IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK J.A., MWARIJA , J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO.545 of 2016

RASHIDI NZOVU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tanga)

(Aboud, J.)

dated 25th day of November, 2016

In

Criminal Appeal No. 99 of 2016

JUDGMENT OF THE COURT

20th & 25th April, 2018

MWARIJA, J.A:.

The appellant was arraigned before the District Court of Muheza on the charge of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 29/9/2015 at about 9:00 hrs at Songabatini village within Muheza district in Tanga region, the appellant did steal from one Ismail Said Shelukindo cash Tshs.80,000/= and one mobile phone make Nokia valued at Tshs. 40,000/= both total valued at

Tshs. 120,000/=. It was alleged further that immediately before such stealing, the appellant used violence by cutting the said Ismail Said Shelukindo on his left hand by using a sword in order to obtain and retain the stolen properties.

When the charge was read over and explained to him, the appellant pleaded guilty to the offence. Consequently, upon his admission of the facts, he was convicted and sentenced to the statutory term of thirty years imprisonment.

Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court contending that the trial court failed to find that his plea was not unequivocal. His appeal was dismissed hence this second appeal.

His memorandum of appeal, consists of two grounds of appeal as follows:

"1. That, both learned trial magistrate and appellate judge erred in holding that the appellant's plea was unequivocal.

2. That, both the learned trial magistrate and appellate judge wasn't rigour enough to note the charge the charge read over to the appellant differ to the facts read to the appellant as it lacks itemized information."

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Ms Jenipher Kaaya, learned State Attorney.

When he was called upon to argue his grounds of appeal, the appellant who had earlier on filed written submission in support of his appeal, opted to hear first, the reply by the learned State Attorney and that he would later make a rejoinder, if he would deem it proper.

In her submission, Ms Kaaya argued that the appellant was convicted on his own plea of guilty and that the plea was unequivocal. Relying on S. 360(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002], the learned State Attorney contended that a person convicted by a subordinate court on his own plea of guilty is not entitled to appeal against conviction save to the extent or legality of the sentence. She stressed that in this case, the appellant's plea was unequivocal and his appeal to the High Court was thus

rightly dismissed. She referred us to the proceedings of the trial court showing that the charge was read over to the appellant on two different occasions and on both occasions he pleaded guilty and admitted that the facts as read to him were correct.

On his part, the appellant insisted that he did not understand what he was pleading to. With regard to the 2nd ground of appeal, he argued that there is a variance between the charge and the evidence. It was his submission that whereas in the charge sheet, it is alleged that he did steal cash Tshs. 80,000/=, the tendered evidence was to the effect that he stole a mobile phone. When his attention was drawn to the fact that in both the charge and the statement of facts both items were described as the properties which were stolen by him during the robbery, the appellant decided to abandon the 2nd ground of appeal.

Having considered the submission by the learned State Attorney and the appellant on the 1st ground of appeal, the only issue for our determination is whether the appellant was convicted on the plea which was unequivocal as found by the 1st appellate court.

The position of the law is that an appeal may be entertained against a conviction based on plea of guilt where it appears; firstly, that the appellant did not appreciate the nature of the charge and secondly, that upon the admitted facts he could not in law be convicted of the offence. - See the cases of **Ngasa Madina v. The Republic,** Criminal Appeal No. 151 of 2005 (unreported) and **Khalid Athumani v. Republ**ic [2006] TLR 79. In the latter case, the Court had this to say:

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

The Court went on to cite the decision in the case of **Rex v Forde** (1923) 2 KB 400 where Avory J stated as follows:

> *A plea of guilt having been recorded, a court may entertain an appeal against conviction if it appears that the appellant 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."

In arriving at her decision, the learned 1st appellate judge revisited the trial court's proceedings and found that the appellant pleaded guilty. She also found that his plea was unequivocal. From the trial court's record, when the charge was read over to the appellant, he pleaded as follows:-

"I admit I stole Tsh. 80,000/= and a Nokia phone and cut Ismail with a sword."

According to the proceedings further, on 6/10/2015, although the appellant pleaded guilty to the offence, the facts were not read over to him because the prosecution was not ready to do so. The facts were read over on 17/11/2015. Before the same were read over however, the appellant was reminded of the charge and the following was his reply:

"It is true. I stole the money and phone. I did cut him as read."

After the facts had been read over to him, the appellant is recorded to have replied as hereunder:-

"I dispute no fact all that has been read is true. It is true I followed him in his farm, I did attack him strangled him with a shirt in his neck cut his left hand using matchet (sic) then took from him Tshs 40,000/= and Nokia phone. I was arrested and the same recovered."

The appellant did not contest the contents of the record of the trial court to that effect. We therefore take that the record reflects a correct position of what was said by him in that court.

The complaint by the appellant is that at the time when his plea was taken, he did not understand what he was pleading. In his mitigation, he is recorded to have contended that at the time when he committed the offence, he was insane because he was encountering serious hardships in life.

We are certain that from the words used by the appellant when entering his plea, he understood the nature of the charge and since the facts, which he admitted, established the offence with which he was properly convicted. As to the contention that he was insane, since the nature of insanity was explained by him to have been based on hardship in

life and not mental illness, we have no doubt that the appellant was not raising it as a defence but rather as a mitigatory factor.

On the basis of the reasons stated above, like the learned first appellate judge, we find that the appellant's plea was unequivocal. In the event, we do not find merit in the appeal. The same is hereby accordingly dismissed.

DATED at **TANGA** this 24th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL