IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 554 OF 2017

JOHN CHARLES .... APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

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

(Opiyo, J.)

dated the 18th day of October, 2017 in Criminal Appeal No. 37 OF 2017

....

JUDGMENT OF THE COURT

17th & 29th September, 2021

KIHWELO, J.A.:

The appellant before this Court, John Charles, was convicted by the District Court of Babati, upon his own plea of guilty of smuggling immigrants, contrary to section 31A (1) (c) of the Immigration Act, Cap 54 R.E 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 and sentenced to twenty years imprisonment or to pay fine of Tshs. 20,000,000.00. The trial court also ordered forfeiture to the Government, a motor vehicle with Registration

No. T. 409 CVX Make Toyota Sienta. His appeal to the High Court was dismissed, hence this second appeal.

Briefly, the factual background of this case as it appears on the record is that, the appellant at the time of his arrest was an employee of the Tanzania People's Defence Force (TPDF) popularly known in kiswahili acronym as "JWTZ" with force number MT 90566 PTE John Charles Shedafa. On 29th November, 2016 the appellant was travelling with his car with Registration No. T. 409 CVX Make Toyota Sienta red in colour from Arusha to Mbeya via Dodoma and upon arrival at Maisaka "B" area in Babati District, Manyara Region he was stopped by three police officers who upon looking inside the car saw a number of people suspected to be foreigners. The appellant along with the eight people who later came to be identified as Ethiopian nationals were taken to the police station for interrogation whereby the eight Ethiopians were charged for illegally entering in the country in Criminal Case No. 91 of 2016. They all pleaded guilty to the charge and admitted to have been transported by the appellant.

The appellant on 5th December, 2016 was arraigned as stated before for the first time to answer the charge of transporting immigrants where

he pleaded guilty to the charge saying *"It is true"*. However, the matter was adjourned on account that there were some missing facts and curiously the same was fixed for preliminary hearing on 7th December, 2016. When the matter came on 7th December, 2016 for preliminary hearing, the charge was read over and explained to the appellant who was asked to plead and he pleaded *"It is true. I was found in the car transporting illegal immigrants"*. The court proceeded to enter a plea of guilty to the charge.

It is noteworthy that in the course of preliminary hearing, the prosecution produced the proceedings in Criminal Case No. 91 of 2016 (exhibit P1). The prosecution also produced in court the Tanzania Revenue Authority (TRA) report about the car with Registration No. T. 409 CVX Make Toyota Sienta (exhibit P2) as well as the car with Registration No. T. 409 CVX Make Toyota Sienta (exhibit P3). The appellant did not object to any of the exhibits when they were cleared for admission and consequently the learned trial magistrate was satisfied that the facts adduced established the offence charged, convicted and sentenced the appellant as hinted above.

The appellant's attempt to appeal to the High Court was unsuccessful as the learned first appellate Judge found that the appellant plea of guilty was unequivocal.

Unhappy with the decision of the High Court the appellant has lodged this appeal against both conviction and the corresponding sentence on five grounds whose thrust can be crystalized as follows: **One**, that the first appellate court erred in not finding that his plea was equivocal. **Two**, that the first appellate court erred in not finding that the appellant did not understand the nature of the charge. **Three**, that the prosecution failed to tender the certificate of seizure of the alleged car. **Four**, that the prosecution failed to tender the certificate of seizure of the alleged illegal immigrants. **Finally**, that the appellant's plea of guilty was unsatisfactory as it did not amount to an admission to every constituent element of the charge.

Before us, the appellant, who appeared in person unrepresented urged us to allow his appeal on the strength of the grounds of appeal he lodged and which he prayed to adopt. He exercised his right to begin to clarify the grounds of appeal and later the respondent Republic will follow. On the other hand, Mr. Diaz Makule, learned State Attorney who was

assisted by Ms. Riziki Mahanyu, also learned State Attorney, gallantly opposed the appeal.

The appellant submitted in respect of the second, third, fourth and fifth grounds of appeal having somehow abandoned the first ground after the Court clarified to him that reference to 29/01/2016 in paragraph 4 of the facts at page 5 of the record of appeal was inadvertent because looking at the original record it was written 29/11/2016 consistent with the date found in the charge sheet at page 1 of the record of appeal.

In support of the second ground of appeal the appellant was fairly brief. He contended that he was convicted without understanding the substance of the charge against him as the language used was very technical despite the fact that the charge was translated in kiswahili. He contended further that, it was not clear according to the charge whether he was found in the car with illegal immigrants or was found transporting illegal migrants.

Arguing in support of the third ground of appeal he briefly submitted that the prosecution did not produce in evidence the seizure certificate for the car alleged to have been used in the commission of the offence and

for this anomaly he submitted that the prosecution did not prove the charge against him.

Equally, arguing in support of the fourth ground of appeal the appellant was fairly brief. He contended that the prosecution did not produce in evidence the arrest warrant of the alleged illegal immigrants. He therefore submitted that the prosecution did not prove the charge to the hilt.

In support of the fifth ground of appeal the appellant contended that the trial court wrongly convicted him upon a plea which was equivocal. To buttress his argument, he referred us to the plea which was taken on 5th December, 2016 at page 3 of the record of appeal as well as the other plea which was taken on 7th December, 2016 at page 5 of the record.

Submitting in response, Mr. Makule, who argued ground five, contended that, the appellant, having been convicted on his own plea of guilty, was barred by section 360 (1) of the Criminal Procedure Act Cap 20, RE. 2019 (the CPA) to appeal against conviction. He referred us to pages 3 and 5 of the record of appeal where the appellant pleaded guilty.

When engaged by the Court at considerable length on whether it was appropriate to conduct a preliminary hearing in the circumstances of the current appeal where the appellant had pleaded guilty to the charge and whether the plea as it stands was unequivocal, the learned State Attorney conceded and argued that it is not a practice to proceed with preliminary hearing where the accused pleads guilty to the charge but in his view, that was not fatal. He insistently argued that the plea by the appellant was unequivocal and that the appellant admitted to the facts that contained every essential element of the charge. He wrapped up his submission by contending that the charge against the appellant was proved beyond any reasonable doubt.

In response to ground three and four, Mr. Makule submitted that these were new grounds which were not raised at the two courts below and therefore, as a matter of law they cannot be entertained at this juncture. Admittedly, looking at the record of appeal ground three and ground four were not raised at the two courts below. It is a settled principle of law and as a matter of general practice this Court will only look into matters which came up in the lower courts and were decided, not on matters which were neither raised nor decided. There is, in this regard a

long line of authority to that effect, if we may just cite the case of **Hassan Bundala@ Swaga v. R,** Criminal Appeal No. 386 of 2015 (unreported). Hence, the third and fourth grounds of appeal cannot be entertained by this court.

We now turn to the sole point of contention which was argued by the parties on whether or not the appellant's plea was an unequivocal one as complained in ground five of the appeal. In that regard, we shall examine in detail the proceedings that led to the appellant's conviction as borne out by the record of appeal.

At the outset, we wish to express that generally, section 360 (1) of the CPA bars entertainment of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence imposed. That provision states that:

> *"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."*

We are however, aware that, notwithstanding the above provision, an appeal against conviction on a plea of guilty may lie under certain circumstances as an exception to the general rule. In **Kalos Punda v.**

Republic, Criminal Appeal No. 153 of 2005 (unreported), the Court cited with approval the decision of **Laurence Mpinga v. Republic** [1983] TLR 166, which, at page 168 while referring to criteria long set in the leading case of **Rex v. Folder** (1923) 2 KB 4000, clearly articulated factors for interfering with a conviction based upon a plea of guilty to be:

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 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.*

The germane question before us is whether in the light of the criteria listed above, there was in fact an unequivocal plea of guilty on the basis of which the appellant was convicted.

We wish to reaffirm that an accused can only be convicted on his own plea of guilty if the court is satisfied that his plea is unequivocal. That is, where it is ascertained that he has accepted as correct facts which

constitute all ingredients of the charged offence see, for example, **Ndaiyai Petro v. Republic**, Criminal Appeal No. 277 of 2012 (unreported). It must be certain that the accused really understood the charge and that he had no defence to it, see **Adan v. Republic** [1973] EA 445. We fully subscribe to the decision of the defunct Court of Appeal of East Africa as good law to date.

In the instant appeal, we stated earlier that the appellant pleaded guilty to the charge after it was read over and explained to him by stating that, "*It is true. I was found in the car transporting illegal immigrants*". This was rightly recorded by the presiding trial magistrate as a plea of guilty. Curiously the prosecution prayed to proceed with preliminary hearing instead of praying to read facts of the case as is the practice in a situation like the one in this appeal, and surprisingly the presiding trial magistrate fell hook line and sinker and granted the prayer. For the sake of clarity, we wish to let record of appeal starting with the charge sheet and the subsequent proceedings on plea taking up to the conviction speak for itself:

> ***"STATEMENT OF OFFENCE***
>
> *SMUGGLING IMMIGRANTS: Contrary to section 31A (1) (c) of the Immigration Act [Cap. 54 R.E. 2002]*

as amended by Section 31 of the Witten Laws (Miscellaneous Amendments) (No.2) Act, 2016.

PARTICULARS OF OFFENCE

MT 90566 PTE JOHN CHARLES SHEDAFA on the 29th day of November, 2016 at Masaika 'B' area, within Babati District in Manyara Region, was found transporting eight (8) illegal immigrants of Ethiopian Nationality from Arusha to Mbeya on a motor vehicle with registration number T. 409 CVX make Toyota Sienta.

On 5/12/2016

Charge read over and explained to the accused person who is asked to plead thereto:

Accused: *It is true.*

Court: Entered plea of guilty to the charge.

Sgd: D.C Kamuzora SRM

05/12/2016

Mr. Masaki: *Investigation is not complete as there are some of the facts which we need to make follow up. We pray for another date when we will proceed with preliminary hearing after we have made follow up of the file and be sure if all facts are clear.*

Court: *Since there are missing facts (sic). Although the accused has pleaded guilty, the case is adjourned also based on the fact that the accused is a Military Officer, this court need to make follow up and be sure if he can be prosecuted before the process by the Military Force is performed. The adjournment is therefore allowed. The accused will be returned to proceed with the preliminary hearing within two days.*

Order: Preliminary hearing on 07/12/2016.

Accused further remanded in custody.

Sgd: D.C Kamuzora SRM

05/12/2016

Date: 07/12/2016

Coram: D.C. Kamuzora SRM

PP. Mr. Masaki

Accused: Present

B/C: Vincent

Mr. Masaki: *The matter is for preliminary hearing, I am ready to proceed.*

Accused: *I'm ready for preliminary hearing.*

Court: *Charge read over and explained to the accused who is asked to plead thereto:*

Accused: *It is true I was found in the car transporting illegal immigrants.*

Court: *Enters plea of guilty to the charge.*

Mr. Masaki: *I pray to proceed with preliminary hearing as the facts are ready."*

Following which the preliminary hearing under section 192 of the CPA was conducted and the prosecution produced exhibit P1, P2 and P3 and the appellant did not object, and thereafter the court prepared the Memorandum of Undisputed Facts which was dully signed in terms of section 192 (2) and (3) of the CPA and reads:

"MEMORANDUM OF UNDISPUTED FACTS

Accused: *I do admit my names and personal particulars. It is true that I am employee of JWTZ here in Tanzania. It is true I had a car was parked the car and I was inside the car (sic). I was interrogated by one police officer and there were eight (8) illegal immigrants in the car. It is true that I was sent to the police station and those illegal immigrants. It is true that those eight (8) people were Ethiopian citizens. I was interrogated at the police station and I told them that I was working with JWTZ land force platoon at Headquarter. It is true that other two people whom we were together fled away.*

Accused Sgn.........

Mr. Masaki Sgn......"

The trial court after indicating that section 192 (2) and (3) was complied with proceeded to convict the appellant as follows;

"CONVICTION

> ***Court:*** *Since the accused person had admitted all facts forming elements of the offence, this court being satisfied with the accused plea to be unequivocal plea do hereby convict the accused person MT 90566 PTE John Charles Shedafa for the offence of smuggling illegal immigrants contrary to section 31A (1) (c) of the Immigration Act (Cap. 54 R.E. 2002) as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016, basing on his plea of guilty to the charge.*

Sgd: D.C Kamuzora SRM

05/12/2016"

If we may pause here for a moment, let us now digress a bit. The provisions of section 31A (1) (c) of the Immigration Act as amended by clause 31 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 upon which the appellant was charged. It states:

> *"A person who*
>
> *(a) N/A*

> (b) *N/A*
>
> (c) *transports immigrants;*
>
> (d) *N/A*
>
> (e) *N/A*
>
> (f) *N/A*
>
> (g) *N/A*
>
> *commits an offence and on conviction, is liable to a fine of not less than twenty million shillings or imprisonment for a term of twenty years."*

From the above excerpt of the record of appeal as well as the provision of the law under which the appellant was charged, the substance of the charge was essentially being found transporting eight (8) Illegal immigrants of Ethiopian Nationality. The responsibility of the prosecution was to adduce facts supporting the charge to which the appellant was required to admit or deny. It was expected to lead facts proving that the appellant was actually found transporting illegal immigrants which is the crucial element of the offence.

We, on our part, are of the firm view that, the trial court, in respect of the plea in question, did not properly direct its mind to satisfy itself as to whether the plea was equivocal or unequivocal. The plea which the appellant entered upon reading the charge was, "*It is true I was found in*

the car transporting illegal immigrants." Looking at this plea, it is conspicuously clear that the appellant was admitting being in the car which was alleged to be transporting immigrants and not transporting the immigrants. Furthermore, it was expected that upon the prosecution adducing the facts proving the charge, assuming for the sake of argument that the plea was unequivocal, then the appellant was expected to say, *I admit to all facts as stated by the prosecution*. This was not the case in the instant appeal.

It is crystal clear therefore that the appellant did not understand the essence of the charge which was placed before him. Additionally, the facts adduced by the prosecution side fell short of proving that the appellant was transporting immigrants. Failure by the appellant to admit to the narrated facts unequivocally, the appellant's plea cannot be taken to have been a plea of guilty. Even assuming that he admitted to the facts which were deduced in the Memorandum of Undisputed Facts, there is no fact in which he admitted transporting illegal immigrants.

Furthermore, there is nowhere indicated either in the charge or the facts mentioning those 8 Ethiopians let alone by names. In the totality of the above, the appellant's plea of guilty cannot stand. The same is thereby

impaired and rendered nugatory and consequently, we decidedly declare that the conviction and sentence cannot stand.

Before we pen off, it is instructive to interject a remark, by way of a postscript that the procedure adopted by the trial magistrate of conducting preliminary hearing in the circumstances of this case was completely novel and superfluous. We are saying so because, the law is very categorical and clear on what is expected when the accused pleads guilty to the charge. We think, for the sake of guidance for the future it is appropriate to recapitulate the relevant provisions of section 192 which reads as follows:

> *"(1) Notwithstanding the provisions of sections 229 and 283,* ***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 and 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.* [Emphasis added]

Reading between lines the above provision, a preliminary hearing is only conducted when the accused pleads not guilty to the charge in view

of considering such matters as are not in dispute between the parties and which will promote fair and expeditious trial. The prosecution will be required to produce witnesses in order to prove matters in dispute between the parties. In other words when the accused pleads guilty to the charge the duty of the prosecution is to read to the accused facts supporting the charge in terms of section 228 of the CPA to which the accused is required to admit or deny. Upon admission, the court will then enter verdict and if the accused is convicted the court will invite the prosecution to address the court on any previous criminal records by the accused or any remarks from the prosecutor before sentence is imposed which will be followed by mitigation from the accused or his advocate if any and after that sentence will be meted upon the accused and that will mark the end of the case.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence as well as the proceedings of the two courts below. We direct the record of the trial court to 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. Considering

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

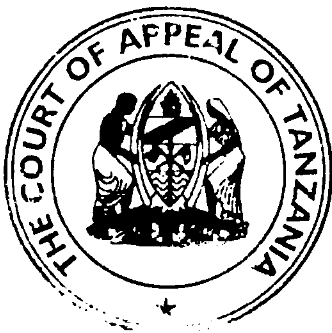
DATED at **ARUSHA** this 28th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 29th day of September, 2021 in the presence of the appellant in person and Ms. Lilian Mmassy, learned Senior State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL