IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., KIMARO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 316 OF 2010

JOSEPHAT JAMES.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Moshi)

(Jundu, J.)

dated the 6th day of January, 2006
in
Criminal Appeal No. 102 of 2004

JUDGMENT OF THE COURT

21st September, & 1st October, 2012

OTHMAN, C.J.:

The appellant, Josephat James, was charged with an unnatural offence contrary to section 154(1) of the Penal Code, Cap 16 R.E. 2002 as amended by the Sexual Offences (Special Provisions) Act, No 4 of 1998. On 5/9/2002, the District Court of Moshi convicted him on his own plea of guilty. He was sentenced to life imprisonment. His appeal to the High Court (Jundu, J. as he then was) was dismissed. Hence this second appeal.

At the hearing of the appeal, on 21/9/2012, the appellant appeared in person, unrepresented. The respondent Republic, which did not resist the appeal was represented by Mr. Marcelino Mwamnyange, learned Senior State Attorney.

Consolidating the appellant's grounds of appeal, one of the critical challenges therein is that the High Court had failed to properly direct itself on his plea of guilty to the offence at the trial court. Before us, the appellant complained that he was neither given an opportunity to explain the circumstances and facts of the charge levied against him nor did he voluntarily plead guilty.

On his part, Mr. Mwamnyange submitted that after the charge was read to the appellant, he merely stated: "*It is correct*". Those words were insufficient to enter a plea of guilty as it was difficult to decipher what the appellant meant. That as such, the appellant had pleaded guilty as a result of a misapprehension, one of the circumstances an appeal against conviction resulting from a plea of guilty could be entertained by an appellate court according to the decision of the Court in **Ramadhan Haima V. Republic,** Criminal Appeal No. 213 of 2009, (CAT) (unreported).

Mr. Mwamnyage furthermore submitted that, the record does not show that the trial court explained the substance of the charge to the appellant to enable him to understand it fully and to appreciate the consequences of pleading guilty. It could not be expected, he urged, that the appellant, a peasant from Nganjeni Kirua Vunjo Village, Moshi District could understand the legal language contained in a charge.

With regard to the statement of facts by the public prosecutor subsequent to the recording of the plea of guilty, Mr. Mwamunyange submitted that what was narrated was a mere repetition of the charge and not facts that contained all the essential ingredients of the offence. Relying on **Safari Deemay V. The Republic**, Criminal Appeal No. 269 of 2011 (CAT) (unreported), he invited the Court to allow the appeal.

The starting point for consideration of this appeal must be, section 360(1) of the Criminal Procedure Act, Cap 20 R.E. 2002. It provides:

> *"360(1).* ***No appeal shall be allowed in the case of any accused 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". (Emphasis added)*

We are fully aware that notwithstanding a conviction resulting from a plea of guilty, under certain circumstances an appeal arising thereof, may be entertained by an appellate court. These would include situations where the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it (**Rex v Forde** (1923) KB 400 at 403. Equally, it may be entertained where:

(i) the 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) an appellant pleaded guilty as a result of a mistake or misapprehension;

(iii) the charge levied against the appellant disclosed no offence known to law, and

(iv) upon the admitted facts, the appellant could not in law have been convicted of the offense charged.(See, **Lawrent Mpinga V The Republic**, (1983) TLR 166 (HC) cited with approval in **Ramadhan Haima's case** (*supra*)).

An appeal may also be entertained where an appellant was pressured into pleading guilty or the plea of guilty was procured as a result of a threat or promise offered by a person in authority in consideration of pleading guilty.

Each case will depend on its own set of circumstances and facts.

In order to properly determine the issues at stake in this appeal, it is essential that we reproduce the appellant's plea of guilty as recorded by the trial court on 5/9/2002. It reads:

Court: Charge read over and explained to accused person who is asked to plea thereto:

Accused's pleads: **It is true.** (Emphasis added)

Court: Entered as a plea of Guilty.

Sgd

N.L. Massawe, PDM

5/9/2002

Now, section 228 of the Criminal Procedure Act, Cap 16 RE 2002 provides:

> *"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".(Emphasis added)*

Having closely examined the record, we would agree with Mr. Mwamnyange that the expression, "*It is correct*", used by the appellant after the charge was read to him, was insufficient for the trial court to have been unambiguously informed of the appellant's clear admission of the truth of its contents. In the circumstances arising, it is doubtful whether that expression by itself, without any further elaboration by the appellant constituted a cogent admission of the truth of the charge. It is trite law that a plea of guilty involves an admission by an accused person of all of the necessary legal ingredients of the offence charged.

In **Safari Deemay's case** (*supra*) the appellant was recorded to have said: "*It is true*" after a charge of rape c/s 130(1)(2)(e) and 131(1) of the Penal Code was read and a plea of guilty entered by the Babati District Court. In quashing and setting aside all the proceedings, conviction and sentence, the Court warned:

> *"Great care must be exercised especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment. We are also of the settled view*

that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate, in his own words as to what he is saying "is true".

We entirely subscribe to that view. In the instant case, the trial court was enjoined to seek an additional explanation from the appellant, not only what he considered was "*correct*" in the charge, but also what was it that he was admitting as the truth therein. With respect, the trial Court was not entitled by the answer given, "*It is correct*", to distil that it amounted to an admission of the truth of all the facts constituting the offence charged.

In **Ramadhan Haima's case** (*supra*), the appellant after a charge of an unnatural offence c/s 154(1)(a) of the Penal Code was read to him admitted:

"It is true that I did commit the unnatural offence, I did commit the offence, I did carnal knowledge to one Kiku s/o Lobuwack, boy of 10 years".

On second appeal, the Court found out that the plea of guilty to the charge was unequivocal and was properly entered by the trial court.

With respect, in the present case, the mere words, "*It is correct*," were hardly sufficient to have conclusively assured the trial court of an admission of the truth of the charge in terms of the requirement of section 228(2) of the Criminal Procedure Act.

A close examination of the record reveals that in its consideration of the matter, with respect, the High court examined at length the appellant's statement *after* the plea of guilty was entered by the trial court and held that it was unequivocal, but omitted to direct itself as we have pointed out earlier, on the completeness of the appellant's admission of the truth of the facts constituting the offence as contained in the charge, *prior* to entering the plea of guilty. We have no doubt in our minds that had the High Court specifically noticed this aspect of the proceedings, it would have come to the same conclusion as the Court that the purported plea of guilty was incomplete. The words expressed by the appellant were insufficient as an admission of the truth of the charge. On that expression, a plea of

guilty could not have been validly entered. In view of the seriousness of the offence and the sentence of life imprisonment imposable on conviction, in our considered view, this serious irregularity occasional a failure of justice.

That apart, we would also agree with Mr. Mwamnyange that the statement of facts by the prosecutor, *after* the plea of guilty was entered by the trial court was a mere repetition of the charge. No facts were disclosed as to what the sole witness, one Elioka w/o James (the victim's mother and the appellant's step mother) who reported the incident to the police actually witnessed or which of the facts she substantiated. In this case, this assumed importance because the victim, a boy aged two and a half years, could not possibly have testified, being an infant. Moreover, it is not known what medical evidence was available, if at all it was and what it had revealed. It should be recalled that the duty is that of prosecution to state the facts which establish the offence with which an accused person is charged. As stated in **Adan V Republic** (1973) EA 445, the statement of facts by the prosecution serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really

unequivocal and that the accused has no defence and it gives the magistrate the basic material to assess sentence.

In his criticism of the propriety of the proceedings, Mr. Mwamnyange went on to submit that the appellant during mitigation of sentence had raised a defence that he was drunk. It was an irregularity for the trial court to have convicted him on a plea of guilty despite the defence raised.

The record bears out that in mitigation of sentence the appellant stated:

> *"I was tempted to do this act due to the drinks I had taken".*

On a proper examination of the record, it would appear to us that by so asserting, the appellant may not only have been calling in aid a factor for consideration in mitigation, but was also raising a defence to the charge. This was yet another occasion where the trial court ought to have either sought further clarification from the appellant whether or not he maintained his plea of guilty or sought to qualify it or was relying on the defence of intoxication under section

14(2) of the Penal Code, which could only have been resolved by a trial. Faced with the above, the court too, on its own appreciation of the circumstances had a judicial discretion to allow a change or withdrawal of the guilty plea before passing sentencing (See, **Kamundi VR** (1973) I EA 540, **R V. Brooks and Child** (2006) SACS 247). Instead, it went on to pass sentence without any further inquiry or finding, with the result that a doubt is cast whether all along the appellant genuinely intended to confess his guilt. With respect, this disturbing feature of the trial proceedings which the High Court failed to notice, affected the integrity of the plea of guilty. To avoid a miscarriage of justice, we are inclined to resolve it in favour of the appellant.

At this juncture, we think that it is important to recall the exigency of the law and the procedural steps to be adhered to when an accused person is called upon to plead, and especially where the plea taken turns out to be a plea of guilty.

The procedure in question was well explained by Spry V.P in **Adan's case** (*supra* at p. 466) thus:

"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. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. 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. 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 or to add any relevant facts. 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 guilty, the magistrate

should record a change of plea to "not guilty" and proceed to hold a trial. 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. The statement of facts and the accused's reply must, off course, be recorded". (See also: ***Chamrungu v. S.M.Z****. (1988 LRC (Crim.) 26 at page 29)*

The next issue for consideration is whether or not a retrial should be ordered so that the appellant's plea can be retaken by the District Court. Mr Mwamnyange submitted that as the appellant has spend over ten years in prison (i.e. from 05/09/2002 to 21/09/2012) and the prosecution evidence may have been lost during this period, a retrial of the case would serve no useful purpose.

Having closely deliberated on the matter, we would agree that in the circumstances of the case, where the appellant has served a period of over ten years imprisonment and the prospects of the availability of the evidence, including medical and of the appellant's

age at the time of alleged commission of the offence is uncertain, the interest of justice is not in favour of a retrial (**See, Shiv Kumar Sofat V.R** (1957) E.A. 469; **Merali and Others V.R** (1971) E.A. 221).

In the final analysis and for all the above reasons, we hereby quash and set aside all the proceedings, conviction and the sentence in the High Court and the trial court. The appellant is to be released forthwith from prison unless otherwise lawfully held. The appeal is hereby allowed.

DATED at ARUSHA this 28th day of September, 2012.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL