

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: JUMA, C.J., LEVIRA, J.A. And MAKUNGU, J.A.)**

**CRIMINAL APPEAL NO 124 OF 2019**

**AMANI YUSUPH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

**(Masara, J)**

**dated the 9<sup>th</sup> day of July, 2019**

**in**

**Criminal Appeal No. 96 of 2019**

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**JUDGMENT OF THE COURT**

**22<sup>th</sup> & 23<sup>rd</sup> February, 2023**

**JUMA, C.J.:**

The appellant Amani Yusuph was nineteen years old when the District Court of Babati convicted him on his own plea of guilty for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002.

It was alleged in the particulars of the offence that on unknown dates in April, 2019 at Magugu village in Babati District (Manyara Region) he had sexual intercourse with a sixteen year old girl, who, in order to

protect her modesty, we shall refer as DDD. When called upon to plead to the charge after the substance of the same had been explained to him, the appellant replied: - *"It is true."* N.S. Gasabile, the learned trial magistrate entered a plea of guilty against the appellant.

The prosecuting learned State Attorney (recorded as Mugeta), then outlined the facts. We shall reproduce exactly the same words appearing on pages 4 and 5 of the record of appeal:

*"...the accused and victim a girl of 16 years old had love affairs which started on unknown dates of April, 2019 at Magugu village in Babati District. That into their relationship the accused and victim used to have carnal knowledge and the relationship started by writing letters [to] each other. That sexual intercourse were done into the accused's friend's house Ramadhani Kisimbo when he was at farm and the accused after being arrested he confessed to have sexual relationship with victim by stating that they had sexual intercourse many times without using condoms that is when the accused charged and said the victim was the one seduced accused to have love affairs with her. That today the*

*accused [was] brought before this court and pleaded guilty.*

*That is all."*

At the conclusion of the narration of the facts the trial Magistrate asked the appellant to plead, to which the appellant responded:- *"It is true your honour [the] victim was my girlfriend and we had sexual affairs."* The appellant, the prosecuting State Attorney and the trial magistrate then signed at the end of the narration of facts.

On the basis of the facts that the public prosecutor narrated, the trial magistrate convicted the appellant, stating: *"The accused person on his own words of plea of guilty he is hereby convicted for the offence of rape c/s 130 (1)(2)(e) and 131 (1) of the Penal Code Cap 16 R.E. 2002."*

Before sentencing, the trial magistrate gave the appellant a chance to present his mitigation. He did not say anything about his conviction but informed the trial court that after his arrest, their parents sat down to settle the matter. The trial court sentenced him to serve thirty years in prison.

Aggrieved, the appellant filed a Petition of Appeal in the High Court of Tanzania at Arusha on 3/10/2019 containing four grounds of appeal. He filed six additional grounds of appeal on 3/5/2021. In the High Court, he

contested his conviction and sentence on a plea of guilty. He wondered why, while facing such a serious offence as rape, he was not allowed to consult an advocate for legal advice. He claimed that the trial court proceedings were unfair and were inundated with irregularities. He blamed the trial court for convicting him without ascertaining the victim's age. He told the first appellate High Court that his guilty plea was not unequivocal.

After considering the grounds of appeal, Masara, J., who heard that first appeal, formulated only one issue for his determination: whether the appellant's plea of guilty was unequivocal. The first appellate Judge dismissed the appeal after concluding that the appellant was aware of all the elements of the charge against him and that the plea he entered was voluntary, based on facts, and was not out of misapprehension.

The appellant, who is fending for himself, has preferred the following six grounds to support this second appeal:

- 1. The two courts below grossly erred in law and in fact when it believed that the facts narrated and read to the appellant at page 2 and 3 supported the charge sheet.*
- 2. That, the two courts below erred in law and, in fact, when it believed that the appellant UNEQUIVOCALLY pleaded to the narrated facts.*

3. *That, the trial court erred in law and, in fact, when it convicted and sentenced the appellant while the appellant did not admit to the facts and ingredients constituting the offence he was charged with, that is, rape.*
4. *That, there was non-compliance with section 228 of the Criminal Procedure Act [Cap 20 R.E. 2019].*
5. *That, the plea of the appellant to the charge was equivocal.*
6. *That, even considering the admitted facts, his plea was imperfect, ambiguous, or unfinished, so the lower court erred in law in treating it as a plea of guilty.*

When the appeal came up for hearing, the appellant appeared in person fending for himself. Ms. Tarsila Asenga, learned Senior State Attorney, assisted by Mr. Charles Kagirwa and Ms. Jackline Linus, both learned State Attorneys, appeared for the respondent Republic.

When we asked him to expound on his grounds of appeal, the appellant maintained that he relied on all the grounds he had earlier filed in his memorandum of appeal. He also relied on the written submissions which he filed earlier on 13/2/2023.

