IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 09 OF 2021

(Originating from the District Court of Temeke, in Criminal Case No. 226 of 2020 by Hon. Ndossy, RM)

OSAMU MWALAMI DENGE .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Last Order: ***22/9/2021***

Date of Judgment: ***03/11/2021***

ITEMBA, J;

This appeal originates from the District Court of Temeke. The appellant, Osamu Mwalami Denge was charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E 2002 as amended by Act No.3 of 2011. The appellant was charged together with other five (5) accused who are not part of this appeal. On 10th November 2020, he was convicted on his own plea of guilty and he was sentenced to serve thirty (30) years of imprisonment term.

The appellant, is not amused by the decision of the trial court, he has come to this court with a petition of appeal containing 8 grounds as follows:

1. That, the learned trial magistrate erred in Law and fact by convicting the appellant on his own plea of guilt while the same was imperfect and ambiguous even taking consideration the admitted facts.

2. That, the learned trial magistrate erred in Law and fact by failing to realize that by virtue of the appellant's age, he pleaded guilty as a result of misapprehension of the consequences of such a plea considering that his co – accused had taken the same action and received a lenient sentence based on their age.

3. That, the learned trial magistrate erred in Law and fact by convicting the appellant in a case where the trial magistrate as a trustee of the court failed to warn the appellant of the consequences of his plea of guilty as he was a Juvenille.

4. That, the learned trial magistrate erred in Law by failing in his duty to explain to the appellant the ingredients of the offence he was charged with after entering a plea of guilty contrary to procedure of Law.

5. That, the learned trial magistrate erred in Law by convicting the appellant in a case where the trial magistrate convicted him of an offence not known to Law.

6. That, the trial magistrate erred in Law and fact by admitting the un procedurally tendered and admitted EXH P2(Caution statement) as the same was;

    i. Tendered by the Public prosecutor (S.A) who a witness is known to Law.
    ii. The same was not read out a loud in court contrary to procedure of Law.

7. That, the learned trial magistrate erred in Law and fact by convicting the appellant in case where the prosecution and trial court failed to ascertain the age the appellant contrary to procedure of Law.

8. That, the learned trial magistrate erred in Law by applying double standard as the sentence for the appellant differs with that of his co – accused while they were all Juveniles.

When this appeal was scheduled for hearing, the respondent, Ms Jenifer Masue, senior state attorney raised an issue that the charge sheet shows that the appellant was below the age of 18 years at the time when he was charged. Following an inquiry by the court, the appellant who was unrepresented, submitted and confirmed that he was below 18 years when the offence was committed and that he actually had a birth certificate as a proof of his age and further explicated that he was not successful in tendering the said certificate before the trial court to support his aversion. Upon revisiting the court records, the second page of the charge sheet shows that initially, the appellant age was typed 18 years and later the figure was cancelled and written by a pen 17 years. The proceedings are silent on those alterations so made.

It was at that time when the court requested the appellant to bring the said certificate which was admitted by the court under section 359 of the Criminal Procedure Act, herein the CPA. Having gone through the said birth certificate, it underscores that the appellant was born at Temeke Hospital, on 06th June 2003. It is apparent on the chargesheet that the appellant was charged on 24th August 2020. Therefore, under these premises it is prudent to state that, when the appellant was charged, he

was under the age of 18 years as he was aged 17 years and 2 months which makes him a minor at the time of commission of the alleged offence.

Based on the situation and upon the court receiving such further evidence, Ms Masue for the respondent submitted eloquently that the court should set aside the sentence of 30 years imprisonment. In that, she cited section 119 (2) (a)(b) and (c) of the Law of the Child Act Cap 13 R.E 2019.

The court has considered both parties' submissions and the records herein and henceforth has the following observations; The appellant indicated in his notice and petition of appeal that he is appealing against both conviction and sentence. It should however be noted that, as the appellant was convicted on his own plea of guilty he could only appeal against the sentence if he contests its legality pursuant section 360 of the CPA. (See the case of **Aly Shaban @ Swalehe (vs) Republic,** Criminal Appeal No. 351 of 2020, CAT at Dodoma (unreported)

Regarding the sentence issued against the appellant, I agree with the learned senior state attorney that the evidence supports the fact that when the appellant was charged with the offence of armed robbery, he was under the age of 18 years. Therefore, the sentence of thirty (30) years of imprisonment was improper and excessive which is contrary to section 119 (2)(a)(b)(c) of the Law of the Child Act. The said section reads:

> *(1) Notwithstanding any provisions of any written law, a child shall not be sentenced to imprisonment.*
>
> *(2) Where a child is convicted of any offence punishable with imprisonment, the court may, in*

addition or alternative to any other order which may be made under this Act-

(a) discharge the child without making any order;

(b) order the child to be repatriated at the expense of Government to his home or district of origin if it is within Tanzania; or

(c) order the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care.

Before sentencing the appellant, under rule 46(4) of the Law of the Child (Juvenile Court Procedure) Rules, 2014 GN 251, this court had requested for a social inquiry report of the appellant. Ms Neema Mambosho, a social welfare officer of Temeke Municipal Council promptly executed the respective duty which highly assisted the court in issuing the sentence against the appellant.

The fact that there is illegality in sentencing and since in the course of hearing the appeal, I had the benefit of hearing from the appellant and satisfy myself about his correct age, that he was 17 years at the time of commission of the offence, I hereby revise the proceedings of lower court by setting aside the sentence of thirty (30) years imprisonment. I substitute the sentence with that of conditional discharge. Pursuant to rule 50(1)(3)(a) and (b) (iii) of Law of the Child (Juvenile Court Procedure) Rules, 2014 GN 251, the appellant is discharged under the conditions that

i. The appellant should be attending supervision of the social welfare officer, at Temeke Municipal Council, Social Welfare Unit, for the period of one (1) year from the date of his discharge.

ii. The appellant is referred to a series of counseling to the social welfare officer, serving at Temeke Municipal Council, Social Welfare Unit, for the period of one (1) year from the date of the initial counseling session.

It is so ordered.

Dated at Dar es salaam this day of 3rd November, 2021.

L. J. Itemba

JUDGE

03/11/2021

Rights of the parties have been explained.

L. J. Itemba

JUDGE

03/11/2021

Judgement delivered at Dar es Salaam this 3rd day of November, 2021 in the presence the appellant in person and his mother Ms. Anna Mhina, Ms. Monica Ndakidemi State Attorney for the Respondent and Ms. Tupokigwe, RMA.