**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)**

**CRIMINAL APPEAL NO. 298 OF 2016**

**ZUBERI SIKITU.......................................................................... APPELLANT**

**VERSUS**

**THE REPUBLIC............................................................. RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Arusha)**

**(Maghimbi J.)**

**dated the 29th day of February, 2015**
**in**
**Criminal Appeal No. 73 of 2015**

# JUGDMENT OF THE COURT

5th & 10th October, 2018

**MMILLA, J.A.:**

On 20.8.2015, Zuberi s/o Sikitu was charged in the District Court of Kiteto at Kibaya in Manyara Region, with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code Cap.16 of the Revised Edition, 2002. When the charge was read over and explained to him on that day, he pleaded guilty. Upon that, the prosecution adduced the facts of the case which were similarly read over to him. He responded that the facts were true and correct. He was consequently convicted and sentenced

to life imprisonment term. He unsuccessfully appealed to the High Court of Tanzania at Arusha, hence this second appeal to the Court.

The facts of the case were that on 17.8.2015 at about 12:00 hours, the appellant, who was around that time riding his uncle's motor cycle took the victim boy name S.R. (minor then aged 12 years) and headed to the bush to fetch fire wood. While in the bush, the appellant persuaded the victim boy to have sexual intercourse with him against the order of nature in consideration of training him to ride a motor cycle. That boy, desirous of the offer, accepted the terms upon which the appellant had carnal knowledge of him against the order of nature. In the course however, the victim boy suffered pains. On arrival home, he reported the incident to his family members who in turn reported same to police. They were given a PF3 with instructions to go to hospital for medical examination and treatment.

Meanwhile, the appellant was traced, arrested and eventually charged in court on 20.8.2015 as it were. The PF3 was tendered before the trial court and was marked exhibit PE1.

As already pointed out, the appellant's first appeal to the High Court was unsuccessful. The memorandum filed in this Court has raised three

grounds. While the first ground alleges that the PF3 constituted in exhibit PE1 was illegally admitted as evidence; the complaint in the second ground is that exhibit PE1 was not properly scrutinized. On the other hand, the complaint in the third ground of appeal is that the age of the victim boy did not feature in the facts which were adduced before the trial court.

When the appeal was called on for hearing on 5.10.2018, the appellant appeared in person and was not represented; while the respondent/Republic was represented by Mr. Felix Kwetukia, who was assisted by Ms Janeth Masonu, learned State Attorneys. The appellant chose to submit first.

In his brief submission, the appellant contended in the first place that exhibit PE1 was illegally admitted as evidence because it showed that it was prepared on 20.8.2015, which is indeed the day he was arraigned before the trial court instead of 17.8.2015, the day the victim was allegedly medically examined. He also submitted that both lower courts did not properly scrutinize that exhibit because it indicated three names of the complainant, whereas only two names were shown in the charge sheet (unfortunately we cannot reveal the names because as aforesaid, the victim is a minor). He also queried that he did not understand why the said

PF3 indicated that the victim was raped instead of having showed that he was sodomized. On the basis of that, he urged the Court to allow the appeal and set him free.

On their part, Mr. Kwetukia pressed the Court to ignore the first and second grounds of appeal because they have been raised for the first time before this Court as they were not raised before the first appellate Court, hence that the Court has no jurisdiction. He relied on the case of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004, CAT (unreported).

Concerning the third ground of appeal which queries that the facts which were given before the trial court did not mention the victim's age, Mr. Kwetukia had a double account. In the first place, he contended that in terms of section 360 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA), the appeal is misconceived in view of the fact that his conviction was based on his unequivocal plea of guilty to the charge. He explained the circumstances under which, in terms of that section, an appeal may be justified. He also cited the case of **Zawadi Mahwata v. Republic**, Criminal Appeal No. 207 of 2008, CAT (unreported) which relied on the case of **Laurent Mpinga v. Republic**

[1983] T.L.R.166. He urged us to dismiss this ground because it did not meet the kinds of exceptions explained under section 360 (1) of the CPA.

Apart from what he submitted in connection with the exceptions explicated in the case of **Laurent Mpinga v. Republic** (supra), Mr. Kwetukia contended as well that the complaint that the age of the victim was not mentioned in the facts which were presented before the trial court is baseless because the age of the complainant was clearly stated in the particulars of the offence which were read over and explained to him. He argued that even where the Court was to consider the appeal from this other angle; it would still have found that this ground has no merit. He requested the Court to dismiss it.

On the other hand however, Mr. Kwetukia raised concern on the aspect of the sentence which was meted out against the appellant. He submitted that because the victim boy was aged 12 years, the appropriate sentence ought to have been a term of 30 years imprisonment instead of life imprisonment as it were. He urged us to invoke the powers we have under section 4 (1) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002 (the AJA), so that we may set aside the sentence of life

imprisonment and substitute thereof the sentence of 30 years imprisonment.

We have intently considered the competing arguments of the parties in this appeal. We wish to begin with the fate of the first and second grounds of appeal *vis a vis* the argument raised by Mr. Kwetukia in that regard.

We have carefully gone through the appellant's grounds of appeal which were filed in the High Court appearing at page 8 of the Record of Appeal. We are satisfied that those two grounds were not raised before that court, therefore that they have been raised in this Court for the first time. Where this is the position, the fate is as was expounded in the case of **Samwel Sawe v. Republic** (supra) cited to us by Mr. Kwetukia. In that case, relying on the case of **Abdul Athuman v. Republic** [2004] T.L.R.151, the Court said:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second 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 v. 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."*

It follows therefore, that since grounds 1 and 2 were not raised in and decided by the High Court on first appeal, we decline to determine them on the basis that we have no jurisdiction. Thus, those two grounds are accordingly struck out.

Coming to the third ground of appeal, we hasten to agree with Mr. Kwetukia that where conviction of an accused person proceeds from his unequivocal plea of guilty, an appeal therefrom must conform to the provisions of section 360 (1) of the CPA. That section provides that:-

*"S. 360(1): 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."*

It is vivid from the above that an appeal in the circumstances of the present case is not as of right. In an endeavour to interpret this section we have, in a number of cases, stated the circumstances under which an appeal from an unequivocal plea of guilty by an accused may lie. The cases include those of **Saidi Mswaje @ Mwanalushu v. Republic**, Criminal Appeal No. 464 of 2007, **Bidon Mgaya v. Republic**, Criminal Appeal No. 250 of 2010 and **Deusi s/o Gendo v. Republic**, Criminal Appeal No. 480 of 2015, CAT (all unreported). All of those cases cited the case of **Laurent Mpinga v. Republic** (supra) in which it was held that:-

> *"(ii) an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the 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 he pleaded guilty as a result of mistake or misapprehension;*

*3. that the charge laid at his door disclosed no offence known to law; and*

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

Relating the above to the present appeal, it is more than clear that the plea was perfect, unambiguous and finished; also that the charge which was laid against him disclosed an offence known to law termed unnatural offence. In the circumstances, we agree with Mr. Kwetukia that the appeal was misconceived.

Even where we were to consider the third ground on merit, we would have gone along with Mr. Kwetukia that it lacks merit because the age of the victim boy was covered in the particulars of the offence which were read over and explained to him. The particulars showed that the boy was then 12 years old. In the circumstances, we would have all the same come to the conclusion that the complaint was baseless, and we would have dismissed it.

That said and done, we hold firm that the appeal lacks merit, in consequence of which we dismiss it.

However, like Mr. Kwetukia said, we entertain the same view that the sentence which was meted out against the appellant was excessive in view of the fact that the victim boy was then 12 years of age. The appropriate sentence ought to have been a term of 30 imprisonment. In the circumstances, we resort to the provisions of section 4 (1) of the AJA on the basis of which we set aside the sentence of life imprisonment and substitute thereof the sentence of 30 years imprisonment.

Order accordingly.

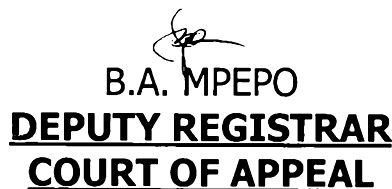
**DATED** at **ARUSHA** this 8th day of October, 2018.

B. M. MMILLA
**JUSTICE OF APPEAL**

R. E. S. MZIRAY
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



B.A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**