

TANZANIA / JUDGMENT

JUDGMENT ZUBERI ULIRE VS R 1

COURT
TANZLIIDECIDED
12 June 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA SUB- REGISTRY AT SONGEA DC. CRIMINAL APPEAL NO. 21139 OF 2024 (Originating from Criminal Case No. 19282 of 2024 in the District Court of Tunduru at Tunduru) ZUBERI BAKARI ULIRE..... APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order 24th September, 2024. Date of Judgment: 9th October, 2024. KAWISHE, J.: In the District Court of Tunduru at Tunduru, the appellant was charged with two counts of rape contrary to section 130 (1) (2)(e) and 131(1) of the Penal Code Cap 16 R.E 2022. The victim was a girl of 14 years old. It was alleged that on 11th and 12th June, 2024 the appellant had sexual intercourse with a girl of 14 years who I shall refer as the victim or girl to conceal her identity. When the charge was read to him, he pleaded guilty. 1 The trial court convicted and sentenced him to serve 30 years imprisonment. Irritated with the conviction and sentence of the trial court, he has approached this court challenging the judgment with two grounds of appeal complaining that:

- (i) The purported plea of guilty was imperfect, ambiguous or unfinished. (ii) The trial Magistrate erred in law and in facts in passing the sentence upon the appellant without convicting him. To comprehend the gist of the appeal, I wish to state the available facts of the case albeit very brief. That on 11th and 12th days of June, 2024 at Matemanga Village within Tunduru District in Ruvuma Region the appellant did have sexual intercourse with the victim, a girl of fourteen years old. That on 12th day of June, 2024 at about 00:00hrs he was arrested and sent to police station. That on 12th day of June, 2024 he was interrogated whereas he confessed to commit the offences on two different days at his room. When the charge was read to the accused before the trial court, he pleaded guilty. He was convicted on his own plea and sentenced. He has approached this court claiming that the plea was unfinished, imperfect or ambiguous. The appeal was challenged by the respondent. 2 When the appeal was called for hearing, the appellant was represented by Mr. Y. Kaukuya, learned advocate while the respondent was represented by Ms. E. Mfanyakazi, learned State Attorney. The appeal was argued orally. Submitting on the grounds of appeal Mr. Kaukuya appellant's learned advocate stated that the appeal has two grounds. Prior to amplifying the

grounds, he prayed to abandon the second ground and argue the first ground of appeal. The learned advocate contended that the purported plea of guilty was imperfect, ambiguous or unfinished. That the appellant was charged with two counts of rape contrary to section 130 (1), (2)(e) and 131(1) of the Penal Code Cap 16 R.E 2022. That, as per the cited section for the offence of rape to be proved, two main elements have to be proved. First, have sexual intercourse with a woman and second, she is under 18 years of age. In efforts to bolster his submission, he cited the case of Michael Adrian Chaki vs. Republic (Criminal Appeal 399 of

2019) [2021] TZCA 454 (9 September 2021) at pages 7 to 9 where the Court of Appeal established six conditions for unequivocal plea of guilty. The learned counsel insisted that the established conditions have to be met conjunctively. He decided to base his argument on the fifth condition. He 3 averred that, in order for the accused's plea of guilty to be proper, the accused has to 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. To reinforce his submission, he cited the case of Richard Lionga Simageni vs. Republic, Criminal Appeal No. 14 of 2020 CAT at page 8-9, where the conditions were reiterated. Mr. Kaukuya further submitted that, in the case at hand, the first count was read to the accused where he replied that: "it is true that I have sexual intercourse with the victim a school girl at my room (ghetto)." That the victim came to the appellant's barbershop where she had haircut and exchanged phone numbers with the appellant. That, the appellant continued to state before the trial court that they kept in touch, on her return home to Kiuma Village. The learned advocate added that the appellant told the trial court that on 11th June, 2024 the victim came to his barbershop thereafter, they went to the appellant's room. The appellant disclosed that getting into his room, the victim undressed all her clothes, and he undressed also. That they started to have sexual intercourse. That the appellant took his male organ and inserted into the victim's female 4 organ. That they started having sex around 17hrs and finished around 18hrs and allowed the victim to go home. Mr. Kaukuya submitted that, on the second count the appellant replied that, 'it is true that I had sexual intercourse with the victim.' That appellant told the trial court that, after they finished having sexual intercourse on 11th June, 2024 when the girl returned home they did not agree if she would come the next day. Nevertheless, on 12th June, 2024 the appellant was surprised to see her at his office, the barbershop. That it was about 18hrs, after that they went to his room where she undressed all her clothes including her underwear. After that, the appellant also undressed his pants. That they had sexual intercourse, proceeded until midnight of about 00:00hrs when he heard someone knocking the door. Upon opening the door, he met and saw two hamlet chairmen namely, Hassan Ngonyani and Mzee Harub of Secondary and Ngalinje. He added that, they were accompanied by one man who was introduced as the victim's parent. That the appellant together with the victim were taken to police station. At the police station the appellant was interrogated on raping a school girl. That he confessed because it was true and correct that he had sexual intercourse with the victim. 5 After he had narrated what the appellant stated before the trial court, Mr. Kaukuya was of the view that looking at the two pleas of

guilty, nowhere the appellant stated that the victim was below 18 years. The learned advocate asserted that the appellant stated that the victim he raped is a school girl and not a girl of under 18 years. Banking on the conditions in the cases he has cited earlier, Mr. Kaukuya lamented that, it is clear that the plea of guilty do not match to the criteria set by the Court of Appeal. He added that the appellant had to plead to each ingredient of the offence. He concluded by contending that the trial magistrate erred to consider the appellant's reply as plea of guilty. That being the case, the only remedy is to order retrial so that the plea of the appellant can be properly taken. He prayed that the appeal be allowed. Ms. Mfanyakazi, learned State Attorney replied by stating that the respondent is of the view that the plea of guilty was perfect, finished and not ambiguous. That it was unequivocal plea. She argued that after the charge was read and explained to the accused in the language he understands that is Kiswahili, the appellant pleaded guilty to all the two counts charged with before the trial court. Ms. Mfanyakazi added that the appellant did not reply it is true and stopped there rather, he continued by 6 stating how he met the victim when she was on vacation and had sex on 11th June, 2024 and 12th June, 2024. She continued to reply that, the appellant stated that he went with the victim to his room and had sexual intercourse. He stated how he was arrested in his room when he was still with the victim on 12th June, 2024. Ms. Mfanyakazi stressed that after the appellant pleaded guilty before the trial court, the facts were read and explained to him stating how the offence was committed. The appellant accepted the facts read to him before the court by stating that, 'they are correct and accurate.' He continued to state how he committed the two incidents in his room and how he was arrested. The learned Attorney invited this court to visit pages 5 to 6 of the trial court's typed proceedings. She quoted the appellant's reply before the trial court stating: "Your honour, what I would like to add is that, nilijaribu sana kumkimbia sana ili nisianzishe mahusiano ya kimapenzi na mhangana ambaye nilikuwa nafahamu ni mwanafunzi wa shule. Hata hivyo, Mwenyezi Mungu akipanga jambo lake huwezi kulikwepa. Nilikuwa nafahamu kuwa kufanya mapenzi na mwanafunzi ni makosa. Tulikubaliana ningemrudisha usiku ule ule hata hivyo kabla 7 sijamrudisha nilikamatwa pamoja naye na tukapelekwa kituo cha polisi. Your honour I was arrested at the spot at my room." Ms. Mfanyakazi added that the proceedings at page 2 to 6 show how the charge was read to the appellant and how he pleaded guilty and accepted the facts. That, in the charge sheet and the facts show the ingredients of the offence of rape. The learned Attorney insisted that, the appellant had sexual intercourse with a girl of 14 years. Buttressing her submission, she referred the case of Michael Adrian Chaki (supra) cited by the appellant's advocate at page 7 to 9 where the Court of Appeal discussed conditions fit for an unequivocal plea. She adduced the 6 conditions one after the other. First, the appellant must be arraigned on a proper charge, that is to say the offence section and the particulars therefore, must be properly framed and must explicitly disclose the offence known to law. Second, the court must satisfy itself without any doubt and must be clear in its mind that an accused full comprehends what is actually faced with otherwise injustice may result. Third, when the accused is called upon to plead to the charge, the charge is stated and fully explained to him before asked to 8 state whether he admits or denies each and every

particular ingredient of the offence. This is in terms of section 228(1) of the Criminal Procedure Act, Cap 20 R.E 2022. Fourth, the facts adduced after recalled a plea of guilty should disclose and establish all the elements of the offence charged. Fifth, the accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged with and the same must be properly recorded and must be clear. Sixth, before a conviction of 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. The learned Attorney averred that through the conditions in the case of Michael Adrian Chaki (supra) and Richard Liona Simageni (Supra), the case at hand met all the conditions. Thus, there is no any challenge on the charge sheet or offence section. She went on to state that looking at the charge sheet, all the ingredients constituting the offence of rape are stated. That the appellant had sexual intercourse with a victim of 14 years of age. Also, the facts stating how the rape offences occurred, on page 5 of the typed proceedings show that all the ingredients of rape are present. 9 That it gave the appellant understanding of the offence charged with and pleaded guilty. While summing up, Ms. Mfanyakazi insisted that, the plea of guilty by the appellant was perfect, finished and not ambiguous. That the appellant understood the offences charged with after the charge sheet and the facts were read explained to him. Thus, the appellant's counsel stating that the plea of guilty was ambiguous because in the two counts, the appellant did not state that the victim was not of 18 years rather was a student, the submission is baseless. That the elements of the offence are found on the charge sheet, particulars of the offence and the facts which constitute the offence are very clear. That the plea of guilty was given after the appellant had understood the offences he was charged with and the ingredients of the offence. She prayed the court not to interfere with the conviction and sentence appealed against and the appeal be dismissed for lack of merits. Mr. Kaukuya the appellant's learned advocate in his rejoinder, stated that on the issue that the appellant stated how he met with the victim on 11th June, 2024 and 12th June, 2024 is not plea of guilty. The learned advocate added that stating that the facts were accepted as correct and 10 accurate, does not make it plea of guilty. Also, the appellant stating how he was arrested does not amount to plea of guilty. The charge sheet and the facts showing the ingredients of the offence not a plea of guilty. For plea of guilty to be perfect, the six conditions stated in the case of Michael Adrian Chaki (supra) have to be met. He contended that in the cases he cited, the Court of Appeal stated the conditions are to be met conjunctively. He insisted that they do not have problems with the charge sheet neither the facts. The accused has to plead to each and every ingredient. He pleaded that he had sexual intercourse, but there is nowhere he stated about age. Age is of essence. Having sexual intercourse with a student cannot be an offence of rape. Having followed carefully the submission made by both parties and perused the records available, it is an ample time to deliberate on the merits of the appeal. In determining the sole ground of appeal, this court found that the main question is whether the plea of guilty was unequivocal. The general rule governing plea of guilty is well established by the law under section 360(1) of the Criminal Procedure Act Cap 20 R.E 2022 which provides that: 11 "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". The law is very clear that the conviction based on plea of guilty cannot be appealed against. An appeal from such conviction ought to be on the sentence only. Nevertheless, there is an exception to the general rule. In certain cases, an appeal on conviction may be entertained even if there is a plea of guilty. Such an oxygen valve was stated in the case of Laurence Mpinga vs. Republic [1983] TLR 166 that: "Such an accused person may challenge the conviction on any of the following grounds:

- (i) 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; (ii) that, he pleaded guilty as a result of mistake or misapprehension; (iii) that, the charge laid at his door disclosed no offence known to law; and (iv) that, upon the admitted facts he could not in law have been convicted of the offence charged." In view of the excerpt drawn from Laurence Mpinga (supra) and the allegation by the appellant's learned advocate that the appellant's plea of guilty was imperfect, ambiguous or unfinished, the first principle in the case cited guides me in determining the authenticity of the plea. That, 12 even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and, for that reason, the trial court erred in law in treating it as a plea of guilty. With that regard, did the trial court err in law as alleged? To unwrap the mystery, I could not hold myself from perusing the trial court's proceedings and the appellant's learned advocate submission where he quoted the appellant stating that: 'it is true that I had (sic) sexual intercourse with the victim a school girl at my room (ghetto).' This statement shows clearly that, he responded to a question concerning sexual intercourse. According to the charge sheet and the facts thereto, the appellant was charged with raping a girl of 14 years. The appellant's learned advocate although challenging the plea of guilty he stated clearly that he has no problem with the charge sheet neither the facts. His problem is that, the fact that the appellant agreed to have raped the school girl does not amount rape. Also, the appellant replying that he committed the offences charged with and that the facts are correct and accurate does not make it plea of guilty. He asserted that, the appellant agreed to have raped the girl and that the facts are correct and accurate but he never stated that the girl was not 18 years old. 13 In his view, the plea of guilty has to be accompanied with the age of the victim. That age is of essence in cases of rape. I tried to figure out why the learned advocate hold so. Then I realised that since he submitted that he had no problem with the charge sheet, he did not want to eat back his words by stating that it was the provision establishing the offence cited on the charge sheet. The Penal Code Cap 16 under section 130(2)(e) covers the age of a victim of rape, it states: '...with or without consent when she is under eighteen years of age,...' Also, Laurence Mpinga (supra) requires that the offence has to be known to the law. The appellant's advocate lamentation that the appellant never stated the age of the victim which is of essence, I had to pay homage to the charge and facts. I wish to reproduce part of the charge sheet hereunder: '..... CHARGE SHEET 1st COUNT STATEMENT OF OFFENCE; RAPE contrary to section 130(1) (2) (e) and 131(1) of Penal Code [CAP 16 R.E 2022] PARTICULARS OF OFFENCE 14 ZUBERI BAKARI ULIRE on 11th day of June 2024 at

Matemanga Village within Tunduru District in Ruvuma Region did have sexual intercourse with the VICTIM a girl of Fourteen (14) years old. 2nd COUNT STATEMENT OF OFFENCE RAPE contrary to section 130 (1) (2) (e) and 131(1) of Penal Code [CAP 16 R.E 2022] PARTICULARS OF OFFENCE ZUBERI BAKARI ULIRE on 12th day of June 2024 at Matemanga Village within Tunduru District in Ruvuma Region did have sexual intercourse with the VICTIM a girl of Fourteen (14) years old.' I purposely reproduced the charge sheet in order to satisfy myself whether it contains the statement of the offences with which the accused person was charged with as Ms. Mfanyakazi submitted. On the face of it, the charge sheet established the offence in accordance with the law and gave sufficient information to the appellant to understand the offence which he stood charged with. Further, as the learned State Attorney argued, the particulars of the offence show clearly that, the accused was charged with offence of rape. That he had sexual intercourse with a girl of 14 years. After he had pleaded guilty, when the facts were read to him he accepted the same to be correct and accurate. At page 3 of the typed proceedings, when he was required to plead on the 1st count, he replied: 15 'Your honour it is true that I have (sic) sexual intercourse with the victim a school girl at my room "ghetto ..."' on the 2nd count, he replied: 'Your honour it is true that I have sexual intercourse with the victim.' The appellant's reply shows clearly that he was aware of the offence he was charged with. The facts stated that the victim was a girl of 14 years old and the appellant admitted the same to be correct and accurate. In my considered view, if the appellant did not accept that the victim was under 18 years, when the charge was read and explained to him; and the facts reiterated that the victim was 14 years old, he should have stated that the facts are not correct. He stated freely that the facts are correct and accurate. The question lingering in my mind is why the appellant's counsel stated that the appellant's plea is equivocal because the appellant just stated that he raped a school girl without stating that she was under 18 years old. I wish to observe the following: first, the accused confessed to have been arrested in his ghetto (room) with the victim a school girl. Second, the accused confessed to have had sex with the girl on 11 th and 12 June, 2024. The particulars of the offence and the facts both stated that the girl was a school girl of 14 years old. Among others, he agreed that the information on the age of the victim was correct and accurate. Thus, the 16 accused/appellant confessing to have had raped the girl of 14 years, instead of relying on the evidence of the victim as it has been always, this has opened a new page in this arena. According to the principle accentuated in the case of Selemani Makumba vs. Republic (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006) the usual way has been that, true evidence of rape has to come from the victim because the act is done between the victim and the assailant in secrecy. This time around the matter has turned bottom up. The lion has freely testified how it ate the deer and not the deer stating how it was ravaged by the lion. The accused/appellant proved penetration, the assailant testified on how he raped the victim a school girl on 11th and 12th June, 2024 by having sex until midnight. The appellant stated that on 12th June, 2024 the girl came by surprise and they went into his room and have sex past midnight and were arrested on the spot. The return of the girl after the 11th June, 2024 sexual intercourse does not in any close point come to consent. Since the charge sheet and the facts showed that the victim was a girl

