IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 462 OF 2017

MANDISELA KUNGURU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

Dated 28th day of April, 2017
in
Criminal Appeal Case No. 56 of 2016

.....

JUDGMENT OF THE COURT

31st March & 4th April, 2020.

KOROSSO, J.A.:

The appeal filed by the appellant, Mandisela Kunguru is to impugn the decision of the High Court sitting at Mbeya (Levira, J.) that dismissed his appeal from the judgment of the District Court of Chunya at Chunya, where the appellant was arraigned and convicted of the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap 20 Revised Edition 2002 (the Code) and sentenced to thirty (30) years imprisonment.

The prosecution alleged that on the 21st December, 2015 at Lyeselo village within Chunya District, Mbeya Region, the appellant did steal cash

money Tshs. 2,895,000/= the property of Nyorobi Nanguda and immediately before and after stealing, did threaten to kill one Nyorobi Nanguda by using firearms a homemade shortgun.

The memorandum of Appeal contains six grounds of appeal, which when paraphrased reads as follows:

1. *That, the judge of the High Court erred in law and fact in dismissing the appellant's appeal despite the fact that the prosecution failed to prove the charge against the appellant beyond reasonable doubt.*
2. *That, the judge of the High Court erred in law and fact dismissing the appellant's appeal believing the trial court decisions that the appellant pleaded guilty to the charge despite the fact that the plea of guilty was ambiguous in view of the appellant failure to understand all the elements of the charge.*
3. *That, the judge of the High Court erred in law and fact to dismiss the appeal by the appellant believing the appellant admitted to the charge without assessing whether the plea was unequivocal or not.*
4. *That, judge of the High Court erred in law and fact in dismissing the appeal by the appellant by believing that the appellant admitted both the charges and the facts of the case presented in court despite the fact*

that essential documents and items to prove the case were not tendered.

5. *That, the judge of the High Court erred in law and fact in dismissing the appeal and supporting the lower court's decision by believing that the appellant admitted to the charge without considering the fact that the appellant is uneducated and his inability to comprehend the legal language used before the court therefore could not understand the nature of the offence*
6. *That, the charge against the appellant was not proved by the prosecution beyond reasonable doubt.*

Before us for hearing, the appellant appeared in person unrepresented and prayed to adopt his grounds of appeal and chose for the respondent Republic to respond to the appeal first, after which he could rejoin if the need arises. Whereas on the side of the respondent Republic, they enjoyed the services of Mr. Basilius Namkambe learned Senior State Attorney and Ms. Bernadetha Thomas, learned State Attorney.

Ms. Bernadetha Thomas was tasked to respond to the appeal for the respondent Republic, and at the start of her submissions she conceded to the appeal, and stated that her submissions will focus on the grievance raised in the third ground of appeal. She contended that the appropriate provision

leading this appeal are found within the contents of section 361(1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002, which states that no appeal is allowed where the accused pleaded guilty and was convicted on own plea, except where the appeal is against the illegality of the sentence imposed.

She submitted that despite the stated legal standing, there are exceptions to the general rule, where an accused convicted on own plea can appeal under circumstances expounded in various decisions of this Court. That one of the circumstances established by case law is where the plea is found to have been equivocal. The learned State Attorney referred this Court to a holding in **Kalos Punda vs Republic**, Criminal Appeal No. 153 of 2005 (unreported), where the case of **Laurent Mpinga vs Republic** (1983) TLR 166 was referred, and circumstances where such an appeal can be considered were underscored. Such circumstances include where the plea is imperfect, or where it is ambiguous or unfinished.

The learned State Attorney contended that assessing the plea of guilty by the appellant as found in the record of appeal (page 3), when he was requested to plea he pleaded guilty to the charge. Thereafter, instead of the court proceeding with narrating the facts to the appellant (the accused then),

the prosecutor submitted that the prosecution was ready for preliminary hearing.

That it was on the date fixed for preliminary hearing, when the appellant was reminded of the charge, and again he was called to plea and he pleaded guilty (page 5 of the record). Thereafter, the prosecutor was invited to read the facts of the case, and after they were read the appellant was asked if he agrees to the stated facts regarding the offence charged. The appellant narrated the facts he was in agreement with. Which included conceding that he did steal money but the amount he conceded was Tshs. 1,900,000/= and to have also stolen a mobile phone and a ring. The amount he conceded to have stolen differed from the amount stated in the charge and was read over as part of the facts that is, 2,895,000/-

The learned State Attorney stated by the fact that the appellant conceded to have stolen a different amount, this was a variation of the content of the facts stated and thus meant that the plea of guilty was not unequivocal. For the learned State Attorney, she found it surprising that the trial court did not comprehend this. That is the fact that, in admitting to all the facts narrated, but varying the amount stolen, the appellant had not admitted to all the facts as required by the law for a plea to be unequivocal. She thus argued that, the act of the trial court recording that the appellant

admitted all the facts except for the amount robbed was an obvious indication that the appellant's plea of guilty was equivocal vitiating the plea of guilty.

The learned State Attorney further contended that there was also a procedural irregularity in the conduct of the plea taking exercise. She contended that because it was a plea taking exercise, and the appellant having pleaded guilty, established procedure required the trial magistrate to call upon the prosecution to read facts of the case, and not to proceed to conduct a preliminary hearing. She thus argued that, by the court proceeding to convict the appellant on an equivocal plea of guilt, meant the proceedings were vitiated, since the appellant's plea of guilty was ambiguous and therefore not unequivocal and thus the proceedings were vitiated due to discerned deficiencies. She thus pleaded the Court invoke the powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2002 (the AJA) to quash the conviction and set aside the sentence and a new trial be ordered from the time of Plea Taking that is on the 18th January 2016.

The appellant's rejoinder was very brief, praying for the Court to set him free and stating that justice be done because he was denied justice by the lower courts.

The arguments and submissions from the learned State Attorney and the appellant have been considered dispassionately. Having gone through the grounds of appeal we are in tandem with the learned State Attorney, that when all these grounds are scrutinized, the major grievance in the memorandum of appeal is that the plea of guilty by the appellant was not unequivocal and that the trial court, and first appellate court failed to properly scrutinize the alleged plea hence the conviction by the trial court and dismissal of his appeal by the first appellate court.

In this case the fact that the appellant was convicted upon his plea of guilty to the charge is not in doubt, the record of appeal demonstrates this. We find it pertinent at this juncture to import the pertinent segment so as to better comprehend what transpired in court.

"Date: 18/01/2016
Coram: O. N. Ngatunga- DRM
PP : D.C. Frederick
Acc : present in person
C.C. H. Shehumu
COURT: Charge read over to the accused person and well explained to him and in reply he states in Kiswahili
Accused: ***"kweli"*** *Signature XXXXXX*
COURT: ***Accused person entered as a Plea of guilty***

Sgd. O. N. Ngatunga- DRM

18/01/2016

PP: Your honour, investigations completed. I pray for preliminary hearing date

Accused: Nil

Order: (1) Phg on 19/01/21016

(2) Aric

Sgd. O. N. Ngatunga- DRM

18/01/2016

Date: 19/01/2016

----------(Not Relevant)

Date: 20/01/2016

Coram: O. N. Ngatunga- DRM

PP : D.C. Frederick

Acc : present

C/C. H. Shehumu

PP: Your honour, the matter scheduled for preliminary hearing. I am ready to proceed

Court: Let accused reminded charge

Sgd. O. N. Ngatunga- DRM

20/01/2016

Accused: Replies in Kiswahili language

*Accused: **"kweli"***

Sgd. O. N. Ngatunga- DRM

20/01/2016

Brief facts of the case

PP: Your honour, accused is one Mandiseia Kunguru 28 years old. Peasant. Christian and resides at Kambikikatoto village

The victim one Nurobi Danguda, Sukuma by tribe, 27 years old. Christian, resides at Lyeselo village, Lupatingatinga Ward, Chunya District....

Your honour, suddenly accused walked on a short distance, thereafter, took out the local muzzle loading gun that used the ammunition of the shotgun, pointed towards and threatened with it to the victim and one Shigela Kasekelo accused ordered them to give them to money they had. ***Because of such threats, the victim produced Tshs. 2,895,000/-, cellular phone make Techno and a ring of his colleague one Nyorobi Danguda****..."*

Court: Accused asked whether he admit the facts of the case delivered in court and himself

Sgd. O. N. Ngatunga- DRM

20/01/2016

ACCUSED

... ***I commanded to give anything they had. The victim gave me money amounting to Tshs. 1.900,000/=, a cellular phone and ring.***

Accused signature XX

PP"s Signature XXX

Court: (1) Section 192 of the CPA, Cap 20 R.E 2002 complied with..."

(2) Not relevant

Sgd. O. N. Ngatunga- DRM

20/01/2016

A perusal of the above excerpt shows clearly that what the appellant conceded to have stolen is Tshs. 1,900,000/=) which differs from the facts stating Tshs. 1,985,000/= was stolen by the appellant. Can we then say that the appellant admitted to the facts of the case? We think not. In the way the facts were framed and responded to by the appellant, what is obvious is the fact that the plea was ambiguous, in the sense the admission is not on all facts.

The law and a plethora of decisions have discussed the import of a plea of guilty. Section 360(1) of the CPA which discussed the right to appeal states:-

> *"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 subordinated court except as to extent of legality of the sentence."*

The above provision clearly envisages that upon a plea of guilty, there is no right of appeal unless it is on extent of legality of the sentence. At the

same time, there are various decisions of this Court that have enumerated circumstances where an accused convicted on his own plea can appeal, where the plea itself can be scrutinized. The case of **Laurent Mpinga vs Republic** (*supra*) outlined criteria for interfering with a plea of guilty by stating that, it is when:

1. *"That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished....*
2. *That the appellant pleaded guilty as a result of mistake or misapprehension;*
3. *That the charged laid a the appellant's door disclosed no offence known to law;*
4. *That upon the admitted facts the appellant could not in law have been convicted of the offence charged".*

Having scrutinized the plea by the appellant, we are convinced that the plea situates as one of the circumstances illustrated in **Laurent Mpinga vs Republic** (*supra*). In the present case, as stated above we are satisfied that the 2nd, 3rd, and 4th criteria do not fall squarely into the scope of our current situation but we are of the view that the first criteria does and the plea is tainted with ambiguities, a matter which was also noted by the trial magistrate when he recorded that the amount stolen as admitted by the

appellant differed from the amount stolen read in the facts of the case by the prosecutor. We are thus satisfied that the appellant plea of guilty was not unequivocal and thus escapes the restriction under section 360(1) of the CPA.

We are of the view that this ground is sufficient to dispose of this appeal. It is important to also note, that we have noted improper application of section 192 of the CPA after plea taking. The procedure is clear. Section 192(1) provides that after plea taking and there is a plea of not guilty a preliminary hearing shall be held as soon as practicable and not otherwise.

The defunct Court of Appeal of Eastern Africa had an opportunity to outline the proper procedure in plea taking in the case of **Aidan vs Republic** [1973] E.A 443. This procedure was approved to apply to our context by this Court in various cases including the case of **Chamrungu vs S.M.Z.** [1988] LRC (Crim) 26 and recently in **Juma Selemani @Paul vs Republic**, Criminal Appeal No. 394 of 2016 (unreported). In **Aidan vs Republic** (*supra*)

> *"when a person is charged, the charge and the particulars should be read out to him, so far as possible I his own language, but if that is not possible, then a language which he can speak or understand.*

The magistrate should then explain to the accused of all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally 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 o to add any relevant facts.

If the accused does not agree with the statement of facts or asserts additional acts which, I true, might raise a question as to his guilt, the magistrate should record a change 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'.

Courts are expected to apply the above procedure during plea taking to avoid ambiguous, unfinished or imperfect pleas. Without doubt the plea in the current case failed to comply with the requisite procedure in plea taking, and thus the plea as stated hereinabove was not unequivocal.

In terms of the way forward we accept the invitation by the learned State Attorney on how to proceed. In the event, exercising the powers conferred upon this Court, by section 4(2) of the AJA, we quash all the proceedings that is from the stage a plea was taken for the first time. The conviction is also quashed and the sentence is set aside. We order a new trial be conducted by taking the appellant's plea afresh. During the period of awaiting retrial the appellant shall remain in custody.

DATED at **MBEYA** this 2nd day of April, 2020.

S.A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of April, 2020 in the presence of the appellant in person and Ms. Sara Anesius learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL