

TANZANIA / JUDGMENT

hussein rashid jumanne vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI fCORAM: MUGASHA. J.A.. MWANDAMBO. J.A. And MAIGE, J.A.) CRIMINAL APPEAL NO. 55 OF 2020 HUSSEIN RASHID JUMANNE.... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Decision and Order of the High Court of Tanzania at Moshi) (Mkppa, JQ dated the 11th day of October, 2019 in Vide DC. Criminal Appeal No. 3 of 2018 JUDGMENT OF THE COURT 20th & 22nd September/2023 MUGASHA. J.A.: The appellant was charged and convicted by the District Court of Mwanga with the offence of rape contrary to section 130 (2) (e) and 131

(1) of the Penal Code [Cap 16 R.E 2002]. The prosecution alleged that, on 26th September, 2017 at or about 15:00hrs at Kiruru village within Mwanga District in Kilimanjaro Region, the appellant did have carnal knowledge of a girl aged 14 years old without her consent. The girl shall be referred to as the victim in order to conceal her identity. i When the charge was read over, the appellant pleaded guilty and admitted all the facts adduced by the prosecution side. Consequently, he was convicted and sentenced to a jail term of thirty years. Aggrieved, the appellant preferred an appeal to the High Court which was, however, dismissed in its entirety and the conviction and sentence upheld. Still discontented, the appellant seeks to impugn the verdict of the High Court in the two memoranda of appeal comprising nine grounds of grievance. However, save for the first ground of complaint in the memorandum of appeal which shall be determined to dispose the appeal, we shall not reproduce the remaining grounds of appeal for reasons to be apparent in due course. The respective ground of complaint first ground of appeal reads as follows:

1. That, both courts below erred in law and fact in failing to note and hold that the appellant while pleading to the charge laid at his door he disputed the major element o f the charge which held that there was no consent, hence he did not understand the charge he was pleading to and as a result the plea o f guilty entered by the appellant was equivocal plea o f guilty. At the hearing, the appellant who appeared in person, unrepresented adopted the grounds of appeal without more and opted to respond to the submissions of the respondent Republic if need arises. On the part of the respondent Republic, Ms. Elianenyi Njiro, learned Senior State Attorney co appeared with Ms. Revina Tibilengwa, learned Principal State

Attorney. Besides supporting the appeal, Ms. Njiro submitted that although generally in terms of section 360 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022], except for the sentence, no appeal lies against a conviction grounded on a plea of guilty. However, she submitted, under certain circumstances an appeal lies against conviction on the accused's own plea of guilty and cited to us the case of LAURENCE MPINGA VS REPUBLIC

[1983] T.LR 166 where the High Court among other things, held: "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." Relying on the above cited case, Ms. Njiro pointed out that, in the present case, the plea of the appellant was imperfect and ambiguous because he admitted the particulars of the offence which indicated that, the rape was consensual. In the premises, Ms. Njiro argued that the plea was equivocal and it should not have been acted upon to convict the appellant. Instead, she stated, the plea ought to have been treated as that of not guilty and not otherwise. On the way forward, Ms. Njiro implored on us to quash and set aside the conviction and sentence and order a retrial. In rejoinder the appellant subscribed to what was submitted by the learned Senior State Attorney without more. As earlier stated, the first appellate court is faulted to have sustained the conviction based on the plea of the appellant which was ambiguous and imperfect. Having considered the complaint, submissions of the parties and record before us, for our determination is the propriety or otherwise of the conviction of the appellant. We begin with the charge which was placed at the door of the appellant. After it was read out, the plea of the appellant was as hereunder: - "Accused: It is true we had sex, she came to my - place and we had an agreement" Subsequently, after the prosecutor read out the facts of the case the appellant replied as follows: - "Accused: - I admit all facts are true and correct we had an agreement to have sex and knew she was 14 years old and we had sex" Thereafter, the trial court proceeded to convict the appellant and sentenced him. We are alive to the general rule that, section 360 (1) of the CPA bars an appeal against the conviction by a subordinate court based on the accused's own plea of guilty. However, as correctly stated by Ms. Njiro, case law has widened the scope having stated special circumstances warranting a remedy of an appeal against a conviction based on own plea of guilty where it is established that the plea was imperfect, ambiguous or unfinished, and for that reason it is wrongly treated as a plea of guilty. See LAURENCE MPINGA VS. REPUBLIC (supra) which has been cited with approval in a number of Court's decision including the cases of MSAFIRI MGANGA VS. REPUBLIC, Criminal Appeal No. 57 of

2012 JOSEPHAT JAMES VS. REPUBLIC, Criminal Appeal No. 316 of 2010 and SAMSON MARCO AND ANOTHER VS. REPUBLIC, Criminal Appeal No. 446 of 2016 (all unreported). In the present case, given the factual setting, it is glaring that besides the charge not being properly drafted in line with the provisions creating the offence charged, the plea was ambiguous and imperfect. Looking at the respective plea of the appellant, it is probable that he could have admitted the charge and facts not known in law or rather he pleaded guilty to a different offence. See; SAMSON KITUNDU VS REPUBLIC, Criminal Appeal No. 195 of 2004 and SOKOINE MTAHALI @ CHIMONGWA, Criminal Appeal No. 459 of 2018 (both unreported). In the latter case, the Court relied on the Kenyan case of ADAN VS REPUBLIC

(1973) 1 EA 445 which emphasized the manner in which pleas of guilty should be recorded and seven steps to be followed in stated chronological order.

1. When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand.
2. The magistrate should then explain to the accused all the ingredients of the offence charged,
3. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty.
4. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts.
5. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial.
6. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.
7. The statement of facts and the accused's reply must, of course, be recorded. The said steps must be cumulatively complied with in order to secure a plea which is perfect, complete and unambiguous. As earlier stated, this was not the case in the present matter and the plea of the appellant as earlier stated was equivocal. Given the imperfect and ambiguous plea of guilty, it was unsafe to rely on it to convict the appellant. Thus, the conviction and sentence meted on the appellant cannot be spared. Consequently, we quash and set aside conviction and sentence sustained by the High Court. Therefore, the ground of complaint under discussion is merited and it is allowed to the extent stated. However, on the way forward, we find that the interests of justice demand that the case file be remitted to the trial court for an expedited trial before another magistrate with competent jurisdiction. Since the determination of the sole ground is sufficient to dispose of the appeal, we shall not determine the remaining grounds of appeal. Meanwhile, the appellant shall remain in

custody awaiting the proper trial. It is so ordered. DATED at MOSHI this 21st day of September, 2023. S.E.A. MUGASHA JUSTICE OF APPEAL L. J. S. MWANDAMBO JUSTICE OF APPEAL IJ. MAIGE JUSTICE OF APPEAL The Judgment delivered this 22nd day of September, 2023 in the presence of Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. ijpC D.R. LYIMO DEPUTY REGISTRAR COURT OF APPEAL 9

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