THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 98 OF 2019

(Originating from Criminal Case No. 8 of 2019 in the Court of Resident Magistrate of Songwe, at Vwawa).

CHRISTOPHER APOLINARY KIKWETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

14.9 & 26.11.2020

UTAMWA, J:

This is a judgment on this first appeal. Before the Court of Resident Magistrate of Songwe, at Vwawa (lower court), the appellant, CHRISTOPHER APOLINARY KIKWETE was charged with and convicted of the offence Transporting Illegal Immigrants contrary to section 46 (1) (c) and (2) of Immigration Act, Cap. 54 R.E. 2016. He was convicted and sentenced to pay a fine of Tanzania Shillings (Tshs) 20,000,000 (Twenty

Million only) or to serve 15 years in prison in case of a default to pay the fine. He is now in prison for failure to pay the fine. The conviction and sentence were entered basing on what lower court considered as the appellant's own plea of guilty. He was aggrieved by both the conviction and sentence. He thus, appealed to this court advancing five (5) grounds as listed in the petition of appeal. The respondent objected the appeal.

The appeal was heard by way of written submissions. The appellant was represented by Ms. Beatrice Mwahandi, learned advocate. However, the submissions filled in court show that, the appellant signed and filed them himself. Ms. Xaveria Makombe, learned State Attorney represented the respondent/ Republic.

In his submissions in chief, the appellant argued the first ground of appeal only and abandoned all others. The first ground was to the effect that, the honourable resident magistrate erred in law and fact on sentencing him (the appellant) basing on an equivocal plea of guilty. He contended that, the plea of guilty was equivocal because, the answer he gave did not support the charge he was facing. He further argued that, in order for the court to enter a plea of guilty, it should be satisfied that the accused's plea is nothing, but a clear admission of guilty. To substantiate his contention he cited a number of precedents, including the case of **Mohammed Muumin Mussa v. Republic [2004] TLR 1** and **DPP v. Paul Reuben Makujaa (1992) TLR 2.**

In her replying submissions, the learned State Attorney for the respondent contended that, this appeal is untenable since it challenges the

conviction and sentence which were entered upon the appellant's own plea. According to her, appeals of this nature are prohibited by the provision of section 360 (1) of the Criminal Procedure Act, Cap. 20 (CPA). She further submitted that, the plea of guilty by the appellant was unequivocal. This is because, the appellant agreed to have transported illegal migrants from Morogoro to Tunduma boarder for the sake of getting quick money.

Moreover, the learned state attorney submitted that, the appellant's claim of poverty as a reason for his illegal practice is inexcusable under the law. She thus, prayed for this court to uphold the conviction and sentence imposed by the lower court.

I have considered the submissions by the parties, the record and the law. There are two issues to be determined by this court. First, is whether or not the conviction against the appellant was based on an equivocal plea of guilty. Secondly, if the first issue is affirmatively answered, then which is the legal remedy or order should this court make.

Regarding the first issue, it should firstly be noted that, the general rule is that, a conviction based on an accused's own plea of guilty is not appealable. This is according to section 360 (1) of the CPA; see also the case of **Laurence Mpinga v. Republic [1983] TLR 166.** However, there are some exceptions to that general rule as it will be shown later.

It is also a legal requirement that, a plea of guilty should be unequivocal. This means that, it should be free from any ambiguity; see the case of **Baraka Lazaro v. Republic, Criminal Appeal No. 24 of**

2016 Court of Appeal of Tanzania (CAT) at Bukoba (unreported), followed in the case of **Abdallah Jumanne Kambangwa v. Republic, Criminal Appeal No. 321 of 2017 High Court of Tanzania at Dar es Salaam,** (unreported, Muruke,J.). In this **Abdallah case** the court further held, and I quote the pertinent paragraph for a readymade reference:

> "…. in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) 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 constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally".

Owing to the legal position according to the above cited precedents, the issue in the matter at hand is this; was the plea of guilty by the appellant unequivocal? In order for a plea of guilty to be acceptable as unequivocal, a trial court like the lower court is required to follow the proper procedure for recording such plea. Regarding subordinate courts, the procedure is provided under section 228 (1) and (2) of the CPA. It provides thus; the substance of the charge should be read to the accused who shall be asked to plead thereto. If he 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. These provisions however, are not elaborate enough. Courts of law have thus, interpreted them and made details of the proper procedure for recording a plea of guilty.

Examples of court decisions elaborating such proper procedure for recording pleas of guilty is **Republic Vs. Masoud s/o Peter @ Ngeleja Doto, High Court Criminal Appeal No. 205 of 2014, at Tabora** (Unreported) following **Republic Vs. Waziri s/o Musa 2 T. L. R. (R) 30** and **Adan Vs. Republic (1973) E. A. 445.** These precedents set the following procedure: the charge must firstly be read over and explained to the accused person in the language he understands. Every ingredient of the charge is made clear to him. He is asked to plead thereto. If he pleads guilty the court records his own words and enters a plea of guilty provisionally. Then the facts of the case are read and the accused is given an opportunity for replying to them. In reading the facts of the case all the pertinent exhibits must be brought to the accused's attention, see also the decision by the CAT in the case of **Joseph Mahona @ Joseph Mboje @ Magembe Mboje Vs. Republic, CAT Criminal Appeal No. 541 of 2015, at Tabora** (unreported). If the accused disputes the facts the court will change the plea to one of not guilty. In case he admits them, the court re-confirms the plea of guilty and records it accordingly. The court then finds him guilty if the facts constitute the offence charged or a lesser offence. It then convicts him and passes the sentence. However, if the facts do not establish any offence in law, the court will record a plea of not guilty.

It is also the stance of our law that, violation of the procedure demonstrated above warrants an appellate court to quash the proceedings, the conviction and set aside the sentence. This is done on grounds of denying the accused's right to fair trial; see the **Mahona case** (supra).

Breach of the procedure thus, renders the plea equivocal. The resulting conviction and sentence are thus, appealable. This position of the law thus, constitutes an exception to the general rule mentioned above that, a conviction based on a plea of guilty is not appealable.

In the matter at hand, the record of the lower court (at pages 3 and 4 of typed proceedings) shows that, the learned trial magistrate did not observe the proper procedure narrated earlier. This is because, the record shows that, upon reading the charge to the accused persons and recording a plea of guilty against the appellant (who stood as the 11th accused), he (the trial magistrate) proceeded to record what he termed as the "MEMORANDUM OF FACTS UNDISPUTED." This memorandum contained facts numbered from 1- 8. The same was followed by various signatures including the appellant's and the public prosecutor's signatures.

It is thus clear that, the lower court did not show in the proceedings that, the facts of the case were read to the appellant and he was given an opportunity to reply to them as required by the procedure. The procedure adopted by the lower court did not thus, comply with the proper procedure just highlighted above. That procedure adopted by the lower court is applicable only in recording undisputed facts in a memorandum of agreed matters made and filed in court when a trial court is conducting a preliminary hearing under section 192 of the CPA. This follows a plea of not guilty of the accused person. This procedure under section 192 of the CPA was thus, inapplicable in this matter since the lower court was not conducting any preliminary hearing when it recorded the plea of guilty at

issue. The trial magistrate thus, seriously misconceived the law. The irregularity thus, denied the appellant of his right to fair trial.

Additionally, the record shows that, the prosecution tendered two exhibits, i.e. the caution statement of the appellant, the seizure certificate of the Lorry with Reg. No. T. 500 DFJ/T 833 CMN make Scania and cash Tsh. 1, 138, 000/=. The same were admitted as exhibits. However, the record does not show that the contents of these exhibits were read to the appellant and that, he admitted them. It is a trite law that, whenever it is intended to tender a document in evidence, its content must be read out to the accused upon the same being admitted; see the case of **Robinson Mwengis and 3 Others v. Republic [2003] TLR 218**. The omission committed by the lower court in the matter at hand thus, prejudiced the appellant, hence fatal to the proceedings.

Having observed as above, I hereby find that, the plea of guilty by the appellant before the lower court was equivocal. I thus answer the first issue affirmatively. The plea could not thus, support the conviction and sentence imposed against the appellant.

Regarding the second issue of which is the remedy or the order should this court make, the answer is available in the **Baraka Lazaro** case (supra). In that case, it was held to the effect that; a conviction based on an equivocal plea, has to be quashed on appeal, and proper cases, a re-trial will be ordered, usually before another magistrate of competent jurisdiction.

As to the conditions for making an order of re-trial, the CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported) following the case of **Fatehali Manji v. R [1966] EA 343** guided thus, and I quote it for an expedient reference;

> "...in General a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and its circumstances and an order for retrial should only be made where the interests of justice require it, and should not be ordered where it is likely to cause an injustice to the accused person..."

In the case at hand, I have already found that, the conviction was resulted from the improper plea of guilty. Under the circumstances of the case therefore, a retrial will not cause any injustice to any party.

Owing to the above reasons, I allow the appeal to the extent that; I nullify the proceedings, quash the conviction and set aside the sentence. I further order that, the case shall be immediately remitted to the lower court for the appellant to plead afresh and the matter shall proceed according to the law before another magistrate of competent jurisdiction.

In case the appellant will be convicted, the period of imprisonment he has served for the quashed conviction shall be considered and deducted in sentencing him. Currently the appellant shall stay in remand prison pending the retrial. The retrial to commence not later than 30 days from the date hereof. Again, the forfeited Lorry with Reg. No. T 500 DFJ/T 833 CMN make Scania and cash Tshs. 700,000/= (Seven Hundred Thousand

only) shall continue to be under the custody of the government pending the re-trial. It is so ordered.

JHK. UTAMWA

JUDGE

26/11/2020.

26/11/2020.
CORAM; J. H. K. Utamwa, Judge.
Appellant: present (by virtual court link while in Ruanda-Prison, Mbeya).
Respondent: Mr. Joseph Tibaijuka, learned State Attorney.
BC; Mr. Kibona, RMA.

Court: Judgement delivered in the presence of the appellant (by virtual court link while in Ruanda Prison) and Mr. Joseph Tibaijuka, learned State Attorney for the respondent, in court this 26th November, 2020.

THE HIGH COURT OF TANZANIA

J. H. K. UTAMWA
JUDGE
26/11/2020.