that the charge sheet was defective. The charge sheet, at p. 1 of the record of appeal, shows that the appellant was charged with:

"Rape c/ss 130 (1) 2 (B) and 131 (1) of the Penal Code Cap. 16 of R.E. 2002"

We are in agreement with the appellant as well as the learned State Attorney that there is no such provision as section 130 (1) 2 (B) exists in the Penal Code. The charge was therefore defective. The appellant ought to have been charged under section 130 (1) & (2) (e) and 131 (1) of the Penal Code. However, we should haste the remark, like the learned State

Attorney, that the ailment, in the light of the provisions of section 388 of the CPA and our decision in **Jamali Ally @ Salum v. Republic** (supra), is curable. As rightly put by the learned State Attorney, when the charge was read to the appellant, he is recorded at p. 2 of the record of appeal as pleading:

> *"It is true, I raped her."*

Thereafter, the trial court entered a plea of guilty against the appellant. After that the Public Prosecutor narrated the following facts to which the appellant was required to reply:

> *"The Accused Mohamed Clavery, aged 25 years, Peasant of Kerege, Bagamoyo Pwani, is facing a charge of rape. It is alleged that on 11/01//2009 at 08:00 pm at Utengule Village, Kilombero District, the accused raped one BL a girl aged 15 years. The matter was reported to the police, then the accused was arrested and sent to the Police Station where, when interrogated, he admitted to rape the said girl."*

To the foregoing facts the appellant replied:

"All the facts of the case adduced by the Public Prosecutor are correct"

Thereafter, the trial court proceeded to convict the appellant on his own plea of guilty and, subsequently, after seeking the antecedents from the Public Prosecutor and *allocatus* from the appellant (to which he had none), it sentenced him to a thirty years' jail term.

Flowing from the above, we are certain that the appellant, even though the charge was defective, he knew that he was charged with rape of a girl aged fifteen years. The date, time and place at which the offence was committed were also known to the appellant. He was therefore able to appreciate the charge facing him. In the premises, we do not see any prejudice being occasioned on the part of the appellant. Luckily, we grappled with an akin situation in **Jamali Ally @ Salum** (supra); the case cited to us by Ms. Mhina. In that case, the charge sheet showed in the statement of the offence that the appellant was charged with rape contrary to sections "130 and 131 (1) (e) of the Penal Code". One of the appellant's arguments in that case was that the charge sheet was defective as there were no such provision as section "131 (1) (e)" in the Penal Code. The

proper provisions should have been sections 130 (1) & (2) (e) and 131 (2) of the Penal Code. We observed at p. 17:

> *"In the instant appeal before us, the particulars of the offence were very clear and in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age".*

We concluded at p. 18:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA."*

[See also: **Abasi Makono v. Republic**, Criminal Appeal No. 537 of 2016 – [2019] TZCA 299 at www.tanzlii.org]

On the authority of **Jamali Ally @ Salum** (supra) followed in **Abasi Makono** (supra), we find and hold that the defect in the charge sheet in the appeal at hand is curable under section 388 (1) of the CPA. For the reasons stated, the first ground of appeal fails.

Next for consideration is ground three. This ground comprises a complaint that the facts constituting the elements of the offence were not explained to the appellant in his own language so that he could understand. This complaint, as Ms. Mhina rightly put, surfaces for the first time in this appeal. It was not raised in the trial court. Neither was it raised on first appeal. It is now settled law that a matter not raised in and decided upon by the High Court on first appeal will not be entertained by the Court on second appeal. We have pronounced ourselves so in a string of our decisions - see: **Samwel Sawe v. Republic,** Criminal Appeal No, 135 of 2004, **Diha Matofali v. Republic**, Criminal Appeal No. 245 of 2015, **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006, **Juma Manjano v. Republic,** Criminal Appeal No. 211 of 2009 and

Bakari Abdallah Masudi v. Republic, Criminal Appeal No. 126 of 2017 (all unreported) and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 - [2018] TZCA 136 at www.tanzlii.org, **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 - [2018] TZCA 20 at www.tanzlii.org, **Omary Iddi Mbezi & 6 Others** (supra) and **Haruna Mtasiwa v. Republic**, Criminal Appeal No. 206 of 2018 - [2020] TZCA 230 at www.tanzlii.org to mention but a few. In **Yusuph Masalu @ Jiduvi** (supra), for instance, we were confronted with an identical situation and relied on our previous decision in **Samwel Sawe** (supra) to hold that this Court will not have jurisdiction to decide on a matter not decided by the High Court on first appeal. We reproduced an excerpt from **Samwel Sawe** (supra) which, we think, merits recitation here:

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and*

decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."

In the appeal at hand, the third ground of appeal was not among the five grounds raised in the High Court on first appeal as appearing at p. 3 of the record. On the strength of the settled law discussed above, it not being a point of law, we are loath to entertain the third ground. We find it as an afterthought and disregard it.

We now turn to consider the complaint that the plea was unequivocal because the appellant did not admit to have raped BL and that he did not admit to each and every fact, the subject of the second and fourth grounds of appeal. These grounds will not detain us, for we have discussed part of it when dealing with the first ground of appeal. We have reproduced above what transpired in the trial court. The record shows that the appellant admitted to have raped BL. The complaint in the fourth ground that he did not admit to have raped the victim is therefore not backed by the record. Likewise the complaint that the appellant did not admit to each and every element of the offence is devoid of merit. The facts we

reproduced above which were narrated to the appellant after he pleaded guilty, contained each and every ingredient of the offence he was charged with to which he replied they were correct. Considering that the appellant was able to plead that "it is true, I raped the girl" and after the facts constituting each and every element of the offence with which the appellant was charged were narrated to him he was able to say "all facts adduced by the Public Prosecutor are correct", we are satisfied that he understood the language and admitted to each and every ingredient of the offence. All considered, we are certain in our mind that the plea of the appellant was but an unequivocal plea of guilty. Grounds two and four must also fail.

In view of the discussion above, we do not agree with the appellant; **one**, that the charge was fatally defective; **two**, that the plea was equivocal; **three**, that he did not admit to have raped the victim and; **four**, that the facts narrated to him did not constitute each and every ingredient of the offence. He therefore did not have justification to challenge the conviction. For the reasons we have endeavoured to assign, although the charge was defective, the plea was nevertheless unequivocal and the facts narrated to him constituted each and every constituent of the

offence with which the appellant was charged. The sentence imposed was the statutory minimum which we have no authority to vary.

This appeal is wanting in merit. It is hereby dismissed in its entirety.

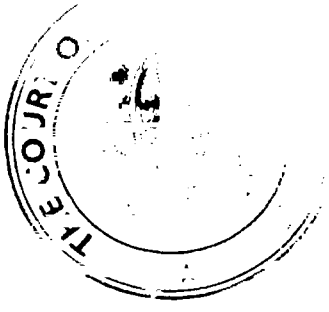
DATED at **DAR ES SALAAM** this 10th day of June, 2020.

A. G. MWARJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 12th day of June, 2020 in the presence of Appellant in person through video conference and Ms. Dhamiri Masinde, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL