IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)

CRIMINAL APPEAL NO. 541 OF 2015

JOSEPH MAHONA @ JOSEPH MBOJE @
MAGEMBE MBOJE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mrango, J.)

dated the 11th day of May, 2015
in
DC. Criminal Appeal No. 195 of 2014

.....

JUDGMENT OF THE COURT

25th & 29th April, 2016

MASSATI, J.A.:

On the 6/5/2004, the appellant and two other persons, appeared before the District Court of Shinyanga, to plead to a charge of Armed Robbery contrary to sections 285 and 286 of the Penal Code. According to the record, he alone, pleaded guilty in the following words:-

> *"It is true that I robbed with other two persons in one shop"*

This was in response to the following charge

CHARGE SHEET

Name, Tribe and Nationality of the charged person(s)

1st Accused person:

Name: Joseph s/o Mahona @ Joseph s/o Mboje @ Magembe s/o Mboje
Age: 29 yrs
Occ: Peasant
Tribe: Sukuma
Res: Iligo mawe Village Highway Ginnery
Rel: Pagani

2nd Accused person:

Name: John s/o Nicholaus @ Chuwa
Age: 36 yrs
Occ: Business
Tribe: Chaga
Res: Majengo area
Rea: Christian

3rd Accused person:

Name: Daudi s/o Masolwa @ Bulegela
Age: 42 yrs
Tribe: Sukuma
Occ: Driver
Res: Ndala
Rel: Christian

***Statement of the offence**:- Armed Robbery c/s 285 and 286 of penal code cap. 16.*

Particulars of offence: *That Joseph s/o Mahona, John s/o Nicholaus @ Chuwa and Daudi s/o Masolwa @ Bulengela are jointly and together charged that on the 4th day of May, 2004 at about 10:30 hrs at Ngokolo area within the municipality District and Region of Shinyanga did steal Tshs. 100,000/= cash of one Richard s/o Matemu and at or immediately before or immediately after the time of such stealing did use panga to injure one Modest s/o Shayo in order to obtain or obtain the cash stolen.*

STATION: SHINYANGA ***.....***
PUBLIC PROSECUTION

DATE: 6/5/2004

See 192 CPA, 1985". After which the trial court recorded.

FACTS ADMITTED

All facts admitted voluntarily by the accused. Hence no fact denied by him.

Sgd by accused .....

Sgd by PP.....

Sgd M. R. GWAE RESIDENT MAGISTRATE

Thereafter the trial court made the following finding:-

> *"As the 1st accused pleaded guilty to the charged offence of armed robbery and then admitted each constitution (sic) fact I find that the plea of guilty is Unequivocal and unambiguous and above all the admission of all facts by the accused on his own wish (sic) before me. Following the fact that the fact read over to the accused are explainable of the charged offence. This court therefore finds the 1st accused guilty as charged.*

Sgd: M. R. GWAE
RESIDENT MAGISTRATE

6/5/2004

After that, the trial court heard the appellant in mitigation, before sentencing him to 30 years imprisonment. His appeal to the High Court was not successful, on the major ground that the appellant's plea of guilty was

unequivocal and therefore unappeallable in terms of section 360 (1) of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA). Further aggrieved, the appellant has lodged an appeal to this Court.

The appellant's Memorandum of Appeal is comprised of a total of eight (8 grounds) but we think they could be condensed into two major ones. **First**, that the trial court did not enter any conviction contrary to section 235 (1) of the CPA. **The remaining** grounds rotate around the propriety of his plea of guilty.

At the hearing of the appeal, the appellant appeared in person and adopted his memorandum of appeal but allowed the respondent/Republic to start to address the Court, reserving his right of reply.

The respondent/Republic was represented by Ms Jane Mandago, learned Senior State Attorney. She supported the appeal only on the major ground that, the trial court did not enter a conviction, and therefore the sentence, and the subsequent proceedings in the High Court were vitiated. She also went on to submit that consequently the present appeal is incompetent so, it should be struck out. On the other hand, and we think in the alternative, she strenuously submitted that the plea of guilty was quite in order and unequivocal, because all the ingredients of the charge of armed

robbery were explained to the appellant who was quite conscious, and understood what was going on when the plea was taken from him from his hospital bed. She wound up on this general ground that, no matter how serious the charge could be, it was lawful for the court to take a plea of guilty. So, she prayed for the dismissal of those grounds of appeal challenging the plea of guilty.

In reply, the appellant insisted that he was not guilty of the crime of which he stood convicted. To illustrate his innocence, he pointed the apparent discrepancies in the record. **First**, while the charge alleges that the robbery took place in a bar, the particulars to which he allegedly "pleaded guilty" refer to a shop. **Secondly**, although the facts show that the plea was taken from his hospital bed, the record does not indicate that the trial court ever moved there. **Lastly**, he insisted that he was not well when his plea was taken. So, he prayed that his appeal be allowed, and that in the interests of justice, this Court should not order a retrial, given the 12 years or so, he has already spent in custody.

This appeal gives rise to two points of law, one of each of which may, alone, dispose of the appeal. But we shall endeavor to dwell on both, just for the sake of reminding trial courts.

The first point relates to the manner of taking pleas of guilty.

A plea of guilty is sanctioned under section 228 (2) of the CPA which reads as follows:-

> *"If the accused 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."*

There are many judicial decisions that have interpreted this provision or its predecessor, but no such case has done so more elaborately than **R. vs YONASANI EGALU AND OTHERS** (1942)9 EACA. 69 at page 67, where the predecessor East African Court of Appeal said:-

> *"In any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and what he says should be recorded in a form that will*

satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."

(See also **HANDO s/o AKUNAY vs R.** (1951) 18 EACA 307, **CHACHA WAMBURA vs R.** (1953) 20 EACA 339, **JOHN FAYA vs R**, Criminal Appeal No. 198 of 2007 **AMBAKISYE MWAIPUNGU vs R**, Criminal Appeal No. 133 of 2010 (both unreported0. In **AKUNAY's case** the East Africa Court of Appeal repeated:-

"Before convicting on a piea of guilty every ingredient of the offence must be explained to the accused and asked to plead. Otherwise the conviction would be faulted."

The procedure on how to record pleas of guilty, was clearly set out in **ADAN vs R.** (1973), EA 445 at 446. There are five steps:-

(i) The charge and all the ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(iv) If the accused does not agree with the fact or raises any question of his guilt, his reply must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

(See also **HEMEDY MKONDYA vs R**, Criminal Appeal No. 69 of 2007 (unreported).

In the present case, there are several missing links in the chain of events in the taking of the appellant's plea of guilty. **First**, when the appellant first appeared in court on 6/5/2004 and the charge read over to the accused, the appellant pleaded:-

"It is true that I robbed with other two persons in one shop."

As an appellate court, it is difficult for us to know whether by the appellant's plea of "robbing in one shop"...the appellant was actually referring to the same incident of armed robbery that happened to one

Modest s/o Shayo on 4th May, 2004. So actually the plea at this stage was not crystal clear as to what facts were presented to the accused. Hence the importance of the third stage for the prosecution to state the facts.

Secondly, in the present case, first, the facts presented by the prosecution were given "per s. 192 CPA 1985". Section 192 of the CPA governs preliminary hearings which applies where an accused person pleads not guilty which was not applicable here. Be that as it may, when the prosecution had finished stating the facts, and instead of following the third step strictly, which is that of giving the accused an opportunity to dispute or explain the facts or to add to them, the trial court recorded not the appellant's own words, but its own:-

"FACTS ADMITTED

All facts admitted voluntarily by the accused, hence no fact denied by him."

But what is particularly disturbing was that according to the said facts, the appellant also gave a cautioned statement; which was neither tendered in court, nor read out to the appellant, as a constituent part of the facts.

This was the biggest missing link. There, not only should the appellant's own words have been recorded if he was given an opportunity to

respond to the facts narrated by the prosecution, but any pertinent documentary exhibits such as the cautioned statement should have been brought to his attention. This, in our view is where the whole process went awry. The appellant, if he truly pleaded guilty, was wrongly denied an opportunity to say something on the facts adduced by the prosecution. This negates the whole plea of guilty. It was an incomplete plea of guilty, so to speak, and traversed one principle of the right to a fair trial.

So, for the above reasons and with due respect to the learned Senior State Attorney we fault the courts below for not strictly following the procedure of taking and recording the appellant's plea of guilty. We therefore quash all the proceedings relating to the plea of the appellant, and the attendant sentence.

The second issue relates to the trial court's omission to convict which Ms Mandago, learned counsel, fully supports.

The appellant's ground rests on the provisions of section 235 (1) of the CPA. But from the wording of that provision, section 235 (1) of the CPA, only applies after a full trial. It provides as follows:-

> *"235 (1) The court having heard both the complainant and the accused person and their*

witnesses and evidence shall convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him, or shall dismiss the charge under section 38 of the Penal Code...."

So, the section does not apply to cases of pleas of guilty. The applicable law here is the same section 228 (2) of the CPA. As seen above, the section provides that, if the accused person admits the truth of the charge...

"the magistrate shall convict him and pass sentence..."

So, if the trial court was convinced that the appellant's plea of guilty was unequivocal, then he was obliged to convict him before passing sentence. But as we have tried to show in the extract of the proceedings above; after finding that the plea of guilty was "unequivocal and unambiguous" the court proceeded to find the appellant "guilty as charged". He was not convicted. This is contrary to the law. A finding of guilty alone cannot precede a sentence. Any lawful sentence must be preceded by a proper conviction.

But whether, such non conviction proceeds from a full trial or from a plea of guilty, we think, the consequences are the same. Omissions to convict after full trials have, previously attracted the wrath of this Court, resulting in the invalidation of the relevant judgments (See **SHABANI IDI JOLOLO AND THREE OTHERS vs R**, Criminal Appeal No. 200 of 2006; **AMANI FUNJA BIKAI vs R**, Criminal Appeal No. 270 of 2008 (both unreported). So would in our judgment, a finding of guilty in a plea of guilty not be spared if not followed by a conviction.

In the above premises, we are also constrained to hold in the present case, that, even if the appellant's plea of guilty was properly taken, and unequivocal, the finding of guilty, cannot stick together, as it is not welded by a conviction, so it has to be quashed. Similarly, the sentence meted on the appellant has no beacon to hang on. It is equally a non-starter and has to be set aside.

What remains is what should be done. Ordinarily, where no proper plea has been taken, the usual course would be to remit the case file to the trial court for it to take a fresh plea and proceed with the trial in the ordinary way. Similarly, where there is no conviction, the trial court case file would also be remitted to the trial court for it to compose, in the case of a full trial,

a judgment in accordance with the law; and in the case of a plea of guilty, like the present one, for the trial court to enter a conviction according to law. But the question in each case is whether it is in the interests of justice to do so? In deciding so, each case has to be decided on its own peculiar facts.

In the present case, we have taken into consideration, the fact that, of the 30 years imprisonment imposed on the appellant since 6/5/2004, the appellant has already served 12 years. From the date of his conviction it took him 11 years to reach the High Court, and another 2 years to reach, the Court of Appeal. With such a snail's speed of our justice system, it could possibly take at least another 10 years to reach this Court again if we remit this matter back to the trial court. This would work out immense injustice to the appellant, and further erode the credibility of our justice system.

So, for the above reasons, we do not think that it would be in the interests of justice to remit the original case file to the trial court for any of the attendant orders. Instead, we quash all the proceedings of the trial court and the High Court on first appeal and set aside the sentence. We order that the appellant be released from custody forthwith, unless he is held there for some other lawful cause.

Order accordingly.

DATED at **TABORA** this 29th day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL