IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 111 OF 2010

NGARANUS s/o KAPORINYI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(L.K.N Kaduri, J.)

Dated the 8th day of February, 2010
in
Criminal Appeal No. 74 of 2009

RULING OF THE COURT

2nd & 8th May, 2013

KAIJAGE, J.A.:

In the District Court of Meatu at Mwanhuzi, the appellant, NGARANUS s/o KAPORONYI and two other persons were convicted on their own plea of guilty of the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002. Each was sentenced to forty (40) years imprisonment and 20 strokes of the cane.

Dissatisfied, the appellant unsuccessfully appealed to the High Court, Tabora, complaining that his plea to the charge was equivocal and that the sentence meted out by the trial Court was illegal and excessive. Dismissing the appeal, the learned High Court judge held that appellant's plea to the

charge was unequivocal. Consequently, the learned judge confirmed the conviction entered and the sentence passed by the trial Court.

Still aggrieved, appellant lodged the present appeal grounded on the following complaints:-

1. That, appellant's plea being equivocal, he was wrongly convicted on his own plea of guilty.

2. That, the appellant was not accorded a fair trial in view of the fact that he is a Masai and was not then conversant with Kiswahili language.

3. That, the sentence imposed by the trial Court and sustained by the High Court is illegal and not in conformity with the Minimum Sentence Act, 1972.

At the hearing of the appeal, the appellant appeared in person and adopted the grounds contained in the memorandum of appeal, without

more. Mr. Hashim Ngole, learned Senior State Attorney appeared for the respondent/Republic.

Mr. Ngole strongly resisted the first ground of appeal. He said that the Courts below cannot be faulted in their finding that the appellant had unequivocally pleaded guilty to the charge of armed robbery. Referring to the record of proceedings pertaining to the lower trial Court, he submitted that on 24/6/1997 when the charge was read out to the appellant, the latter's response contain a clear admission of the essential ingredients of the offence. He further informed the Court that when the facts of the case disclosing the offence charged were subsequently outlined by the prosecution, the appellant accepted them as representing nothing but the truth.

It is the law that before proceeding to convict an accused on his own plea of guilty, the trial Court must explain every ingredient of the alleged offence to him, and that what he says should be recorded in a form which will satisfy an appellate Court that he fully understood the charge and pleaded guilty to every element of it unequivocally. (see; **R.V. YONASANI EGALU AND OTHERS** (1942) 9 EACA 65, **AMBAKISYE MWAIPUNGU V.**

R., Criminal Appeal No. 133 of 2010 and **JOHN FAYA V. R.**, Criminal Appeal No. 198 of 2007 (both unreported).

We have carefully examined the record of the lower trial Court's proceedings. When the appellant first appeared in Court on 24/6/1997 and after a charge of Armed Robbery contrary to sections 285 and 286 of the Penal Code was read over to him, he is recorded to have admitted:-

> *"It is true that I stole the cattle but I never used the gun to shoot a person; though I had a gun and gave a warning shot."*

It was on the basis of that admission that the trial Court entered a 'PLEA OF GUILTY' to the charge thereby satisfying the requirements under section 228 (1) and (2) of the Criminal Procedure Act, Cap 20 R.E. 2002(the CPA).

Subsequently, on 26/6/1997 the facts of the case, which we are satisfied that they contain the essential ingredients of the offence of armed robbery, were outlined by the prosecution side. Upon being given an opportunity to dispute or add anything to the outlined facts, the appellant is recorded to have further admitted:-

"It is true the facts are correct. One Chambaki s/o Nambaya who gave us a gun was in our company also. We used it in the banditry."

From the record, we are unable to find that appellant's plea was ambiguous or equivocal. However, no appeal would lie on a plea of guilty. Section 360(1) of the CPA is relevant and it provides:-

"S.360 (1) 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 of legality of the sentence."

We are 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 pleads guilty as a result of a mistake or misapprehension, the charge levelled against him discloses no offence known to law, the plea is imperfect, ambiguous or unfinished and where upon the admitted facts,

the appellant cannot in law be said to have been convicted of the offence charged. (see; **JOSEPHAT JAMES V. R.,** Criminal Appeal No. 316 of 2010, **RAMADHANI HAIMA V.R.,** Criminal Appeal No. 213 of 2009, **SAFARI DEEMAY V.R.,** Criminal Appeal No. 269 of 2011 (all unreported) and **LAURENT MPINGA V.R.** [1983] TLR 166.

In the present case, we see no existence of any of the circumstances unveiled herein above. We similarly entertain no doubts in our mind that the first appellate Court correctly found that appellant's plea of guilty to the charge was unequivocal and that he was properly convicted. We therefore find that the appeal on the first ground is devoid of any merit.

We hasten to find that the second ground of appeal is also without merit. A complaint that the appellant is a Masai and that he was not then conversant with 'Kiswahili', a language which the trial Court employed in conducting proceedings, was raised for the first time before the first appellate Court which correctly opined thus;

> *"In my opinion, gauging from how the appellant and the rest of the accuseds revealed vital information, the appellant understood the*

proceedings very well. Their plea being unequivocal the only issue is on sentence."

With respect, we have found ourselves in agreement with the learned first appellate Court's Judge.

No where in the record is it shown that the appellant suffered any language inhibition to follow proceedings before the trial Court. In any case, the appellant has not suggested that the elaborate statements he is recorded to have made during mitigation, when he was asked to plea to the charge and when responding to the facts outlined by the prosecution, were words of the trial magistrate and not his. On this note, we agree with Mr. Ngole that the second ground was raised as an afterthought. We consequently hereby dismiss this ground.

We have, however, found merit in the appellant's grievance touching on the sentence. Following appellant's conviction on his own plea of guilty, the trial Court meted out a sentence of forty (40) years imprisonment with twenty (20) strokes of the cane.

The crucial question for determination is whether the circumstances of this case merit interference by this court of the sentence imposed by trial Court and sustained by the first appellate Court.

Circumstances in which the Court can interfere with the sentence could be distilled from the cases of **NYANZALA MADAHA V. R.,** Criminal Appeal No. 135 of 2005, **MUSSA ALLY YUSUFU V. R.,** Criminal Appeal No. 72 of 2006, **SWALEHE NDUGAJILUNGU V. R.,** Criminal Appeal No. 84 of 2002, **KATINDA SIMBILA V. R.,** Criminal Appeal No. 15 of 2008 (all unreported) and **SILVANUS LEONARD NGURUWE V. R.,** [1981] TLR, 66.

These circumstances which are not exhaustive are to the effect that an appellate Court will only interfere where:-

(a) The sentence imposed is manifestly excessive or it is so excessive as to shock;

(b) The impugned sentence is manifestly inadequate;

(c) The sentence is based on a wrong principle of sentencing;

(d) The trial Court overlooked a material factor;

(e) The sentence has been based on irrelevant considerations;

(f) The sentence is plainly illegal;

(g) The time spent by the appellant in remand prison before conviction and sentence was not considered.

Submitting on the third ground of appeal, Mr. Ngole urged us to find that the sentence of 40 years meted out by the trial Court and sustained by the High Court is illegal for not being in accord with section 170 (2) (a) (i) of the CPA. In elaboration, Mr. Ngole contended that a sentence of 40 years imprisonment passed by the trial District Magistrate and which is beyond the minimum sentence prescribed under the Minimum Sentence Act, Cap. 90 R.E. 2002, ought to have been confirmed by the High Court before being carried into effect in line with the requirement of S.170 (2) (a) (i) of the CPA. We think, with respect, that Mr. Ngole made this contention

out of context. Section s.170 (2) (a) (i) comes into play where a sentence beyond the prescribed minimum, under the Minimum Sentence Act, is in respect of an offence or offences specified in any of the Schedules to the Minimum Sentence Act. Armed robbery not being an offence specified in any of the Schedules to the Minimum Sentence Act, the District trial Court had no legal basis to impose a sentence of 40 years which is above the minimum and was not subject to confirmation by the High Court in terms of section 170 (2) (a) (i) of the CPA.

The District trial Court sentenced the appellant on his own plea of guilty way back in 1997. The Minimum Sentence Act as amended by Act No. 6 of 1994, provides for a minimum sentence of 30 years for an offence of Armed Robbery. The trial Court should have considered imposing the minimum sentence.

The illegality of the sentence is also in respect of the twenty (20) strokes of the cane ordered in addition to the term of imprisonment. Section 12 (2) of the Corporal Punishment Act, Cap 17 R.E. 2002 provides:-

S. 12 (2) A sentence of corporal punishment when imposed inrespect of any offence specified in ***Part III of the Schedule to this Act, shall consist of twelve strokes.*** *" (emphasis added).*

The offence of armed robbery is specified in Part III of the Schedule to the Corporal Punishment Act. Thus, the trial Court had no jurisdiction to order the strokes of the cane beyond the number of strokes prescribed under the said Act.

In the absence of cogent evidence on the aggravating factors, we are settled in our minds that the appellant, who is the first offender, should have earned a sentence of thirty (30) years imprisonment and twelve (12) strokes of the cane. We accordingly quash and set aside a sentence of forty (40) years imprisonment and twenty (20) strokes of the cane sustained by the High Court. Substituted thereof is a sentence of 30 years and twelve (12) strokes of the cane. The appeal only succeeds to that extent.

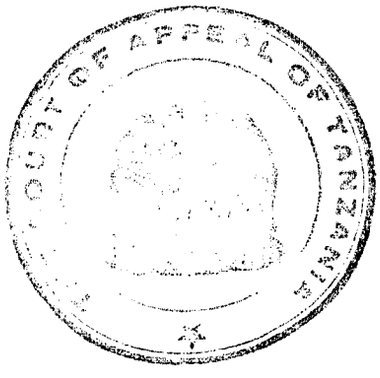
DATED at **TABORA** this 7th day of May, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL