IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 144 OF 2020

(Appeal from the Criminal Case No. 22 of 2020 in the District Court of Chato at Mwanza (Amworo, RM) dated 19th of February, 2020.)

MUSSA BAHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th March, & 24th May, 2021

ISMAIL, J.

On a plea of guilty, the District Court of Chato at Chato convicted the appellant of armed robbery, contrary to **section 287A** of the Penal Code, Cap.16 R.E. 2019. Consequent thereto, he was sentenced to a custodial sentence of thirty years.

The allegation, as gathered from the flimsy record, is that on 20th January, 2020, at Kisesa village within Chato District in Geita Region, the appellant and Musa Abdul, stole a motorcycle, SanLG with registration

Number MC 115 CDH, belonging to a certain Mr. Salumbola. It was further alleged that immediately before stealing, the assailants tied one Kurwa Shaban, a cyclist, with a rope around the neck, feet and arms and threatened him with a knife in order to obtain the stolen property. The prosecution's further contention is that the motor cycle was valued at TZS. 2,100,000/-, and that one of the assailants (Wasola Maduka) masqueraded as a passenger who intended to hire the victim to ride them from Muungano bus terminus in Chato to Kisesa village, where the appellant allegedly was. On arrival, the appellant joined the victim and Maduka, after which the duo turned on the victim and robbed him.

On the same day of the incident, the appellant was arrested at Ichankima village as he rode the same motor cycle, the subject of the robbery incident. His co-assailant eluded the angry mob that apprehended the appellant.

On 22nd January, 2020, the appellant was arraigned in court where he pleaded guilty to the charge of armed robbery. The plea of guilty was followed by an admission of the facts read out to him. Pursuant to the appellant's plea of guilty and admission to the facts, the appellant was convicted and handed to a maximum prison term of thirty (30) years.

The conviction and sentence did not go well with the appellant. His bemusement has attracted the instant appeal which has six grounds of appeal paraphrased as follows:

1. *That, the trial magistrate abdicated her responsibility of informing the appellant the meaning and effect of a plea of guilty before she committed him on that basis.*
2. *That, the prevailing circumstances required that the presiding magistrate to order that the case proceeds on trial irrespective of the appellant's plea of guilty.*
3. *That, the trial magistrate erred in law in convicting the appellant based on a plea of guilty which was equivocal.*
4. *That, the plea of guilty was purely ambiguous, imperfect and unfinished.*
5. *That, the appellant was denied his basic right of opinion to object or agree to the admission of exhibits P1 and P2 while there was no chronological report from the owner of the motorcycle.*
6. *That, the trial magistrate erred in admitting exhibit P3 in disregard of the provisions of section 210 (3) of the Criminal procedure Act, Cap. 20 R.E. 2019.*

Hearing of the appeal pitted the appellant who fended for himself, against Ms. Ghati Mathayo, learned State Attorney, who represented the

respondent. Noting that the appellant was a lay person who did not enlist services of a legal practitioner, it was resolved, at the appellant's instance, that the respondent should address the Court first, while the appellant would come last.

In her submission, Ms. Mathayo opted to argue ground three of the appeal which she thought was all encompassing and representing the rest of the grounds. Ms. Mathayo began by admitting that pleas of guilty are governed by section 228 (1) and (2) of the Criminal Procedure Act, Cap. 29 R.E. 2019 (CPA), which gives details of the procedure to be followed. The learned counsel argued that section 360 prohibits appeals on pleas of guilty, unless such plea is shrouded in some flaws. The attorney went ahead and cited the decision of the Court of Appeal of Tanzania in ***Frank Mlyuka v. Republic***, CAT-Criminal Appeal No. 404 of 2018 (unreported), in which exceptions to this general rule were listed. Ms. Mathayo took the view that none of the listed exceptions fit in the instant case. The learned attorney was insistent that the appellant pleaded guilty and admitted to the facts of the case, without any objection to the admissibility of the exhibits tendered in court. She held the view that the plea was descriptive, meaning that the appellant understood the charge and the facts, and that they disclosed the

ingredients of the charge. The consistence in pleading guilty was quite astute.

With respect to PF3, Ms. Mathayo conceded that the same was not read out. She argued that, failure to read the exhibits is not fatal provided that facts were admitted.

The counsel concluded that the plea was unequivocal and consistent with the requirements of the law. She prayed that the appeal be dismissed.

For his part, the appellant submitted that he pleaded guilty because of torture he went through. He stated that he was threatened death. He prayed that his appeal be allowed.

These brief submissions point to a singular question. This is as to whether this appeal is meritorious.

I will embark on the disposal journey by first looking at ground three of the appeal which, as rightly contended by Ms. Mathayo, carries four of the six grounds of appeal. The issue for consideration is whether the plea of guilty on which the conviction was grounded was unequivocal.

I begin by stating what is otherwise a known legal principle. This is to the effect that appeals against convictions on a plea of guilty can only lie where, upon the admitted facts, the accused could not in law have been

convicted of the offence charged. This position enduring principle is enshrined in section 360 (1) of the CPA whose substance 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."*

This means that, while sentences can be challenged with a minimum of legal impediment, convictions are challengeable in limited circumstances which are also articulated in a number of judicial pronouncements. The decision in the legendary case of ***Laurence Mpinga v. Republic*** [1983] TLR 166, has provided such kind of circumstances. Subsequent decisions have built on the principles propounded in the cited case. These include the decision in ***Msafiri Mganga v. Republic,*** CAT-Criminal Appeal No. 57 of 2012 (unreported), in which the Court of Appeal of Tanzania held as follows:

> *"... 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].

From this excerpt arises a question on whether the plea of guilty that bred the instant consternation is predicated upon facts that are incapable of supporting the conviction. The answer to this question is derived from the trial court's proceedings held on 19th February, 2020, the date on which the appellant was called upon to make a plea on the charges levelled against him. For ease of reference, it is apposite that the said proceedings be reproduced with all their grammatical challenges as hereunder:

"Date: 19/02/2020
Coram: Odira Amworo – RM
P.P: Mauzi
Accd: Present
B/C: Margreth
Court: *Charge read over and fully explained to the accused persons who are required to plea thereto.*

Accused plea*:*

1st accused: *It is true. We robbed "bodaboda" a motor cycle. We had a knife with us. We robbed the "bodaboda"his tied him up using*

a rope. The rope we used to die up the "bodaboda" we bought at Chato township. I was with Wasola Maduka when robbing the "bodaboda" his motorcycle. Wasola maduka run away, he was not arrested.

2nd accused: It is not true.

***Court**: entered as a plea of guilty to the charge in respect of the first accused and not guilty in respect of the second accused.*

Sgd

Odira Amworo – RM

19/02/2020

FACTS:

On 20/01/2020 one Wasola Maduka hired a "bodaboda" riden by Kura Shabani, to take him from Muungano bus stand, Chato to Kisesa village, Chato where the 1st accused was.

Upon arrival at Kisesa village, Wasola Maduka asked the "bodaboda" rider one Kuwa Shaban stop that he may take to the first accused who was at that place.

The first accused and Wasola Maduka then got of the "bodaboda" rider one Kurwa Shabani, tied up Kurwa Shabani at the neck, feet and hands. They threatened Kurwa Shabani to stab him using knife in case he cried for help.

At that point the first accused and Wasola Maduka managed to rub Kurwa Shabani his motorcycle with registration number MC 115 CDH make SANLG valued at Tshs 2,100,000/=.

The due made away with the motorcycle.

On 20/01/2020, the very day, the first accused was arrested by "wananchi at Ichenkima village" while riding the motorcycle MC 115 CDH make SANLG, they robbed from Kurwa Shabani. Wasola Maduka managed to run away.

Accordingly "wananchi" who arrested the first accused took him to Rubambangwe police station together with the motorcycle, MC 115 CDH he was arrested while riding.

I pray to tender motorcycle with registration number MC 115 CDH make SANLG as evidence, Kurwa Shabani and PF3 of Kurwa Shabani.

1st accused: I have no objection.

Court: Motorcycle, MC 115 CDH make SANLG, admitted as evidence and marked exhibit P1, two ropes admitted as exhibit P2 and PF3 of Kurwa Shabani dated 20/01/2020 admitted as exhibit P3

That's all.

Sgd

Odira Amworo – RM

19/02/2020

***1st Accused**: I admit all of the facts stated by the republic prosecutor, they are all true and correct.*

ROFC.

Sgd

Odira Amworo – RM

19/02/2020

Court Finding:

The first accused, Mussa s/o Behe, is hereby found of the offence of armed robbery contrary to section 287A of the penal code as amended by section 10A

of the written laws miscellaneous Amendments Act, number 3 of 2011, and accordingly convicted on his own plea of guilty to the charge forthwith.

Sgd

Odira Amworo – RM

19/02/2020

Previous records:

PP: *We have no previous records of the first accused. However, since acts of robbery cause death and loss of property, we pray the accused be awarded a severe sentence.*

Mitigation:

First accused: *I pray for linient sentence.*

Sentence: *The first accused, Mussa s/o Behe is sentenced to thirty years imprisonment."*

Sgd

Odira Amworo – RM

19/02/2020

While there can be no qualms that the facts constituting the offence were read, as deduced from the record, the question that arises immediately is whether such facts constituted all ingredients of the offence with which the appellant was charged. This question takes into account the fact that the prosecution is, at all times, duty bound to prove that the offence with which the accused is charged has all the ingredients disclosed and proved.

This is irrespective of whether the accused pleads guilty to the charges. The rationale is that facts of a case stand as a substitute of formal evidence that would be adduced were the accused to plead not guilty to the charge. Where proof of the ingredients requires that an expert analysis be conducted, then the said analysis must be conducted and the findings of the said analysis should constitute part of the exhibits to be tendered. In so doing, they become part of the facts to be read over and pleaded or admitted to.

This imperative requirement was amply stated in ***Josephat James v. Republic***, CAT-Criminal Appeal No. 316 of 2010 (unreported), wherein the Court of Appeal of Tanzania held as follows:

> *"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. 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."*

See: ***G & S Transport Limited v. The Director of Public Prosecutions & 2 Others***, HC-Criminal Revision No. 1 of 2020; and

Thereza Shija v. Republic, HC-Criminal Appeal No. 198 of 2019 (both unreported).

The reasoning in the cited decision reflects what was accentuated in ***Adan v. Republic*** [1973] EA 445, wherein Spry V.P. (as he then was), laid out very elaborate and imperative procedural steps that must be applied by a trial court when an accused person is arraigned in court and pleads guilty to a charge. 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].

Where the case involves theft and proof requires that a property stolen be tendered in evidence, the mandatory requirement is that such property must be identified. In ***David Chacha and 8 Others v. Republic***, CAT-Criminal Appeal No. 12 of 1997 (unreported), it was held:

> *"It is a trite principle of law that properties suspected to have been in possession of accused persons should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property.'*

The foregoing passage was quoted with approval in the subsequent decision of the upper Bench in ***Hassan Saidi Twalib v. Republic***, CAT-Criminal Appeal No. 92 of 2019 (unreported), in which it was guided as follows:

"Not even one witness testified on the colour of the stolen motor cycle, let alone the descriptions shown in the charge. In cases of this nature, sufficient description of the stolen item is of paramount importance. This Court has always been insistent that description of the stolen item should be sufficiently given even in circumstances where the stolen item is found in possession of the culprit. ... ownership of the stolen item was not established. PW1 who is stated in the charge to be its owner did not testify. No document was ever tendered to establish that PW1 was the owner of the allegedly stolen motor cycle. What we have is just a word from PW1 that the appellant stole his motorcycle. No registration card was tendered to show that he owned it. Neither was any receipt tendered to verify this. This infraction watered down the prosecution case greatly."

Glancing through the proceedings, I get contented with the procedural aspects which were applied in taking the plea of guilty. The unblemished part of the proceedings notwithstanding, it is the question of adequacy of the evidence to support the charge that is troubling. The facts of the case, though admitted, did not go to the lengths of proving that the motorcycle allegedly found in the appellant's possession was a stolen property belonging to Kurwa Shabani or a certain Mr. Salumbola stated in the charge sheet.

None of the requirements in the just cited decisions was conformed to in proving the allegation that the property allegedly found in the appellant's possession was truly stolen from Kurwa and that it belonged to the alleged owner. Adduction of a registration card, a receipt or identification of the motorcycle's chassis number would constitute proof of the allegation of theft, while evidence of possession of a weapon would jointly and sufficiently prove that the offence of armed robbery, with its ingredients, was committed. Doing that would go along with the principles that govern proof of cases in criminal cases, as restated in ***Joseph John Makune v. Republic*** [1986] TLR 44, wherein it was held:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence...."*

See also: ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported).

The requirement on the prosecution's burden proof applies even where the conviction is, as was the case here, predicated on a plea of guilty made by the appellant. I take the view that lack of sufficient descriptive account of the facts surrounding this case made the plea of guilty and admission of

facts fall short of the unequivocality required by the law. As such, the same cannot be the basis for grounding a conviction. It is simply that the appellant's plea of guilty did not amount to an admission of every constituent part of the charge of armed robbery.

In consequence of all this, I take the view that the appellant's conviction was erroneous and I allow the appeal. I quash the proceedings, set aside the conviction and sentence, and I order that the matter be remitted back to the trial court where the appellant will be arraigned before another magistrate.

It is so ordered.

DATED at **MWANZA** this 24th day of May, 2021.

M.K. ISMAIL

JUDGE