IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: OTHMAN, C.J., KILEO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 307 OF 2012

MARCO LUSHONA SUKUMA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Kibella, J.)

dated the 17th day of October, 2012
in
HC. Criminal Appeal No. 12 of 2012

JUDGMENT OF THE COURT

28th February & 4th March, 2014

MUSSA, J.A.:

In the District court of Chato, the appellant was arraigned for armed robbery, contrary to section 287A of the Penal Code. The particulars on the charge sheet alleged that on the 24th May 2010, at Muungano Village, Chato District, the appellant stole Tshs. 870,000/= in cash, the property of a certain Riziki James. It was further alleged that immediately before such stealing, the appellant threatened the said Riziki with a *panga* in order to obtain the stolen monies. When he appeared before the trial court, the charge was read over and explained to which the appellant pleaded: -

It is true that we robbed some money from Riziki James.

The trial Principal District Magistrate entered a plea of guilty to the charge, following which the prosecutor outlined the following facts: -

The accused is Marco s/o Lushona Sukuma of Buseresere aged 40 years that (sic) the accused on 24/5/2010 at 02.30 hrs was with Paulo s/o Mashaka and Didas where (sic) they invaded the house of Riziki James. This followed a similar incident done at 02.00 hrs at Nyerere house (c.c. 22/2010) where they demanded for (sic) some money as has been done told by Nyerere Kabaragata that he was the custodian of the money they got in their business of selling herds of cattle. Then the wife of Riziki one Josephina d/o Magoke gave cash 870,000/= to the invenders (sic) then the robbers left away. That at the time of demanding money the accused and 2 others (Paulo and Didas) did cut Riziki by using a panga on the back, chest and on the left hand. As the victim was screaming people came up and surrounded the robbers and arrested the accused Paulo and Didas managed to escape. The accused was brought to police Chato

where he admitted to have committed the offence jointly with Paulo and Didas the accused admitted before No. F52 D/sgt Bahati then 25/2/2010 (sic) the accused has been brought before the court and still admitting (sic) the offence charged. Riziki has been admitted and is getting well. This is the PF3 issued to Riziki by the police, I produce it as an exhibit...

As is patently obvious, the statement of facts has a host of grammatical errors and some extraneous information pertaining to Criminal Case No. 22 of 2010; but the material information relayed pertaining to the case under consideration is very clear. In a nutshell, the appellant and company were alleged to have attacked Riziki at his home of residence with a *panga* in the course of which they dispossessed him a sum of Tshs. 870,000/=. The appellant was arrested there and then but his colleagues, Paulo and Didas, bolted away beyond reach. On the facts, the appellant's response was free of ambiguity: -

It is true that we robbed Riziki using a panga but I did not get anything my friends got the money and went with them (sic).

The appellant was accordingly, found guilty and convicted on his own plea of guilty. Upon conviction, he was sentenced to the statutory minimum

penalty of thirty years imprisonment. His appeal to the High Court was dismissed (Kibella, J.) hence this second appeal which is two grounded: -

1. *That the Hon. Judge of the first appellate court misdirected himself to comply with the trial court and disregarded my explanations as detailed to him in my petition of appeal.*
2. *More to be elaborated at the hearings to this appeal.*

Before us, the unrepresented appellant elected to make a response after the submissions of the respondent Republic. Through the services of Ms Jacqueline Evaristus Mrema, learned Senior State Attorney, the Republic resisted the appeal and fully supported the conviction and sentence. In her forceful submission Ms Mrema observed that the appellant unequivocally pleaded guilty to the charge of robbery and, in addition, he accepted the summary of facts which established the offence without equivocation. To that end, she submitted, the appellant was properly convicted by the trial court on his own plea of guilty and, in that regard, the High Court rightly dismissed the first appeal. Furthermore, the learned Senior State Attorney contended that, in terms of section 360(1) of the Criminal Procedure Act (CPA), the appellant having pleaded guilty to the charge, he only had a right to appeal against sentence. Ms Mrema added that it was, in the first place, wrong for the High Court to entertain the appeal which should have been

summarily rejected under section 364 of the CPA. To this latter submission, the learned Senior State Attorney referred the unreported Criminal Appeal No. 323 of 2010 – **Chrizostom Benyoma Vs Republic**.

It should be recalled that in his memorandum of appeal, the appellant promised to elaborate his sole substantive ground pertaining to the first appellate court disregarding his petition of appeal. Yet, in his rejoinder to the respondent's submission, the appellant concentrated his efforts towards impeaching the record of proceedings on account that he did not, after all, plead guilty when the charge was read over to him. To this complaint, we should express at once that a record of proceedings is a solemn document that cannot be lightly impeached by a bare contention such as the one advanced by the appellant. It is always to be assumed that a record of proceedings is a true and genuine reflection of what transpired in court unless the contrary is proved upon evidence. No such evidence was availed and, accordingly, we shall abide by the record of proceedings. Back to the memorandum of appeal and to discern what the appellant told the first appellate court, we have to reflect on his petition which was to this effect; -

> 1. *THAT, the learned trial court Magistrate erred in law and facts to ignore the principles established by the High Court in the case/Appeal of* ***LAWLENCE MPINGA [1983] TLR*** *whereby it*

allows anyone to against the decision/order/judgment if

(i) His plea was imperfect, ambiguous or unfinished

(ii) He pleaded guilty as a result of mistake or misapprehension

The appellants plea also was not only imperfect/ambiguous but also too general and unfinished one hence not a proper plea of guilty to convict.

