IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 127 OF 2019

[Originating from Criminal Case No. 16 of 2019 of the District Court of Urambo – A. E Chilongola, RM]

RAMADHANI OMARY KAMBAYA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 26/06/2021

Date of Delivery: 18/08/2021

AMOUR S. KHAMIS, J.

Ramadhani Omary Kambaya was arraigned in the District Court of Urambo for the offence of breaking into the building with intent to commit an offence contrary to Section 297 of the Penal Code, Cap 16, R.E 2002 and stealing contrary to Sections 258 and 265 of the Penal Code.

The prosecution alleged that on 30th day of December 2018 at or about 11.00 hours at Mabatini within Urambo District, Tabora Region, Ramadhani Omary Kambaya entered and broke a shop of one Ezra S/o Isaka with intent to commit an offence therein.

In the second count, it was alleged that on 30th day of December at or about 11.30 hours at Mabatini Street within

Urambo District in Tabora Region, and after breaking and entering into the shop of one Ezra Isaka, Ramadhani Omary Kambaya did steal one TV – flat screen make Sunda valued at Tshs. 150,000/=, extension cable valued at Tshs. 10,000/=, handbag valued at Tshs. 3000/=, flash disc 16 GB valued at Tshs. 16,000/= and Tshs. 100,000/=.

It was further alleged that a total value of the stolen properties was Tshs. 417,000/=.

Upon a plea of guilty to the charge, Ramadhani Omary Kambaya was convicted as charged and sentenced to serve a term of fourteen (14) years in jail for the first count and twelve (12) months imprisonment for the second count.

Aggrieved by the conviction and sentence, Ramadhani Omary Kambaya, hereinafter to be referred to as the appellant, raised seven grounds of appeal in this Court, namely:

1. That the plea of guilty by the appellant was ambiguous and equivocal.
2. That the appellant was convicted on his own plea of guilt based on a defective charge for failure to cite properly the section of laws in the statement of the offence which creates the offences charged.
3. That the trial Court erred in law to allow the prosecutor to read the facts of the case under Section 192 (3) of the CPA Cap 20, R.E 2002 which applies only to accused persons who have pleaded not guilty to the charge.
4. That the learned trial magistrate erred in law for failure to make a finding whether the plea of guilty of the appellant was unambiguous and unequivocal and that the conviction of the

appellant on his own plea of guilt was entered by the trial court in the absence of such finding.

5. That the alleged caution statement of the appellant (exhibit PI), the certificate of seizure (exhibit P II) and the sketch map (exhibit P III), while containing information adverse to the appellant were not read aloud in Court during hearing. This affected the appellant's plea of guilty.
6. That the properties subject of the charge in the second count and allegedly found in possession of the appellant per Exhibit P II, were not admitted in Court as exhibits.
7. That in light of the preceding grounds of complaints, the appellant had a defence to the charge laid before him such that the trial Court erred in law, to treat the plea of guilt by the appellant as complete.

On a date of hearing, the appellant appeared in person through a video conference facility while the respondent was represented by Mr. Deusdedith Rwegila, learned State Attorney.

Mr. Rwegila was the first to occupy the floor. He submitted that the appellant was convicted on own plea of guilty on two offences and that the plea was unequivocal.

He further contended that apart from the charge sheet, the facts of the case were read over to him and the appellant accepted them as true.

He asserted that before the facts were read over, the appellant was reminded of the charge and replied that; ***"It is true I did break the building and stole the items."***.

The learned counsel contended that a certificate of seizure, cautioned statement and sketch map of the scene of crime were

also tendered in evidence and admitted with consent of the appellant.

The learned counsel urged this Court to endorse the appellant's conviction.

Further, the learned State Attorney submitted that the facts read constituted the essential ingredients of the offences of which the appellant was charged of and added that charges read over to the appellant were not defective in any form.

He said Section 297 of the Penal Code provides for breaking and committing an offence, Section 255 of the same Code provides for stealing and Section 265 provides for the punishment of stealing.

He capped that the trial Court's proceedings did not contain any error and reasoned that the entire facts and plea did meet the required threshold of being unequivocal.

Mr. Rwegira concluded that the case of ***KENETH MANDA V REPUBLIC*** (1983) TLR was relevant to the cirumstances and implored this Court to follow it.

On his side, Ramadhani Omary Kambaya adopted the grounds of appeal and had nothing to add.

Reviewing the grounds of appeal, it is noted that the appellant's main focus was a plea of guilty which culminated into a conviction and sentence. According to him, the plea was equivocal.

The general rule is that no appeals can lie against convictions on pleas of guilty, except where the plea on which the conviction was grounded is ambiguous. Section 360 (1) of the Criminal Procedure Act clearly provides for this as it reads:

> *"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 above position of the law was emphasized in several decided cases including that of **KHALID ATHUMAN V REPUBLIC** (2006) T.L.R 79 wherein it was held that:

"The Courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she understands the charge that has been laid at his I her door, discloses an offence known under the law and that he/she has no defence to it. A plea of guilty having been recorded, a Court may entertain an appeal against conviction if it appears that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it; or that upon the admitted facts he could not in law have been convicted of the offence charged."

In the case of ***SMAIL BUSHAIJA V REPUBLIC (1986) TLR 1***, this Court held that:

"Before an appellate Court upholds a purported plea of guilty it has to satisfy itself that:

a) the charge drawn and signed by the trial magistrate is an offence known to law

b) it is an offence over which the Court has jurisdiction

c) the offence charged is sufficiently identifiable from the facts as lodged by the complainant

d) the plea was unequivocal

e) where applicable, the assessors played their statutory role."

In the instant case, particulars of the offence missed some important details that ought to have been read over to the appellant but were not and were presumed by the trial Court throughout its proceedings.

In the first count, it was alleged that the incident of entering and breaking the shop of Ezra Isaka with intent to commit the offence was done at Mabatini. However there were no details as to what Mabatini stood for. Was it a street, village, suburb or a building?

In the second count, the prosecution alleged that the offence of stealing was committed on 30th December but omitted to disclose the year in which it took place.

The said particulars of offence showed that:

> *".....Ramadhani s/o Omary charged that on 30th day of December at or about 11.30 Hours....."*

In the case of ***MITINGE MIHAMBO V REPUBLIC (2001) TLR 348*** this Court held that:

> *"It is the law of this country that an accused person is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence for which he stands trial. This is even more important in trials in which the accused is undefended. It is always prudent in the case of an undefended accused person who pleads guilty that care should always be taken to see whether he understands the elements of the crime to which he is pleading guilty."*

In the case at hand, as earlier on demonstrated, important details relating to the scene of crime and the year of committing the offence were left out of the charge sheet.

With those omissions, the appellant could not be said to have understood the nature of the charge and the proceedings that led to his conviction.

The appellant further faulted the trial magistrate for allowing the prosecution to read over the facts of the case under Section 192 (3) of the Criminal Procedure Act.

He reasoned that such facts only applied to accused persons who have not pleaded guilty to the charge.

In ***JOSEPH MUNENE & ALLY HASSAN V REPUBLIC (2005) TLR 141***, the Court of Appeal held that holding a preliminary hearing is a mandatory requirement under Section 192 (1) of the Criminal Procedure Act and Rule 3 of the Accelerated Trial and Disposal of Cases Rules, 1988.

It was further held that the law under Section 192 (3) of the Criminal Procedure Act imposes a mandatory duty of reading and explaining contents of the memorandum of facts to the accused.

However, in the case of ***NDAIYAI PETRO V REPUBLIC, CRIMINAL APPEAL NO. 277 OF 2012*** (unreported), the Court of Appeal excluded the requirement of conducting preliminary hearings in cases where accused persons pleads guilty.

To use its own words, the apex Court of the land held that:

> *"In a case where an accused person pleads guilty, the trial Court does not conduct a preliminary hearing. A preliminary hearing is conducted where an accused person pleads guilty and the purpose is to ascertain what is not in dispute so as to minimize the costs for calling witnesses not required."*

In the present case, the trial magistrate mistakenly acted in the same way as happened in the case of ***NDAIYAI PETRO V REPUBLIC***, that is: she read over the numerated facts as done in a usual preliminary hearing.

Thereafter, the appellant was asked to state if he admitted each of the numbered paragraphs, to which his reply was undeniable.

The admission was followed by parties' signing the proceedings to document the agreed facts. Afterwards, the trial magistrate recorded a conviction on the appellant's own plea of guilty and accordingly sentenced him.

This narrated procedure is a total misdirection in law and was strongly discouraged by the Court of Appeal in the case of ***NDAIYAI V REPUBLIC*** (supra).

The highlighted flaws resulted to a miscarriage of justice on part of the appellant who is a lay person and was unrepresented.

Consequently, the appeal is allowed. Let the appellant be released from prison forthwith unless held for other lawful causes.

It is so ordered.

Dated at Tabora this 18th day of August, 2021.

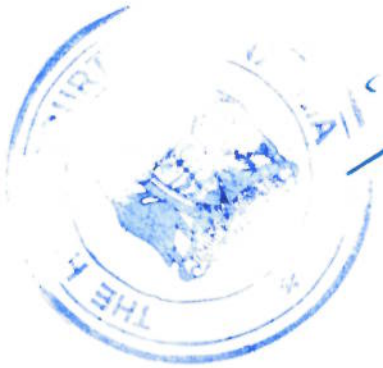
AMOUR S. KHAMIS

JUDGE

ORDER:

Judgment read in open Court in presence of the appellant in person and Mr. Tito Mwakalinga, learned State Attorney for the

Republic. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

18/08/2021