IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 101 OF 2020

(Appeal from the Criminal Case No. 67 of 2020 in the District Court of Misungwi at Misungwi (Marick, RM) dated 29th of May, 2020.)

JOHN ELIAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th February, & 15th March, 2021

ISMAIL, J.

The appellant was convicted on his own plea of guilty of a single county of armed robbery, contrary to the provisions of sections 287A and 287C of the Penal Code, Cap. 16 R.E. 2019. The District Court of Misungwi at Misungwi (Marick, RM) in which the appellant was arraigned, sentenced him to a statutory custodial sentence of 30 years. Brief facts, as gathered from the scanty record of the trial proceedings have it that, at about 08.00 pm on 14th May, 2020, at Igokelo Village, within Misungwi District in Mwanza Region, the appellant invaded a Mr. Phares Ezekiel, a rider of a

motor cycle and stabbed him with a knife in the stomach, before he disappeared with the victim's motor cycle. The stolen motor cycle, SUNLG, bore registration number MC 203 BKU. The value of the motor cycle was estimated to be TZS. 2,000,000/-.

It is further gathered that, in the course of wrestling for the control of the motor cycle, the appellant allegedly dropped his mobile phone handset which was picked for investigation. Through it, the appellant was located and apprehended. He was allegedly interrogated and confessed that he, indeed, was the perpetrator of the robbery incidence. This confession was allegedly recorded before the Justice of the Peace whose name was not revealed.

On arraignment in court, the appellant allegedly pleaded guilty to the charge and admitted to the facts which were read subsequent to his plea. On the basis of the plea, the trial magistrate convicted and sentenced him to imprisonment. Bemused by the court's verdict, the appellant has stepped up, through an appeal to this Court, which has five grounds of appeal, paraphrased as hereunder:

1. *That, the record of proceedings does not indicate that the admitted charges were read over to the appellant in a language with which the appellant is conversant with to justify that he admitted to the facts.*

2. *That, the said facts were wrongly and unfairly recorded as they were recorded in a cumulative manner, contrary to what the law provides.*

3. *That, the trial court erred in law and in fact by believing that the appellant's plea was unequivocal despite the incurable defects of the said plea.*

4. *That, neither the charges nor the admitted facts or the memorandum of undisputed matters were read over in a language that the appellant understood and signed by the appellant.*

5. *That, in view of the anomalies and in order to meet ends of justice, the trial court ought to have ordered trial of the matter proceed to the end.*

Hearing of the matter pitted Mr. Castuce Ndamugoba, senior State Attorney, who represented the respondent, while the appellant fended for himself, unrepresented. In his brief submission, Mr. Ndamugoba was opposed to the appeal. Noting that the grounds of appeal mostly dwelt on the propriety of the plea, the learned attorney contended that the charges were read over to the appellant before he pleaded guilty to the charge and admitted to the facts. It was the counsel's view that the appellant understood the charges to which he pleaded guilty and signed the facts he admitted. The respondent's counsel further argued that the facts contained key ingredients of the offence.

While conceding that the facts were read as preliminary facts, akin to what happens during the preliminary hearing, Mr. Ndamugoba contended that the appellant was still asked to say if the facts were correct to which he admitted. It was the Counsel's contention that the appellant was not prejudiced by the anomaly. He prayed that the appeal be dismissed.

In his laconic reply, the appellant maintained that he did not comprehend what was stated in court because he had been bitten while in police custody. It was his argument that there was no justice of the peace or a relative at the time of his confession. He prayed that his appeal be allowed and that his conviction and sentence be set aside.

As correctly submitted by the counsel for the respondent, this matter touches on the propriety of the plea of guilty allegedly pleaded by the appellant. The dominant cry by the appellant is that the plea of guilty extracted from the appellant was not unequivocal and, as such, the same cannot form the basis for his conviction. The respondent would hear none of it. Its counsel takes the view that there is nothing untoward in the manner in which the appellant's case was handled. Before I delve into the heart of the parties' contending views on the equivocality or otherwise of the appellant's plea of guilty, it is imperative that legal position, as it currently obtains, be laid out. It is to the effect that an appeal against

conviction on a plea of guilty can only be preferred if the plea on which the conviction was grounded is imperfect, ambiguous or unfinished. This position is consistent with section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019, which provides as hereunder:

> *"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."*

The firm position enshrined in the cited provision has been undersored in numerous court decisions, one of which is the groundbreaking case of ***Laurence Mpinga v. Republic*** [1983] TLR 166. Subsequent decisions have picked from where this epic decision left. In ***Msafiri Mganga v. Republic,*** CAT-Criminal Appeal No. 57 of 2012 (unreported), the Court of Appeal observed:

> *"... 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 principle enunciated in the just cited decision, I hold the conviction that the trial proceedings, held on 29th May, 2020, and which bred the impugned decision, fall in the category of convictions which are predicated on facts that are not capable of supporting the conviction. This is in view of the fact that the 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 that the prosecution bears the responsibility of ensuring that facts that are read are as detailed as possible. The prosecution ought to have known that such facts were, in law, a substitute of formal evidence which would be adduced were the appellant to plead not guilty and require that a full trial of the matter be conducted. It was expected that these facts would constitute key legal ingredients of the charged offence, and that the same would be made known to the appellant. Sadly, in this matter, this essential step was ignored, much to the appellant's detriment.

Another glaring omission touches on the prosecution's failure to tender exhibits which were allegedly the subject of the robbery incident or the appellant's property allegedly recovered at the scene of the crime. These include the appellant's cautioned statement; his cell phone from which the appellant's particulars, leading to his arrest, were retrieved; and the knife with which the victim was stabbed. This spurned requirement was accentuated in the case of ***Fikiri Joseph Pantaleo v. Republic***, CAT-Criminal Appeal No. 323 of 2015 (unreported). In this case, it was emphasized that a charge of armed robbery has two elements both of which must be proved. These are stealing, and use of offensive weapon. As stated earlier on, none of exhibits proving the offence were tendered as exhibits.

A glance at the trial proceedings reveals that after reading the facts, it was recorded that all facts were admitted. This was done in a manner which was akin to the proceedings conducted during the preliminary hearing. It is known the actual words used by the appellant. I take the view that the procedure adopted by the trial court was irregular and unacceptable. Several of the decisions of this Court and the Court of Appeal have discouraged the use of words such as ***"It is true"*** which do not convey the actual admission which would be considered to be meet

the intended need. The consequence of all this is to vitiate the proceedings. 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.*** "[Emphasis supplied].

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 MZA-unreported).

In a case which clearly shows insufficiency in recording the appellant's admission the trial magistrate recorded the words ***"Fact Admitted"***, in a repeated fashion. As underscored in the decisions cited above, the trial court's process of recording a plea of guilty is a serious matter, and not a mere formality that is done to suit the presiding magistrate's convenience. It is a cornerstone of justice dispensation that must conform to the requirements of the law. Thus, in ***Adan v. Republic*** [1973] EA 445, Spry V.P. (as he then was), laid out very elaborate procedural steps that must be mandatorily 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:

> *"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.*** [Emphasis is supplied].

In the instant case, unlike what Mr. Ndamugoba held as flawless, the trial magistrate indulged in a horrendous misstep akin to what was abhorred by the Court of Appeal in ***Samson Marco & Another v. Republic***, CAT-Criminal Appeal No. 446 of 2016 (Mwanza-unreported), in which it was observed:

"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.*** '[Emphasis added].

It is my considered view that the proceedings in question from which the conviction and sentence were distilled were marred by flaws which compromised with every aspect of a fair process. In my view, the appellant was quite right to contend that the plea of guilty that was extracted from him was not unequivocal. I have no reservation in agreeing with the appellant that his conviction was not based on his full understanding of the offence with which he was charged. This is due to the fact that not a single ingredient of the offence was disclosed in a manner which would bring any sense of clarity. It follows that, even the resultant sentence borne out of the flawed process and irregular conviction was nothing better than a travesty of justice.

The consequence of all this is to annul the proceedings and the ensuing conviction and sentence, and order the appellant be re-arraigned.

Should the fresh proceedings culminate into a conviction and sentence, then the trial magistrate should consider time within which the appellant has spent in the annulled sentence.

It is so ordered.

DATED at **MWANZA** this 15th day of March, 2021.

M.K. ISMAIL

JUDGE