IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 34 OF 2020

(Originating from Nanyumbu District Court Criminal Case No. 17 of 2019 before Hon. G. A. Mwambapa – DRM)

ILANZI ABDALLAH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25 March, & 14 April, 2021

DYANSOBERA, J.:

The appellant Ilanzi s/o Abdallah who, at the trial stood as the 3rd accused was, together with his two fellows, namely Shantare d/o Chubwa (1st accused) and Idefonce s/o Dismas (2nd accused) charged before Nanyumbu District Court with four counts.

In the First Count, the 1st accused was charged with unlawful presence in the United Republic of Tanzania contrary to Section 45 (I) (i) and (2) of the Immigration Act [Cap. 54 R.E.2002]. The particulars of the offence alleged that the 1st accused, on 12th day of February, 2019 at or

about 1700 hrs at Nambunda village within Nanyumbu District in Mtwara Region, being a citizen of Burundi, was found unlawfully present within the United Republic of Tanzania without being in possession of any valid passport, visa or permit that could allow her to stay in Tanzania.

The trio was charged in the Second Count with attempt to depart from the United Republic of Tanzania through an undesignated area contrary to Section 20 (3) (a) and 37 of the Immigration Regulation GN No. 433 of 2002 in that the appellant and his fellows, on 12th day of February, 2019 at or about 1700 hrs at Nambunda village within Nanyumbu District in Mtwara Region, did attempt to depart to Mozambique through Mrumba area, a non-gazetted entry point.

The appellant was charged alone in the Third Count with facilitating smuggling of immigrants contrary to Section 46 (1) (d) and (2) of the Immigration Act [Cap. 54 R.E.2002]. the prosecution alleged that the appellant, on 10th and 12th February, 2019 in Kigoma Region, knowingly that Shantare d/o Chubwa is a Burundese and not in possession of any valid passport, visa or permit, did aid and finance her to move from Nayarugusu in Kasulu District to Namaromba area within Nanyumbu

District in Mtwara Region in order to depart to Mozambique through a non-gazetted entry point.

In the Fourth Count, the 2nd accused was charged with transporting illegal immigrants contrary to Section 46 (1) (c) and (2) of the Immigration Act [Cap. 54 R.E.2002] the allegations being that the 2nd accused, on 12th day of February, 2019 at or about 1700 hrs at Nambunda village within Nanyumbu District in Mtwara Region did transport one Shantare d/o Chubwa who is a Burundese to move from Masasi Town to Namaromba area by using a motor cycle with Reg. No. MC 182 CCY make SANLG in order to depart in Mozambique through a non-gazetted entry point.

The brief facts of the case is that the 1st accused was a Burundian, the 2nd accused is a Tanzanian born at Mbesa village, Tunduru District, Ruvuma Region. He was residing and working for gain at Masasi being a motor cyclist commonly known as boda boda and was using motor cycle Reg. No. MC 182 CCY. The appellant is a Tanzanian and a resident of Kasulu in Kigoma Region. On 12th February, 2019 the trial were detained by citizens who suspected them to be unlawful immigrants. A report was made to PW 2, a Nambunda Chairman who informed PW 1, the Mirumba Village Executive Officer. PW 1 relayed the information to the police

authority and the police arrested the trial and impounded the motor cycle. After interrogation and recording their statements, the police decided to charge them as indicated above.

On 26th February, 2019 when the 1st accused and the appellant were arraigned in the trial District Court shows:

Charge is read over and explained to the 1st and 3rd accused who are asked to plead

1st accused plea to 1st count:

1st accused: it is true

Accused plea to 2nd count:

1st accused: it is true

3rd accused: It is true

3rd Accused to 3rd count:

3rd accused: it is not true

FACTS:

Ct: the first and third accused are asked whether the facts read against the m are correct:

1st accused: they are correct

3rd accused: they are correct

1st accused signature

3rd accused signature:

Pros. We pray to tender the two caution statements of the accused

1st accused: No objection

3rd accused: No objection.

Ct: the cautioned statements are admitted as exhibit P 1 collectively.

Ct: from the facts read against them this court is satisfied that they constitute the offence. Since the accused have pleaded guilty without qualification, this court convict the first accused to first count, the first and third accused to the second count.

We don't have records against the accused. We however pray for stiff punishment against the accused as being lesson

Mitigation:

1st accused: Nil

2nd accused: Nil

Sentence:

The first accused is sentenced to a fine of Tshs. 500,000 or one year imprison for 1st count. The first accused and third accused are sentenced to a fine of 500,000/= or one year in prison for the second count.

Sgd: G. A. MWAMBAPA
RM
26/02/2019

A trial of the appellant and the 2nd accused followed whereby, at the end of the day, the court acquitted them on the second count. It also acquitted the 2nd accused in the fourth count. The same court, however, convicted the appellant in the third count of facilitating immigrants and consequently sentenced him to a fine of twenty million, or in default of payment of the fine, to imprisonment of twenty years.

The appellant was aggrieved and, enjoying the services of learned Counsel, Mr. Zuberi Maulid, has appealed to this court on the current four grounds of appeal as shown in the amended memorandum of appeal. At the hearing of this appeal, the said counsel argued in support of the appeal. On part of the respondent, Mr. Paul Kimweri, learned Senior State Attorney appeared.

In his submission in support of the appeal, learned counsel for the appellant abandoned the 4th ground of appeal and argued the 1st and 2nd grounds of appeal jointly. The 3rd ground of appeal was, however, argued separately.

Mr. Kimweri, on his part, declined to support the conviction but told this court that the sentence meted to the appellant was illegal and this court has to interfere.

For the reasons that will be apparent in this judgment, I will not dwell on the submissions made before me as there is a very important point of law which will dispose the appeal in its totality.

The law on arraignment of an accused in a court of law is clear. When an accused person is arraigned in court, the charge or information must be read and explained to him and he should be required to plead to it. Whether he pleads guilty or not guilty, his plea must be recorded. The arraignment procedures have been laid down by courts of law in various decisions. For instance, the defunct Court of Appeal of Eastern Africa had an opportunity to outline the proper procedure in plea taking in the case of **Aidan vs. Republic** [1973] E.A 443. This procedure was approved to apply to our context by the court in various cases including the case of **Juma Selemani @Paul v. R,** Criminal Appeal No. 394 of 2016 (unreported), **Khalid Athuman v. R.,** Criminal Appeal No. 103 of 2005 (unreported). The laid down procedure in those cases is to the following effect:

'When a person is charged, **the charge** and **the particulars** should be **read** ***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* ***then 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* ***formerly 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 the facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change 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 mine)

The arraignment of the accused must therefore, be complete. This position was stated by the Court of Appeal in the case of **Joseph s/o Masaganya v. R.**, Criminal Appeal No. 77 of 2009 the Court of Appeal observed, inter alia:

> "The arraignment of the accused is not complete until he has pleaded. Where no plea is taken, the trial is a nullity. The omission is not an irregularity which can be cured by section 346 of the Criminal Procedure Code (now s. 388 (1) of CPA)"

Second, as to the modus of taking the plea of an accused person and subsequent procedures as regulated by Section 228 (1) and (2) of the Criminal Procedure Act, the Court of Appeal in the case of **Yeremiah s/o Jonas Tehani v. R.,** Criminal Appeal No. 100 of 2017 (unreported) had this to say:-.

> *"The modus of taking the plea of an accused person and subsequent procedures are regulated by section 228 of the CPA which stipulates as follows:*

(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

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided

(4) If the accused person refuses to plead the court shall order a plea of "not guilty" to be entered for him".

In the light of the cited provision, it is a mandatory requirement under section 228of the CPA to take an accused person's plea before commencement of his trial. Thereafter, the accused person's plea must be recorded".

So, going by the interpretation by the Court of Appeal of the provisions of section 228 of the Criminal Procedure Act, taking the accused

person's plea and then recording the plea is mandatory, failure of which, the plea becomes incomplete and the whole arraignment procedure is vitiated.

I find the trial court misdirected itself on essential legal procedure which occasioned miscarriage of justice. I declare the whole trial court's proceedings, judgment and subsequent order a nullity. The same are quashed and set aside. The conviction is thereby quashed and sentence set aside. The appeal is allowed to the extent explained above.

What next?

Since no pleas were recorded, there were no proper plea taken by the trial court. Ordinarily, where no proper plea has been taken, the usual course would be to remit the case file to the trial court for it to take a fresh plea and proceed with the trial in the ordinary way. This is a legal position as detailed by the Court of Appeal in the case **Joseph Mahona @ Joseph Mboje @ Magembe Mboje v. R**. Criminal Appeal No. 541 of 2015. That being the case, I have no alternative but to be guided by the said procedure and I, accordingly, order a fresh plea in respect of the appellant to be taken and the trial to proceed in the ordinary way as per the dictates of law.

In the meantime the appellant should remain in custody to await the resumption of trial.

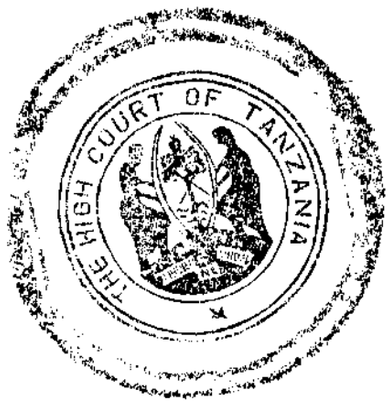
Order accordingly.

W.P.Dyansobera

Judge

14.4.2021

This judgment is delivered under my hand and the seal of this Court on this 14th day of April, 2021 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of Mr. Nestory Nyoni, learned Counsel for the appellant.



W.P. Dyansobera

Judge