2. *That, the trial court magistrate contradicted himself to prove the appellant guilty based on equivocal plea that was not an admission of each and every constituent element contrary to section 228(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002]*
3. *That the trial court deliberately erred in law and facts to paraphrase and manufacture new words contrary to acceptance of facts as were recorded contrary to verbal words of the appellant but rather paraphrased by the presiding officer in his own language. Refer the case of* ***CHACHA WAMBURA Vs. R. EACA 339****.*
4. *That the trial magistrate misdirected himself to ignore the following factors before convicting me based on equivocal plea.*

   (i) Illiteracy rate in judicial issues

   (ii) The facts of the offence were not properly disclosed.

5. *That, the trial court magistrate deliberately erred in law and facts to allow prosecution based on malice and unreasonably repeated cases base on the same offences. Facts in Criminal Case No. 23/2010 hence contravening constitutional provisions in Article 13 of the Constitution of the United Republic of Tanzania, 1977 (as amended)*

Addressing the rival points of contentions, we propose to first address Ms. Mrema's contention that in terms of section 360(1) of the CPA it was not open to the appellant to seek to impugn his own plea of guilty. This takes us to the referred provision which stipulates:-

> **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 to the extent or legality of the sentence.**

Nonetheless, as was stated in the unreported Criminal Appeal No. 103 of 2005 – **Khalid Athumani V. Republic** under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. Their lordships approvingly adopted a proposition laid in the English decision of **Rex V. Forder** (1923) 2 KB 400:-

> *A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the*

nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he could not in law have been convicted of the offence charged.

Corresponding remarks were made by the High Court decision of **Laurent Mpinga Vs. Republic** [1983] TLR 166 in the course of setting out the criteria for tampering with a plea and guilty. This decision was affirmed by this court in the unreported Criminal Appeal No. 153 of 2005 – **Kalos Punda Vs. Republic.** Applying the law to the matter under our consideration, we do not entertain any doubts whatsoever that the appellant understood the nature of the charge to which he pleaded guilty in no uncertain terms. Furthermore, the summary of facts outlined by the prosecutor clearly disclosed the offence charged and his response to the narrated facts was also free of ambiguity. The accepted facts, we note, included a PF3 which is consistent with the prosecution allegation that Riziki was attacked. Quite significantly, the appellant even endorsed the detail that a *panga* was employed and went so far as to add a particular that he did not get anything from the heinous act, much as his friends disappeared with the money. Speaking of the appellant's plea and his response to the outlined facts, it is noteworthy that the presiding officer did not paraphrase his speech as the appellant tried to impress in his petition of appeal to the

High Court. Rather, he recorded verbatim what the appellant said. To this end, we are fully satisfied that there is nothing upon record indicative of an imperfect, ambiguous or unfinished plea. Likewise, from the certainty of the language used by the appellant, it cannot be claimed that the plea resulted from a mistake or misapprehension. We, however, think that it was wrong for the prosecutor and the learned trial magistrate to make reference to Criminal Case No. 22 of 2010 which was, in effect, extraneous to the proceeding. We nonetheless, accept the submission of the learned Senior State Attorney that the misnomer was innocuous and did not occasion any miscarriage of justice.

In his petition to the High Court, the appellant also complained of being double jeopardized by being tried in two cases involving the same subject matter. The appellant made reference to Criminal Case No. 22 of 2010 which was being tried in the same court. In this regard, Ms. Mrema elaborated that Criminal Case No. 22 of 2010 involved a separate incident to which the appellant stood accused and convicted, incidentally, on his own plea of guilty. The trial proceedings were, however nullified by the High Court on account of an imperfect plea. Fortunately, we were availed a copy the decision of the High Court through which Criminal Case was nullified with an order for retrial. We noted further that, in the retrial, the appellant was

finally acquitted by the District Court on the 19th January, 2012. What is of significance however is that Criminal Case No. 22 of 2010 depicted the appellant on a different matter, unrelated to the one giving rise to this appeal. To say the least, the points raised by the appellant have no semblance of merit. The appeal is accordingly, dismissed in it's entirely.

DATED at **BUKOBA** this 1st day of March, 2014.

M. C. OTHMAN
CHIEF JUSTICE

E. A. KILEO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: OTHMAN, C.J., KILEO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 307 OF 2012

MARCO LUSHONA SUKUMA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Kibella, J.)

dated the 17th day of October, 2012
in
HC. Criminal Appeal No. 12 of 2012

JUDGMENT OF THE COURT

28th February & 4th March, 2014

MUSSA, J.A.:

In the District court of Chato, the appellant was arraigned for armed robbery, contrary to section 287A of the Penal Code. The particulars on the charge sheet alleged that on the 24th May 2010, at Muungano Village, Chato District, the appellant stole Tshs. 870,000/= in cash, the property of a certain Riziki James. It was further alleged that immediately before such stealing, the appellant threatened the said Riziki with a *panga* in order to obtain the stolen monies. When he appeared before the trial court, the charge was read over and explained to which the appellant pleaded: -