IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 215 of 2020

(Arising from the District Court of Chato in Criminal Case No.234 of 2020)

1. GINSON S/O JOHN NSIMBA

2. STEPHEN S/O CHACHA } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 25.05.2021

Date of Judgment: 28.05.2021

A.Z. MGEYEKWA, J

In the District Court of Chato at Chato, the appellants, GINSON S/O JOHN NSIMBA and STEPHEN S/O CHACHA were arraigned, charged with one count; armed robbery contrary to section 287 A of the Penal Code of Cap 16 [R.E 2019]. Upon conviction, they were sentenced to serve 30 years imprisonment. Aggrieved, the appellants appealed to this court for

both the conviction and sentence. The appellants presently seek to impugn the decision of the District Court of Chato upon a petition of appeal comprised of five grounds which I shall reproduce at a later stage of the judgment. In the meantime, I deem it apposite to explore, albeit briefly, the factual background giving rise to this appeal.

As I have hinted upon, the case for the prosecution was built around the accusation of armed robbery as it was alleged that the accused persons GINSON S/O JOHN NSIMBA and STEPHEN S/O CHACHA were jointly charged. The prosecution alleged that, on 31st October, 2020 at Gatin street within Chato District in Geita Region did steal several items to wit; five mobile phones make Sony, Techno, Infix, Hot 8, and two Nokia all valued at Tshs. 1,250,000/=, two pairs of military shoes make mountain not, one military knife, one read flash 8GB, one small bag and Tshs. 300,000/= all stolen properties valued Tshs. 2,240,000/= being the properties of ROTKEN MAYANGA and immediately before stealing did threaten to cut with *matchet* the said ROTKEN MAYANGA in order to obtain the stolen properties. Upon arraignment, before the trial court, both accused entered the plea of guilty. The trial Magistrate proceeded to convict and sentenced the accused persons to serve 30 years imprisonment.

Dissatisfied, the appellants filed the instant appeal pegged on the following paraphrased grounds:-

1. *That the trial court had erred in law and fact to convict the appellants on belief that the plea of guilty was unequivocal.*
2. *That the trial court grossly erred in law to convict and sentence the appellants on a plea of guilty whereby the charge and particulars of the offence did not establish with all ingredients of the offence they were charged with.*
3. *That the trial Court committed a grossly error by convicting the appellants on plea of guilty without requiring the prosecution to explain each and every ingredient of the offence.*
4. *That the trial Magistrate grossly erred in law to sentence the appellants without considering the mitigating factors, age and the factor that the appellants were first offender.*
5. *That the trial court erred in law and fact to convict the appellant on defective charge sheet which did not disclose the ingredients of the offence they were charged with.*

When the appeal was argued before this court on 25th May, 2019 vide audio teleconference. The appellant enjoyed the legal service of Mr. Duttu Dotto, learned counsel, and Ms. Sabina, learned State Attorney represented the respondent republic. Bothe were remotely present.

The learned counsel for the appellant started his onslaught by seeking to abandon the fifth ground and opted to consolidate the first, second, and third grounds because they intertwined and he argued the fourth grounds separately. Submitting on the first, second, and third grounds, he stated that the plea of guilty was equivocal since the second appellant stated that it is true, I did threaten him with weapons but I did not steal. Mr. Duttu argued that as per the charge sheet, the second appellant was charged under section 287 A of the Penal Code Cap.16 [R.E 2019]. The learned counsel for the appellant went on to state that the offence of stealing must be proved but it seems that the second appellant was charged for attempted armed robbery as per section 287B of the Penal Code Cap.16 [R.E 2019]. Mr. Duttu claimed that the second appellant did not understand the nature of the offence which he was charged with. He asserts that when the prosecution read the material facts of the case, the second accused reply was a sort of defence. He added that the second appellant stated that prosecution facts are all true and correct, 'I was arrested with one mobile phone'.

Mr. Duttu further submitted that when a party pleads guilty, the court must direct itself and make sure the accused statement is clear since the prosecution in such kind of plea does not need to bring evidence.

Insisting, Mr. Duttu argued that the trial Magistrate was required to clear doubts before recording a plea of guilty. To buttress his position he cited the case of **DPP v Salum Madito**, Criminal Appeal No. 108 of 2019, the Court of Appeal of Tanzania observed that the accused person in admission must state the elements of an offence to show that he understood the charges.

The learned counsel for the appellants continued to argue that the first appellant plea is also equivocal. He went on to state the first appellant replied to the plea that '*Ni kweli nilimtishia na kuiba mali hizo ila hatukumkata*'. In his view, the first appellant plea was in sort of defence, thus, the same was required to be treated as a plea of not guilty. He further stated that both appellant's pleas were ambiguous and equivocal.

