IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MMILLA, J.A. And NDIKA,J.A.)

CRIMINAL APPEAL NO. 446 OF 2016

SAMSON MARCO.....1ST APPELLANT
MKWIZU ELIAS.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Mwanza)

(Hon. De-Mello, J.)

dated the 17th day of August, 2013
in
Criminal Appeal No. 89 of 2016

JUDGMENT OF THE COURT

23th & 31st March, 2020

JUMA, C.J.:

This is a second appeal. The appellants SAMSON MARCO and MKWIZU ELIAS, were in the District Court of Sengerema Criminal Case No. 196 of 2015 charged with one count of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002.

The particulars of the offence are that at 01:00 hrs. on the 5th day of September 2015 at Chanika Village, Sengerema in Mwanza Region; they stole cash Tshs. 900,000/= the property of Filbert s/o Mgwesa and immediately

before and after stealing, they used a machete (panga) to obtain and retain the stolen property.

After their arrests, the appellants were on 21/09/2015 presented before the trial magistrate (M. O. Ndyekobora—RM). They denied the charge. When they again appeared before the same court on 08/10/2015, Inspector Sylvester, who was prosecuting, informed the trial court that investigations were not complete. He prayed for another date for mention. Just before the adjournment, the first appellant urged the trial court to remind him of the charge facing him, which was duly done.

Both appellants pleaded guilty to the charge. In addition, they accepted as correct, all the facts which the prosecution narrated in support of the charge. They were convicted on their respective pleas of guilty and sentenced to serve thirty (30) years imprisonment each. Later that same day, the appellants filed a joint notice of intention to appeal to the High Court against conviction and sentences in Criminal Case No. 195 of 2015 and Criminal Case No. 196 of 2015. They later on presented separate petitions of appeal to the High Court at Mwanza. Their appeal was however dismissed by the High Court for want of merit.

Aggrieved, the appellants have come to this Court predicating their second appeal on a joint memorandum of appeal containing five (5) grounds of appeal.

The first and second grounds contend that although the charge sheet was not included in the record of this appeal, the supporting facts which the prosecution narrated, did not disclose the essential ingredients of the offence for which they pleaded guilty. That because of the defective charge sheet, their conviction and sentence should be regarded as a nullity. The third ground of appeal expounds the first and second grounds, contending that the threat, which is an essential ingredient of the offence of armed robbery was not proved, making their pleas of guilty equivocal.

The fourth ground faults the discrepancies over the real number of accused persons who were jointly charged, and the confusion over the number of counts which the appellants faced. They wondered how, when their pleas were being taken when they appeared in court for the first time on 21/09/2015 the record of appeal shows three accused persons who faced more than one count. But at the next appearance on 08/10/2015, there was only one count levelled against two accused persons. The final ground raises issue with the confession which the appellant allegedly made after police

interrogation. In so far as they are concerned, their confessional statements created doubts against prosecution case.

When the appeal came before us for hearing on 23/03/2020, learned counsel Mr. Constantine Mutalemwa appeared for the two appellants. Mr. Robert Kidando, learned Senior State Attorney, appeared for the respondent Republic.

Mr. Mutalemwa informed us that only the second appellant, MKWIZU ELIAS, was present. SAMSON MARCO was absent because, following the outbreak of the world-wide COVID-19 pandemic (Corona virus), he and other prisoners serving terms in prison were not allowed to be transported from Mollo Agriculture Prison in Sumbawanga to Butimba Central Prison in Mwanza. He waived his right to be present, and asked Mr. Mutalemwa to appear on his behalf.

In urging us to allow the appeal, Mr. Mutalemwa concentrated on the third ground of appeal where the appellants complained that they had pleaded guilty to a charge without fully understanding the nature of the offence they were accused of committing. The learned Counsel for the appellants gave several examples from the record of appeal showing that the two appellants' pleas were not unequivocal and their conviction on pleas of guilty was unsafe.

He added further that the proceedings of Criminal Case 195 of 2015 had been mixed up with those of Criminal Appeal No. 196 of 2015. He referred us to page 1 of the record of proceedings where there are three accused persons (SAMSON MARCO AND 2 OTHERS), whereas in the charge sheet for Criminal Case No. 196 of 2015 there are only two accused persons (SAMSON S/O MARCO AND ANOTHER).