He attacked the facts the prosecution had read out during his trial and submitted that these facts do not prove the essential ingredients of the offence of rape, and they do not make his guilty plea unequivocal. He elaborated further that while the particulars of the offence of rape in the charge sheet claim that he had sexual intercourse with sixteen-year-old DDD, the facts which the prosecutor narrated state that he had "love affairs" with the victim. Even when the trial court asked him to plead to the facts that prosecution had narrated, his response did not match the statutory words "sexual intercourse" which form one of the essential ingredients of rape in the charge sheet. Instead, he pleaded: *"It is true, your Honour victim was my girlfriend; we had sexual affairs."* He added that this divergence between the particulars of the offence and narrated facts, support his main complaint that the offence in the charge sheet is at variance with the facts that the prosecution narrated. Citing the support of the case of **LAURENCE MPINGA V. R.**, [1983] T.L.R. 116, he submitted that the divergence makes his supposed plea to be imperfect, ambiguous and cannot support unequivocal guilty plea. He insisted that the trial and first appellate courts were wrong to treat his guilty plea unequivocal.

On the strength of his submissions, the appellant urged us to allow his appeal, quash his conviction and sentence, and set him free.

In reply, Mr. Charles Kagirwa submitted on behalf of his colleague Senior State Attorney and State Attorney. He opposed the appeal, and urged us to dismiss all the grounds of appeal. He submitted that the appellant's claim that narrated facts are at variance with the ingredients of rape in the charge sheet is baseless. He referred us to page 3 of the record of appeal, where after reading the charge and explaining it to him, the appellant pleaded, "It is true!" He further referred to the facts the prosecution read, proving all the salient ingredients of rape, including the victim being sixteen. He submitted that since the appellant, the trial magistrate, and the public prosecutor all signed, this Court should dismiss any suggestion that his guilty plea was not unequivocal. Even in his mitigation, Mr. Kagirwa argued, the appellant appears to acknowledge his guilty plea and explain how their families sat together to settle the matter after his arrest.

Mr. Kagirwa next urged us to dismiss the appellant's complaint concerning non-compliance with section 228 of the Criminal Procedure Act, Cap 20 (the CPA). The learned State Attorney record of appeal shows how

the trial magistrate complied with section 228(2) of the CPA by recording the actual words the appellant used when he pleaded guilty. He submitted that section 228(1) of the CPA requires trial courts to state the charge to the accused person, which the trial court complied. He argued that the trial court complied with the requirement of asking the accused whether he admits or denies the truth of the charge. He referred us to the record of appeal and argued that the trial court fully complied with section 228 (1) and (2) of the CPA.

Mr. Kagirwa submitted that the appellant's guilty plea was unequivocal and this instant appeal before us does not meet the four conditions set out in **LAURENCE MPINGA V. R** (supra) for us to allow the instant appeal that is before us. Mr. Kagirwa also argued that even the case of **JOHN CHARLES V. R.**, CRIMINAL APPEAL NO. 554 OF 2017 (unreported) which the appellant relied on, does not support his claim that his guilty plea was ambiguous and this Court should allow his appeal. He submitted that the record of appeal shows that the trial court complied with conditions to sustain an unequivocal plea of guilty which this Court discussed in the case of **ONESMO ALEX NGIMBA V. R.**, CRIMINAL APPEAL NO. 157 OF 2019 (unreported).



The learned State Attorney reiterated that the appellant was convicted and sentenced on the strength of his guilty plea. He added that section 360 of the CPA bars appeal by the appellant, who was convicted after guilty plea unless it is against the sentence. Section 360 (1) of the CPA provides:

*360.-(1) An appeal shall not 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.*

Finally, the learned State Attorney urged us to dismiss this appeal and let the appellant serve out his sentence following his conviction on his plea of guilty.

In his rejoinder, the appellant insisted that his guilty plea was not unequivocal and we should allow his appeal. He added that the police duped him by telling him to plead guilty and the trial court would set him free, which did not happen.

From submissions of the appellant and that of the learned State Attorney, we shall condense the six grounds of appeal into one, whether the appellant's guilty plea on the charge of rape of a sixteen-year-old girl

was not unequivocal. In other words, whether we should allow his appeal because his guilty plea was imperfect, ambiguous, and hence equivocal.

Ordinarily, under the terms of section 360 (1) of the CPA, having pleaded guilty to the charge of rape, accepting as true the supporting facts, convicted and sentenced by the trial District Court of Babati, then the appellant would not have a right to appeal to the High Court at Arusha and later this Court, except against sentence. Despite the compulsive tone employed in section 360 (1) of the CPA to prohibit appeals against convictions based on guilty pleas, the appellant has submitted that the plea leading up to his conviction was equivocal. The appellant submitted that there are several conditions in this appeal that warrant this Court to interfere with his equivocal plea.

In **MICHAEL ADRIAN CHAKI VS REPUBLIC** [2021] TZCA 454 TANZLII, the Court identified six conditions that must all be present in an unequivocal plea of guilty:

*"1. The appellant must be arraigned on a proper charge. That is to say, the offence, section and the particulars thereof must be properly framed and explicitly disclose the offence known to law;*

*2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result;*

*3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA;*

*4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offences charged;*

*5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear;*

*6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."*

After looking at the facts that the public prosecutor narrated at the trial District Court of Babati, we cannot but conclude that the appellant's

plea was not unequivocal. As we said in **MICHAEL ADRIAN CHAKI VS REPUBLIC** (supra), a critical condition for an unequivocal guilty plea is that the charge sheet and facts the prosecution narrated to an accused, must enable the accused to comprehend what he is facing; otherwise, injustice may result. For purposes of this appeal before us, the facts that the prosecution narrated to the appellant must consistently reflect and expound the ingredients of the offence of rape appearing in the particulars of this offence.

Undoubtedly, sexual intercourse is an essential ingredient in the offence of rape under section 130 (2) of the Penal Code which states, "(2) *A male person commits the offence of rape if he has **sexual intercourse with a girl or woman** under circumstances falling under any of the following descriptions:*" According to section 130 (4) of the Penal Code, it is penetration, however slight, that constitutes sexual intercourse.

We disagree with Mr. Kagirwa's submissions that the facts the prosecution narrated enabled the appellant to comprehend the ingredient of sexual intercourse. The facts appearing on pages 4 and 5 confusingly used different words to denote sexual intercourse but brought more confusion. The facts the public prosecutor seemingly narrated almost appear as if he

was interrogating the appellant on the spot and recording the answer, which became the confused set of facts. The confusing words include,

*...the accused and victim a girl of 16 years old had love affairs which started on unknown dates of April 2019."*

*"...their relationship the accused and victim used to have carnal knowledge."*

*"...sexual intercourse was done in the accused's friend's house Ramadhani Kisimbo."*

*"...after being arrested, he confessed to have sexual relationship with victim by stating that they had sexual intercourse many times."*

*"...when the accused [was] charged and said the victim was the one seduced accused to have love affairs with her."*

Even when after the prosecutor had read over the facts and explained, the appellant's reply did not concede he had sexual intercourse with DDD:  
*"...It is true, your honour, the victim was my girlfriend, and we had sexual affairs."*

We do not think the appellant understood the import of the facts the prosecutor narrated and relate them to the ingredients of the charge of rape.

There is also the ingredient of the victim's age, which the trial and the first appellate courts only touched by the way so to speak. For example, the first appellate Judge held that the victim's age could not be proved on 22/8/2019 when the appellant appeared for the first time before the trial court and immediately pleaded guilty. The first appellate Judge observed that proof of the victim's age would ordinarily be subject to trial when prosecution or defence would lead evidence to prove the victim's age. He pointed out further that proof of the victim's age was impossible because the appellant opted to plead guilty on his first day in court. Proof of age is even more critical in all cases of statutory rape. We agree with what Ngwembe, J. said in **OMARY HASHIMU V. R.** [2022] TZHC TANZLII:

*"In statutory rape, proof of age is fundamental. In fact, the age of a woman is a determining factor which differentiates between normal rape and statutory rape. Even punishment depends on the age of a woman."*

At the hearing of this appeal, the Court had engaged the learned State Attorney to clarify whether the appellant facing the offence of statutory rape, understood the significance of the victim's age to make his guilty plea unequivocal. He submitted that the appellant understood the importance of the age of his victim because after the prosecution read out the charge sheet and the facts, the appellant accepted everything. He added that the mention of the age was sufficient to enable the appellant to understand the consequences of sexual intercourse with a sixteen-year-old girl.

We must reiterate that in statutory rape cases that attract lengthy prison terms of thirty years to life imprisonment, proof of age should not be casual or superficial, even when the accused readily agrees to plead guilty.

In the upshot of all we have said, we shall allow this appeal. We invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 and quash and set aside the entire proceedings including conviction and sentences of the District Court of Babati District in Criminal Case No. 124 of 2019 and subsequent proceedings including conviction and sentences of the High Court of Tanzania at Arusha in Criminal Appeal No. 96 of 2019.

Because there was no trial, we hereby order re-arraignment before another magistrate with competent jurisdiction. We further order that in the event of conviction following a new trial, the time the appellant spent in custody shall be considered.

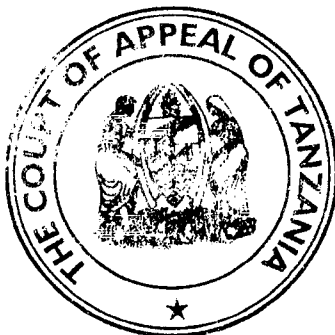
**DATED** at **ARUSHA** this 23<sup>rd</sup> day of February, 2023.

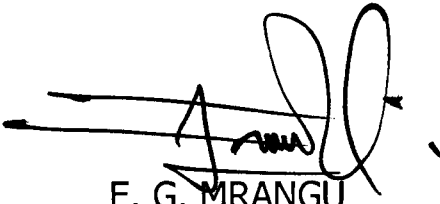
I. H. JUMA  
**CHIEF JUSTICE**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

The Judgment delivered this 23<sup>rd</sup> day of February, 2023 in the presence of the appellant in person and Ms. Jacqueline Linus, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



  
E. G. MRANGU  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**