of 14 years, it is clear that consent is immaterial. In the case of *Kulwa Daje vs. Republic*, Criminal Appeal No. 345 Of 2018 the Court of Appeal stated: 17 ‘... the offence of rape created under section on 130 (2) (e) of the Penal Code, does not require to be proved by the lack of consent on the part of the victim. Rather, as in the present case, the prosecution is enjoined to prove that there was an act of sexual intercourse and that the victim was below eighteen years of age...’ Being bound with this decision of the Apex Court, I wish to reproduce paragraphs 3 and 4 of the facts read and explained to the accused: ‘3. Your honour that on 12th day of June, 2024 the accused person was at Matemanga Village within Tunduru District in Ruvuma Region.

4. Your honour on 12th day of June, 2024 at Matemanga Village within Tunduru District in Ruvuma Region did have sexual intercourse with the victim a girl of Fourteen (14) years old.’ [emphasis is mine]. In my view, the appellant was informed of the age of the girl through the charge sheet and the facts read and explained to him as shown at page 2 to 6 of the typed trial court’s proceedings. From the narration given by the appellant as how they started their relationship until when he was arrested in his ghetto after having a prolonged sexual intercourse with the girl, it is my considered view that, his plea is unequivocal. See the case of *Jack Mahembega vs. Republic* (Criminal Appeal No.369 of 2020) [2023] TZCA 17821 (10 November 2023). The words used by the appellant when he admitted the facts show that, the appellant understood the facts of the case which stated the offence and the age of the victim. In the case of *18 Joel Mwangambako vs. Republic* (Criminal Appeal 516 of 2017) [2020] TZCA 1880 (27 November 2020) the Court of Appeal stated: “Bearing in mind and the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said narrative, we find without demur that he was rightly convicted as his plea was unequivocal and unmistakable”. The principle developed in this excerpt matches with what the appellant did before the trial court. Thus, I have no doubt that he understood the charge and the facts narrated to him, that is why he replied that, ‘they are correct and accurate.’ The age of the girl was one of the ingredients, he never challenged the age thus, he accepted the same. His plea was unequivocal. The appellant’s learned advocate argued that, the plea of guilty was imperfect or unfinished. Thus, urged this court to order retrial so that the plea of the appellant can be taken and recorded properly. In order for the court to order retrial, it has to be satisfied that there was an error which can be rectified without occasioning injustice to the appellant. See the case of *Fatehali Manji vs. Republic* [1966] EA 343 where the Court of Appeal of East Africa restated the principle upon which the court should order retrial. It stated that: 19 “In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill the gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused

person....” Guided by the principle founded in Fatehali Manji vs. Republic (supra) since the appellant was conversant with the offence he was charged with, and his plea was unequivocal, I do not see any reason to incline to appellant’s learned counsel submission. Consequently, the issue raised, whether the plea of guilty was unequivocal is answered in the affirmative. From the foregoing discussion, the appeal lacks merit and is hereby dismissed in its entirety. Subsequently the conviction, sentence and order of the trial court are upheld. It is so ordered. DATED and DELIVERED at SONGEA this 9th day of October, 2024. E. L. KAWISHE JUDGE 20 Court: Judgment delivered in the presence of Ms. Esther Mfanyakazi, learned State Attorney for the respondent and in the presence of Mr. Yusuph Kaukuya, learned advocate for the appellant and in absence of the appellant. Right of further appeal explained. E. L. KAWISHE JUDGE 9/10/2024 21

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF’s page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/319431/source_file/e480a2d699d986cf/JUDGMENT_ZUBERI_ULIRE_VS_R_1.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/zuberi-bakari-ulire-v-the-republic-rape-tanzlii-2024--6a3ea5243b1caa9129819d7a>

Prepared on 13 October 2026 · Esheria