Mr. Mutalemwa urged us to find that although the record of the trial court shows that the appellants pleaded guilty, their pleas were not unequivocal in that they were facing two different criminal cases (Criminal Case No. 195/2015 and Criminal Case No. 196/2015) before same magistrate (M.O. Ndyekobora—RM) in the same Sengerema District Court. When they were pleading, they could not know which narrated facts was in relation to which of the two criminal case they facing.

Learned counsel next faulted the learned trial magistrate for failing to comply with Section 228 (2) of the Criminal Procedure Act, Cap. 20 (CPA) when he was convicting the appellants on their own pleas of guilty. Specifically, he faulted the trial magistrate for failing to record the appellants' replies when they were asked to plead as nearly as possible in the words they had used. Section 228(2) provides:

228 (2) 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 appears to be sufficient cause to the contrary.

Mr. Mutalemwa concluded by urging us that, to the extent the two appellants' pleas of guilty were not unequivocal, we should invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 (AJA) to quash the entire proceedings and the decision of the High Court, and order a fresh trial.

In reply, while fully agreeing with Mr. Mutalemwa that this appeal should be allowed on the main reason that the appellants' pleas were not unequivocal; Mr. Kidando began by commenting on general issues which Mr. Mutalemwa had raised during his earlier submission. The first related to the contention that the typed record of proceedings were muddled up because the two appellants were simultaneously facing two different criminal cases before same trial magistrate. On the contrary, he submitted, after he had perused the original record, he realized that there were typographical errors

in the text of the record of the Criminal Case No. 196/2015 which incorrectly suggest that there were more counts in the charge sheet and three accused persons. He insisted that this appeal before us originated from Criminal Case No. 196/2015 of the District Court of Sengerema and we should ignore the apparent typing error appearing of page 1 of the record of appeal.

On another general point, Mr. Kidando insisted that after reading the original trial court's record of proceedings, he saw nothing wrong with the way the learned trial magistrate had recorded the appellants' replies when the charge was read out. In so far as he is concerned, the non-compliance with section 228(1) which Mr. Mutalemwa complained about, is not borne out of the record of this appeal.

Mr. Kidando however conceded that in the joint notice of their intention to appeal to the High Court appearing on page 6 of the record of appeal, the appellants were appealing against both Criminal Case No. 195/2015 and Criminal Case No. 196/2015.

On what he described as substantive matters, Mr. Kidando raised his concerns with regard to the facts which the prosecution narrated, and which he believes made the appellants' pleas equivocal and unsafe to base a conviction. He first faulted the way the learned trial magistrate titled the facts

which the prosecution narrated under section 192 of the CPA designated for Preliminary Hearing. The purpose of conducting preliminary hearing, he argued, is to identify what matters the accused do not disputed to allow trials to proceed on disputed facts only. Facts which are narrated after pleas of guilty, he submitted, are designed to determine facts which if true, might *prima facie* prove the essential ingredients of the offence for which the person who pleaded guilty might have committed.

Narration of facts as if the trial court was conducting a preliminary hearing, he submitted, was an error which was confusing to the appellants and made their subsequent pleas to be equivocal. He supported his line of submissions that the trial magistrate was misled by what is expected in a preliminary hearing by referring us to the case of **NDAIYAI PETRO V. R.,** CRIMINAL APPEAL NO. 277 OF 2012 (unreported).

Mr. Kidando also shared his misgivings with respect to the insufficiency of facts which the prosecution narrated in the third paragraph. The facts narrated did not, in the learned State Attorney's view, prove an important ingredient of the offence of armed robbery. The learned trial magistrate had recorded:

*"-**[3]**"...that on the date of 05 of September 2015 at about 01.00 hours at Chanika Village within Sengerema District in Mwanza Region did steal money Tsh 900,000/= the property of one Filbert Mgwesa and immediately before and after such stealing did use a Panga in order to obtain and retain the said property.*

*-**[4]** That the accused got arrested and interrogated at Police Station where they confessed the offence."*

Mr. Kidando submitted that paragraphs above, do not disclose the salient ingredient of armed robbery, with respect to how, the *panga* was used. It is not clear whether the weapon was used to injure, or to threaten in order to steal. And it is not clear who was subjected to the threat or injury by the person using this weapon. Without showing this important ingredient of armed robbery, he urged us, the appellants' pleas cannot be regarded to be unequivocal.

