

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA
CRIMINAL APPEAL NO. 17 OF 2021

*(Originating from Criminal Case No. 150 of 2020 in the
District Court of Mtwara)*

TUMUOMBE MAPAMBANO FERDINAND..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

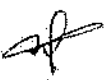
JUDGMENT

Hearing date on: 07/06/2021
Judgement date on: 14/06/2021

NGWEMBE, J:

This appeal emanates from conviction and sentence meted by the trial court upon plea of guilty of the appellant. After being convicted and sentenced accordingly, the appellant was dissatisfied, hence appealed to this court clothed with four (4) grounds challenging his conviction and sentence.

Briefly, the appellant was found in conflict with public laws on 28th September, 2020 at Nandope Street within Municipality and region of Mtwara, being a citizen of Burundi was found unlawfully present within the



United Republic of Tanzania without visa or pass port or permit contrary to section 45 (1) (i) & (2) of the Immigration Act. When the charge was read over to the appellant, he pleaded guilty, consequently the court proceeded to convict him and sentence to imprisonment for the period of twenty-four (24) months or pay fine of TZS 500,000/=.

It is in record, that the investigator recorded the caution statement of the appellant on 29/9/2020, which statement was admitted in court as exhibit P1. It is also recorded that when the prosecution read all facts of the case, the appellant/accused pleaded "*all facts are true and correct*". Even when the prosecution tendered the caution statement, the appellant/accused did not object, thus, same was admitted as exhibit unopposed.

However, on the hearing date of this appeal, the appellant appeared in person and briefly argued that he is a Tanzanian born at Nyakahura village in Biharamulo District in Kagera region. Added that he pleaded guilty because of threat from immigration and police. Thus, the plea was equivocal. He prayed this court to allow this appeal and let him free.

In turn the learned senior State Attorney, Mr. Ndunguru opposed this appeal and prayed same be dismissed forthwith. Argued that when considering the plea as recorded by the appellant/accused, obvious indicates that he understood the nature of charge and its contents. Added that the appellant explained quite clearly that he is a Mhutu from Burundi, entered in Tanzania quite long time.



Finally, rested by pointing out that the sentence of the trial court was incomplete, in the sense that after completing his sentence there is no order to be repatriated to Burundi. Thus, prayed this court to correct it and complete the trial court's order.

I may begin my consideration by citing section 360 of Criminal Procedure Act, whose contents is to prohibit an appeal from conviction founded on unequivocal plea of guilty, save only on sentence. The section is quoted hereunder for easy of reference: -

"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".

However, the appellant in this appeal is challenging both conviction and sentence. The conviction on unequivocal plea of guilty may only be appealed against based on the principles laid down in the case of **Laurent Vs. R [1983] T.L.R 166**, including, equivocality of the plea; plea on mistakes of law or misapprehension; the charged laid down against the accused did not disclose an offence; and the offence charged did not exist.

In respect to this appeal, the question is whether such preconditions did exist so that this court may justify to hear those grounds challenging his conviction?

Before considering the above question, it is important to recap on the offence and the law applicable, which the appellant was charged against. The alleged offence committed by the appellant was to enter into and stay

or unlawfully be found in Tanzania contrary to section 45 (1) (i) of Immigration Act which is quoted verbatim hereunder for ease of reference:-

"Any person who –

- (i) Unlawfully enters or is unlawfully present within Tanzania in contravention of the provisions of this Act, shall be guilty of an offence"*
- (2) "Any person who commits offence under this Act shall, except where any other penalty is specifically provided therefore, be liable on conviction to a fine not less than five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment"*

Justifying this offence, the investigation investigated and recorded his caution statement where the appellant clearly disclosed that he is a Hutu in tribe from Burundi. Born at Rusagan village at Hamlet of Mulezi in Kigamba District within Cankuzo Region in Burundi. That his father is still alive living where he was born while his mother died and buried in the same village. That he entered Tanzania on 8th August, 2014 through Mlusagamba boarder in Kagera region.

Above all, he disclosed that, while in Tanzania he acquired voters card No. T-1001-6413-734-6 registered at Camp No. 2 at Kagera sugar Company where he was working therein. Also disclosed that he acquired National Identification Card from NIDA bearing No. 19920405331090000828 registered at Mabatini street in Mwanza region.

More so, he travelled to Mtwara under employment of Cachson Risk Management. While he was in Mtwara, he joined Militiamen training (Jeshi la Mgambo). There are many more details which were disclosed by the appellant in his caution statement.

I am satisfied that such detailed explanation of the appellant cannot be made by a person who is a stranger in Burundi, rather must be a person who is well familiar with such country.

Considering the grounds of appeal preferred by the appellant herein, raise several questions including the question of whether his plea of guilty constituted unequivocal or otherwise? To answer this question, I should make reference to the precedents set forth by this court and the Court of Appeal before arriving into the conclusion. Fundamentally, the laid down prerequisites of unequivocal plea of guilty was first pronounced by the Eastern Africa Court of Appeal in the case of **Adan Vs. R, (1973) EA 445** where the court held: -

- "(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language he understands;*
- (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
- (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;*



- (iv) If the accused does not agree to the facts or raises any question of his guilt must be recorded and change of pleas entered;*
- (v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded"*

The same contents were repeated in the case of **Laurent Mpinga Vs. R, [1983] TLR 166.**

Though the recording of plea made by may be poor, the trial court, but those mistakes are curable as they did not go to the root of the case itself and no miscarriage of justice was made to the accused. Above all the accused was not prejudiced in any way. I therefore, rule out that the appellant's plea of guilty was unequivocal. That the appellant pleaded to the offence he knew its contents and the nature of the offence itself. There was no ambiguity of the charge and facts read over to the accused.

Considering the sentence preferred by the trial court, I would agree with the learned senior State Attorney that it was incomplete. The law provide minimum fine, if preferred by the trial court, must not be less than TZS 500,000/= but if imprisonment is the right punishment, the legislature put maximum of three (3) years jail. But once sentence is imposed to the accused, it goes like day followed by night, that consequential orders must be issued including, being deported to his original country. Such order is missing in the decision of the trial Magistrate.

In the circumstances of this appeal, I find no reason to depart from the findings and conviction made by the trial court. However I proceed to employ my revisional powers to revise the sentence preferred by the trial court of imprisonment for the period of two years into eight months, which he has already served and immediately from today, the Immigration Officers are ordered to deport the appellant to his home country. Above all, the following documents must immediately be seized and preserved properly to the relevant authorities. Those documents are National Voters Card No. T-1001-6413-734-6; National Identification Card No. 19920405331090000828; and any travelling documents issued by Tanzanian Authorities.

I accordingly Order.

DATED at MTWARA in Chambers this 14th day of June, 2021



P.J. NGWEMBE

JUDGE

14/6/2021



Court: Delivered at Mtwara in Chambers on this 14th day of June, 2021 in the presence of Mr. Wilbroad Ndunguru, Senior State Attorney for the Republic and in the presence of the appellant in person.

Right to appeal to the Court of Appeal of Tanzania explained.



P.J. NGWEMBE

JUDGE

14/6/2021

