IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: MWARIJA, J.A., MWAMPASHI, J.A. And MURUKE, J.A)

CRIMINAL APPEAL NO. 308 OF 2020

MKULA MKAMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Galeba, J.)

dated the 10th day of May, 2020

in

Criminal Appeal No. 32 of 2020

.....

JUDGMENT OF THE COURT

7th & 13th June, 2024

MURUKE J. A.:

The appellant, Mkula Mkama, was charged before the District Court of Bunda at Bunda with six counts of attempted armed robbery Contrary to Section 287B of the Penal Code (Cap. 16 R.E. 2002). He was convicted on his own plea of guilty to the charge and having admitted the facts constituting the offence as narrated by the prosecution to be correct, he was subsequently sentenced to serve a jail term of 30 years on each count. The sentence was ordered to run concurrently. The appellant was aggrieved with both conviction and sentence. He unsuccessfully appealed to the High Court where his appeal was dismissed.

The brief background of the case in the trial court is that; on 22nd day of July, 2014 at 20:45 hours, at Kisangwa Village, Bunda District, in Mara Region, the appellant together with two other bandits, armed with machetes and iron bars, attempted to rob 6 persons who were passengers in the targeted vehicle, by laying a large stone on the road in order to hijack it. They allegedly targeted motor vehicle with registration No. SM 4225, Toyota Land Cruiser, the property of Bunda District Council. When the car stopped, the bandits ordered the driver to open the car's windows so that they could rob whatever was in the car. However, one of the policemen who was amongst the passengers in the car shot dead one of the bandits thereby stopping the robbery from being committed. Upon the police investigations, within few days from the date of the incident, the appellant was arrested and as we have alluded to above, was subsequently charged with the offence of attempted robbery, convicted and sentenced on his own plea of guilty. His appeal to the High Court was dismissed. Still protesting for his innocence, the appellant preferred the present appeal on two set of memoranda of appeal. On the first memorandum filed on 15, September, 2020 containing 6 grounds it is complained that -

1. *That, the trial court and the first appellate court both erred in law and fact to convict and sentence the appellant to serve thirty (30)*

years imprisonment without proving the case beyond ali reasonable doubts.

2. *That, the trial court and the first appellate court erred in law and fact to convict and sentence the appellant without considering that no appellant's caution statement was taken to prove that the appellant was cautioned in this under section 23 (1) and (3) (a) of the Evidence Act.*
3. *That, the trial court and the first appellate court erred in law and fact to convict and sentence the appellant basing on the plead of appellant while the appellant admitted some fact such as his names and address but not plea of guilt.*
4. *That, the trial court and the first appellate court erred in law and fact to convict and sentence the appellant basing on the appellant's plea without evaluating the appellant's submission adduced during the hearing.*
5. *That, the trial court and the first appellate court erred in law and fact to convict and sentence the appellant basing on the contradictory and defective charge.*
6. *That, the trial court and the first appellate court erred in law and fact to convict and sentence the appellant without considering that the burden of proof lies on prosecution side, the same was not investigated as the law required under section 110(1) of the Evidence Act.*

On 19th January 2022, the appellant filed a supplementary memorandum containing 5 grounds namely:

1. *That: The first appellate court and the trial court both erred on evaluating the plea of guilt.*
2. *That: the first appellate court, grossly erred to uphold the judgment which was Improperly and Illegally recorded by the trial court, thus didn't convict the appellant.*
3. *That: When the charge read was over, the trial court did not explain to the appellant in a common language.*
4. *That: The plea of guilt was equivocal.*
5. *That: Both lower courts erred on imposing the maximum sentence of thirty (30) years to the Appellant who was first offender and in circumstance of the alleged plea of guilt served the time of the Court.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent/Republic, had the service of Mr. Tawabu Yahaya Issa, learned State Attorney.

With leave of the Court the appellant withdrew ground two from the supplementary memorandum. Thereafter, he adopted all grounds of appeal and prayed to initially hear the reply submission of the learned State Attorney.

The learned State Attorney, at the outset, declared his stance that he is supporting the appeal on the ground that, the appellant's plea was not properly taken because what was read as charged offences and what was pleaded is different on all counts. After the charge has been read and the appellant asked

to plea thereof, he replied "***it is true I attempted to rob***", while the charge was on attempted armed robbery and not robbery, the learned State Attorney argued. He submitted that, the offence of robbery and armed robbery are two different offences, citing the case of **Jack Mahembega v. Republic**, Criminal Appeal Number 369 of 2020 to support his argument. The learned State Attorney insisted that the trial court must be satisfied that the plea is satisfactory before convicting an accused. The learned State Attorney urged the Court to quash the conviction and set aside the sentence as the ground of improper plea itself disposes the present appeal. On the way forward, the leaned State Attorney pressed for retrial taking into account that the appellant has spent 10 years in prison.

On being probed by the Court as to whether the sentence of 30 years' imprisonment was proper, he was quick to reply that it was not because the appellant was sentenced to maximum sentence while he was a first offender and only attempted to commit the offence.

In rejoinder, the appellant prayed for the Court to quash the conviction and set aside the sentence without an order for retrial, as he has already served 10 years illegally.

Looking at the nature of the grounds raised and before the determination of the same, it is worth to briefly discuss the position of the law regulating appeals of this nature. Of essence is section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA) that provides that no appeal lies where the accused person is convicted on his own plea of guilty. For clarity it is hereby reproduced:

> *"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".*

From the provision of the law above, the appellant can only challenge his plea of guilty under certain circumstances as elaborated in the decision of the High Court in the case of **Laurence Mpinga v. Republic** [1983] T.L.R 166, cited with approval in **Josephat James v. Republic**, Criminal Appeal No 316 of 2010 [2012], TZCA 159 (1 October, 2012 TANZLII) and **Frank Mlyuka v. Republic**, Criminal No. 404 of 2018 [2020], TZCA 1738 (20 August, 2020, TANZLII) in which the Court echoed the position stated in **Laurence Mpinga** (supra) thus:

> *"(i) An appeal against a conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand;*

(ii) An accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the conviction to a higher court on any of the following grounds:

1. *that, even taking into consideration the admitted facts, his 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, he pleaded guilty as a result of mistake or misapprehension;*
3. *that, the charge laid at his door disclosed no offence known to law; and*
4. *that upon the admitted facts he could not In law have been convicted of the offence charged".*

A similar position was made by the Court in the case of **Msafiri Mganga v. Republic,** Criminal Appeal No. 57 of 2012 (unreported), wherein, the Court, in addition, stated as follows:

> *"... 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 piea amounts to an admission of every constituent of the charge and the admission is unequivocal".***
>
> [Emphasis added].

In view of the stated position of the law, the remaining issues for determination are: **one**, whether the appellant was convicted on the plea which was unequivocal and **two**, whether the complaint against the sentence stands.

As to the propriety or otherwise of the plea made by the appellant, it is glaring on the record that when called upon to plead to the charge he replied, *"it is true I attempted to rob"* on all six counts. The phrase "It is true I attempted to rob" does not mean that the plea was unequivocal. This was emphasized in the case of **Abdalah Jumanne Kambangwa v. The Republic,** Criminal Appeal No. 321 of 2017, the Court defined an equivocal plea of guilty as follows:-

> *"An ambiguous or vague plea in which it is not clear whether the accused denies or admit the truth of the charge. Plea in such terms as "I admit, nilikosa or that is correct and the like" though prima facie appear to be piea of guilty, may not necessarily be so. In fact, invariably such plea is equivocal. It is for this reason that where an accused reply to the charge in such similar terms, the facts must be given and accused asked to deny or admit them. Only by doing so can a magistrate be certain that an accused plea was of not guilty or unequivocal plea of guilty".*

In the matter under scrutiny, after the appellant pleaded *"it is true I attempted to rob"* to all six counts. Subsequently, the facts constituting the offence or the case were read over to him as seen at page 4 of the records that:

> *"The accused names and his personal particulars are according to the charge sheet. On 27th July 2014, at Kisangwa village, Bunda District Mara Region, the accused who was together with other three persons who armed with panga and iron bars, tried to rob the complainants using the above mentioned weapons after laying big stone on the road, and hijacked the motor vehicle with Reg. No SM4225, Toyota Land Cruiser, the property of Bunda District Council when the said motor vehicle has stopped, the accused and his colleagues, invaded the said motor vehicle with their weapons and ordered the driver too open the window in order to rob them. The exercise or act was frustrated because the police who were on board of the motor vehicle, discharged or shot one of the bandits who died instantly other bandits ran away leaving the dead at the scene. The incidence was reported at Bunda Police Station and the locus in quo was visited and the body of the bandits was taken to DDH Hospital for safe custody. The investigation went on, and in that course the accused Mkula Mkama was arrested and*

interrogated after being cautioned and agreed to commit the crime and that, he did not know the whereabouts of his colleagues".

After the facts had been read it was then followed with the appellant's admission of all the facts at page 4 of the records when he said ***"I admit the statement of facts narrated by prosecution it is true and correct."*** As seen above the facts which the appellant admitted to be true and correct, disclosed the ingredients of the offence of armed robbery and as such, the appellant understood the nature of the charges and the narrated facts establishing the offence. Given the circumstances, as rightly found by the first appellate court, there is no doubt that the appellant was convicted on his own unequivocal and unblemished plea of guilty. Therefore, contrary to the learned State Attorney's submission, the appellant's plea was proper in the circumstances of this case. Thus, in terms of section 360 (1) of the CPA the appellant was barred to appeal against conviction which resulted from his own plea of guilty except on the severity of the sentence. The case of **Jack Mahembega** (supra) cited to us by leaned State Attorney is deferent form the case at hand because in **Jack Mahembega's** case, the charge was on unnatural offence to a boy but the appellant pleaded to have raped the boy mentioned on the charge sheet, while in the present case the offence is the

same. Thus, serve for ground 5 on additional grounds of appeal, all other grounds are without merits thus, dismissed.

This takes us to the appellant's complaint in the additional grounds of appeal particularly ground number 5, on the propriety or otherwise of the sentence. It is settled principal of the law that, the Court will not readily interfere with the discretion of the trial court, exercised when passing sentence, unless it is evident that it has acted on a wrong principle, or overlooked some material factors. [See: **James s/o Yoram v. Republic** [1950] 18 EACA 147, **Katinda Simbila @ Ng'waninana v. Republic**, Criminal Appeal No. 15 of 2008, **Willy Walosha v. Republic**, Criminal Appeal No. 7 of 2002 (both unreported).

It is as well a general rule that, excessive sentence should not be imposed on a first offender, save where the offence is particularly grave or widespread. See: **Yeremia @ Jonas Tehani v. The Republic**, Criminal Appeal No. 100 of 2017, [TZCA 65 (11 March, 2020, TANZLII) and **Willy Walosha v. The Republic**, [Supra].

In the latter case, the Court was faced with a situation whereby the appellant being a first offender who had readily pleaded guilty to the charge of manslaughter, was given a sentence of twenty (20) years imprisonment.

This was considered excessive and reduced to four years after among other things, the Court had observed the following:-

> *"It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has in fact done so. ... For example, first offenders who pleaded guilty to the charge are usually sentenced leniently, unless there were aggravating circumstances".*

In the present matter, after the appellant has been convicted, the prosecutor intimated to the trial court that, apart from not having any previous criminal record of the appellant, they prayed for severe sentence against the appellant because the offence admitted by the appellant was rampant. Then, the appellant did not say anything in mitigation and left it to the court to decide on the sentence. The appellant was sentenced to imprisonment to a term of thirty years for each count. However, in assessing the sentence the magistrate did not consider that the appellant was a first offender as asserted by the prosecution.

When such circumstances are considered together with the appellant having pleaded guilty and being a first offender, with respect, it is glaring that both courts below failed to consider material factors which normally entitle an

offender to leniency. We understand that the trial court has discretion to impose the sentence. However, the discretion must be judiciously exercised. We had the opportunity of looking at the general principles upon which an appellate court can interfere with the exercise of discretion of an inferior court of tribunal in the old case of **Mbogo and Another vs Shah** [1968] EA 93 the Court said:-

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have acted; or*
>
> *(iii) it has failed to take into consideration matters which it should have taken into consideration,*
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic and reason, but was arbitrary, unreasonable or unconscionable.*

Since the minimum sentence for the offence committed by the appellant is 15 years' imprisonment, the trial court ought to have given the appellant a minimum sentence of fifteen (15) years considering that the appellant was a first offender, who admitted the offence on the first hearing date. Thus, he was entitled to leniency and as such, the maximum sentence of thirty years was on the higher side. In this regard, we are satisfied that the trial and the

first appellate court, with respect, failed to exercise the discretion judiciously. This warrants the interference by the Court to do what the courts below ought to have done having failed to take into consideration matters which it should have taken into consideration and arrived at wrong conclusion. Consequently, the sentence of thirty years imprisonment is quashed and substituted with that of fifteen years' imprisonment.

Appeal partly allowed in the manner pointed out above.

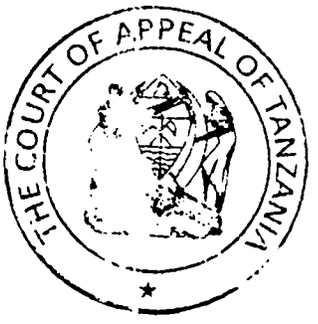
DATED at **MUSOMA** this 13th day of June, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2024 in the presence of the appellant through video link from at Musoma Prison and Ms. Joyce Godfrey Matimbwi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. A. MSHASHA
DEPUTY REGISTRAR