The learned State Attorney faulted the casual way the prosecution had narrated as a matter of fact that the appellants had confessed to the police. This, he submitted, created doubt whether they understood the significance of the facts to their case.

In his brief rejoinder, the learned Advocate for the appellants urged us that in exercising our powers of revision under section 4(2) of the AJA, we

should extend it to quashing the decision of trial court in Criminal Case No. 195/2015 because the learned first appellate Judge failed to deal with appellants' appeals from Criminal Case No. 195/2015 despite having filed a notice of intention to appeal.

From their submissions, the two learned counsel have taken a common position that the two appellants' pleas of guilty upon which they were convicted and sentenced to 30 years' imprisonment were not unequivocal.

As a general rule, section 360 (1) of the CPA prohibits appeals where the accused person has been convicted by a subordinate court on his own plea of guilty. This provision states:

> ***360***.*-(1) 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.*

There are several decisions of this Court which appeals can be allowed against pleas of guilty. For example, in **MSAFIRI MGANGA VS. R.,** CRIMINAL APPEAL NO. 57 OF 2012 (unreported), the Court stated:

> *"...one of the grounds which may justify the Court to entertain an appeal based on a plea of guilty is where it*

may be successfully established that 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. This goes to insist therefore that ***in order to convict on a plea of guilty, the court must in the first place be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal.***" [Emphasis added].

In their lucid and helpful submissions, Mr. Mutalemwa and Mr. Kidando have demonstrated why they think that the two appellants' pleas of guilty were not unequivocal and trial and first appellate proceedings should be regarded a nullity.

Mr. Kidando has submitted that the facts which the prosecution narrates in this appeal must be directed at *prima facie* establishing the main ingredients of armed robbery. We agree with the learned Senior State Attorney that the narrated words "*did use a panga in order to obtain and retain the said property*" did not clarify to the appellants if they used or threatened to use violence to any particular person in order to obtain or retain the stolen property. Essential elements or ingredients to a charge of armed robbery as shown in the particulars of offence must be expounded and explained to an accused person when the prosecution narrates the facts. What

the prosecutor did was to merely repeat the same words appearing in the "Particulars of the Offence" of armed robbery without elaboration and relating to the ingredients constituting the charge facing the appellants.

Repetition of such words as: ***"before and after such stealing did use a Panga"*** during the narration of facts begs the question whether the appellants used that weapon to injure or they used it threaten, and if so, was it directed at Filbert Mgwesa, the owner of the stolen property, or to somebody else?

We cannot on second appeal, say that facts narrated to support this ingredient of armed robbery, were clear to the appellants to support the position of the two courts below that there were unequivocal pleas of guilty.

As this Court restated in **MSAFIRI MGANGA VS R**, CRIMINAL APPEAL NO. 57 OF 2012 (unreported), the narrated facts which an accused person admits to be true and correct, must in the eyes of the law, disclose the ingredients of the offence for which the appellant was charged with.

The first appellate court had concurred with the trial court that the appellants' pleas of guilty were unequivocal. This Court has in so many occasions, reiterated its settled position that a second appellate Court should not disturb the concurrent findings of fact by the two courts below, unless it

is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice: **JAMALI ALLY @ SALUM VS. R.,** CRIMINAL APPEAL NO 52 OF 2017 (unreported). We have in this appeal demonstrated how the two courts below, misapprehended the facts narrated to support the essential ingredients to a charge of armed robbery.

There is another matter which we must consider, and that is, the fate of Criminal Case No. 195/2015 which the appellant included in their notice of intention to appeal to the High Court. Mr. Kidando conceded that indeed, in their joint notice of intention to appeal to the High Court, the appellants clearly indicated that they were appealing against both Criminal Case No. 195/2015 and Criminal Case No. 196/2015. The learned Senior State Attorney did not, however, submit on the consequences which should follow the failure of the first appellate court to determine the fate of that matter.

The original case file in Criminal Case No. 195 of 2015 shows that the two appellants before us (SAMSON s/o MARCO and MKWIZU s/o ELIAS) together with another, MAJESHI s/o KALEGEYA, were charged with five counts of armed robberies. During the Preliminary Hearing, MAJESHI s/o KALEGEA pleaded not guilty. But the two appellants pleaded guilty, and were convicted

on their own plea of guilty on all five counts. They were ordered to serve concurrent sentence of thirty years in prison. On that same day, SAMSON MARCO and MKWIZU ELIAS pleaded guilty, and were convicted on their own plea of guilty in Criminal Case No. 196/2015 and were sentenced to serve thirty years in prison. Also, on the same day, the two appellants filed a joint notice of their intention to appeal to the High Court against Criminal Cases No. 195 and 196 of 2015.

On our part, we think, after duly filing their notice of intention to appeal under section 361 (1)(a) of the CPA, the two appellants were entitled to be heard in their first appeal against their conviction and sentences which originated from Criminal Cases No. 195 and No. 196 both of 2015. In their notice, the two appellants stated that they *"were found guilty of Armed Robbery c/s 287A of the Penal Code and sentenced to 30 years per each charge (two charges) means 60 years."*

It is a notice of intention to appeal under section 361 (1) (a) of the CPA, and not a Petition of Appeal, that initiates criminal appeals from subordinate courts to the High Court. Oftentimes this Court has struck out criminal appeals arising from subordinate courts for having been filed without obtaining notice of intention to appeal under section 361 (1) (a) of the CPA: see **ALLY**

RAMADHANI SHEKINDO & SADICK SAID @ ATHUMANI VS. R., CRIMINAL APPEAL NO. 532 OF 2016 (unreported).

It is important to point out that it is apparent from the judgment, the first appellate High Court did not realize that the two appellants, had through their joint notice, initiated two appeals arising from subordinate court in Criminal Cases No. 195 and 196. The first paragraph of the judgment of the first appellate court does not refer to notice of intention to appeal to the High Court against two criminal cases, but rather refers to the two petitions of appeal relating to Criminal Case No. 196 of 2015:

> *"Arising from the same court and jointly charged, two appeals were joined having same similar grounds of appeal. Based on an 'Unequivocal Plea of Guilty', the court convicted the accused of their own plea of guilty and sentenced them to thirty years (30) imprisonment."*

Although the appellants through their joint notice of intention to appeal alerted the High Court to be prepared to hear their appeals against two separate decisions of the same learned trial Magistrate; the proceedings and the judgment of the High Court overlooked matters arising from Criminal Case No. 195 of 2015.

The record of proceedings arising from Criminal Case No. 195 of 2015 should have been placed before the first appellate Judge. We think, although the two appellants, who are now serving thirty years in prison following their conviction in five counts of armed robbery in Criminal Case No. 195 of 2015, did not properly initiate their criminal appeal in the High Court but, having done so albeit improperly, the High Court was duty bound to come out with an answer. The appellants ought to have been informed that the fate of their appeal against their conviction in five counts of armed robbery.

The upshot, having found that the two appellants' pleas of guilty in respect of Criminal Case No. 196 of 2015 were equivocal, their conviction is a nullity, cannot stand and it is hereby quashed and the sentences set aside. We order that the appellants shall be re-arraigned afresh before another Magistrate of competent jurisdiction. In case they are convicted, the time they have so far served in prison shall be deducted from their sentence.

Further, in view of our finding that after lodging their notice of intention to appeal against the decision of the Sengerema District Court in Criminal Case No. 195 of 2015 the appellants were not informed of the fate of Notice of their intention to appeal and be heard in the High Court; we hereby exercise of our revisional jurisdiction under section 4 (2) of the AJA, and hereby nullify the

proceedings, quash the appellants convictions and set aside the sentence of District Court of Sengerema with respect to Criminal Case No. 195 of 2015.

We order that the appellants shall be re-arraigned afresh before another Magistrate of competent jurisdiction in Criminal Case No. 195 of 2015. In case they are convicted, the time they have served in prison shall be deducted from their sentence.

We order accordingly.

DATED at **MWANZA** this 28th day of March, 2020.

I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The judgment delivered this 31st day of March, 2020 in the presence of Mr. Costantine Mutalemwa, learned counsel for the appellants and Mr. Paschal Marungu, learned State Attorney for the respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL