IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 399 OF 2019

MICHAEL ADRIAN CHAKI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salam)
(De – Mello, J.)

dated 11th day of September, 2019.
in
HC. Criminal Appeal No. 347 of 2018.
.....

JUDGMENT OF THE COURT

6th July & 9th September,2021

LILA, JA:

The appellant, **MICHAEL ADRIAN CHAKI,** was convicted on his own plea of guilty of the offence of grievous harm c/s 225 of the Penal Code [Cap 16 R.E 2002]. He was accused of shooting with a gun one Ezekiel Joshua (the victim) on his chest and arm on the 8th day of August, 2016 at Samora Area within Ilala District in Dar es salaam Region and thereby causing him to suffer grievous harm. He purportedly pleaded guilty to the charge. Facts of the case were adduced by the prosecution. The trial court was satisfied that the charge was proved. Consequently, he was sentenced to serve seven years imprisonment and was also ordered to pay TZS 3,000,000.00 to the victim as

compensation. His appeal to the High Court was dismissed. He preferred this second appeal.

We find it apposite to travel through the record and see what transpired in the District Court. This is what is discernable. On 4/12/2017, the appellant was first arraigned in court to answer the charge of grievous harm to which he denied saying "it is not true". He had no sureties to bail him out. He was remanded in prison custody and the case was adjourned to 15/12/2017 on which the bail conditions were met and he was released on bail. The case then suffered two adjournments until the 18/1/2018 when the case was called on in court for preliminary hearing. Upon being reminded the charge the appellant pleaded guilty saying *"it is true"*. The case, again, suffered several adjournments until the 28/3/2018 when the prosecution narrated the facts and tendered three exhibits; the gun, two unused and one used bullets which were admitted as exhibits P1, P2 and P3, respectively. At the end the learned trial magistrate was satisfied that the facts adduced established the offence charged, she convicted and sentenced the appellant as shown above.

The appellant's appeal to the High Court bounced as the learned judge found his plea of guilty unequivocal.

Still lingering under doubts of his guilty being established by the facts adduced, the appellant contests the High Court findings upon a three points of grievances which may be paraphrased as hereunder: -

1. *That, the first appellate judge misdirected herself in law and fact to hold that the appellant's plea was unequivocal.*
2. *That, the provision of the law under which the appellant was convicted was not indicated.*
3. *That, exhibits P1, P2 and P3 that were illegally tendered and admitted in evidence for lack of plausible explanation from whom the exhibits were seized and to who they were handed for safe custody until when they were tendered in court and for want of a ballistic expert report verifying if those bullets were of the same shotgun.*

The appellant appeared in person at the hearing of the appeal and was unrepresented while Ms. Grace Lwila and Ms. Salome Assey, both learned State Attorneys, teamed up to represent the respondent Republic.

Exercising his right to begin to amplify the grounds of appeal, the appellant simply adopted them together with the written statements of his arguments and a list of authorities he had lodged before the hearing

date without more and he urged the Court to consider them and set him free.

On her part, initially Ms. Lwila expressed her firm position that the respondent was opposing the appeal. Submitting in respect of the first ground of appeal, she contended that the record is vivid that the appellant on his own volition pleaded guilty to the charge and did not object reception and admission of the exhibits. To her, that rendered his plea unequivocal hence he cannot be heard complaining about that. In bolstering her assertion she referred us to our earlier decision in **Charles Samweli Mbise vs Republic**, Criminal Appeal No. 355 of 2019 (unreported) which, she said, has similar facts to the present case.

In respect of ground two of appeal, Ms. Lwila attacked it for unjustifiably faulting the courts below on failure to indicate the provision of the law under which he was convicted. She argued that, on the date set for preliminary hearing, the appellant was reminded the charge he was facing that is grievous harm to which he pleaded guilty and the facts thereof were not adduced but adjourned until on the 28/3/2018 when he was, once again, reminded the charge to which he readily admitted to be true. She further argued that it is on record that the learned magistrate indicated that "*the accused is hereby convicted of the offence as charged for his own plea of guilty*". Under the

circumstances, she asserted, the appellant well knew the offence he was charged with and convicted of. She implored us to find this ground of appeal baseless and dismiss it.

Ground three of appeal which is two-limbed was similarly seriously opposed by Ms. Lwila. Directing her argument on exhibits P1, P2 and P3 being illegally admitted as exhibits, she submitted that the same were admitted without any objection from the appellant. Relying on the Court's unreported decision in the case of **Frank Mlyuka vs Republic,** Criminal Appeal No. 404 of 2018 (unreported), she further argued that tendering of exhibits is not a necessary requirement where an accused pleads guilty to an offence. For the second limb, she argued that there was no need to produce ballistic expert report because the accused pleaded guilty to the charge.

In all, Ms. Lwila submitted that the appellant's complaints are unfounded and the appeal should be dismissed in its entirety.

Before she could rest her submissions, we wanted to ascertain ourselves whether or not the appellant's conviction could be founded on the facts as adduced by the prosecution after the appellant had pleaded guilty to the charge. After a few minutes' somehow serious and sober examination of the facts adduced, she hastened to agree that the facts

lacked evidence proving grievous harm which is an essential element of the offence charged. In the circumstances, she changed her position and was quick to state that the appellant's plea could be nothing but an equivocal one. She, however, beseeched the Court to allow the appeal and invoke the powers of revision, in terms of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) to order a trial *de novo*.

Upon our serious examination of the record of appeal we are convinced that this appeal may be disposed of by consideration of a sole ground or crucial issue of whether or not the appellant's plea was an unequivocal one as complained in ground one of appeal. In that accord, we shall examine in detail the proceedings that led to the appellant's conviction as borne out by the record of appeal.

We begin by expounding the law on plea of guilty. Generally, a person convicted of an offence on his own plea of guilty is barred from appealing against conviction. He can only appeal against the extent or legality of the sentence imposed. That is in terms of section 360(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). That strictness of the law notwithstanding, courts have taken cognizant of certain circumstances which may render a plea equivocal whence a conviction on one's plea of guilty may successfully be challenged by way

of an appeal. The leading case is that of **Rex vs Folder** (1923) 2 KB 400 where the criteria or circumstances which may make a plea equivocal were identified and were followed by the High Court in **Laurent Mpinga vs Republic** [1983] TLR 166 and later cited with approval in **Karlos Punda vs Republic**, Criminal Appeal No. 153 of 2005 (unreported). The four factors set were : -

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

Closely examined, the above criteria suggest that there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:-

1. The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof

must be properly framed and must explicitly disclose the offence known to law;

2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.
3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.
4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.
5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see **Akbarali Damji vs R.** 2 TLR 137 cited by the Court in **Thuway Akoonay vs Republic** [1987] T.L.R. 92);

6. Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged.

As a matter of insistence on the need to observe the above principles, the High Court, in a very persuasive decision in **Salehe Mohamed v. R** [1971] HCD No. 176 cited the decision of the defunct East African Court of Appeal in **Kato v. R.** [1971] E. A. 542 where it held that it is only if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged that a court can properly enter a plea of guilty.

The above pronouncement was in accord with the stance set much earlier in **Kato's** case (supra), where the erst while Court of Appeal of East Africa cited the case of **R. v. Ynasani Egau** [1942] 9 E.A.C.A. 65 at 67 and stated that:-

> *"In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be*

explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."

We find these principles still good law and we subscribe to them. We shall in our scrutiny, accordingly, subject the facts in this case to the foregoing principles of law.

As earlier on hinted, the appellant in the present case, when he was reminded of the charge he was facing and called upon to plead, he responded "it is true". The learned trial magistrate entered a plea of guilty. As is the practice, the prosecution was called upon to narrate the facts of the case. For certainty, we take the pain to recite the charge and the proceedings of 28/3/2018 which resulted in the appellant's conviction on his own plea of guilty as hereunder: -

Starting with the charge as reflected at page 1 of the record of appeal, it was couched thus: -

"**STATEMENT OF OFFENCE**

GRIEVUOS HARM: Contrary to section 225 of the Penal code [Cap. 16 R. E. 2002]

PARTICULARS OF OFFENCE

MICHAEL ADRIAN CHAKI, on the 8th day of august, 2016 at Samora area within Ilala District in Dar es Salaam Region, did shot one EZEKIEL JOSHUA ONG'ERE by a short gun on his chest and arm and thereby caused him to suffer grievous harm."

Next, the proceedings on plea of guilty were:-

*"**1st PARA**: that the accused is Michael Adrian Chaki living at Mbagala area.*

***ACCUSED**: It is true.*

That, on 8/8/2018 he was at Samora Area within Ilala District.

***ACCUSED**: It is true*

That, on the same date the accused and shot Ezekiel Joshua with a short gun on his chest and arm.

***ACCUSED**: It is true.*

That the accused was arrested and when interrogated he confessed to have committed the offence.

***ACCUSED**: It is true.*

That on 4/12/2017 the accused was brought at court for trial.

***ACCUSED**: It is true.*

Sgd: Signed

Sgd: Signed

HON. C. A. KIYOJA, RM

28/3/2018

***PP**: I have 2 exhibits I pray to tender the exhibits;*

1. *A short gun with No. MV 5183*
   2 unused bullets.
   1 used bullet

***ACCUSED**: I have no objection.*

***COURT**:*

: Short gun with no. MV 5183 admitted as exhibit P1

: Unused bullets admitted as exhibit P2

:1 used bullet admitted as exhibit P3

HON. C. A. KIYOJA, RM

28/3/2018

CONVICTION:

The accused is hereby convicted of the offence as charged for (sic) his own plea of guilty.

HON. C. A KIYOJA, RM

28/3/2018"

It is plain that the appellant was charged with grievous harm and upon his admission of the facts adduced he was convicted on his own plea of guilty. A crucial issue for our determination is whether or not, given the set of facts outlined by the prosecution and the principles of law expounded above, the appellant's plea could be taken to be unequivocal.

To answer the above issue, we revert to contents of the charge. The substance of the charge was that the appellant "shot EZEKIEL JOSHUA ONG'ERE by a short gun on his chest and arm and thereby caused him to suffer grievous harm." The responsibility of the prosecution was to adduce facts supporting the charge to which the accused was to be required to admit or deny. It was expected to lead facts proving that the appellant shot Ezekiel, he used a gun, the parts of body shot are the chest and arm and that Ezekiel sustained injuries amounting to grievous harm as defined under section 4 of the Penal Code. These were crucial elements of the offence which the facts ought to have established.

In the instant case and on the adduced facts as borne out from the record, it is crystal clear that the facts adduced fell far short of

proving that the appellant used a gun for there was no facts tending to show that the used bullets came from the short gun under the appellant's control and also there was no proof that Ezekiel sustained grievous harm and the ill-will linked with it (*mens rea*). In short, the facts narrated by the prosecution purporting to support the charge did not establish all the elements of the offence as laid in the charge. Going by the above cited decisions, in the absence of those facts which were necessary for establishing the offence charged, the appellant's plea cannot be taken to have been a plea of guilty. The facts, as they are, did not disclose any offence known to law. The appellant's plea of guilty cannot stand. The same is thereby impaired and is rendered nugatory because he cannot be taken to have pleaded guilty to a non-existent offence. The principle that "upon the admitted facts the appellant could not in law have been convicted of the offence charged" rightly applies here. For that reason, the trial court erred in treating it as a plea of guilty. The conviction cannot, therefore, stand. The same is hereby quashed and the sentence is set aside.

Having quashed the conviction and set aside the sentence, the other grounds of appeal are rendered redundant. We shall not, therefore, delve to consider them.

Before we pen off, let us briefly address the prayer by Ms. Lwila that we be pleased to order a retrial. We have given deep thoughts to the prayer advanced but we think the answer to it rests on the need to remind the learned State Attorney of the whole purpose of narrating facts after a plea of guilty is recorded. Ordinarily, once a crime is reported at the police station, the police would investigate the matter and secure witnesses. Then, it will arrest the suspect and arraign him in court to answer the charge. Witnesses will be called to testify in court so as to prove the accusations laid in the charge. In a situation where the accused admits the allegations in the charge, it is deep rooted and invariable practice that the responsibility is on the prosecution to state facts establishing the allegations in the charge. In short, a plea of guilty relieves the prosecution the burden of calling witnesses to prove the charge but it does not releave them from narrating facts correctly, clearly and sufficient enough to support the offence charged [see **Salehe Mohamed v. R** (supra)]. Actually, the facts narrated are in lieu of the otherwise evidence that the prosecution would be required to lead in court by calling witnesses so as to prove the charge beyond reasonable doubt.

We are alive to the usual course taken by the Court where the appellant's plea is found to be equivocal that the case is remitted back

to the trial court for it to proceed with the trial as if the appellant had denied the charge that is to say, he has pleaded not guilty to the charge (see **Juma Mohamed vs Republic,** Criminal Appeal No. 272 of 2011 (unreported). In fact, the proceedings on a plea of guilty did not involve calling of witnesses and it is supposed to be so. In the real sense, therefore the appellant did not stand trial. So, by being taken back to the trial court for him to stand trial as if he had pleaded not guilty to the charge it does not amount to a trial *de novo or a re-trial* as the learned State Attorney has put it. Actually, it is then when he stands trial.

The learned State Attorney, had further, urged us to invoke our powers of revision under section 4(2) of the AJA to revise the proceedings and judgments of both courts below. We think we need not do so regard being that the issue of the propriety of the sentence was raised as aground of appeal.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. We direct the record of the trial court be remitted back to the trial court for it to deal with the appellant as if he had pleaded not guilty, that is to say, the trial court has to proceed with the case from where it had ended before the appellant purportedly pleaded guilty. In short, the trial court has to conduct the preliminary hearing and proceed with trial. Bearing in mind the time the

appellant has spent in prison, we direct the trial to be immediately commenced and in the event he is found guilty, the period of time he has spent in remand prison as an accused person and as a prisoner should be considered in the proper determination of the sentence.

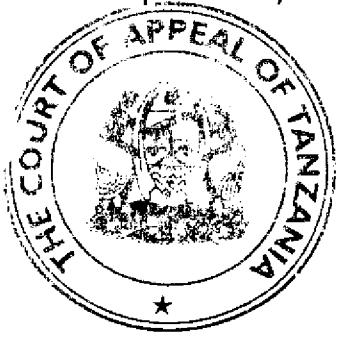
DATED at DAR ES SALAAM this 7th day of July, 2021.

S.A. LILA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of September, 2021, in the Presence of the Appellant in person linked via Video conference from Ukonga prison and Ms. Ester Kyara, learned State Attorney, appeared for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL