IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A. MKUYE, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 109 OF 2017

HYASINT NCHIMBI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Songea)

(Mutungi, J.)

Dated the 24th day of November, 2016
in

Criminal Appeal No. 30 of 2016

JUDGMENT OF THE COURT

15th & 22nd August, 2019

KITUSI, J.A.:

The appellant was convicted of Armed Robbery contrary to Section 287 A of the Penal Code, Cap. 16 of the laws, as amended by Act No. 6 of 2011, by the District Court of Mbinga, upon his own plea of guilty. He was consequently sentenced to the statutory minimum jail term of 30 years. His appeal to the High Court of Tanzania, Songea sub Registry was unsuccessful, that first appellate court taking the view that under Section

360(1) of the Criminal Procedure Act, Cap 20 R.E. 2002, hereafter the CPA, no appeal lies against a conviction entered upon one's plea of guilty.

Still dissatisfied, the appellant appeals hereto against the decision of the High Court by a six ground Memorandum of Appeal, the first three protesting against the finding of the two courts below that the plea was unequivocal. We shall refer to the remaining three grounds if that need will arise because we think determination of whether or not the plea was unequivocal is the central issue in this case.

At the trial it was alleged that on 30th April 2016 at or about 15:00 at Minyanyo Village, within Mbinga District Ruvuma Region, the appellant stole one motorcycle make HAOJUE, Registration Number MC 599 BAQ valued at Tshs 2,030,000/= the property of one Fadhili Franco Nyoni and before such stealing he did hit one Karlos Nombo, the user of that motorcycle, with a piece of sugarcane on his head in order to obtain the same.

When the charge was read over and explained to the appellant, he is recorded to have pleaded as follows; "Ni kweli pikipiki niliiba" meaning "It

is true I stole the motorcycle". Consequently the trial court entered a plea of guilty.

What followed thereafter is a matter of particular interest, but the long and the short of it all is that the trial Court convicted the appellant on his own plea and proceeded to impose on him the statutory minimum sentence of 30 years in jail. As earlier intimated, the appellant's first appeal against the conviction and sentence was unsuccessful and his appeal before us mainly reiterates the contention that the plea was equivocal.

Indeed, whether or not the plea was unequivocal was the only issue when the appeal was called on for hearing, with Ms. Tulibake Juntwa, learned Senior State Attorney, appearing for the respondent Republic, whereas the appellant appeared without legal representation. After the appellant had elected to hear the respondent's submission first then rejoin latter, Ms. Juntwa announced that she was in support of the appeal on the ground that the plea was equivocal citing the following reasons:

First, she submitted, the appellant's plea that "Ni kweli nilliba pikipiki" meaning; "It is true I stole the motorcycle" could not be a plea of guilty to Armed Robbery but a plea to a charge of simple theft, which was not the

charge laid before him. Secondly, the learned Senior State Attorney drew our attention to two sets of facts that came after appellant's plea. First the printed facts prepared or submitted by the prosecution and then the facts (referred to as Memorandum of Facts) recorded by the trial Court. Ms Juntwa had the following arguments in relation to these facts.

In practice the facts are narrated by the prosecution unlike in this case where there are two sets of facts which are not identical, and the learned Senior State Attorney pointed out the difference between the two sets of facts. One, the Police Officer who interrogated the appellant is different. Two, the response of the appellant to the interrogations is not the same. In one he admitted committing the offence in the other he denied.

Thirdly, nowhere was the appellant called upon to state whether he admitted any of the facts as true or not. The record does not show that before the conviction being entered, the appellant was given the opportunity to plead to the facts of the case.

For those reasons, the learned Senior State Attorney prayed that we be pleased to quash the entire proceedings of the High Court which sat on

first appeal then quash the conviction and set aside the sentence imposed by the trial Court. She moved us under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 to order a retrial before another magistrate.

The appellant, unrepresented and a lay person as it were, had little to say in response. He prayed that we consider the grounds of appeal he presented and set him at liberty bearing in mind that he has stayed in custody for too long.