Submitting on the fourth ground, the learned counsel for the appellants stated that the appellants were sentenced to serve 30 years imprisonment. While the first appellant's age as per the charge sheet is 19 years old and the Extra-Judicial Statement reveals that the first accused person was 17 years old since he was born on 07th November, 2003. Mr. Duttu claimed that the 19 years stated in the charge sheet is doubtful.

He went on to state that the trial Magistrate was required to order the amendment of the charge sheet to reflect the actual year of the first appellant or the trial Magistrate was required to inquire the age of the first appellant on whether he was a minor or an adult. Mr. Duttu fortified his submission by referring this court to Rule 12 (1) and (2) of the Law of the Child Act (Juvenile Court Proceedings) Rules, 2016. He also cited section 100 of the Law of the Child Act which directs a child of 17 years old is required to be convicted in the Juvenile Court and section 116 (1) of the Act restricts or forbids a child under the age of 18 years to be placed in prison. He spiritedly argued that the first appellant was a child thus it was not correct to sentence him to serve 30 years imprisonment.

Mr. Duttu did not end there he claimed that in mitigation, the first appellant said that he was a student and if the court will set him free =, he will change his bad habit. He valiantly argued that the whole proceedings of the trial court was a nullity.

On the strength of the above, Mr. Duttu beckoned upon this court to set free the appellants.

Responding, the learned State Attorney supported the conviction and sentence. Mr. Sabina stated that the appellants' plea was unequivocal. To support her submission she referred this court to the trial court

proceedings stated 05th November, 2020 and argued that the prosecution read over the charges of armed robbery and the material facts were also read over whereas the ingredients of armed robbery were clearly stated. She went on to state that the first accused replied that ' it is true, nilimstishia na kuiba mali hizo ila sikumkata' . Ms. Sabina stated that the charge did not state that they assaulted or cut the victim but they threatened the victim.

Ms. Sabina continued to submit that the second appellant also pleaded guilty and the trial Magistrate recorded the appellants' plea in accordance to section 228 (1) and (2) of the Criminal Procedure Act, Cap.20 [R.E 2019], what they pleaded was recorded on their own words then he proceeded to convict and sentenced them as charged. The learned State Attorney claimed that both appellants's understood the charge and the material facts of the case. She added that the second appellant added his own words ' I stole a phone' to mean that he understood the charge.

It was Ms. Sabina's further submission that no appeal can be allowed in a plea of guilty. To support his position she cited section 360 (1) of the Criminal Procedure Act, Cap.20 [R.E 2019] and the case of **Frank S/O Mlyuka v Republic**, Criminal Appeal No. 404 of 2018. She added that

the appellants' claims are an afterthought. She urged this court to disregard these grounds of appeal.

Responding to the fourth ground, Ms. Sabina argued the charge sheet and material facts of the case reveal that the first appellant was 19 years old and he admitted all facts that mean he was 19 years old. Ms. Sabina lamented that this is not a time for the court to admit new evidence.

In conclusion, the learned State Attorney urged this court to find that the appellants' pleas were unequivocal and sustain the conviction and sentence.

In his rejoinder, the learned Advocate for the appellant reiterated his submission in chief. Insisting he stated that the facts of the case reveal that the first appellant was brought before the Justice of Peace before he was arraigned before the court on 05th November, 2020. He insisted that the appellants' plea was imperfect, ambiguous, and unfinished. To bolster his submission he cited the case of **Laurence Mbinga v Republic** [1983] TLR 161.

In conclusion, the learned counsel for the appellant urged this court to allow the appeal.

Having heard the arguments for and against the appeal I have to say that I will determine the issue whether the appeal is meritorious. In my

determination, I will also consolidate the first, second, and third grounds because they are intertwined. Except for the fifth ground which was abandoned by the learned counsel for the appellants, and the fourth ground will be argued separately.

From above, the crux of the matter in this appeal is whether the facts disclose the offence with which the appellant was charged. The first, second, and third grounds of appeal relate to the charge and plea of guilty. The appellants' Advocate claims that the appellants were charged contrary to section 287A of the Penal Code Cap. 16 [R.E. 2019]. The issue for determination is ***whether the appellants' plea of guilty was unequivocal or not.*** Having closely examined the record, I have found that the appellants' expression was as follows:-

1st accused person:-

"It is true, Ni kweli nilimtisha na kuiba mali hizo ila hatukumkata"

2nd accused person:-

"It is true, I did threaten him with weapons to the mentioned person."

I have perused the charge sheet and found that the appellants were charged for armed robbery contrary to section 287A of the Penal Code Cap. 16 [R.E 2019]. To prove the charge of armed robbery, the prosecution had to establish the ingredients of armed robbery. The same

applies to the plea of the accused they were required to mention the ingredients of armed robbery to include; an act of stealing that at or immediately after the stealing the perpetration was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the said stolen property.

It is trite that a plea must contain all ingredients of the offence charged. The trial court is warned to take great care in conviction an accused person based on an equivocal plea. In the famous case of **Safari Deemay's V R** Criminal Appeal No. 269 of 2011 at (Unreported) the Court of Appeal of Tanzania held that:-

> *"Great care must be exercised, especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment.* ***We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate, in his own words as to what he is saying "is true".*** *[Emphasis added].*

Applying the above authority in the instant appeal, there is no dispute that the ingredients of armed robbery were all mentioned in the charge sheet. I have read the appellants' expressions or plea and noted that the second accused person plea lacks some ingredients of armed robbery. As rightly pointed out by Mr. Duttu the second accused person did not mention that he stole the victim's property. In other words, the ingredients of stealing were missing.

In the circumstances arising, 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. Therefore, I am in accord with the learned counsel for the appellant that it was unsafe for the trial Magistrate to proceed to convict the second accused while his plea was equivocal. Therefore, the second appellant plea was equivocal.

In regard to the first appellant's plea, without wasting the time of the court, reading the first appellant plea, all elements of armed robbery are mentioned. In the charge sheet the prosecution did not mention that the appellants assaulted the victim. Therefore saying that he did not cut the victim was correct. Therefore, Mr. Duttu claims cannot stand.

Regarding the mitigating factor, the appellant's Advocate termed the first accused mitigation as ambiguous in the sense that the appellant put

forth an element of defence. I have perused the trial court proceedings specifically on page 6, the first accused statement advanced in mitigation was as follows:-

> *"I have said the truth I did not want to waste the time of the court. I am a student I do not want to proceed with these rubbish acts. If I am released I will be a good citizen."*

Reading the above excerpt, it is clear that the first appellant prayed for a leniency punishment. I do not see any ambiguity in the above statement. There is no any element of defence.

In the cited case of **DPP v Salum** (supra), the accused person statement advanced in mitigation was as follows:-

> *'I pray for court as I am lost on my way'*

Guided by the above excerpt, it is clear that his statement was unclear and the same put forth an element of defence. Therefore, I am not in accord with the learned counsels for the appellants that the first accused plea was sort of a defence.

With respect to the fourth ground, the learned counsel for the appellant claimed that at the material date the first accused was under 17 years. The records reveal that the first accused person was before the

Justice of Peace on 02nd November, 2020 and he stated that he is 17 years old was born on 07th November, 2003. Reading the charge sheet it is dated 5th November, 2020 and it shows that the first appellant was 19 years old. The facts of the case also stated that the first accused person was 19 years old. The Extra Judicial Statement was tendered, read in court and admitted as Exhibit P4. It is my respectful view that as long as the Extra Judicial Statement of the first accused person was admitted in court as an exhibit, the same forms part of the accused statement. Therefore, there was uncertainty of the age of the first appellant's age.

I am in accord with the learned counsel for the appellant that the trial Magistrate was required to notice the variance of the first appellant's age and inquire about the age of the first accused person as per Rule 12 (1) and (2) of the Law of the Child Act (Juvenile Court Proceedings) Rules, 2016. For ease of reference, I reproduce the Rule 12 (2) of the Law of the Child Act (Juvenile Court Proceedings) Rules, 2016:-

> *" 12 (1) Where a person appearing before the court claims to be a child, and that claim is in dispute, the court shall cause an inquiry to be made into the child's age under section 113 of the Act.*
>
> *(2) the court may, in making inquiries, under sub-rule (1) rely upon:*
>
> *(a) the child's birth certificate.*

(b) such medical evidence as is necessary to provide proof of birth whether it is of a documentary nature or otherwise;

(c) information from any primary school attended by the child as to the child's date of birth;

(d) any primary school leaving certificate or its equivalent certificate; and

(e) any other relevant credible information or document.

Applying the above provision of the law, in order to do justice, it was imperative for the trial Magistrate to inquire about the age of the first accused person instead of sentencing the first appellant person to 30 years imprisonment. With the said uncertainty, I am not sure whether the first appellant person understood the charge against him and the material facts of the case. The uncertainty of his age vitiated his plea of guilty. For that reason, I find that the first appellant's plea was equivocal.

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 No. 234 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 appellants 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 appellants' have so far served in prison should be taken into account. The appellants shall in the meantime, remain in custody to await the said trial.

It is so ordered.

DATED at Mwanza this 28th day of May, 2020.

A.Z.MGEYEKWA

JUDGE

27.05.2020

Judgment delivered on 28th day of May, 2021 in the presence of Mr. Duttu, learned counsel for the appellant and Ms. Sabina, the learned State Attorney.

A.Z. MGEYEKWA

JUDGE

28.05.2020