IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 108 OF 2011

LUANDA S/O MORIS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mushi, J.)

Dated 14th day of April, 2011
In
Criminal Appeal No. 132 of 2009

JUDGMENT OF THE COURT

13th April & 20th June, 2016

MJASIRI, J.A.:

The appellant was charged and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002 (the Penal Code). He was sentenced to thirty (30) years imprisonment and in addition, to suffer twelve strokes. His appeal to the High Court was unsuccessful, hence his second appeal to this Court. The appellant's conviction in the High Court was based on his alleged plea of guilty to the offence.

At the hearing of the appeal the appellant did not have the benefit of legal representation and like in both the High Court and the District Court he had to fend for himself. The respondent Republic was represented by Ms. Zawadi Mdegela, learned Senior State Attorney who was assisted by Faraja George and Ms. Janet Magoho, learned State Attorneys. The appellant presented a nine (9) point memorandum of appeal. However, the appeal centres on the complaint that the appellant was convicted on an untenable plea of guilty. The appellant also complained that the conviction was entered when the matter came for mention. The appellant then opted to let the learned State Attorney address the Court first.

Ms. Mdegela opposed the appeal. She submitted that the law is settled that once an accused person pleads guilty to a charge he has no right of appeal against conviction. He can only appeal against sentence. She relied on section 360 (1) of the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA). She stated that the appellant's plea of guilty was unequivocal. She contended that there was no requirement under the law to warn the appellant when he wished to change his plea from not guilty to guilty. According to her, after the facts were read out to the appellant, he still

pleaded guilty. She made reference to the case of **Kalos Punda v Republic**, Criminal Appeal No 153 of 2005 CAT (unreported).

On the second ground of complaint, that the appellant was improperly convicted when the matter was called on for mention, the learned Senior State Attorney readily conceded that it was not proper for the learned trial magistrate to do so.

The appellant in reply lamented that he did not understand what was taking place when a conviction was entered against his own plea of guilty. He insisted that he was then under 18 and did not plead guilty.

We, on our part, after a careful scrutiny of the record and hearing the arguments of both parties would like to make the following observations. A quick perusal of the record would show that the appellant entered a plea of guilty to the charge of armed robbery. The facts of the case were read on to the appellant who readily accepted what was stated by the prosecution. However that was not all. Initially the appellant pleaded not guilty to the charge. The case was mentioned three times on February 19, March 3 and March 19, 2007. The appellant entered a plea of not guilty on March 19. No other plea was entered until April 2, 2007 when the matter came up for

mention for the fourth time when a plea of guilty was entered. The appellant stated, "*it is true I robbed.*" It is not stated anywhere in the record by the trial magistrate that the appellant had wished to change his earlier plea. The plea of guilty was surprisingly entered when the matter came up for mention. This is not the usual practice. Therefore when the appellant agitated that he did not know what was going on, we cannot ignore his outcry. The appellant is facing a serious offence with a mandatory minimum sentence of 30 years imprisonment and twelve (12) strokes.

Section 360(1) of the Penal Code provides as under:-

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

However under certain circumstances an appeal may be entertained not withstanding a plea of guilty. In **Rex v Folder (1923) 2 KB 400** it was stated that:-

> *"a plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears that:*

(1) 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 charged offence.

Similar criteria was laid down in the High Court case of **Laurent Mpinga v Republic 1983 TLR 166** on the circumstances for interfering with a plea of guilty namely:-

1. *that even taking into consideration the admitted facts, 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;*
2. *that the appellant pleaded guilty as a result of mistake or misapprehension:*
3. *that the charge laid at the appellant's door disclosed no offence known to law, and*

4. that upon the admitted facts the appellant could not in law have been convicted of the offence charged.

See - **Kalos Punda v Republic,** Criminal Appeal No. 153 of 2005 and **Ngasa Madina v Republic**, Criminal Appeal No. 151 of 2005 CAT (both unreported).

Taking into consideration the circumstances surrounding the plea taking, we cannot state with certainty that the plea of guilty entered by the appellant was unequivocal, and that he appreciated the nature of the charge and intended to admit that he was guilty of it.

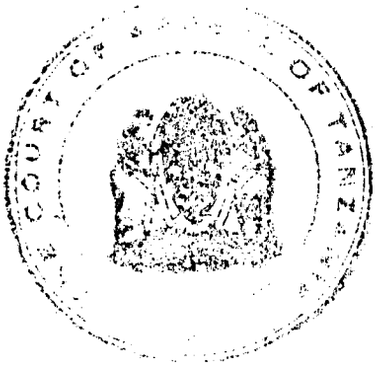
For the foregoing reasons, the appeal is hereby allowed. The orders of the trial District Magistrate dated April 2, 2007 relating to the plea of guilty, conviction and sentence are quashed and set aside. Similarly, the subsequent proceedings and judgment of the High Court in Criminal Appeal No. 132 of 2009 are quashed and set aside. It is directed that the file be remitted to the District Court of Morogoro to proceed with the hearing of Criminal Case No. 160 of 2007 in accordance with the law, by taking the plea of the accused a fresh. Given the fact that the appellant has been in custody since 2007, that is for a period of (9) years, the case should be heard

expeditiously. If the appellant is subsequently convicted, account should be taken of the nine years he spent in prison.

Order accordingly.

DATED at **DAR ES SALAAM** this 14th day of June, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL



S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL