IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 38918 OF 2023

(Arising from the District Court of Kilolo at Kilolo
in Original Criminal Case No. 52 of 2023)

ERICK PETER KISOMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 08/04/2024
Date of Judgement: 29/04/2024

LALTAIKA, J

The appellant herein **ERIC PETER KISOMA** was arraigned in the District Court of Kilolo at Kilolo charged with the Offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code Cap 16 RE 2022. When the charge was read over and explained to him, he pleaded guilty. The court proceeded to sentence him to serve 30 years in jail. He was also ordered to pay TZS 500,000 as compensation to the victim.

Dissatisfied, the Appellant has appealed to this court by way of a petition of appeal. In spite of quite a few grammatical, typographical and

signs of direct Kiswahili translation, I take the liberty to reproduce all the grounds, in their original, for ease of reference and record keeping:

1. *That the trial Magistrate erred in both law and fact to convict and sentence the appellant without considering that the plea of guilty was equivocal since what he pleaded in charge sheet is differ (sic!) from what he pleaded in the fact of the case.*
2. *That the trial Magistrate erred in law and fact to convict and sentencing the appellant without considering that pregnant as a root of this case was not proved beyond reasonable doubt.*
3. *That the trial Court wrongly convicted and sentenced the appellant without considering that no expert was called to read over the exhibit PF3 as it require (sic!) specialist [Doctor] to read it.*
4. *That the trial magistrate erred in for (sic!) failure to afford the appellant the right to mitigate.*
5. *That the trial Magistrate erred in law an (sic!) fact to convict and sentence the appellant by relying on nullity proceedings.*
6. *That the prosecution side failed totally to prove the case against the appellant beyond reasonable doubt.*

When the appeal was called for hearing on the **8th of April 2024**, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through **Ms. Rehema Ndege,** learned State Attorney.

The appellant, putting forth a disclaimer that he was not learned in law, indicated that he had nothing substantial to add to his grounds of appeal. He asked that the learned State Attorney be allowed to respond to the said grounds while reserving his right to a rejoinder if the need arose.

Taking the podium, Ms. Ndege declared boldly that the Respondent was not in support of the appeal. The learned State Attorney meticulously countered each ground, commencing with the observation that despite the appellant's guilty plea recorded in the records, he had appealed against both his conviction and sentence.

This action, Ms. Ndege reasoned, stood in contravention of section 360(1) of the Criminal Procedure Act Cap 20 RE 2022. Drawing upon the well-known case of **JOSEPHAT JAMES v. REPUBLIC** Criminal Appeal No 316 of 2010, which referenced an old English case of **REX v. FORDE** (1923) KB 400 at 403, Ms. Ndege delineated the four conditions requisite for an appeal against pleading guilty. She forcefully argued that in the case at hand, all the prescribed conditions had been met, thus positing that the appeal lacked merit and ought to be dismissed.

Taking the argument further, Ms. Ndege refuted the claim of equivocality in the appellant's plea, emphasizing the explicitness of the charge sheet and the appellant's comprehensive comprehension of the

offense at hand. Her arguments were bolstered by reference to several cases such as **ERNEO KIDILO AND ANOTHER V. REPUBLIC** Crim Appeal No 206 of 2017 and **FRANK MLYUKA v. R.** Crim Appeal No 404 of 2028.

Emphatically, Ms. Ndege elucidated that the charge against the appellant was rape, not impregnation, thus dismissing the second ground which posited the inability to prove the victim's pregnancy. According to her interpretation, pregnancy was not a requisite proof for the offense charged, but rather the act of rape itself.

Addressing the third ground, Ms. Ndege expounded that no expert testimony was mandated to read the PF3, as the case did not proceed to a full trial following the appellant's guilty plea. Her argument found legal grounding in the precedents set forth by **PASKALI KAMARA v. REPUBLIC** Crim App No 457 of 2018, wherein it was firmly established that upon pleading guilty and the subsequent reading of the facts, the need for witness summoning dissipated.

