IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 100 OF 2017

YEREMIA S/O @ JONAS TEHANI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mwandambo, J.)

Dated 19th September, 2016
in
HC Criminal Appeal No. 208 of 2015

JUDGMENT OF THE COURT

17th February & 11th March, 2020

MUGASHA, J.A.

In the District Court of Mkuranga at Mkuranga the appellant was charged and convicted on his own plea of guilty to the two counts of burglary contrary to section 295 and stealing contrary to sections 258 and 265 respectively of the Penal Code **[CAP 16 RE.2002].** He was sentenced to serve concurrently, imprisonment to a term of fourteen years for the first count and seven years in respect of the second count.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed. Still undaunted, the appellant has

preferred an appeal to the Court. In the Memorandum of appeal, he has raised five grounds which we conveniently condensed into four main grounds of complaint:

1. That, the learned appellate Judge erred in law to uphold the conviction on a plea of guilty whereas the particulars of the offence did not establish with certainty the ingredients of the offences of burglary and stealing.
2. That, the learned appellate judge erred in law to uphold the conviction based on the plea of guilty without initially requiring the prosecution to explain each and every ingredient of the offences.
3. That, the learned appellate judge erred in law to uphold the conviction basing on belief that the plea of guilty was entered upon own words used by the appellant.
4. That, the learned appellate judge and the trial magistrate misconceived the application of the law by imposing severe punishment without considering that the appellant was a first offender.

At the hearing of the appeal the appellant appeared in person unrepresented and apart from adopting the grounds of appeal, he opted to initially hear the submission of the respondent reserving a right of reply. On the other hand, the Respondent Republic had the services of Ms. Florida Wenceslaus, learned State Attorney who partly opposed the appeal.

While the learned State Attorney conceded to the 1st 2nd and 3rd grounds of appeal in respect of the appellant's conviction on the first count of burglary, she opposed them in relation to the conviction on the second count of stealing. Regarding the second count, she submitted that, while the appellant was charged with burglary of a dwelling house under section 295 of the Penal Code instead of section 296 of the Penal Code, yet, the particulars of the offence refer to burglary which was alleged to have been committed at the complainant's office. As such, Ms. Wenceslaus contended, since the appellant was not sufficiently made aware of the charges against him in order to make an informed plea, this was a violation of the mandatory provisions of sections 132 and 135 of the Criminal Procedure Act [CAP 20 RE. 2002] To support her argument, she cited to us the case of **MAREKANO RAMADHANI VS REPUBLIC,** Criminal Appeal No. 202 of 2003 (unreported).

As for the second count of stealing which was preferred under sections 258 and 265 of the Penal Code, the learned State Attorney contended the same to have been in accordance with the dictates of the law because the charge did specify all the ingredients of the offence. In addition, it was contended that, the facts clearly explained the manner in which the stolen items were recovered by the police upon being led to a hideout by the appellant. As such, the learned State Attorney concluded that the appellant's plea of guilty to the second count of stealing was indeed unequivocal and the conviction was justified and thus, not appealable in terms of section 360 of the CPA. To back up this proposition she referred us to the case of **LAURENCE MPINGA VS REPUBLIC** [1983] T.L.R.166 and urged us to dismiss the 1st, 2nd and 3rd grounds of appeal in respect of the conviction relating to the second count of stealing.

Furthermore, it was the appellant's complaint in the 4th ground of appeal that, the trial magistrate imposed severe punishment without considering that he was the first offender. On the other hand, although the learned State Attorney submitted that the trial magistrate did not consider that the appellant was a first offender, she urged the Court to allow the appeal and uphold the appellant's conviction in relation to the second count. When asked by the Court on the propriety or otherwise of the

imposed sentence of seven years for the offence of stealing in terms of section 170 of the CPA vis *a vis* the statutory limits of sentencing powers vested on the trial magistrate of the rank of Resident Magistrate, she conceded the same to be irregular on account of not being confirmed by the High Court.

Having carefully considered the grounds of appeal, the submissions of counsel and the record before us, the appeal raises the following two issues namely: **One,** the propriety or otherwise of the charge against the appellant and subsequent plea of guilty; **Two,** the legality or otherwise of the sentence of the appellant.

In respect of the first issue, the charge which was laid at the appellant's door reads as follows:

"THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT COURT OF MKURANGA
AT MKURANGA FORCE

NAME, TRIBE OR NATIONALITY OF PERSON(S) CHARGED

NAME- YEREMIA S/O JONAS

AGE: 28 YRS

TRIBE- GOGO

OCC- SECURITY GUARD

RESD- MIALE - MKURANGA

1st count

OFFENCE, SECTION AND LAW:

BURGLARY c/s 295 OF THE PENAL CODE CAP 16 [RE.2002]

PARTICULARS OF THE OFFENCE: -

That YEREMIA s/o JONAS @ TEHANI charged on the 7 th day of May, 2015 at about 04.00hrs at Mkuranga within Mkuranga District in Coast Region did break into the office of one DEVOTHA d/o MKULIA intent to commit an offence against the law.

2nd count

OFFENCE, SECTION AND LAW:

STEALING c/s 258 and 265 OF THE PENAL CODE CAP 16 [RE.2002]

PARTICULARS OF THE OFFENCE: -

That YEREMIA s/o JONAS @ TEHANI charged on the aforesaid times, place and date after break and enter into the office of one DEVOTHA d/o MKULIA did steal three head of sewing machine in which two make Butterfly and one make Singer valued at TSHS. 550,000/= and different types of new clothes valued at TSH, 250,000/= the property of DEVOTHA d/o MKULIA.

Station: - MKURANGA

It is crystal clear that, in respect of the first count the appellant was charged with burglary contrary to section 295 of the Penal Code which provides as follows:

> *"295. Any person who enters or is in any building, tent or vessel used as a human dwelling with intent to commit an offence therein, is guilty of an offence, and liable to imprisonment for ten years and if the offence is committed in the night, he is liable to imprisonment for fourteen years."*

Reading the particulars of the offence, the appellant was alleged to have committed burglary into the complainant's office. Thus, he thus ought to have been charged under the provisions of section 296 (a) and (b) of the Penal Code which stipulate as follows:

> *"Any person who–*
>
> *(a) breaks and enters a school house, shop, warehouse, store, workshop, garage, office or counting house, or a building which is adjacent to a dwelling house and occupied with it but is not part*

of it, or any building used as a place of worship and commits an offence therein;

(b) having committed an offence in any building referred to in paragraph (a) breaks out of the building, is guilty of an offence and is liable to imprisonment for ten years".

In view of the stated position of the law, the follow up question is whether with such state of affairs, can it be safely vouched that the appellant was sufficiently made aware of the charged offence of burglary? Our answer is in the negative on account of the incompatibility in the statement of the offence which refers to breaking and entering into a dwelling house in the night while the particulars indicate breaking into the complainant's office. In this regard, apart from the appellant not having been made aware of the proper charges he faced, he could as well have pleaded guilty to a completely different offence. We say so because sections 132 and 135 of the CPA which prescribe the manner in which criminal charges shall be preferred provide as follows:

Section 132

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

Section 135 (a) (i) to (iii):

"The following provisions of this section shall apply to all charges and informations and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–

(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;

(iii) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary, save that where any rule of law limits the particulars of an offence which are

required to be given in a charge or an information, nothing in this paragraph shall require any more particulars to be given than those so required;"

Apparently, though the appellant had complained about the infraction in the first appellate court, the same was not addressed due to a belief that the conviction was justified on account of unequivocal plea of guilty which unfortunately was not the case. We thus agree with the learned State Attorney that, the charge in respect of the count of burglary was not in conformity with the provisions of sections 132 and 135 of the CPA. Thus, a failure of justice was occasioned. The said omission is fatal and it cannot be cured by the provisions of section 388 (1) of the CPA. See - **MAREKANO RAMADHANI VS REPUBLIC** (supra).

As such, his conviction on the count of burglary cannot be safely sustained. In the circumstances, we partly allow grounds 1, 2 and 3 of the appeal in respect of the first count of burglary.

Regarding the second count of stealing, as earlier stated the charge was preferred under the provisions of sections 258 and 265 of the Penal Code. It was the appellant's complaint that he was wrongly convicted having pleaded guilty to the offence of stealing whereas the ingredients were not explained to him. On the other hand, the learned State Attorney

conceded though, she pointed out that, the trial magistrate had wrongly invoked the modality of conducting a preliminary hearing under section 192(1) of the CPA to explain to the appellant the facts of the case by way of facts not in dispute. However, she argued that the infraction was minor because the appellant was not prejudiced as he was aware of the ingredients of the offence before his plea was taken.

The modus of taking the plea of an accused person and the subsequent procedures are regulated by section 228 of the CPA which stipulates as follows:

> *(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(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.*
>
> *(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*
>
> *(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.*

In the light of the cited provision, it is a mandatory requirement under section 228 of the CPA to take an accused person's plea before the commencement of his trial. Thereafter, the accused person's plea must be recorded. In case he refuses to plead, a plea of not guilty shall be entered under section 228 (4) of the CPA. Where an accused pleads guilty, the subsequent procedure was amplified in the case of **ADAN VS REPUBLIC,** [1973] E.A whereby at page 446 the defunct Eastern Africa Court of Appeal did lay down the requisite procedure considered desirable to be followed throughout East Africa where the Court among other things, said:

> *"... 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 ingredients of the offence charged, If the accused then admits all those essential elements, the magistrate 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 or to add any relevant facts. If the accused does not agree with the statements of 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. ... The statement of facts and the accused's reply must, of course, be recorded. The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused had no defence and it gives the magistrate the basic material on which to assess the sentence..."

We have deliberately quoted the said decision extensively in order to remind some of the magistrates who invoke the procedure of conducting a preliminary hearing even where the accused person pleads guilty to the charge as was the case in this matter.

In the case at hand, at page 4 of the record, after the charge was read to the appellant, he pleaded guilty and then, the trial magistrate prepared the memorandum of undisputed facts which were read out to the appellant as follows:

1. *That, the accused person is YEREMIA s/o JONAS @ TEHANI, 23 YRS old. Gogo Christian, security guard, Resident at Miale village within Mkuranga District.*
2. *That on the 7th day of May 2015 at about 04.00hrs the accused person YEREMIA s/o JONAS @ TEHANI was at Mkuranga town within Mkuranga District in Coast Region.*
3. *That on the same date, time and place mentioned above the accused person YEREMIA s/o JONAS @ TEHANI did break into the office of one DEVOTHA d/o MKULIA with intent to commit an offence therein.*
4. *That on the aforesaid date, time and place after breaking and entering into the office of one DEVOTHA d/o MKULIA did steal three head of sewing machine in which two of them make Butterfly and one make Singer valued at TSHS 550,000/= and different stolen properties valued at THS. 200,000/= of one DEVOTHA d/o MKULIA.*
5. *That on 18th day of June 2015 at about 05.00hrs at Miale village near his home within Mkuranga District in Coast Region the accused person YEREMIA s/o JONAS @ TEHANI did show all the stolen properties where he used to hide them.*

These facts constitute the ingredients of the offence of stealing which were brought to the attention of the appellant whose response is reflected at page 5 of the record as follows:

> *"I have no objection the exhibit which mentioned by the PP which I see in this court three heads of saving (sic) machine (sic) two make Butterfly and one make Singer and new different clothes are the one I steal (sic). I have no objection to be tendered in court."*

The above expression shows that the appellant unequivocally pleaded guilty to the charge of stealing and accepted the prosecution facts as correct, so he was properly convicted. Thus, the appellant was not in any way prejudiced by the mode of the presentation of the facts by way of the memorandum of undisputed facts envisaged by section 192 (1) of the CPA which stipulates as follows:

> *" 192 (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of*

the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.

The aforesaid notwithstanding, we wish to make it clear that, section 192 (1) of the CPA can only be invoked to expedite criminal trials by conducting preliminary hearing where the accused pleads not guilty to the charge. As earlier indicated, preliminary hearing is not applicable where the accused pleads guilty to the charge. In view of what we have endeavoured to discuss, we allow grounds 1, 2 and 3 of the appeal in respect of the first count of burglary and disallow those grounds in respect of the second count of stealing and the respective conviction was justified.

As for the 4th ground of complaint, it is clear that, in imposing the sentence for the offence of stealing the trial magistrate did not take into account that the appellant was a first offender. The learned State Attorney maintained that seven years' imprisonment was adequate. We found this argument wanting and shall state our reasons.

As a general rule, imprisonment should not be imposed on a first offender save where the offence is particularly grave or widespread. This was aptly held by Georges, CJ in **HATTAN VS REPUBLIC** (1969) H.C.D NO 234 that:

> *"Wherever a first offender is concerned the emphasis should always be on the reformative aspect of punishment unless the offence is one of such serious nature that an exemplary punishment is required or unless the offence is so widespread that severe punishment is needed as shock deterrent."*

Moreover, in the case of **MASANJA CHARLES VS REPUBLIC**, Criminal Appeal No. 219 of 2011 (unreported), the Court quashed and set aside the sentence of life imprisonment and ordered the immediate release of the appellant who had pleaded guilty.

Guided by the said principles and considering that the appellant was a first offender who readily pleaded guilty to the charge of stealing, we are satisfied the sentence of seven years was on the higher side and we shall later revert to the matter.

Regarding the legality or otherwise of the imposed sentence of seven years in terms of section 170 (1) (a) of the CPA, it is vivid that at page 6 of

the record that, upon convicting the appellant on the second count of stealing, the trial magistrate sentenced him to 7 years' imprisonment. The sentencing powers of magistrates are regulated by section 170 of the Criminal Procedure Act which stipulates as follows:

> *"170 (1) (a) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences–*
>
> *(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;"*

In the light of the stated position of the law, it is clear that, though a Resident Magistrate is vested with power to impose sentence of imprisonment for unscheduled offences, the power is not absolute being subjected to the statutory limitations of the sentence to be imposed depending on the rank of the magistrate. Any term of imprisonment beyond the prescribed statutory limits warrants the case file to be

transmitted to the High Court for confirmation before the sentence is executed. In the case at hand, though stealing upon conviction attracts a jail term of seven years, since it is not a scheduled offence under the Minimum Sentences Act Cap 90, the trial magistrate ought to have imposed a sentence not exceeding five years in terms of section 170 (1) (a) of the CPA.

In the premises, the imposed sentence of seven years' imprisonment could not be carried into effect or executed without being initially confirmed by the High Court which was not the case. We remind magistrates to consider the prescribed statutory limits in the sentencing of accused persons convicted of unscheduled offences so as to avoid meting out illegal sentences. Whenever a trial magistrate imposes the sentence which is beyond the prescribed limit, the matter must be referred to the High Court for confirmation or else the sentence will not be executed on account of illegality. During the pendency of the confirmation, the subordinate court has power to admit sentenced person to bail in terms of section 172 of the CPA. This is crucial so as to avoid the accused persons serving illegal sentences as it was the case in the matter at hand.

All said and done, in the matter under scrutiny, troubled by the manifest injustice, we invoke our revisional jurisdiction under section 4 (2)

of the Appellate Jurisdiction Act **[CAP 141 RE.2002]** to do what the High Court had omitted to do in considering the appropriate and legal sentence to be meted on the appellant. As earlier pointed out, since it is settled that, that the appellant was a first offender who readily pleaded guilty to the charge of stealing, which was not considered by the trial magistrate, we think the term of three years' imprisonment suffices. We thus reduce the term of imprisonment to three years effective from 19/6/2015 when the appellant began to serve the original sentence. On that account, we order the immediate release of the appellant unless he is held for another lawful cause.

DATED at **DAR ES SALAAM** this 9th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 11th day of March, 2020 in the presence of the appellant in person and Ms. Monica Ndakidemi learned State Attorney for the respondent is hereby certified as a true copy of the original.

G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL