

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA  
HC.CRIMINAL APPEAL NO.11 OF 2021**

*(Arising from Sengerema District Court in Criminal Case No. 185 of 2020)*

**BUNDALA MARCO MASHAURI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 18.02.2021*

*Date of Judgment: 22.02.2021*

**A.Z. MGEYEKWA, J**

The appellant, BUNDALA MARCO MASHAURI was convicted on his own plea of guilty in Criminal Case No. 185 of 2020 in the District Court of Sengerema. The prosecution alleged that on the 04<sup>th</sup> November, 2020 at 20:00 hrs at Buyagu Village within Sengerema District in Mwanza Region, the appellant did steal one motorcycle with Registration No. MC 475 CQP make SANLG valued Tshs. 2,600,000/= the property of

FRANK SHIGANGA RENATUS and immediately before and after such stealing did use a machete to cut him on the neck to obtain and retain the said property.

The trial Magistrate was satisfied that the plea of the appellant was unequivocal and that the facts constitute the offence as charged. He was convicted on his own plea of guilty and was sentenced to serve thirty years imprisonment for the first count. The appellant was convicted and sentenced to twelve years imprisonment for the second count and to compensate the victim Tshs. 100,000/=.

The appeal was called for hearing, Mr. Tabuye, learned counsel represented the appellant while Ms. Gisela Alex, learned State Attorney represented the Republic respondent.

It was the learned counsel for the appellant who started to kick the ball rolling. Mr. Tabuye urged this court to adopt the grounds of appeal to form part of his submission. Submitting in support of the appeal, the learned counsel for the appellant began by abandoning the fourth fifth, and ninth grounds of appeal. He also chooses to argue the first and eighty grounds of appeal together.

Submitting on the first and eighty grounds of appeal, he argued that the trial court erred to record the appellant's plea as an equivocal plea while it was unequivocal. He added that the law requires the elements of an offence must be included in the facts of the case. To support his submission he referred this court to section 287A of the Criminal Procedure Act, Cap. 20 [R.E 2019]. He went on to state that the words threat and violence are missing in the appellant's plea on page 1 of the court proceedings.

Mr. Tabuye further submitted that section 3 of Evidence Act, Cap.6 [R.E 2019] defines the word confession to mean a statement that contains admission of all the ingredients of an offence. He valiantly argued that the facts of the case do not constitute the offence of theft since the words violence and threat were missing. Mr. Tabuye fortified his position by referring this court to the Court of Appeal of Tanzania case of **Rhino Migire v R**, Criminal Appeal No. 122 of 2002. Therefore, it was his view that the appellant's plea was unequivocal.

Mr. Tabuye did not end there, he argued that after reading over the facts of the case the appellant was not able to reply correctly since he did not understand the language.



Arguing on the second ground, Mr. Tabuye was brief and straight to the point. He argued that inspector Martha wrongly tendered exhibit P1, exhibit P2, and exhibit P3. To bolster his submission he referred this court to page 4 of the trial court proceedings and the case of **Frank Massawe v R** Criminal Appeal No. 302 of 2012.

Submitting on the 4<sup>th</sup> ground, Mr. Tabuye claimed that the plea was made out of torture. He argued that the appellant was in remand from 08<sup>th</sup> November, 2020 to 23<sup>rd</sup> November, 2020 the day when he was arraigned before the District Court of Sengerema. He added that 15 days lapsed, thus, it was contrary to section 32 (1) of the Criminal Procedure Act, Cap.20 [R.E 2019]. He lamented that the time spends at the police station renders the appellant to be subjected to torture therefore he had to plea.

As to the 6<sup>th</sup> ground, he stated that the trial court did not satisfy itself on the existence of the alleged offence because there was no PF3, certificate of seizure, and weapon which were tendered in court.

On the strength of the above argumentation, Mr. Tabuye urged this court to quash the trial court decision and court order.

In reply, Ms. Gisela supported the conviction and sentence. She argued that the appellant was convicted on his own plea of guilty and he had no any right to file an appeal against a plea of guilty except where there is an issue of illegality.

Submitting on the first ground of appeal, Ms. Gisela stated that the prosecution amended the charge sheet on 23<sup>rd</sup> November, 2020. She added that the charge was read over on 23<sup>rd</sup> November, 2020 in a language which the appellant was conversant with and he replied it is true, he has committed the said offence. She added that the facts of the case were read over and the facts included the ingredients of offence. She further submitted that the facts reveal that the appellant used a bush knife to obtain the motorcycle, the property of Renatus Shiganga. She added that the plea was elaborative, therefore she urged this court to disregard this ground of appeal.

Submitting on the second ground of appeal, Ms. Gisela states that the exhibits were tendered in court and the appellant did not object therefore the exhibits were admitted and the court proceeded to read the contents of the exhibits. She added that this ground is demerit.

With respect to the 3<sup>rd</sup> ground, the proceedings reveal that the appellant was arrested on 08<sup>th</sup> November, 2020, and was brought before the court of law on 23<sup>rd</sup> November, 2020. She argued that the delay was justifiable since the prosecution was preparing witnesses' statements and chargers. Ms. Gisela went on to argue that the appellant had a chance to raise his complaints before the court therefore the appellant cannot raise his complaints now.

As to the 6<sup>th</sup> ground, she argued that there was no any room to tender weapons, the same could have been done when the prosecution was proving the chargers. She stated that all happened when the trial court was conducting the preliminary hearing. She added that in case the appellant could have denied the charges then the court could act differently.

On the strength of the above submission, Ms. Gisela urged this court to dismiss the and in case the appellant's plea is equivocal then she urged this court to order retrial to allow the prosecution to proceed with preliminary hearing and call witnesses to testify.



In a brief rejoinder, the appellant's Advocate reiterated his submission in chief and insisted that the charge sheet lacks the ingredients of theft as a result the appellant's plea was equivocal. Mr. Tabuye also insisted that the exhibits P1 to P3 were wrongly tendered therefore the same was contrary to the procedure. He referred this court to section 198 (1) of the Criminal Procedure Act, Cap.20. Mr. Tabuye also insisted that the appellant's conviction was based on circumstantial evidence therefore his plea was equivocal.

On the strength of the above, Mr. Tabuye urged this court to quash and set aside the District Court proceedings in Criminal Case No. 185 of 2020 and set free the appellant.

Having summarized the submissions by both parties and after going through the evidence on record, I am now in the position to determine the grounds of appeal before me.

Addressing the first ground of appeal that the trial court convicted the appellant on equivocal plea, in determining this ground of appeal I had to scrutinize the charge sheet and find out whether the ingredients of the offence were included in the charge sheet. The main dispute between the appellant's Advocate and the learned State Attorney was

based on the ingredients of the offence of armed robbery. Therefore, the beginning point is the charge sheet under focus. I wish to reproduce it hereunder for ease of reference:-

"STATEMENT OF OFFENCE SECTION Armed Robbery by c/s 287A of the Penal Code Cap.20 [2019].

PARTICULARS OF THE OFFENCE: PETER S/O PHILIPO that on the 04<sup>th</sup> November, 2020 at 20:00 hrs at Buyagu Village within Sengerema District in Mwanza Region, the appellant did steal one motorcycle with Registration No. MC 475 CQP makes SANLG valued Tshs. 2,600,000/= the property of FRANK SHIGANGA RENATUS and immediately before and after such stealing did use a machete to threat and cut him on the neck to obtain and retain the said property."

The above-cited section 287A of the Penal Code, Cap.16 [R.E 2019] reads:-

*"Any person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or **immediately before or after stealing uses or threatens to use violence to any person** to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than*



*thirty years with or without corporal punishment."* [Emphasis supplied].

Guided by the principle of section 287A of the Penal Code Cap.16 [R.E 2019], an important element of the offence of armed robbery is the use of force against a victim for purpose of stealing or retaining the property after stealing. I have scrutinized the charge sheet and reviewed the plea of the appellant and noted that the charge sheet on both counts was amended, the prosecution on the last sentence the prosecution inserted the following words 'threat and' after the word to. On the second count, the prosecution on the last sentence inserted the word 'unlawfully' after the word did and they appended their signatures. However, in the trial court proceedings, the facts of the case did not contain the words 'threat and'. The charger was read over and the appellant pleaded guilt to the charge. On the first charge, the appellant plead as follows:-

*" Ni kweli nilifanya unyang'anyi wa kutumia silaha ya panga na kuiba pikipiki hiyo ya Frank Shiganga."*

When the facts of the case were read over the word 'threat' was missing. It is indisputable that the ingredients of the offence of armed

robbery were disclosed in the charge sheet. As it is recalled, the appellant in his plea said that he used a bush knife to rob and stole a motorcycle from Frank Shiganga.

In my considered view, as rightly stated by the learned counsel for the appellant the facts of the case were also required to disclose the ingredients of armed robbery. The justification for the requirement to disclose the essential elements of the offence in the particulars is to enable the accused person to understand the case he is faced with. The same was observed in the case of **Juma Ismail and Another v R**, Criminal Appeal No. 501 of 2015.

On the contrary, the facts of the case which was read over by the prosecution did not constitute all ingredients of armed robbery, therefore, the appellant's confession was made out of facts which did not constitute the offence which the appellant was charged with. Based on the facts of the case which was read over to the appellant, I find that the essential elements of an offence were missing. Thus, the prosecution prevented the appellant from knowing the facts of the case with which he was charged with.

Based on the above findings, it suffices to hold that the trial court's conviction against the appellant was not proper and occasioned to failure of justice on the part of the appellant. The first ground of appeal, suffice to dispose of this appeal. In the premises, I refrain from determining the remaining five grounds of appeal, the same will not serve useful purpose now.

It is trite law that where the court is satisfied that the conviction was based on an equivocal plea, the court may order retrial as held in the case of **Baraka Lazaro v Republic** Criminal Appeal No. 24 of 2016 CAT Bukoba (unreported) and B.D Chipeta (as he then was) in his book Magistrate Manual stated at page 31 that:-

*"Where a magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon on appeal the conviction will almost certainly be quashed and in a proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction."*

For those reasons, therefore, having found the original trial was defective for the main reason that the accused plea was equivocal, I



hereby allow the appeal. In the end, I nullify the whole proceedings in respect to Criminal Case 185 of 2020, I quash the conviction on the purported plea of guilty, and set aside the sentence. I order that the case be remitted to the trial court for the appellant to plea afresh and the matter to proceed in accordance with the law. I direct, the case scheduling for trial be given priority, hearing to end within six months from today, and in the interest of justice, the period that the appellant has so far served in prison should be taken into account. The appellant shall in the meantime, remain in custody to await the trial.

Order accordingly.

DATED at Mwanza this 22<sup>nd</sup> February, 2021.



A.Z.MGEYEKWA

**JUDGE**

22.02.2021

Judgment delivered on this 22<sup>nd</sup> February, 2021 in the presence of both parties.

A.Z.MGEYEKWA

**JUDGE**

22.02.2021