IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 54 OF 2010

CONSTANTINE DEUS @ NDINJAI .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 26th day of June, 2009
in
Criminal Appeal No. 54 of 2006

JUDGMENT OF THE COURT

31st May & 4th June, 2012

RUTAKANGWA, J.A.:

The appellant and one Moses s/o Thobias @ Ikangala and six others appeared before the District Court of Geita on 19th April, 2002, to answer a charge of Armed Robbery c/ss 285 and 286 of the Penal Code. The particulars of the charge, partly read as follows:-

"That Moses s/o Thobias @ Ikangala, Constantine s/o Deus @ Chendela, ... jointly and together are charged on 16th April, 2002 at about 18.00 hrs at Mashinde Village within Geita District ... did steal one Phoenix bicycle, ...one bag, ... different kinds of clothes, ... one Sunny radio ... all total valued at Tshs. 74,000/= the property of Emmanuel s/o Peter and before such stealing did use actual violence to wit, the panga to the said person in order to obtain the said properties."

When the charge was read out to the accused persons, the appellant and Moses Thobias, readily pleaded guilty, each one saying:-

"It is true."

The trial Senior District Magistrate entered pleas of guilty. The rest of the accused persons denied the charge and pleas of not guilty were entered.

The plea taking exercise, we must quickly point out, was done in fulfillment of the mandatory requirements of section 228 (1) and (2) of the Criminal procedure Act, Cap. 20, R.E. 2002 (the Act). This section provides as follows:-

> *" 228. – (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."*

Although under the said section there is no requirement for recitation of the facts, as a matter practice, the public prosecutors have always been giving outlines of the facts of the case. This practice was applauded "as sound" by this Court in the case of **John Faya v. R.,** Criminal Appeal No. 198 of 2007 (unreported). In line

with this salutary practice, the Public prosecutor prayed for an adjournment to prepare the facts of the case. The prayer, which was not opposed by the accused persons, was granted.

The trial court reconvened on 25th April, 2002 to hear the facts of the case. Although it was absolutely not necessary, the charge was again read out to the appellant and Moses Thobias, who returned the same pleas of guilty. Then the public prosecutor narrated what he thought were the appropriate facts as far as the two accused persons were concerned.

As in this appeal it is being vigorously claimed that the pleas of guilty were not unequivocal, we have found it unavoidable to reproduce here the entire facts as given in the trial court. They were as follows:-

> *"The accused in the dock who are the 1st and 2nd accused live at Mshinde village and Kakubiro respectively. On 16/4/2002 at 17.00 hrs the accused was at Mshinde forest. One*

Emmanuel Peter who was accompanied by his wife was passing at Mshinde forest. They had their bicycle make phoenix and had tied on the carrier a bag which contained various clothes and a radio. The first accused appeared holding a panga and wanted to cut the complainant. Emmanuel Peter carried the bag so that he could run away with it. The 1st accused pursued the complainant with his panga and he dropped it. The 2nd accused had a stick. They stole the bicycle and the bag with its contents therein. The complainant identified the 1st accused because they attended school together. The complainant went to report at the village members who made a follow up. The accused were arrested. When they were interrogated they admitted. The 1st and 2nd accused on their free will showed where they hid the properties of the complainant. The properties were recovered and some were not recovered. The redio was not recovered. The properties were identified by the complainant. The recovered properties are one bicycle make Phoenix No.? Three shirts, one head

gear, one jacket, one Tshirt, one table cloth and the bag. I tender them as exhibits – Bicycle exhibit P1, three shirts – exhibits P23 collectively, one jacket, a Tshirt – Exh and a table cloth Exh P3 collectively."

What each accused said in response to these facts, is very relevant for a proper and conclusive determination of this appeal. Moses Thobias (1st accused) said:-

"I have heard what the prosecutor has stated. It is true I met with Emmanuel. It is true I had a panga. It is true I wanted to cut the complainant with a panga. It is true he dropped the bag and I stole the bicycle and the bag. The properties were of the complainant Emmanuel."

On his part, the appellant, who was the second accused, said:-

"I have heard what the prosecutor has said. It is true that I met with the complainant. It is true I had a stick. It is quite true that

myself and the 1st accused stole the bag and the bicycle."

The learned trial magistrate found both accused persons to have unequivocally pleaded guilty to the charge of armed robbery and convicted them accordingly. They were sentenced to thirty (30) years imprisonment each. The appellant appears to have been aggrieved by the conviction and sentence. He accordingly preferred an appeal to the High Court. The appeal was resisted by the respondent Republic.

The appellant briefly argued before the learned first appellate judge that he had been beaten by the police. He went on to contend that as a result the police had asked him to plead guilty. So he pleaded guilty because he was so directed by the police, but in actual fact he never committed the offence.

The appellant's claims did not find purchase with the learned first appellate judge. In her well reasoned judgment, she partly said:-

> *"I believe the appellant's assertion is nothing but an afterthought. This is because when appellant appeared before the trial court, the charge was read over and explained to him and he admitted the charge and the facts stated by the prosecution and exhibits P1, 2 and 3."*

She then referred to some decided cases wherein it was succinctly held that there is no right of appeal against a conviction based on a plea of guilty. She, all the same, made this germane observation, with which we are in agreement:-

> *"I am however, aware that in some instances a person convicted on his own plea of guilty may appeal against conviction on grounds that the plea was ambiguous or that it was taken under mistake or misapprehension ... In this appeal, appellant has not raised as ground of appeal that his plea was ambiguous or that it was taken under misapprehension."*

On being satisfied that the trial magistrate had followed all the necessary procedures to avoid basing a conviction on an equivocal plea of guilty, she sustained the conviction, as the plea was unequivocal and dismissed the appeal. Dissatisfied and undeterred, the appellant has lodged this second appeal.

To prove his innocence, the appellant has accessed the Court with four grounds of complaint against the judgment of the High Court. One, the learned appellate judge erred in treating his plea of guilty as unequivocal. Two, technical words, which were not explained to him in the trial District Court were used. Three, the exhibits, on which the learned judge relied, were wrongly introduced in evidence. Four, the narrated facts did not show that he exercised personal violence on the complainant, Emmanuel, in order to obtain the said properties.

The appellant appeared before us in person, fending for himself. The respondent Republic, on the other hand, was represented by Miss Judith Nyaki, learned State Attorney.

The appellant adopted his four grounds and, understandably he had nothing in elaboration of any of the ground. Miss Nyaki, vigorously resisted the plea. She took us through the statement of the offence, the particulars of the charge, the pleas of the appellant and the admitted facts. She impressed upon us, that both the statement of the offence, the particulars of the offence as well as the admitted facts not only show that the appellant was properly charged but that also they showed all the necessary ingredients of the offence of armed robbery using ordinary words understood by the accused persons. It was for this reason, she argued, the appellant and Moses accepted the facts and they gave details on how they committed the offence jointly. She accordingly pressed us to dismiss the appeal in its entirety, as the plea was unequivocal.

In disposing of this appeal, we shall be guided by this conventional wisdom which has been crystallized into a principle of law. This is that there is always a presumption of innocence on the part of the accused in all criminal cases. As such, a conviction should not be hurriedly obtained by forcing a plea of guilty. All the same,

there is no better witness in a criminal case than an accused person who unequivocally admits an offence through an extra judicial confession and/or a plea of guilty in court. It is on this basis that Lord Reid in **S [an infant] vs Manchester City Recorder and Others** [1969] 3 All E.R. 1230, aptly said:-

> *"The desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty.* ***The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty.*** *Guilt may be proved by evidence. But also it may be confessed", [Emphasis is ours].*

It was emphasized by the Court of Appeal for East Africa in **David K. Gitihi v. R.,** Criminal Appeal No. 118 of 1972, that it is not the concern of the courts to convict an accused person on his own plea of guilty unless:-

"It is certain that the accused understands the charge and intended to plead guilty and that he has no defence to the charge."

We have studied the trial court's proceedings on 19th April, 2002, and 25th April, 2002. We have carefully read the accused persons' pleas on both occasions, the facts given and their responses thereto. We are satisfied beyond any reasonable doubt that the appellant clearly understood the nature of the charge he was facing and had no other intention but to plead guilty. What he said in response to the narrated facts bolstered his resolve to plead guilty and demonstrates clearly that he had no possible defence to the charge at all. The plea of guilty was therefore unequivocal and we are constrained to dismiss the appeal, as the admitted facts show that the two had a common intention to rob Emmanuel of his properties, which indeed they did.

It is a pity that our criminal justice system does not give the courts the discretion to reciprocate by imposing lesser stiff sentences to such remorseful first offenders. While not hoping against hope,

we pray the authorities responsible to consider to lessen the rigours, caused to repetentant first offenders who plead guilty, of some statutes which impose mandatory minimum sentences. To us, the immediate advantage of this justice-cum-reformation oriented approach would be decongestion of our overcrowded prisons, speedy disposal of criminal cases, saving of public funds unnecessarily spent on witnesses because many might be tempted to plead guilty and less appeals to appellate courts. Furthermore, this incentive to plead guilty approach, might lead to a decrease in criminality. A lost child when humanely treated, returns to himself and conforms with the ethos of his society.

The immediately above observations notwithstanding, after dismissing the appeal, we confirm the conviction of the appellant which was based upon his own unequivocal plea of guilty and the sentence of thirty years imprisonment.

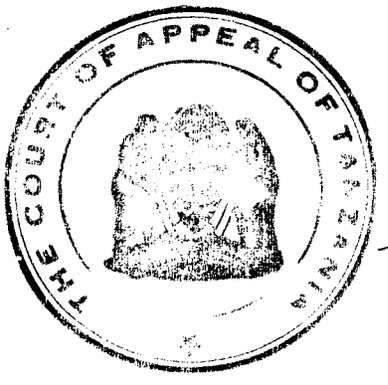
DATED at MWANZA this 2nd day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. Mkwizu
DEPUTY REGISTRAR