As she delved into the fourth ground, acknowledging the procedural lapse in affording the appellant the right to mitigate, Ms. Ndege contended that such an oversight bore no prejudice upon the appellant's sentence. She navigated the legal landscape, citing section 131(1) of the **Penal Code** (supra), which stipulates a statutory minimum sentence, thereby

rendering the opportunity for mitigation ineffectual in altering the prescribed sentence. Proposing a pragmatic solution, she suggested that the court file be remitted to the trial court to fulfill this procedural requirement.

Venturing into the fifth ground, Ms. Ndege adamantly refuted any claims of nullity in the proceedings, elucidating the steps undertaken during the appellant's arraignment, plea, and subsequent sentencing. Quoting from the case of **JOSEPHAT JAMES** (supra), she emphasized the procedural regularity observed throughout, thereby nullifying the assertion of nullity.

Concluding her rebuttal, Ms. Ndege addressed the final ground, asserting that all elements of the offense, including penetration, the victim's age, and the identity of the accused, had been duly established. Drawing upon the appellant's own confession and the prosecution's evidence, she argued that the appeal lacked merit and ought to be dismissed.

The Appellant, on his part, highlighted the absence of a complainant in court, particularly noting the lack of a birth certificate tendered to establish the victim's age. He provided context surrounding the victim's living arrangements, explaining that she had moved from their village to Dodoma for household work and had returned to live with her mother,

who was a tenant in his house. He emphasized that the victim's mother had consented to their potential marriage due to the daughter's non-attendance at school and awareness of their relationship. The Appellant noted the involvement of the victim's uncle, referred to as "Baba Mdogo," who had initiated his arrest on allegations of the victim being underage, resulting in all parties being taken to the police.

The Appellant confirmed his agreement with the victim's mother regarding their living arrangements and highlighted the lack of further testimony from any witnesses. He reiterated his intention to marry the victim and emphasized his relocation from Bomangombe Village to Mkalanga, where he had constructed a house with assistance from his sister.

Expressing dissatisfaction with the treatment he received, the Appellant conveyed his belief that the victim's parents were not transparent with him about her age. He emphasized his plans for marriage and expressed a desire for leniency from the court, asserting that he had been punished severely for actions he was unaware of. Additionally, he clarified that he was unmarried and intended to marry the victim, noting that while there was no animosity with the victim's uncle, their relationship had soured due to a disagreement over the purchase of corrugated iron sheets for the victim's mother without his involvement.

I **have dispassionately considered** the grounds of appeal, forceful submission by Ms. Ndege and the appellant's response. I will focus my analysis on the first ground of appeal namely equivocality of the plea. The saying of the sage that the devil is in the details is especially applicable in the matter at hand. I thank Ms. Ndege for choosing to go to the details of the appeal. Her detailed submissions triggered my examination of the records with more keenness.

It appears to me that conviction based on accused persons' purported plea of guilty before learned Magistrates, as measured by the number of criminal appeals reaching this Court, is on the increase. It is probably high time our learned Magistrates took a pause and examined ramifications of this trend in the light of the bigger picture of fair trial.

I should probably be pragmatic here. It is very difficult for me to believe that an accused person, totally on his own volition, appears in court, some facts are read over, (or no facts are read at all as we shall see later) and he delightedly say yes to an allegation that would see him jailed for thirty years or more. No thank you! I am not a believer in such simplicity. At least not for offences that attract longer jail terms like the present one.

With that suspicion in mind and having tried to connect the dots from the appellant's narrative as summarized above, I took the trial court's

file for some very close examination. This is because, in our jurisdiction, the role of a first appellate court is akin to rehearing. I will not be crossing any procedural line if, in my appellate capacity commit the entire record and evidence adduced in the trial court to a fresh (and rigorous) scrutiny. See the case **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT, Bukoba (Unreported**).**

Premised on the above, I take the liberty to let the trial court's records speak followed with my evaluation.

> **Date:** 05/10/2023
>
> **Court:** Charge is read over and explained to the accused in Kiswahili language; and the accused pleads as follows:
>
> **Accused plea:** "Ni kweli nilifanya mapenzi na...(miaka 17) mara tano kwa makubaliano kuanzia Julai 2023."
>
> **Court:** Entered a plea of guilty against the accused person in respect of the charge of rape.
>
> **Insp. Kimale:** I pray for an adjournment so that we may prepare facts of this case.
>
> **Court:** Prayer for an adjournment is granted.

A critical look at the above purported plea leaves a lot to be desired. It is divided into two parts: the general part and the bracketed part. No

one can tell whether the bracketed part ("miaka 17") were mentioned by the appellant or came from the learned Magistrate. Court proceedings are supposed to recorded verbatim and be written in first person singular taking the words of the witness or accused person as closely as possible. It does not take much though to realize that the above contradictory statement does not meet the threshold of a plea known to law. Spoken language knows no parenthesis.

The court file got more intriguing, and I decided to take the analysis even deeper. It appears that on the 10/10/2023 the prosecution prayer to amend the charge was granted. The amended charge was read and explained to the accused whose plea was recorded as follows:

> **Accused:** Nakiri kufanya mapenzi na [name concealed] mara tano kuanzia 11/7/2023 na tarehe zilizo fuata baadaye. Tulifanya mapenzi kwa makubaliano kati yangu na yeye."
> [I admit that I had carnal knowledge with...five times from 11/7/2023 and subsequent dates. The sexual intercourse was based on our private agreement."
> **Court:** Entered a plea of guilty against the accused in respect of the charge of rape.

Comparing the plea entered on the 5/10/2023 with that of 10/10/2023 one needs not be a rocket scientist to realize that the appellant and the learned trial Magistrate were not speaking the same language. To borrow the phrase commonly used in contract law, there was no "meeting of the minds." I say this because, the appellant had consistently admitted that he had carnal knowledge with the victim. He went further and explained that he had started the process towards marrying her.

Assuming the above assertion to be the correct representation of the appellant's version of the story, the most important task on the part of the prosecution, which task the learned trial Magistrate needed to ensure it was carried out at the required threshold, was to ascertain the age of the victim.

It should be noted that while on 5/10/2023 the purported age of the victim was bracketed, upon amendment of the charge, the plea is without any number denoting age. It appears to me the learned trial Magistrate paid leap service to this essential element of the offence of statutory rape. Again, I invite the trial court records to speak:

> **Date:** 12/10/2023
>
> **Insp. Kitamale:** The case is coming for narration

of facts. But I pray for an adjournment in **order to complete seeking a proof concerning the age of the victim.**

Order: (1) Facts on 17/10/2023

(2) Prosecution is warned to complete seeking a proof concerning the age of the victim. (Emphasis added)

It is very unfortunate that what the prosecution ended up tendering as "proof concerning the age of victim" to quote the learned magistrate, was nothing but a handwritten letter purportedly written by a Primary School teacher (unnamed) addressed to the OC-CID of Kilolo claiming that the victim had completed standard seven in that school in 2022 and was supposed to be in Form One. The letter, with more than a fair share of errors and omissions, in my opinion, should not have been considered official communication in the first place let alone proof of age of anybody. Regrettably, the learned trial Magistrate, uncritically I would say, admitted the letter as exhibit P1.

It should be noted that the so called "proof of age" came several days after the appellant was arraigned and allegedly pleaded guilty. This means, when the plea was entered neither the prosecution nor the learned trial Magistrate knew how old the victim was. That is why despite the grammatical errors, I see perfect sense in the first ground of appeal.

To this end, I entertain no flicker of doubt in holding that conviction was based on unequivocal plea.

The next issue for my determination is whether the case file can be reverted for retrial. My answer to this is to the negative. The above discussion has shown that there was no sufficient evidence to support arraignment of the appellant in the first place let alone his conviction for the offence of rape. This is in line with the principle handed down by the former Court of Appeal for Eastern Africa in the case of **FATEHALI MANJI v. R** (1966) E.A thus:

> "...each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires."

In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence of thirty years imprisonment. Further, I order that the appellant **ERICK PETER KISOMA** be released from prison forthwith unless he is being held for any other lawful cause.

It is so ordered.

THE HIGH COURT OF TANZANIA

E.I. LALTAIKA
JUDGE
29/04/2024

Court

Judgement delivered this 29th day of April 2024 in the presence of **Ms. Muzzna Mfinanga**, learned State Attorney for the Respondent and the Appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
29/04/2024

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
29/04/2024