

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 80 OF 2019

(Original Nachingwea District Court Criminal Case No. 127 of 2018)

GIFT ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

11.5 & 8 June, 2020

JUDGMENT

DYANSOBERA, J.:

The appellant Gift s/o Abdalla was, together with Bakari s/o Ally Chuma (1st accused), arraigned before the trial District Court for an offence of two counts. In the first count the appellant and the 2nd accused were charged with conspiracy c/s 384 of the Penal Code in which it was alleged that the two, at unknown date, time and day in the month of July, 2018 at Nachingwea District in Lindi Region, unlawfully did conspire to escape from lawful custody of Nachingwea District Prison. In the 2nd count the appellant and his fellow were charged with escape from unlawful

custody c/s 116 of the Penal Code. It was alleged in this count that the duo, on 26th July, 2018 at about 1200 hrs at Nachingwea District Prison within Nachingwea District in Lindi Region, unlawfully escaped from lawful custody of Nachingwea District Prison.

It is on record that on 1st August, 2018 when the charge was read over and explained to the appellant and the 1st accused, they pleaded guilty to both counts. Upon conviction, each was sentenced to three years imprisonment in the first count and one year imprisonment in the 2nd count. . The sentences were ordered to run concurrently.

Aggrieved, the appellant has appealed to this court on the following grounds:

1. That the learned trial Magistrate incurably erred in law by convicting the appellant on both counts of conspiracy and attempted escape while both the two are inchoate offences.
2. That the sentence imposed is too excessive especially due to the fact that the appellant pleaded guilty and did not waste the court's time and resources.
3. That the learned trial Magistrate incurably erred in law by failing to consider the appellant's mitigation.

On 13th May, 2020 when this appeal was called for hearing, the appellant was present but unrepresented whereas the respondent was represented by Ms Caroline Matemu, learned state attorney.

When called upon to argue his appeal, the appellant opted to let the learned state attorney respond first the petition of appeal.

In her submission, the learned state attorney supported the appeal in the first count of conspiracy on the ground that there was no elaboration of facts for the first count. With respect to the 2nd count, Ms Caroline Matemu Contended that the appellant pleaded guilty to the charge, the facts read in court was elaborate and established the ingredients of the offence. She relied on the case of **Samson Kitundu v. R**, Criminal Appeal No. 195 of 2004 CAT-Mza. (Unreported). She urged the appeal against conviction in the 2nd count to be dismissed.

As to the appeal against sentence, learned state attorney was of the view that the sentence meted out to the appellant was proper and the appeal has no basis.

Responding to the submission by learned state attorney, the appellant argued that he was forced to commit the offence. He explained that they were given work by force before they had been convicted, the

fact they considered to be against the law. The appellant's further argument was that they were not given the right to be heard in their defence. He lamented that they were three but one of them died due to the torture.

FACTS:

Accused persons name and address and particulars as per the charge sheet.

It was on 26th day of July, 2018 at 1200 hrs, both accused were at remand custody, in the prison of Nachingwea. First accused person was charged with the offence of armed robbery in criminal case No. 108 of 2018 and second accused person was charged with the offence of stealing and burglary in criminal case No. 66 of 2011. Accused persons being in the mentioned prison did break the fence of the prison and run away. They were caught by prisoner policemen, returned to prison on 1.8.2018 and brought to court for that accusations. That is all.

Court: Asked both accused's if they do agree with the facts narrated by the public prosecutor.

1st accused: it is true fact.

2nd accused: it is true facts

The trial court recorded the following finding:

"The fact accused person one Bakari Ally Chuma and Gift Abdallah admitted before this court without qualifications; constitutes offences charged with are first count conspiracy contrary to section 384 of the Penal Code and 2nd count escape from lawfully custody contrary to section 116 of the Penal Code. I therefore found them guilty, they are convicted accordingly per section 228 (2) of the Criminal Procedure Act [Cap. 20 R.E.2002].

I so order."

As rightly submitted by the learned state attorney, the facts narrated did not establish any ingredients of the offence of conspiracy. Indeed, there was not mention that the appellant and his fellow ever conspired to commit an offence. The conviction in the first count was uncalled for and illegal.

As regards the second count, the appellant and his fellow were convicted under section 228 (2) of the Criminal Procedure Act [Cap. 20 R.E.2002]. it is provided under those provisions as hereunder:

228.-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."

There is no dispute and the record is clear that the appellant and his fellow were not charged under section 228 (2) of the Criminal Procedure Act; rather, they were charged with escape from lawful custody contrary to section 116 of the Penal Code [Cap.16 R.E.2002].

in the second count

Likewise, section 312 (2) of the said Act provides:

"312 (2) in the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law

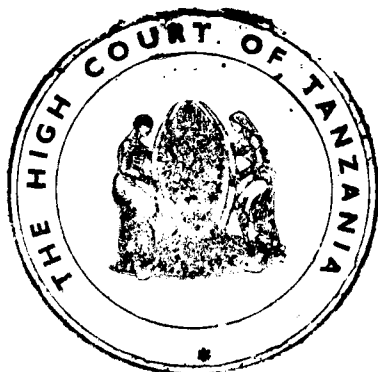
under which the accused person is convicted and the punishment to which he is sentenced"


The Court of Appeal of Tanzania, in the case of **George Patrick Mawe and 4 others versus Republic**, Criminal Appeal No. 203 of 2011 cited to me by the learned senior state attorney, had this to say:-

"In case of conviction the judgment shall specify the offence of which and the section of the Penal Code or other law, the accused person is convicted and punishment to which he is sentenced".

Convicting and sentencing the appellant and his fellow under section 228 (2) of the Criminal Procedure Act was violative of section 312 (2) of the Criminal Procedure Act [Cap.20 R.E.2002].

Since the judgment violated the law, it cannot be allowed to stand. For those reasons, the appeal is allowed, conviction quashed and sentence set aside. It is ordered that unless lawfully held for other casuses, the appellant should be released from custody forthwith.

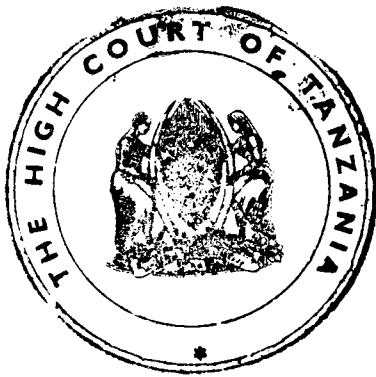




W.P.Dyansobera

JUDGE

8.6.2020

This judgment is delivered under my hand and the seal of this Court on this 8th day of June, 2020 in the presence of Mr. Paul Kimweri, learned senior state attorney for the respondent Republic and in the presence of the appellant (virtually present in court).




W.P. Dyansobera
JUDGE