To begin our deliberation, we agree with the learned High Court Judge that no appeal lies against a conviction entered upon one's plea of guilty. This is according to Section 360 (1) of the CPA cited by the Judge and many decisions, such as; **Luhinda Njemu Vs. The Republic,** Criminal Appeal No. 300 of 2012 (unreported).

The appellant invites us to fault the manner in which the plea in this case was taken by the trial Magistrate, and the Senior State Attorney supports that position. We take the governing provision in the case to be Section 228 (2) of the CPA which reads:

> *"If the accused person 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 shall appear to be sufficient cause to the contrary."*

This provision was also the subject of discussion in **Said Mamboleo Sanda V. Republic**, Criminal Appeal No. 25 of 2008 (unreported).

In the instant case, it is not clear as submitted by Ms Juntwa, whether the appellant's plea was in relation to the charged offence of Armed Robbery, or an offence of theft, which was not laid against him. In the circumstances, it cannot be said that the appellant's plea was unequivocal, when he did not plead all elements of the charged offence. A plea of guilty may be held to be equivocal in any of the following instances; when the charge does not disclose all elements of the charge [see **Deus Gendo V. Republic,** Criminal Appeal No. 480 of 2015, (unreported)]; when a plea has been induced by undue influence [**Said Mamboleo Sanda V. Republic** (supra)]; when a plea is ambiguous or unfinished [**Laurence Mpinga V. Republic** [1983] TLR 166]. We are therefore of

the conclusive view that in the present case, the appellant's plea was equivocal. In addition, he was not called upon to admit or deny the facts, whether those which were recorded by the court or those which appear to have been prepared by the prosecutor.

We have found it opportune to, once again, draw the attention of magistrates to the difference between the procedure under Section 228 of the CPA and that obtaining under Section 192 of the CPA. The former provision applies when an accused admits the charge and the facts. The facts that are adduced under Section 228 of the CPA are not by any means in a form of a Memorandum, but they are mere facts supporting the charge. The latter provision applies during the preliminary hearing when the accused has pleaded not guilty and the prosecution adduces facts with the view of ascertaining which of them are not disputed so as to speed up trial and avoid the costs of calling witnesses to undisputed facts. At the end of the procedure under Section 192 of the CPA, a Memorandum of undisputed facts, if there be any, is prepared. At the end of the procedure under Section 228 of the CPA a conviction is probably entered.

In the case at hand, the facts that were recorded by the court were titled Memorandum of Facts. With respect, this was wrong in view of what we have shown above, because even if the appellant had been called upon to respond to them, he would not have responded to a Memorandum. It is perhaps necessary to reiterate the procedure which should be followed when an accused pleads guilty. The long paragraph from **Adan V. Republic** (1973) EA 445, cited in **Khalid Athuman V. Republic**, Criminal Appeal No. 103 of 2005 (unreported), will serve the purpose:

> *"When a person is charged, the charge and the particulars should be read out to him so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingridents of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formerly enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the*

facts or to add any relevant facts. If the accused does not agree with the statement of the facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded".

Before we conclude, we wish to express our feeling indebted to Ms Juntwa's able submissions which, as we have shown in our decision, we are entirely in agreement with. She has moved us to nullify the proceedings of the two courts below and order a retrial, and we agree, applying our powers under Section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002. We quash the conviction and set aside the sentence for the reason that the plea was not unequivocal as required. We order an expedited retrial before another magistrate, competent to do so, and at the end of the retrial if the appellant is again found guilty and convicted, the period which he has so far served in prison may be considered in

sentencing. The appellant shall continue to be in remand custody to await the said retrial.

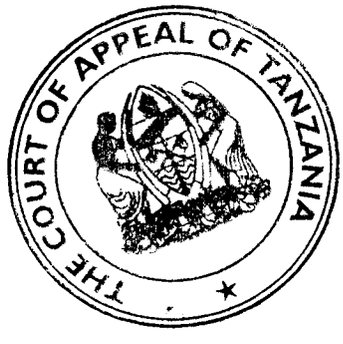
DATED at **IRINGA** this 21st day of August, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of August, 2019 in the presence of Mr. Tulibake Juntwa, learned Senior State Attorney counsel for the Respondent and in the presence of the applicant in person, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL