

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**CRIMINAL APPEAL NO. 126 OF 2019**

(Original Criminal Case No. 17 of 2019 of the District Court of Urambo at  
Urambo)

**RAMADHANI OMARY KAMBAYA ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**KIHWELO, J.**

This matter was initially assigned to my late Brother Bongole J. who owing to his sudden death he could not live to compose the Judgment and subsequently the matter was re-assigned to me.

Before the District Court of Urambo at Urambo, the appellant, Ramadhani Omary Kambaya was charged with the offence of Unlawful Possession of breaking instruments c/s 298 (d) of the Penal Code, Cap. 16 RE. 2002 [Henceforth "the Penal Code"].

Briefly stated the facts of the case are as follows; The appellant on the 3<sup>rd</sup> day of January, 2019 at or about 11:30 hrs at Mabatini within Urambo District in Tabora Region was unlawfully found in possession of various breaking instruments. When the charge was read to the appellant and called upon to answer it, he pleaded guilty, the facts of the case were

then read to him and there upon he admitted all the facts read to him to be true.

The court went on to convict the appellant on his own plea of guilty and sentenced him to serve five (5) years imprisonment.

Dissatisfied the appellant presently seeks to overturn the decision of the District Court a petition of appeal which is comprised six points of grievance, namely;

- 1. That, the plea of guilty by the appellant was ambiguous and equivocal.*
- 2. That, the trial court erred in law to allow the prosecutor to read the facts of the case under section 192(3) of the CPA Cap 20 RE. 2002 which applies only to accused persons who have pleaded not guilty to the charge.*
- 3. That, the learned trial magistrate erred in law for failure to make a finding whether the plea of guilty of the appellant was unambiguous and unequivocal and that the conviction of the appellant on his own plea of guilty was entered by the trial court in the absence of such finding.*
- 4. That, the allege cautioned statement of the appellant (exhibit P1), while containing information adverse to the appellant was not read aloud in court in the hearing of the appellant, this affected his plea of guilty.*
- 5. That, the breaking instruments subject of the charge and allegedly found in possession of the appellant were not admitted in court as exhibit.*

6. *That, in light of the preceding round of complaint, the appellant had a defense to the charge laid before him such that the trial court erred in law to treat the pleas of guilty by the appellant as complete.*

At the hearing before this Court, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Miraji Kajiru learned State Attorney.

When asked to address the court the appellant opted to adopt his grounds of appeal. On his part Mr. Kajiru supported the appeal. He strenuously submitted that, the appellant pleaded guilty to the charge but the procedure adopted in conducting the case was unfair. He referred this court to page 1 of the typed proceedings where it reveals that the charge was read to the appellant and he pleaded guilty but the facts were not read to him that same day until the next day on 08/09/2019 where facts were read to him. According to Mr. Kajiru this was contrary to section 288 (1) and (2) of the CPA Cap 20 RE. 2002 (Henceforth "the CPA") which requires facts to be read on the same day upon a plea of guilty being entered.

Furthermore, Mr. Kajiru referred this court to page 3 of the typed proceedings where according to him the caution statement of the appellant was admitted in court but the same was not read in court offending the requirement of the law as stated in the case of **Robinson Mwanjisi V.R** (2003) TLR 2008. He forcefully argued that the caution statement must be expunged from the records.

Upon careful perusal of the court records as obtained in the trial court's file, I find it convenient to begin with the charge sheet which is the basis of the trial as the charge sheet is what commences a criminal case before any court of law. In the instant case the charge reads as follows:

**"CHARGE**

**STATEMENT OF OFFENCE:** *Unlawful Possession of breaking instruments C/S 298(d) of the penal code Cap 16 RE 2002.*

**PARTICULARS OF OFFENCE:** *that RAMADHAN S/O OMARY Charged on 3<sup>rd</sup> day of January, 2019 at or about 11:30 hrs at Mabatini within Urambo District in Tabora Region was unlawfully found in possession of various breaking instruments."*

I think that from the above quoted portion of the charge sheet, nobody can doubt that the particulars of offence have some important missing information. From the above particulars of offence, it is conspicuously clear that the particulars of offence fall short of describing/disclosing the breaking instruments that were alleged to be found in the appellant's possession and to make it worse these instruments were not admitted in court as exhibits to prove the charge.

It is elementary principle of law that every criminal charge should set out all essential constituents of the offence alleged so that the accused may understand the nature of offence he stands charged. In this particular case it is apparent that the appellant was not in a position of understanding the charge so that he could prepare his defence due to lack of important information in the particulars of the offence and therefore the

appellant was prejudiced by defectiveness of the charge that resulted in the conviction and sentence that was imposed to him.

There is a plethora of legal authorities on this requirement of the law and the Court of Appeal has construed seriously and strictly the implication of a defective charge or information which escapes the attention of a subordinate court and the High Court. In the case of **Isidori Patrice v. the Republic**, Criminal Appeal No. 224 of 2007 CAT (unreported) the Court of Appeal had this say.

*"It is now trite law that the particulars of the charge sheet disclose the essential ingredients of the offence. The requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the particulars in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law".*

Unfortunately, with due respect, the learned trial Resident Magistrate did not exercise care and close scrutiny when he admitted the charge sheet which was defective before he assumed the trial of the case. The Court of Appeal in the case of **Antidius Augustine v Republic**, Criminal Appeal No. 89 of 2017 CAT at Bukoba (unreported) emphasized that exercising care in the scrutiny of a charge is extremely important for the trial court. The Court of Appeal referred to erstwhile East African Court of Appeal in **Avone v Uganda** (1969) EA 129.

Traversing further records of the trial court it is noteworthy that there is another anomaly worthy of addressing it. This is in relation to the plea of guilty allegedly entered by the appellant. It is apparent that the plea of guilty entered during trial was equivocal. The accused plea as it appears in the records of the typed proceedings reads in part;

***"it is true, I was found with breaking instruments"***

**B. D. Chipeta**, in Magistrate Manual 3<sup>rd</sup> Edition 2010, at page 30 defines equivocal pleas as follows;

*"An equivocal plea simply means an ambiguous or vague plea, that is a plea in which it is not clear whether the accused denies or admits the truth of the charge. Pleas in such term as "I admit" "nilikosa" or "that is correct" and the like, though prima facie appear to be pleas of guilty may not necessary be so. In fact, invariably such pleas are equivocal. It is for this reason that where an accused person replies to the charge in such or similar terms facts must be given and accused asked to deny or admit them. Only by doing so can a magistrate be certain that accused's pleas is one of "not guilty" or "unequivocal plea of guilty."*

To resume to the matter under my consideration, the accused's response to the charge that "it is true I was found with breaking instruments" the statement is unclear as to whether the accused denied or admitted the charge, the statement being so ambiguous the trial magistrate ought to have recorded a plea of not guilty and continue with the hearing of the prosecution's case. With due respect, I think the trial

magistrate grossly erred in failure to make a finding whether the plea was either equivocal or unequivocal and this in my view prejudiced the applicant.

Apart from the grounds leveled by the appellant this Court spotted another error by the trial court whereby the trial magistrate sentenced the appellant to 5 years imprisonment without first convicting him accordingly. Let the records of typed proceedings at page 4 paint the picture:

*"Due to the fact that the accused person pleaded guilty to the charge when the charge read (sic) over and explained to him and agreed with the facts containing the substance of the offence charged to be true and correctly recorded also signed, the accused person is convicted as charged basing on his plea or guilty."*

In the case of **The Director of Public Prosecutions vs Ponda Issa Ponda** Crim Appeal No. 57 of 2015 CAT at Dar es Salaam the court emphasized that;

*"Finding the accused or not guilty alone is not sufficient as the trial court must go further to either conviction or acquit and that failure to convict renders the judgment invalid"*

The law requires that, the court must state the law and particular section of law which the accused is convicted upon, a mere mention of the word convicted does not suffice to be a proper conviction under the law.



Having dispassionately considered the discrepancies complained of, I allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order for an immediate release of the appellant unless held for other lawful reason.



**P.F. KIHWELO**

**JUDGE**

**10/12/2020**

Judgment to be delivered by the Deputy Registrar on a date to be fixed.



**P. F. KIHWELO**

**JUDGE**

**10/12/2020**





**Court:** Judgment delivered this 17<sup>th</sup> day of December 2020 in the presence of the appellant but in absence of the Respondent.

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "B.R. Nyaki".

**B.R. NYAKI**

**DEPUTY REGISTRAR**

**17/12/2020**