

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 480 OF 2015

DEUS S/O GENDO..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
At Iringa)**

(Kihwelo, J.)

Dated the 30th day of September, 2015

in

DC. Criminal Appeal No. 28 of 2014

JUDGMENT OF THE COURT

27th July & 1st August, 2016.

MJASIRI, J.A.:

In the District Court of Mafinga District, the appellant Deus Gendo together with three others were charged with three counts: conspiracy to commit an offence contrary to section 384 of the Penal Code, Cap 16, R.E. 2002 (the Penal Code), stealing, contrary to section 269 and 265 of the Penal Code and malicious damage to property contrary to section 326 of the Penal Code.

It was the prosecution case that on the 31st day of May, 2014 at Maguvani Village in Mufindi District within Iringa Region they stole 540

bales of grade C used clothes worth eighty million shillings (80,000,000/=) and 60 bales of grade C used shoes, worth twenty million shillings (20,000,000/=) from a motor vehicle with Registration No. T527 BPQ with a trailer with Registration No. T976 BME, ERF which was being transported to the Democratic Republic of Congo, the property of **Affordable Fashions Limited**.

It was alleged by the prosecution that immediately after having stolen the 540 bales of clothes and 60 bales of shoes, they destroyed the motor vehicle and the semi-trailer and staged an accident by setting fire to the motor vehicle and trailer.

The appellant was convicted on his own plea of guilty and was sentenced to thirty years imprisonment. Being dissatisfied with the decision of the trial Court the matter did not rest there. The appellant filed his appeal to the High Court. His appeal to the High Court was dismissed for the reason that his plea of guilty was unequivocal. The appellant has now come to this Court with his second appeal. He has presented a four – point memorandum of appeal. The grounds of appeal are reproduced as under:-

1. *That the Honourable Judge erred in law for failure to take into account that the prosecution side failed totally to prove its case beyond reasonable doubt.*
2. *That the Honourable Judge wrongly relied on his plea of guilty without taking into consideration the statement adduced in his cautioned statement.*
3. *That the Honourable Judge wrongly dismissed the appellant's appeal basing on his plea of guilty, without addressing his mind properly that the sentence meted out to the appellant is punitive and excessive.*
4. *That, the Honourable Judge erred in law to uphold the sentence of the trial court without taking into consideration the age as well as the previous record of the appellant.*

During the hearing of the appeal, the appellant did not have any legal representation and had to fend for himself while the respondent Republic had the services of Mr. Alex Mwita, learned State Attorney. The appellant opted for Mr. Mwita to address the Court first.

Mr. Mwita from the outset did not support the conviction of the appellant. The basis of this position is that the appellant's plea of guilty was not unequivocal. According to him the legal requirement is that on a plea of guilty, the appellant has to plead guilty to the ingredients of the

offence and all the elements of the offence. For instance in the second count, the appellant was charged under sections 265 and 269 of the Penal Code. Section 269 contains various elements outlining various circumstances outlined in subsections (a) to (f). It provides as follows:-

" If a theft is committed under any of the following circumstances, that is to say if-

- (a) the thing is stolen from another;*
- (b) the thing is stolen in a dwelling house and its value exceeds one hundred shillings and the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling house;*
- (c) the thing is stolen from any kind of vessel or vehicle or place of deposit;*
- (d) the thing stolen is attached or forms part of a railway;*
- (e)*
- (f) the offender, in order to commit the offence opens any locked room, box or other receptacle by means of a key or other instrument;*

the offender is liable to imprisonment for ten years."

He submitted that there was an anomaly in the charge sheet. Section 269 on its own without making reference to the subsections is too broad and too general. Hence the appellant when pleading guilty did not plead

guilty to all elements of the offence, and did not clearly understand the nature of the charge. He relied on **Khalid Athuman v Republic** 2006 TLR 79.

In relation to the 3rd count of malicious damage to property Mr. Mwita submitted that the damaged car was admitted by the Court without being seen. The prosecution sought the following order:-

"I pray to tender cautioned statement of 1st accused person cautioned statement of 3rd accused person, certified documents that were used to transport the goods, the vehicle that was burnt by the accused persons and goods, 503 bales of grade C used clothes that have been recovered, the vehicle is at the police station."

