IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 207 OF 2019

(Appeal from the Judgment of the District Court of Kwimba at Ngudu (Lema, RM) Dated 9th of August, 2018 in Criminal Case No. 133 of 2018)

JUMA S/O CONSTANTINE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

18th May, & 8th July, 2020

ISMAIL, J.

The District Court of Kwimba at Ngudu convicted the appellant on his own plea of guilty of the offence of malicious damage to property, charged under section 326 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). As a result, he was sentenced to a prison term of seven years.

It is gathered from the flimsy record of the trial proceedings, that the offence with which the appellant was charged occurred on 3rd August, 2018 at about 13:45 hours, when the appellant was accused of cutting

down forty trees, valued at TZS. 2,000,000/-, allegedly the property of Somo s/o Kimwaka. The incident occurred at Malya village in Kwimba district. The appellant was apprehended and taken to Malya Police Station where he recorded a cautioned statement (Exhibit A) in which he allegedly confessed his wrong doing. In the said statement, the appellant alleged that it all started in June, 2018, when the appellant approached Somo Mwaka with a request to harvest trees which were planted at the training college. The appellant stated that he was verbally allowed to go ahead and he harvested the trees for two days before he left for Nyambiti village. On 30th July, 2018, he went back to Somo Mwaka for yet another permission but this time Mr. Mwaka withheld the request. The appellant defiantly went ahead and harvested more trees on 2nd and 3rd August, 2018. On 4th August, 2018, the appellant was arrested as he was allegedly arranging the harvested trees at his home. He, however, contended that the trees that he unauthorized felled were 8 as opposed to 40 which appeared in the charge sheet.

The appellant was arraigned in the District Court of Kwimba at Ngudu where he pleaded guilty to the charge, after which he was sentenced to a seven-year custodial sentence.

The appellant is aggrieved by the conviction and sentence imposed by the trial court. As a result, he has preferred the instant appeal which has six grounds of appeal, paraphrased as hereunder: ***One***, that the trial court failed to appreciate that the appellant's plea of guilty was perfunctory; ***two***, that the charge and the facts of the case were not read over to the appellant in a language that the appellant is conversant with; ***three***, that the plea of guilty was not unequivocal since it was not recorded in the words that the appellant used, thereby contravening the provisions of section 228 (2) of the Criminal Procedure Act (CPA), Cap. 20 R.E. 2002 (now R.E. 2019); ***four***, that the trial court erred for not ordering full trial of the case in which evidence of the prosecution and the defence would be adduced and determination would be based on the evidence; ***five***, that the sentence imposed by the trial court was erroneous as it did not consider the limit imposed on the trial magistrate; and, ***finally***, that the conviction was poorly obtained without conforming to the standards.

Hearing of the appeal was done virtually through audio tele-conference that pitted the appellant who fended for himself, unrepresented, and Ms. Gisela Alex, learned State Attorney, who appeared for the respondent.

Addressing the Court, the appellant prayed that his grounds of appeal be received, considered and that the appeal be allowed by quashing and setting aside the conviction and sentence imposed on him.

On her part, Ms. Alex submitted with no particular reference to the grounds of appeal. She contended that, while she supports the conviction entered against the appellant, she was not in support of the sentence meted by the trial court. She argued that her opposition is premised on the provisions of section 170 of the CPA which caps sentencing powers of a resident magistrate to a term of up to five years. In this case, the sentence imposed was seven years which is excessive and, therefore, unlawful. She urged the Court to invoke the provisions of section 388 of the CPA and rectify the error by substituting the sentence with a fitting sentence.

With respect to conviction, Ms. Alex contended that after his plea of guilty to the charge, the trial magistrate followed the requirements of section 282 of the CPA and convicted. She submitted that the plea of guilty was in relation to the charge that was read over in a language that the appellant understood and that the facts of the case were also read over and all ingredients of the offence were admitted to. This, she submitted, justified the trial court's decision to convict on a plea of guilty.

The learned attorney conceded, however, that the requirement of having words used in the plea recorded was not complied with. In that case, she argued, the Court may quash the proceedings and order that the matter goes on full trial. Reacting to the question on what will happen to the time spent in prison, Ms. Alex argued that if retrial is ordered and conducted, the trial magistrate will have to consider time spent in prison and net it off from the sentence that may be imposed after the retrial.

In rejoinder, the appellant opposed to the proposal to have the matter remitted for retrial as he had already spent two years in prison. He urged the Court to set him free.

I will begin with ground five of the appeal which has taken exception to the sentence imposed by the trial magistrate, following the finding of guilty and eventual conviction against the appellant. Ms. Alex has conceded that the trial magistrate went far overboard and, in so doing, he offended the provisions of section 170 of the CPA. Before I get to the heart of the matter, let me state that the general principle is that sentencing is a discretionary power that is bestowed on and exclusively enjoyed by a trial court. An appellate court will intervene quite sparingly and only where the trial court has acted on a wrong principle or where the sentence imposed is patently excessive or patently inadequate. This

succinct position was underscored in the, in ***Bernadeta d/o Paul v. Republic*** [1992] TLR 97, in which it was held:

> "*.... that an appellate court should not interfere with the discretion exercised by a trial judge as to sentence except* ***in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive***".

See also: ***R v. Mohamed Ali Jamal*** (1948) 15 E.A.C.A. 126. (See also ***James Yoram v. R*** (1951) 18 E.A.C.A. 147).

Thus intervention of the appellate court in varying the sentence would only occur upon satisfaction that the irregularity sought to be remedied is colossal and has led to an injustice. This is the case here. The trial magistrate acted in wanton disregard of the provisions of section 170 (1) (a) of the CPA which caps his sentencing powers to five years, he being a judicial officer of the rank of a resident magistrate. This means that the sentence of seven years of imprisonment imposed against the appellant was manifestly excessive and out of the scope of the powers bestowed on him. In such a case, intervention of this Court through the powers vested in it by section 388 of the CPA is, as submitted by Ms. Alex, warranted and justified. I will come back to this point in due course.

With respect to the other grounds of appeal, the dominant cry by the appellant is that the plea of guilty extracted from the appellant was not unequivocal and, as such, the same ought not to have formed the basis for his conviction. The respondent concedes that the words used by the appellant to admit to the facts were not recorded, but she holds the view that the rest of the procedure was quite in order and that section 282 of the CPA was rightly invoked. With respect, I find the learned attorney's stance on this matter unconvincing. As I address this, let me start by stating that as a general rule, appeals cannot lie against convictions on pleas of guilty except where the plea on which the conviction was grounded is imperfect, ambiguous or unfinished. The express bar to appeals in such circumstances is enshrined in section 360 (1) of the CPA which provides thus:

> *"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."*

Circumstances that legitimize deviation from this firm position of the law were accentuated in the groundbreaking case of ***Laurence Mpinga v. Republic*** [1983] TLR 166. Subsequent decisions have picked from where this landmark decision left. In ***Msafiri Mganga v. Republic,***

CAT-Criminal Appeal No. 57 of 2012 (unreported), the Court of Appeal made the following observation:

> *"... one of the grounds which may justify the Court to entertain an appeal based on a plea of guilty is where it may be successfully established that 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. 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 plea amounts to an admission of every constituent of the charge and the admission is unequivocal."*** [Emphasis supplied].

Applying the wisdom showered in the just cited decision, the question which would be derived is whether the plea extracted from the appellant in the trial proceedings falls in the category of pleas which may be said to be predicated on facts which are capable of supporting the conviction. Looking at the proceedings conducted on 9th August, 2018, this question can only be answered in the negative. The answer has taken into consideration the fact that facts read by the prosecution were acutely insufficient to prove all ingredients of the offence in respect of which the appellant was called upon to plead and from which the plea of guilty was inferred. The casual manner in which the facts were drafted and read,

ignored the fact the prosecution bears the responsibility of ensuring that facts that are read are as detailed as possible, knowing that such facts substitute formal evidence which would be adduced were the appellant to plead not guilty and necessitate a full trial of the matter. It is through this process that all legal ingredients of the charged offence would be exposed to the appellant. This was not the case in the instant matter.

A glance at the trial proceedings reveal that when the accused was arraigned in court on 9th August, 2018, the charge was read and the appellant replied thereto by saying ***"It is true."*** This was construed to mean that the appellant pleaded guilty to the charged offence. In my considered view, trial magistrate's interpretation of the words ***"It is true"*** defied the current legal holdings which are to the effects that such pleas are insufficient to constitute the basis for conviction on the appellant's own plea of guilty.

In ***Josephat James v. Republic,*** CAT-Criminal Appeal No. 316 of 2010 (unreported), the Court of Appeal of Tanzania held as follows:

> *"(1) The expression "It is correct", used by the appellant after the charge was read to him, was insufficient for the trial court to have been unambiguously informed of the appellant's clear admission of the truth of its contents. In the circumstances, it is doubtful whether that expression*

by itself, without any further elaboration by the appellant, constituted a cogent admission of the truth of the charge.

(2) ***It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged.***

(3) The trial court was enjoined to seek an additional explanation for the appellant, not only what he considered "correct" in the charge, but also what it was that he was admitting as the truth therein. The trial court was not entitled by the answer given, "it is correct", to distil that it amounted to an admission of the truth of all the facts constituting the offence charged.

(4) In view of the seriousness of the offence and sentence of life imprisonment imposable on conviction, this serious irregularity occasioned a failure of justice.

(5) The statement of facts by the prosecutor, after the plea of guilty was entered by the trial court was a mere repetition of the charge. No facts were disclosed as to what the sole witness who reported the incident to the police actually witnessed or which of the facts she substantiated. In this case, this assumed importance because the victim, a boy aged two and a half years, could not possibly have testified, being an infant. Moreover, it is not known what medical evidence was available, if at all it was and what it had revealed.

(6) ***The duty is that of the prosecution to state the facts which establish the offence with which an accused person is charged. The statement of facts by the prosecution serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence, and it gives the magistrate the basic material to assess sentence."***

See: ***G & S Transport Limited v. The Director of Public Prosecutions & 2 Others***, HC-Criminal Revision No. 1 of 2020; and ***Sikini Mhanuka & Another v. Republic***, HC-Misc. Criminal Application No. 31 of 2019 (both Kigoma-unreported); ***Tereza Shija v. Republic***, HC-Criminal Appeal No. 198 of 2019; and ***Patrick Jumanne v. Republic***, HC-Criminal Appeal No. 9 of 2019 (both Mwanza-unreported).

As stated hereinabove, on the appellant's arraignment in court, the appellant was called upon to plead to the charge and what came out of him are the words which were recorded in the words: ***"It is true."*** Then, the facts of the case were read over to the appellant. What came out of that is that the trial magistrate recorded the word ***"Admitted"***, meaning that the appellant entered an admission to the facts as true and correct. Words stated in admission, from which the trial court derived the word ***"Admitted"*** were not recorded. Furthermore, what is contended to be facts of the case was a reproduction of the particulars of the offence with nothing additional. It was a case of restating what was already stated and known through a charge to which he admitted his guilt. Detailed facts which would, if read and admitted to, make the plea perfect, finished, conclusive and, therefore, unequivocal, were inexplicably not provided. This flagrant omission means that ingredients of the charge which would

be gathered from the detailed facts went missing and it cannot be said, from the totality of the raised infractions, that the plea of guilty was anywhere close to being unequivocal.

It should be clearly understood that a trial court's process of recording a plea of guilty is not a mere formality which may be handled in a manner that creates convenience to the presiding magistrate. It is a process of justice dispensation which is subject to some stringent requirements. Some of these requirements were spelt out in ***Adan v. Republic*** [1973] EA 445, in which Spry V.P. (as he then was), laid out very elaborate procedural steps that must be imperatively applied by a trial court, when an accused person is arraigned in court and called upon to plead to the charge that has been levelled against the accused. He held as follows:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should*

next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record the charge of plea to "not guilty" and proceed to hold a trial. ***If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded.*** *"*

Discerning from the proceedings, it is clear that the path taken by the trial magistrate mirrors what the superior Court observed in ***Samson Marco & Another v. Republic***, CAT-Criminal Appeal No. 446 of 2016 (Mwanza-unreported), in which a similar conduct was abhorred in the following words:

"What the prosecutor did was merely to repeat the same words appearing in the "Particulars of the Offence" of armed robbery without elaboration and relating to the ingredients constituting the charge facing the appellants.... We cannot on second appeal, say that facts narrated to support this ingredient of armed robbery, were clear to the appellants to support the position of the two courts below that there were

unequivocal pleas of guilty. As this Court restated in Msafiri Mganga v. R, Criminal Appeal No. 57 of 2012 (unreported), ***the narrated facts which an accused person admits to be true and correct, must In the eyes of the law, disclose the ingredients of the offence for which the appellant was charged with."***

It is simply that the proceedings conducted on 9th of August, 2018, leading to the appellant's conviction and sentence, are a process which disregarded every aspect of a fair process and the appellant was quite right to contend that the plea of guilty that was extracted from him was not unequivocal. The conviction was not based on the appellant's full understanding of the offence with which he was charged as no single ingredient of the offence was disclosed in a manner which would bring any sense of clarity. It follows that even the resultant sentence was borne out of the flawed process and the conviction was nothing but a mere farce. It cannot stand the test of a fair trial process.

The resultant consequence is to have the entire proceedings quashed, conviction and sentence set aside and remit the matter back to the trial court where the appellant will be re-arraigned. If the proceedings subsequent to re-arraignment will result in a conviction and sentence then

the trial magistrate will have to factor in the time that the appellant has spent in prison.

It is so ordered.

DATED at **MWANZA** this 8th day of July, 2020.

M.K. ISMAIL

JUDGE

Date: 13/07/2020

Coram: Hon. A. W. Kabuka, Ag - DR

Appellant: Present

Respondent: Ms. Gisela Alex, State Attorney

B/C: Warsha

Ms. Gisela Alex:

The matter is for judgment, we are ready.

Appellant:

I am ready too.

Court:

Judgment delivered today 13.07.2020 in the presence of Accused, learned State Attorney Ms. Gisela Alex and Bench Clerk one Ms. Warsha.

Sgd: A. W. Kabuka

AG – DR

At Mwanza

13th July, 2020

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL

RESIDENT MAGISTRATE MWANZA