IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 115 OF 2020

(Originating from Criminal Case No.235 of 2020 of Ngara District Court)

GEOFREY KENEDY @ GEORGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20/07/2021 & 23/07/2021

NGIGWANA, J

This appeal is against both conviction and sentence meted out against the appellant on 15th day of October, 2020 by the District Court of Ngara at Ngara, following his own plea of guilty to the offence of Robbery with violence Contrary to Section 285 and 286 of the Penal Code Cap 16 R: E 2019 whereas, it was alleged that the appellant on 5th day of September, 2020 at Ngara Town within Ngara District in Kagera Region, did steal one Smart phone make Itel valued at Tshs 180,000/= the property of one Jesca d/o Faustine and during such time of stealing did use actual violence in order to obtain the said property.

After conviction, he was sentenced to serve a term of fifteen years (15) in jail. The Appellant was 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 appellant appeared in person and fully relied on his grounds of appeal, while Mr. Grey Uhagile, learned State Attorney, appeared for the respondent/Republic. In his self-crafted memorandum of appeal, the appellant raised five (5) grounds of appeal on the basis of which he asked this court to quash the conviction and set aside the sentence. However, the reading and perusal of the grounds can be summarized as follows; **One,** that the trial Magistrate erred in law and fact by convicting the appellant whose plea was equivocal **Two,** that the trial Magistrate erred in law and facts by convicting and sentencing the appellant regardless the age of the appellant who was aged 17 years old

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. Grey supported the appeal. Expounding on the first ground of appeal, Mr. Grey, learned State Attorney submitted that, as a general rule, 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, however, there are circumstances in which appeal pertaining conviction on plea of guilty may be entertained especially where the plea was imperfect, ambiguous or unfinished or the appellant pleaded guilty as a result of mistake or misapprehension. He made reference to the case of **Laurence Mpinga versus R** [1983] TLR 166

Mr. Grey further submitted that, in our case, the facts read and explained to the appellant did not disclose the elements of the offence

of Robbery with Violence as required by law, and therefore the plea was equivocal. He referred the court to the case of **Buhimila Mapembe versus R** [1988] TLR 74.

Now, before reaching far, it is prudent to know the legal position as to whether the High Court can allow the appeal of the accused 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"

The Court of Appeal of Tanzania in the case of **Jonas Ngolida versus R**, Criminal Appeal No. 351 of 2017 held among other things that,

"For an unequivocal plea of guilty to be sustained in an appeal,

statement of the offence shown in a charge sheet must disclose the

ingredients of the offence and punishment that an accused person should expect should he plead guilty to the charge. We think, charge sheets must make correct reference to the provisions creating not only the offences, but also the punishment that is to follow should the

accused person be convicted. In other words, an offence is unlawful act or omission that is punishable. An offence is not complete without attendant punishment"

From the case of **Jonas Ngolida (supra),** it clear that the trial court has the duty to explain to the accused not only the ingredients of the offence but also the punishment that is to follow should the accused person be convicted.

The Court Appeal of Kenya addressing the question of plea of guilty by unrepresented accused/appellant in the case of **Elijah Njihia Wakianda versus Republic [2016] EKLR** held that;

".....We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process....."

It is therefore apparent that the Court must ensure that not only does the accused understand the ingredients of the offence with which he is charged at all the stages of the plea taking, but that he also understand the sentence he faces where he opts to plead guilty as failure to do so amounts to violation of his right to a fair trial and that the plea of guilty

is in those circumstances will definitely be equivocal hence challengeable in the high court by way of appeal.

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 appellant's plea was unequivocal?

The appellant was charge under section 285 (1) of the Penal Code Cape 16 R: E 2019 which provides;

Any person who steals anything and, at or immediately before or immediately after stealing, use or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained is guilty of robbery"

It is trite that the ingredients of the offence of robbery violence are as follows; stealing facilitated by the use of actual or threat of violence by the perpetrator at or immediately before or immediately after to obtain or retain the stolen property or to prevent or overcome resistance to its being stolen or retained.

Page 2 of the typed proceedings appears in this style;

"**PP:** Facts are ready, I pray to proceed

Accused: I am also ready

Court: The filed facts are adopted, read over and explained to the accused person who reply

Accused: (i) I agree with my names, tribe, work and residence

(ii) I agree with fact No.2

(iii) I agree that I agree to commit an offence before DC Lucian

(iv) I agree that I was interrogated by justice of peace"

(v) I agree that I have pleaded guilty today after the charge read to me"

Indeed, fact No.2 is no more but a replica of the particulars of charge sheet, thus ingredients of the offence as per section 285(1) and the

sentence/penalty that would be applicable as per section 286 of the Penal Code Cap 16 R: E 2019 were not read and explained to the appellant.

It is my considered view that failure by the trial court to explain to the appellant herein the nature and magnitude of the charge he was facing and the severity of the sentence goes to the root of the plea taken by the appellant.

Furthermore, certificate of seizure and the appellant's cautioned statement were admitted by the trial court to form part of the facts, but were not read out to the appellant, and this was also procedurally wrong.

In addition to that, the record does not indicate the language (Kiswahili or English) used to read and explain the charge to the appellant, and no record of whether the court inquired from the appellant what language he understood. Such an inquiry would have assisted the court to determine the language of reading and explaining the charge. It is good practice for the specific language used read, explain the charge, and state the elements of the offence be specifically stated. Page 1 of the typed proceedings read;

"Charge read over to the accused person in a language he understands who is asked to plead thereto"

Under the circumstances, this court is in agreement with Mr. Grey, learned State Attorney that the way the charge was read, and the facts, as narrated by the prosecution and admitted by the appellant, it cannot

be said that the appellant's plea was unequivocal. The first ground of appeal is therefore meritorious.

Another issue to be determined here is regarding the legality or otherwise of the imposed sentence of fifteen years.

As regards this issue, Mr. Grey submitted that, the sentence imposed by the trial court was illegal since the offence of Robbery Violence does not fall within the offence listed in the Minimum Sentence Act, therefore the trial Magistrate ought to have complied with Section 170 (1) (a) of the Criminal Procedure Act Cap 20 R: E 2019.

As correctly submitted by the learned State Attorney, in terms of section 170 (1) (a) of the Criminal Procedure Act Cap 20 R: E 2019, it is vivid at page 6 of the typed proceedings that, upon convicting the appellant the trial magistrate sentenced him to serve a term of fifteen (15) years in jail. 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, Robbery with violence upon conviction attracts a jail term of fifteen years (15), since it is a scheduled offence under the Minimum Sentences Act Cap 90, R: E 2019 as correctly considered by the trial Magistrate in our case, the trial magistrate was right to have imposed a sentence of **15years** in terms of section 5(1) of Minimum Sentence Act Cap 90 (R.E 2019). In the premises, the imposed sentence of fifteen years imprisonment was legally imposed which need no confirmation by the High Court. Therefore, on the issue of illegality of sentence, I do not shake hands with the learned State Attorney.

Another issue is whether the trial Magistrate considered the age appellant. From the charge revealed that the appellant was a student of Ngara secondary school aged 18 years, but the appellant never admitted that he was 18years old but seventeen (17) years old hence a minor.

Mr. Grey submitted that it was the duty of the trial court to determine the age of the appellant and in case of its failure to do so, treat the age mentioned by the appellant or his guardian or relative as his correct age.

As correctly submitted by Mr. Grey learned State Attorney under such a situation, the trial Court ought to have determined the age of the appellant, or treated the age 17 years as the correct age of the

appellant. See section 113 (1) and 114 (2) of the Law of the Child Cap 13 R: E 2019. That omission in my view was fatal and it has occasioned injustice to the appellant.

With all that said, together with the overall circumstances surrounding this case, it is apparent that the plea by the appellant was equivocal as it has denied the appellant a fair and balanced consideration of his case. Following all the flouting of procedures and irregularities that I have pointed above; I find ordering a retrial would not serve justice of this case. I allow the appeal, quash the conviction and set aside the sentence of 15 years imposed against the appellant. I further order for an immediate release of the appellant unless held for other lawful reasons

It is so ordered

E. L. Ngigwana

JUDGE

23/07/2021