Therefore the facts and details relating to the offence of malicious damage to property were not properly outlined to the appellant. The important elements of the offence were missing. The learned State Attorney also submitted that there were other irregularities. The cautioned statement of the appellant was not read out to him.

He further stated that appellant's plea of guilty was not unequivocal as he did not plead guilty to all the ingredients of the offence and the facts

read out to him and accepted by him did not encompass all the elements of the offence.

Mr. Mwita asked the Court to quash the conviction of the appellant in all the three counts and to set aside the sentences meted out by the trial Court. Mr. Mwita did not request for a retrial given the anomaly and defects contained in the charge sheet and the handling of the damaged motor vehicle and trailer. He was of the view that the appellant would not have a fair trial. He asked the Court to set free the appellant.

The appellant on his part, being on his own and without legal representation simply stated, that he supported the submissions made by the learned State Attorney. He informed the Court that he was leaving the matter in the hands of the Court.

We on our part after carefully reviewing the evidence on record and the submissions made by Mr. Mwita, would like to make the following observations. Even though the appellant had lodged four grounds of appeal, the crucial issue for consideration and determination is whether or not the appellant's plea of guilty was unequivocal. The law is settled, no appeal lies where an accused person has been convicted on his own plea of guilty save as to the legality of sentences meted out to him.

Section 360 (1) of the Criminal Procedure Act (the CPA) provides as follows:-

"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 or legality of the sentence."

In **Laurent Mpinga versus Republic** (1983) TLR 166 Samatta, J. (as he then was) outlined the circumstances where an appeal would lie on a plea of guilty.

- 1. That taking into consideration the admitted facts, his 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 he pleaded guilty as a result of a mistake or misapprehension,*
- 3. That the charge laid at his door disclosed an offence not known to law; and*
- 4. That upon the admitted facts, he could not in law have been convicted of the offence charged.*

This decision has been affirmed by this Court. See – **Kalos Punda v Republic**; Criminal Appeal No. 153 of 2005 CAT (unreported).

In **Rex v Forde** (1923) 2KB 400 it was held:-

"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,*
- (2) that upon admitted facts he could not have been convicted of the offence charged."*

In the instant case we are satisfied that the appellant's plea of guilty was not unequivocal and the facts narrated were incomplete and lacked essential elements of the offence.

In the case of **Khalid Athumani v. Republic** (2006) TLR 79 it was stated thus:-

*"The Courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she really understands the charge that has been laid at his/her door, discloses an offence known under the law and that he/she has no defence to it; **A plea of guilty having been***

recorded, a Court may entertain an appeal against conviction if it appears; that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged."

On looking at the 3rd count, the relevant provision is section 326 (1) and not 326 of the Penal Code section 326 is non-existent. The charge is therefore defective. Taking into consideration that all the essential elements of the offence have not been clearly spelled out, the appellant cannot be said to have entered an unequivocal plea of guilty.

For the foregoing reasons we hereby exercise our powers of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002 and we quash the proceedings and judgments of the trial court and the High Court, and set aside the sentence of 7 years imprisonment on the 1st count, 10 years imprisonment on the second count and 7 years imprisonment on the 3rd count.

In view of the defective charges on the 2nd and 3rd counts, we are inclined to agree with the learned State Attorney, that under the

circumstances of this case, the appellant will not have a fair trial, if a retrial is ordered. The appellant is to be released from prison forthwith unless, he is otherwise lawfully held.

Order accordingly.

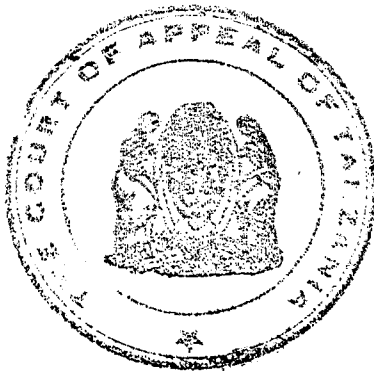
DATED at **IRINGA** this 30th day of July, 2016.

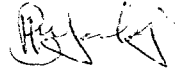
S. MJASIRI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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




B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL