IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO.22 OF 2021

(Originating from Criminal Case No.11 of 2021 of Biharamulo District Court)

BYAKATONDA PASCHAL.....1ST APPELLANT

EDGER DAUD.....2ND APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

22/07/2021 & 26/07/2021

NGIGWANA, J

This appeal is against both conviction and sentence meted out against the appellants on 29th day of January, 2021 by the District Court of Biharamulo at Biharamulo following their own plea of guilty to the two offences; Breaking into a building with an intent to commit an offence contrary to section 297 of the Penal Code Cap 16 R: E 2019, and Stealing contrary to section 265 of the Penal Code Cap 16 R: E 2019

As regards the 1st count, it was alleged that the appellants together with other two persons namely; Edward Antidius and Stephano Paschal on 28th day of January 2021 during night hours at Kikomakoma Village within Biharamulo District in Kagera Region did break and enter into a

store owned by Emmanuel s/o Jeremiah @ Ndegesera with intent to commit an offence therein.

As regards the 2nd count it was alleged that the appellants together other two persons as named in the first count on 28th day of January 2021 during night hours at Kikomakoma Village within the District of Biharamulo in Kagera Region having broken and entered the store of Emmanuel Jeremiah did steal therein twenty six (26) sacks of rice each weight 50kilograms valued at Tshs 1,300,000/= the property of Emmanuel Jeremiah @Ndegesera.

After conviction, each was sentenced to serve a term of five (5) years in jail in respect of the 1st count, and a term of three (3) years in jail in respect of the 2nd count. The court ordered that sentences shall run concurrently. The Appellants were aggrieved by both conviction and sentence, hence lodged the appeal before this court to challenge both conviction and sentence.

At the hearing of the appeal, the appellants appeared in person and fully relied on their joint grounds of appeal, while Mr. Emmanuel Kahigi, learned State Attorney, appeared for the respondent/Republic.

In their self-crafted memorandum of appeal, the appellants raised four (4) grounds of appeal on the basis of which they asked this court to quash the conviction and set aside the sentences.

1. That the learned Magistrate erred in law and fact in convicting the appellants without performing her fundamental duty of informing the appellants the meaning of plea of guilty before inviting them to plead to the facts

2. That the learned Magistrate erred in law and fact in convicting the appellants relying on equivocal plea of guilty

3. That the learned Magistrate erred in law and fact in convicting the appellants while their plea of guilty was ambiguous, unfinished and was conducted in perfunctory manner.

4. That the learned Magistrate erred in law and fact in relying on the charged offences which were not proved for want of tendering 26 sacks of rice

However, the reading and perusal of the grounds can be summarized as follows; **that the learned Magistrate erred in law and fact by convicting the appellants relying on equivocal plea.**

The grounds of appeal were served to the respondent Republic who decided not to file the reply but to argue the appeal viva voce.

At the outset, Mr. Emmanuel Kahigi objected the appeal. Expounding on the ground of appeal, Mr. Kahigi, learned State Attorney submitted that, as per Section 360 (1) of the Criminal Procedure Act CAP 20 R:E 2019, 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.

The learned State Attorney went on submitting that, in this case, the charges were read over and explained to the appellants in the language they understood to wit; Kiswahili they both entered a plea guilty, and when the facts constituting the offences were read over and explained to them, each admitted the truth and correctness of the facts. The learned State Attorney argued that, the plea was unequivocal, therefore

conviction was proper likewise the sentences meted against both appellants. Wherefore prays for the dismissal of the appeal for being devoid of merit

Now, before reaching far, it is prudent to know the legal position as to whether the High Court can allow the appeal of the appellant who has pleaded guilty and convicted upon his own unequivocal plea by a subordinate court? The answer to this question is as correctly submitted by the learned State Attorney and as provided for under Section 360 (1) the Criminal Procedure Cap .20 R: 2019

"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****" (emphasis supplied)*

Section **228 (2) of the Criminal Procedure Act, Cap 20 RE 2019** provides for the procedure where an accused pleads guilty to the charged offence. The section reads:

228.-(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."*

The procedure which must be followed by the trial Magistrate once the accused pleads guilty to the charge was articulated in **Adan V. Republic (1973)** EA 445, cited in **Khalid Athuman V. Republic,** Criminal Appeal No. 103 of 2005 (unreported) that;

"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 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"

However, it must be noted that there is always an exception or exceptions to the general rule. In our jurisdiction, the criteria for interfering with a plea of guilty were stated in the decision of this court (Samata, J) in the case of **Laurence Mpinga** (Supra) and confirmed and adopted by the Court of Appeal in **Kalos Punda V R,** Criminal Appeal No. 153 of 2005 and **in Josephat James versus R,** Criminal Appeal No. 316 of 2010 (both unreported) that; An accused person who has been convicted by any court of an offence on his own plea of

guilty, may appeal against the conviction to the higher court on any of the following grounds;

1. *That even taking into consideration the admitted facts, 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;*
   2. That the appellant pleaded guilty as a result of mistake or misapprehension;
   3. That the charge laid at the appellant's door disclosed no offence known to law; and
   4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged

Going by the criterions given by the Court of Appeal above, the question now comes as to whether the appellants' plea was unequivocal?

The typed proceedings appear in this style;

> **"Court:** Charge read over and well explained to the accused in a language he understands who are asked to plead thereto;
>
> **1st count:**
>
> **1st Accused: Ni kweli nimevunja stoo ya Emmanuel Jeremiah nikiwa na nia ya kutenda kosa**
>
> **Sgd 1st accused**
>
> **2nd accused: Ni kweli nimevunja stoo ya Emmanuel Jeremiah nikiwa na nia ya kutenda kosa**
>
> **Sgd 2nd accused**

2nd count:

1st accused: Ni kweli niliiba viroba 26 vya kilo 50 kila kimoja kwa ndugu Emmanuel Jeremiah

Sgd by 1st accused

2nd accused: Ni kweli niliiba viroba 26 vya kilo 50 kila kimoja kwa ndugu Emmanuel Jeremiah

Sgn 2nd accused"

When the facts including their cautioned statements were read over and explained to the appellants, each admitted the truth and correctness of the facts. The facts read over and explained to them revealed the ingredients of both offences.

The 1st accused/appellant replied: **"I admit all facts are true and correct"**

The 2nd accused/appellant replied: **I admit all facts are true and correct"**

Under the circumstances I am of the strong view that the way the charges were read, and the facts, as narrated by the prosecution and admitted by the appellants, their plea was unequivocal, and for that reason, the ground of appeal is baseless hence dismissed.

Another question is whether the sentences imposed were illegal. Page 7 of the typed proceedings revealed that, upon convicting the appellants the Magistrate sentenced each to serve a term of five (5) years in jail in respect of the 1st count and to a term of three (3) years in respect of the 2nd count. We should not forget that the sentencing powers of

Magistrates are regulated by section 170 of the Criminal Procedure Act Cap 20 R: E 2019 which provides as follows:

"170(1)*A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences-*

(a) ***imprisonment for a term not exceeding five years;*** *save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;"*

In the light of the stated position of the law, it is clear that, though a Resident Magistrate is vested with power to impose sentence of imprisonment for unscheduled offences, the power is not absolute because it has been subjected to the statutory limitations of the sentence to be imposed depending on the rank of the Magistrate.

Any term of imprisonment beyond the prescribed statutory limits warrants the case file to be transmitted to the High Court for confirmation before the sentence is executed.

In the case at hand, the trial Magistrate imposed the sentences which are within her statutory limits, thus the sentences were not illegal. However, the records do not show how the appellants mitigating factors were considered; they were first offenders, young persons of 18 years, they did dot waste court time and were so remorseful. Under the circumstances of this case, I am of the strong view that the court ought to have been more lenient to them. In the case of FORTUNATUS

FULGENCE V.R, Criminal Appeal No.120 of 2007 (Unreported) the court held that;

"*The trial Court's principal duty is to look into and assess the aggravating factors surrounding the commission of the offence which may push the sentence upwards, and the mitigating factors which may tend to push the sentence downwards*"

With all that, I have endeavored to demonstrate, I find and hold that the appellants were properly convicted therefore, I uphold the conviction, and varies the sentences as follows: - Appellants shall serve a term of three (3) years in jail in respect of the first count and a term of two (2) years in jail in respect of the 2nd count. I also uphold the order that sentences shall run concurrently.

It is so ordered.

E. L. Ngigwana

JUDGE

26/07/2021

Date: 26/7/2021

Coram: Hon E. Ngigwana, J.

1st Appellant: Present

2nd Appellant: Present

Respondent: Veronica Moshi (SA)

B/C: Gosbert Rugaika

State Attorney:

My Lord, the matter is coming for judgment. We are ready to receive it.

1st Appellant: I am ready.

2nd Appellant: I am ready.

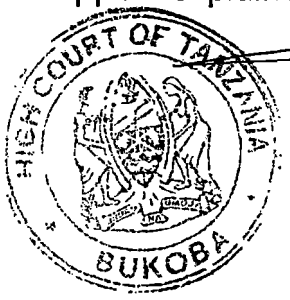
Court: Judgment delivered this 26th in the presence of both Appellants and Ms. Veronica Moshi, learned State Attorney for the Respondent/Republic.

Sgd: E. Ngigwana

JUDGE

26/07/2021

Right of Appeal explained.



Sgd: E. Ngigwana

JUDGE

26/07/2021