IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

MISCELLANEOUS CRIMINAL APPLICATION NO. 39 OF 2007

ORIGINAL CRIMINAL APPEAL NO. 15 OF 2005

OF THE DISTRICT COURT OF URAMBO AT URAMBO

ORIGINAL ULYANKURU

DEUS S/O BAGAYA .....APPLICANT
(Original Accused)

VERSUS

THE REPUBLIC .....RESPONDENT
(Original Prosecutor)

RULING

09th & 10th April, 2014

S.M. RUMANYIKA, J

When the application for extension of time, within which one to appeal against both conviction and custodial sentence of fifteen (15) years by the primary court Ulyankulu, dated 31.05.2005, was called for hearing, Mr. Nestory Pascal learned state attorney pointed it out very quickly, that the Republic had been wrongly involved. As the

latter had been not a party to the proceedings ever since, quite unusually, the applicant did not even remember who had been the complainant in this case. It being caused by the lapse of time. submitted apparently the layman in person.

It is settled law that a person not a party to the previous court proceedings cannot, without court leave, be made a party to the subsequent proceedings. It being a Primary court matter, the case had been prosecuted by an individual Kilienza Kaloli. That means, this application ought to have been preferred against the former. Not otherwise. The Republic thus are hereby discharged, and the applicant advised as such. The application is for the foregoing reasons afore going, struck out.

However, in exercise of the powers conferred upon me under sections 372 and 373 (1) (b) of the Criminal Procedure Act Cap. 20 RE 2002, and having examined the records of the two courts below, I will have the following observations:- the conviction, though based on plea of guilty, the charge of robbery with violence (c/ss 285 and 286 of the Penal Code Cap. 16 RE 2002), was not pleaded unequivocally. On 10/01/2005, when the charge was read to him for the 1st time, the applicant is recorded to have said:-

> .....mashitaka haya siyo ya kweli maana mimi sijamnyang'anya mlalamikaji shati na pesa na

yote ninayo lalamikiwa siku yatenda kabisa.

Literally meaning that he denied to have had robbed one the shirt and cash.

Yet still, as the charge was once again read to him on 24/01/2005, the appellant simply pleaded:-

"Mimi naomba leo niseme ukweli .....nakiri na Kukubaliana yote na nipo tayari kumlipa mlalamikaji fidia yote ya shs. 21,000/= (elfu ishirini na moja tu).....nimekubali makosa na kumlipa mlalamikaji (page 4 of the typed copy of proceedings)".

This means that the applicant admits the wrongs and undertakes to compensate/ pay the complainant to the tune of shs. 21,000/= (shs. twenty one thousand only). What were the "wrongs" being admitted? By the wording itself one can not say it confidently, that it was ascertained that the applicant had accepted as correct all the facts constituting the ingredients of the offence charged.

In other words, a plea of guilty needs be maintained consistently throughout by the accused. Any statement suggesting, for instance civil liability, any bonafide claim of right to mention few, cannot leave a plea of guilty safe. Leave alone an unequivocal plea of guilty. On

this one, this court, (my senior brother Chipeta, J (as then was), held in the case of Buhimila Mapembe V Republic (1988) TLR 174:

> In any case in which a conviction is likely to proceed on a plea of guilty, 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 element of it unequivocally .....

Or, as it was also held in the case of Keneth Manda V Republic (1993) TLR 107 (Mroso, J).

> An accused person can only be convicted on his own plea of guilty if it is ascertained that he has accepted as correct facts which constitute the ingredients of the offence charged .....

In other words the applicant was convicted, and therefore sentenced wrongly merely on the purported plea of guilty to the charge.

And equally of more importance, were the material facts of the case as narrated by the complainant. Quoted in part:-

> .....terehe 25/12/2004 .....saa 11.00 jioni nilikutana na mshtakiwa barabarani ..... akitoka kunywa pombe

na alikuwa amelewa pombe na sikuwa na wasiwasi na mshitakiwa ambaye ni shemeji yangu .....

This means that the complainant pleaded for the accused (now the applicant), a defence of intoxication. Like saying that the applicant was at the material time, incapable of committing any criminal offence.

Had the two courts bellow considered all this, the applicant would not have been convicted for the offence charged. I will nullify the proceedings as hereby do, quash the conviction and set aside the sentence. The applicant has served about nine (9) years in jail. I will order no retrial. The applicant to be set free forthwith. Unless he is otherwise lawfully held in custody.

S.M.RUMANYIKA

JUDGE

09/4/2014

Delivered under my hand and seal of the court in chambers. This 10/04/2014. In the presence of Ms J. Moka. The applicant is present.

S.M.RUMANYIKA

JUDGE

10/4/2014