

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 126 OF 2020

*(Originating from the judgment of the District Court of Bukombe
in Criminal Case No. 103 of 2020,)*

GASPER THOMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th & 23rd June, 2021.

TIGANGA, J.

The appellant herein, Gaspar Thomas, stood charged together with another person who did not appeal, before the District Court of Bukombe at Bukombe with two offences of house breaking contrary to section 294(1)(a) and (b) of the Penal Code [Cap 16 R.E 2019] in the first count and stealing contrary to sections 258 and 265 of the same law in the second count.

The particulars of the offence as reflected in the charge sheet were that, on 12th day of April 2020 at 19.30 hrs at Msasa village within Bukombe District in Geita Region did break and enter in the dwelling house of one Juma Magesa and having so entered he stole therefrom, one Camera make Sony valued at Tshs. 650,000/=, two curtain valued Tshs. 20,000/= and one bag valued Tshs. 5000/= all total valued at Tshs. 715,000/= the property of the same person Juma Magesa.

When the charge was read and explained to the accused he pleaded guilty to the two offences, following that plea, they were both found guilty and convicted as charged in both counts. They were consequently sentenced to a suspended sentence in the first count, while in the second count they were sentenced to seven years imprisonment in terms of section 265 of the Penal Code [Cap 16 R.E, 2019]

Aggrieved by both conviction and sentence, the appellant filed an appeal before this court armed with five grounds of appeal:

1. That the trial Magistrate erred in law and fact to convict the appellant while his plea was due to misapprehension.
2. That the trial Magistrate erred in law and facts by convicting the appellant without proving if the camera, two curtains and one bag

belonged to Juma Magesa, thus the victim Juma Magesa failed to show the receipt in order to prove if those items belonged to him. In this way the court used hearsay evidence to convict the appellant.

3. That the trial Magistrate erred in law and facts to use statements given by police officer that the appellant admitted to commit the offence while the admission was caused by the beating given by the police officer to the appellant.
4. That it was a serious misdirection on the part of the trial Magistrate to deal with the prosecution evidence on its own and drive at the conclusion that the accused is guilty without considering reasonable doubt which remains unresolved.
5. That the trial Magistrate erred in law and facts to convict the appellant excessive sentence of 7 years imprisonment by using hearsay evidence given by the prosecution side while the appellant did not commit the offences.

In the end he prayed for this court to allow the appeal, quash the conviction and set aside the sentence thereby releasing the appellant from prison.

When this appeal was called for hearing, the appellant appeared in person through audio teleconference, while the respondent was represented by Ms. Rehema Mbuya, learned Senior State Attorney.

Called upon to argue his appeal, the appellant opted to adopt his grounds of appeal and asked the court to consider them as his submissions, he asked the Senior State Attorney to respond to the grounds thereby reserving his right to rejoinder, should there be anything to rejoinder from the arguments by the Senior State Attorney.

Ms. Rehema Mbuya, for the respondent did not support the appeal, she instead supported the conviction and the sentence meted out against the appellant.

In her submission in opposition of appeal, she combined all the grounds and argued them together, that the grounds of appeal filed by the appellant are nothing but just afterthought. She said the plea made by the accused is clear and un equivocal. In the facts of the case it was said that the properties was of Juma Magesa and he admitted to have broken the house of the victim and stole the said properties therefrom, he said had Juma been not the owner of the properties he would not have admitted the facts.

Further to that, the learned Senior State Attorney submitted that the appellant also admitted to have recorded the statement at the police station which statement was tendered and admitted as exhibits. In her opinion he submitted that, the grounds of appeal are all after thought therefore the plea was unequivocally clear and therefore the conviction based on that plea is legal. She reminded the court that section 360 of the Criminal Procedure Act [Cap 20 R.E 2019] as interpreted in the case of **Khalid Athuman vs The Republic** [2002] TLR 76 CAT which held that an accused person who is found guilty on his own plea of guilty can only appeal against the legality of sentence not the conviction. She thus asked the court to dismiss the appeal and uphold the conviction and sentence passed against the appellant. In rejoinder, the appellant had nothing material to add, he simply prayed for his appeal to be allowed and he be acquitted.

As earlier on pointed out, on arraignment the accused persons pleaded guilty to the charge they were facing. Following that plea they were found guilty and convicted on their own plea and consequently they were sentenced as indicated hereinabove. It is true as indicated by the learned Senior State Attorney in her submission in opposition of appeal

that section 360 allows a person aggrieved by the decision of the court based on his plea of guilty to appeal against the legality of sentence only not against his conviction. For purposes of easy reference, the said provision is hereunder reproduced;

"360(1) 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."

In this case, learning from the grounds of appeal, it can be gathered that the appellant did not appeal as to the extent or legality of the sentence, he instead appealed against the conviction. The issue is whether he was justified in law?

To answer that issue, I should however point out that the general principle provided under section 360(1) of the CPA, has exception, as expressed in a number of cases one of them being the case of **Msafiri Mganga versus The Republic**, Criminal Appeal No. 57 of 2012 CAT-Dodoma, which also relied on the authorities in the cases of **Laurence Mpinga v. Republic** [1983] T.L.R. 166 and **Josephat James v. Republic**, Cr. Appeal No. 316 of 2010, CAT, Arusha, Registry (unreported).

In the latter case of **Josephat James v. Republic**, this Court stated that under certain circumstances an appeal arising thereof, may be entertained by an appellate court where:

- (i) 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;
- (ii) An appellant pleaded guilty as a result of a mistake or Misapprehension;
- (iii) The charge levied against the appellant disclosed no offence known to law, and
- (iv) Upon the admitted facts, the appellant could not in law have been convicted of the offence charged.

From the authorities indicated above, it is a condition that, for the court to be justified to entertain an appeal based on a plea of guilty, it must 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 means 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.

Having laid down the principle in the cases cited above, the Court of Appeal in the case of **Msafiri Mganga versus The Republic, (supra)**

went ahead and held while relying on the case of **Rep.v Yonasani Egalu and 3 Others (1942-1943) IX-X E.A.C.A. 65**

"as a matter of law that, in any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent of the offence, and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded thereto unequivocally."

Now the issue is whether, this case falls under the said exception? This can be ascertained from the record of the trial court. I have passed through the record I find that the accused persons pleaded guilty to the charge on arraignment. The only problem I see is that when the facts of the case were narrated the accused were not required respond to each and every ingredient of the offence they are charged with.

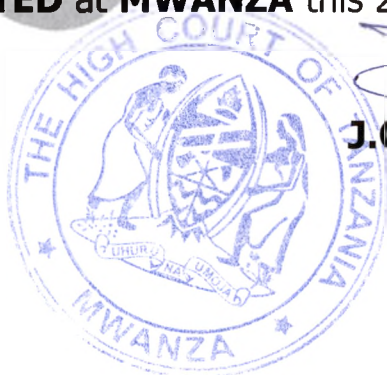
The first accused for example responded that; **"it is true and correct that I did break into the dwelling house of Juma Magesa and stole the camera."** It should be noted from the charge sheet that, the accused were charged for stealing a number of items which are one Camera make Sony valued at Tshs. 650,000/=, two curtain valued Tshs.

715,000/=. In the facts he admitted to steal the camera, he said nothing about other items, inferring from this facts, I find that the appellant did not plea to all constituent of the charge. The plea is therefore not complete and for that reasons equivocal. Having recorded the plea of the accused, the trial court was supposed to explain the fact containing all the constituent of the charge, which included all stolen items, and require him to respond to each constituent of the charge. That was not done in this case therefore; I find the trial court was not justified to find that the plea was unequivocal. I thus find the same to be equivocal and not justified to found the conviction.

That said, I find the appeal to be meritorious, I hereby allow it, quash the conviction and set aside the sentence. I substitute there at a plea of not guilty and direct that the case be remitted to the trial court to proceed with the hearing on merits.

It is so ordered.

DATED at MWANZA this 23rd day of June, 2021




J.C. Tiganga

Judge

Judgment delivered in the presence of the appellant on line via audio conference and Miss. Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.



J.C. TIGANGA

JUDGE

17/05/2021

ORIGINAL