IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO 56 OF 2012

ORIGINAL LIWALE DISTRICT COURT

CRIMINAL CASE NO 48 OF 2012

ABDALLAH YASINI NGABUJA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

19th June 2013 & 26th July, 2013

MZUNA, J.:

Abdallah Yasini Ngabuja has lodged this appeal against the conviction on his own plea of guilty whereby he was sentenced to serve seven (7) years imprisonment for the offence of Causing Grievous Harm contrary to Section 225 of the Penal Code Cap 16 R.E. 2002 (Hon. E. R. Rwehumbiza RM).

The first issue is whether the plea was unequivocal?

The appellant opted not to attend during hearing of this appeal. He raised five (5) grounds of appeal which centers on the issue of the plea of guilty as being equivocal one and the sentence which he says is manifestly excessive.

Submitting on the issue of plea, Mr. Kisheni, the learned State Attorney said that he supports this appeal as the plea was equivocal plea not unequivocal. That, after the charge was read to him, there was no narration of the facts. The Public Prosecutor only said facts as per the charge sheet. He submitted that there was a need to elaborate the facts so that the appellant could know what he admits and what he does not admit. He amplified his point by citing the case of **Keneth Manda V. R. [1993] T.L.R. 107** to support his arguments.

The court record shows that on 30/8/2012 the charge sheet was read over to the appellant. He pleaded "it is true" which was recorded by the trial Magistrate as a 'Plea of Guilty' to the charge. The court record shows that the Public Prosecutor then said and I quote:

"PP: I pray for the facts to be as per charge sheet".

The appellant was never called upon to say anything. The trial Magistrate proceeded to convict him saying that "since the accused person had (sic) admitted the facts he is liable for conviction and sentence".

As above shown, the appellant was convicted on what the trial magistrate considered as his own plea of guilty. I am satisfied that the appellant was wrongly convicted. In a criminal trial a conviction based on a plea of guilty comes about when an admission by the accused takes the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution. This, as rightly argued by the learned State Attorney, the facts of the case were not read to the accused and thereby putting open the elements of the offence of grievous harm and then

I am in total agreement with the course taken by my bother judge. The first issue is answered in the negative that the appellant's plea was not unequivocal as indeed rightly argued by the learned State Attorney. The trial magistrate ought to have recorded it as a plea of not guilty and proceed to invite the prosecutor so as to adduce the evidence.

The second issue is whether the court should order a retrial or set him free?

The argument by the learned State Attorney was that the appeal should be allowed with directions to order a re-trial and take further evidence. His argument was centered on the provisions of Section 366 (1) (a) (i) of the Criminal Procedure Act, Cap 20 R.E. 2002 which gives this court power to order a retrial among other judicial actions which this court is enjoined to impose.

It is an undisputed fact that the procedural errors were committed by the trial Magistrate. I am however at a disagreement with the learned State Attorney that the circumstances warrant this court to make an order for retrial. The appellant, according to the trial court record, was convicted and sentenced on 30/8/2012. It is now eleven (11) months he had served the sentence. That fact, taken together with the fact that he is a first offender, without any previous criminal records, justice demands that he be set free.

Further, the offence he was charged with, does not create a mandatory sentence of seven years and does not fall under the Minimum Sentences Act. The trial magistrate is once again called upon to read between the lines

the provisions of section 170 (2) (a) (ii) of the Criminal Procedure Act, CAP 20 R.E 2002 so as to be certain on his power of sentencing.

The facts obtainable in the above cited case by the learned State Attorney of **Keneth Manda** (supra) is distinguishable from the facts of the case under consideration. It was a traffic case where only a fine was paid unlike in the present case where the appellant had already served almost half of the sentence which would otherwise be lawfully imposed.

For the above stated reasons, I allow the appellant appeal, quash his conviction and set aside the sentence. I hereby order his immediate release from prison unless otherwise lawfully held therein for any other lawful cause.

M.G. MZUNA,

JUDGE

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M.G. MZUNA,

JUDGE

26/7/2013

Court: Judgment delivered in the absence of the learned State Attorney though aware this 26th day of July 2013.

M.G. MZUNA,

JUDGE

26/7/2013