

TANZANIA / JUDGMENT

hagai tuwelane tusenche chizo vs republic 2023 tzhc 22744 31 october 2023

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TZHCDECIDED
31 October 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MBEYA SUB REGISTRY) AT
MBEYA CRIMINAL APPEAL No. 113 OF 2023 (Originating from the decision of the District Court
of Mbozi at Vwawa in Criminal Case No. 27 of 2023) HAGAI TUWELANE TUSENCHE @
CHIZO..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

23h & 31st October, 2023 MPAZE, J.: The appellant, Hagai s/o Tuwelane Tusenche @ Chizo, was charged before Mbozi District Court at Vwawa (the trial court) in Criminal Case No. 27 of 2023, with two counts. The first count was rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2022 now R.E 2022], (The Penal Code); and the other one was impregnating a school girl, contrary to section 60A (3) of the Education Act [Cap 353 as amended by section 22 of Written Laws (Miscellaneous Amendments) Act No. 2 of 2016]. i Upon the appellant's plea of guilty on both counts, he was sentenced to thirty (30) years and twenty (20) years in respect of the above said counts, respectively, with an order for the sentences to run concurrently. Displeased with both the conviction and sentences, he preferred an appeal to this court on six (6) grounds. However, upon a careful review of the said six grounds in the petition of appeal, two specific complaints feature. His main concerns are; that the plea upon which he was convicted was equivocal and that none of the two offences were proved beyond reasonable doubt. On 14th April, 2023, the appellant when appeared before the trial court pleaded guilty to the charge that was read over to him. The exact words used by the appellant in his reply to the charge were; "It is true, I raped the victim by the name XYZ, a giri aged 17 years old" [acronym added]. That was in respect of the first count. On the second count, he pleaded, "It is true, I did impregnate her as a result of raping hef". This plea made the trial court enter a plea of "Guilty" against the appellant. Then the facts were narrated to the appellant. From which the appellant replied to the trial court that, "What Public Prosecutor has read 2 is true and correct. I do agree with them as presented." The trial court then convicted the appellant on his own plea of guilt. The following facts form part of the admitted facts of the appellant as per the record before the trial court; 'The appellant was, on IFF April, 2022 and 17th April 2022, at Igamba Village within Mbozi District in Songwe Region where he met the victim (XYZ) on her way back from school. He raped her on those two days. Eventually, the victim gets pregnant. He, during the interrogation at

the police station, admitted before D/C Frank to have committed the said offences.' At the hearing, the appellant appeared in person, unrepresented, while the respondent/Republic was represented by Ms. Prosista Paul, when the appellant was required to submit on the said grounds of appeal, he opted to hear what the respondent had to say first. Ms. Paul, the learned • State Attorney, who represented the respondent, contested the appeal and invited the court to dismiss it. Throughout her brief but composed submission, she was persistent that the procedure before the trial court that led to the conviction and sentence of the appellant was perfect. 3 Ms. Paul was displeased with the appellant's approach to appeal to this court, bearing in mind the import of section 360 (1) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA) which bars him from appeal against conviction but only against legality. The State Attorney valiantly suppressed the appellant's concern about the equivocality of his plea and the need for exhibits such as a PF3 form, a birth certificate and a school register book. She adamantly argued that the pleas were unequivocal and the admission of the facts that constitute the offences charged against him was flawless. To her, the conviction on one's own plea of guilty can stand regardless of tendering physical Exhibits. She was firm that the appellant understood the facts that constituted the offence charged against him. That is why he had to reply 'What the Public Prosecutor has read is true and correct. I do agree with them as presented'. The appellant, being a layperson, had nothing useful to offer when he was required to react to Ms. Paul's submission. With the above revelation of what happened, the niggling issue is whether the pleas are unequivocal to warrant the appellant's conviction and sentence. 4 It is common legal knowledge, as correctly submitted by Ms. Paul, that section 360 (1) of the CPA bars an appeal if the record before the trial court shows that the appellant understood the charge and the facts well enough and the plea is unequivocal. However, there are instances where an appeal can be entertained notwithstanding a plea of guilty. Principally, a plea of guilty may be challenged in the following scenarios;

1. When the plea is ambiguous, imperfect or unfinished, incapable of being treated as a plea of guilty.
2. When the plea of guilty resulted from a mistake or misapprehension.
3. When the charge laid against the appellant disclosed no offence known to the law and
4. When the admitted facts, cannot amount to a conviction of the offence charge. (See for instance the case of Laurence Mpinqa v. Republic [1983] TLR 166.) It can safely be said .that an unequivocal plea for a valid conviction should come from a proper charge in terms of section 135 of the CPA that would be fully comprehended by the accused person against whom the charge is laid. On top of that, the law, section 228 (1) of the CPA, requires the charge to be read over and fully explained to the accused person in a language he understands before he is asked to state whether he admits or denies every particular ingredient of the offence. 5 The admitted facts should disclose and establish all the elements of the offence charged. Whereupon, the accused person must plead to each ingredient of the offence charged and the court's record should reflect the same. See the case of Michael Adrian Chaki v. Republic. Criminal Appeal No. 339 of 2017 (unreported). In this case, when the charge was read over and explained to the appellant, on 14th April 2023 his answer was,

on the first count, 'It is true, I raped the victim by the name XYZ, a girl aged 17 years old' [a0xQr\yvc\ added]. On the second count, he pleaded, 'It is true, I did impregnate her as a result of raping her. It is from this plea that the trial court entered a plea of guilty against the appellant. Then the facts were narrated to the appellant. From which the appellant replied to the trial court that, 'What Public Prosecutor has read over is true and correct. I do agree with them as presented.' The trial court then convicted the appellant on his own plea of guilty. The following facts form part of the admitted facts of the appellant as per the record before the trial court; 'The appellant was, on 15th April 2022 and 17th April 2022, at Igamba Village within Mbozi District in Songwe Region where he met the victim (XYZ) on her way back from school. He raped her on 6 those two days. Eventually, the victim got pregnant. He, during the interrogation at the police station, admitted before D/C Frank to have committed the said offences' I entertain no doubt at all that the charge was perfect and the procedure during the narration of the facts to the appellant was equally flawless. Remarkably, the facts point out two events-stances. The first one is the raping of the victim and the other one is impregnating the victim as a result of the rape incident. The facts ought to be descriptive enough to enable the appellant to say with certainty that he was pleading guilty to the commission of the two offences charged against him. The ingredients of the offences ought to spell out clearly in the facts to be able to say that the pleas were unequivocal. For a statutory rape like the present scenario, there ought to be a clear statement of fact establishing penetration of the male organ into the vagina. As for the second count, the facts should show that the victim is a schoolgirl and pregnant. See, for instance; Omary Kijuu v. The Republic Criminal Appeal No. 39 of 2005), published on a website www.tanzlii.org [2007] TZCA 9, Mathayo Ngalya @ Shaban v. Republic, Criminal Appeal No. 170 of 2006 (unreported) and Imani Charles Chimanjo v. Republic, (Criminal Appeal No. 382 of 2016), published on a website www.tanzlii.org [2019] TZCA 30 The facts that were read to the appellant do not disclose and establish all the elements of the offences the appellant was charged with. There ought to be a statement as to the facts showing the ingredients of the offence of rape and impregnating a schoolgirl. It is enough to say that in the present case, there was no compliance in ascertaining whether the appellant's plea was unequivocal. It is thus unsafe to say that the appellant entered a plea of guilty to the two counts of rape and impregnating a schoolgirl that was preferred against him. Thus, given the above position, I allow the appeal and proceed to nullify and quash the trial court's proceedings and set aside the conviction and sentences meted against the appellant. I hereby direct the record in Criminal Case No. 27 of 2023 to be remitted to the District Court of Mbozi at Vwawa for trial, whereupon the charge should be read over and explained to the accused, who is the appellant before me, in the language he would understand. The trial should be conducted by another magistrate of competent jurisdiction. 8 At the end of the trial, in case the appellant is found guilty and convicted, the time that he spent in prison shall be deducted. Meanwhile, the appellant shall remain in custody as a remandee pending his trial. It is so ordered. Dated at Mbeya this 31st October, 2023. M.B. PAZE JUDGE Court: Judgment delivered in the presence of the appellant in person and Ms. Imelda Aluko Public Prosecutor this 31st day October, 2023. Right of Appeal fully explained. 9

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