IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 38 OF 2021

(Originating from the District of Court of Mtwara at Mtwara in Criminal Case No. 39 of 2021)

ATHUMANI FARIDI MAWELE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11th Oct. & 30th Nov., 2021

DYANSOBERA, J.:

In the District Court of Mtwara at Mtwara, the appellant, Athumani Faridi Mawele was charged with and convicted on his plea of guilty of the offence of unlawfully present within the United Republic of Tanzania, contrary to section 45 (1) (j) and 2 of the Immigration Act [Cap. 54 R.E. 2016]. It was alleged that on 20.01.2021, at Kilambo Village within Mtwara Rural District Council in Mtwara Region, the appellant being the citizen of Democratic Republic of the Congo was found unlawfully present in the United Republic of Tanzania without having a valid Passport, Visa or Permit. Upon such conviction, the trial court meted a

sentence on the appellant of a fine of Tshs.500, 000/= or in default of payment of the fine to serve twenty four (24) months imprisonment term.

Aggrieved by both, conviction and sentence the appellant has preferred this appeal to this court by way of petition of appeal containing two complaints which are to the following effect: -

1. That the Magistrate erred in law and facts in sentencing the appellant while there was no proper conviction entered as per provisions of the Criminal Procedure Act. The alleged conviction did not state the sections of the law in which the appellant was convicted under as required by the Criminal Procedure Act section 312(2) Cap 20 R.E. 2002.
2. That the trial Magistrate erred in law and fact by convicting the appellant by his own plea of guilty, the entire proceeding in the lower court does not show if the appellant know what he was pleading to when the case was before the lower court, pg 1 of the lower court the charge was read to the appellant, it fails to reflect which language the charge was read and if the appellant understood the language taking into consideration the appellant is conversant in French language as his national language. That basing on the seen fallacy it is not possible for one to plea or offers a plea of guilty.

During the hearing of this appeal, the appellant appeared in person, unrepresented whereas the respondent was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney.

On his part, the appellant told this court that he had filed two grounds of appeal and had nothing useful to add.

In response, Mr. Ndunguru declined to support the appellant's appeal. He argued that when the charge was read over and explained to the appellant, he pleaded guilty and upon the facts having been narrated to him, he admitted their being correct. In adducing the mitigating factors, the same appellant asked for forgiveness. Mr. Ndunguru stressed that there is nowhere that the plea was equivocal, but the appellant was aware on what he was pleading guilty.

On the first ground of appeal, Mr Ndunguru conceded that the trial court did not show the section under which it convicted the appellant. He, however, pointed out that the facts are clear on the offence with which appellant was charged and of which he was convicted. He was of the view that the omission was not fatal and the court did not err.

As to the sentence, the learned Senior State Attorney stated that the sentence of a fine of Tshs. 500,000/= or, in default, 24 months term of imprisonment, was proper. Urging the court to dismiss the appeal, he prayed for an order that after completion of the sentence, the appellant be deported to his home country.

In his rejoinder, the appellant argued that when he entered in Tanzania, he was fleeing the war and fortunately he entered Tanzania insisting that he had no opportunity to look for necessary documents. He prayed for leniency.

Normally, in cases involving accused's conviction on his own plea of guilty, matters to be taken into account include whether the accused's plea was unequivocal and unambiguous, whether the appellant has a right to appeal against conviction on such a plea and whether the conviction was proper.

As a general rule, there is no right of appeal against conviction. This position is clear under section 360 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019], the only exception being an appeal against the legality of the sentence.

Courts have, however, devised circumstances in which an appeal against conviction can be entertained even when the appellant is convicted on his plea of guilty. Such circumstances were well illustrated in the case of **Laurent Mpinga v. R** [1983] T.L.R. 166 as follows:-

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

In the case under consideration, the appellant has two complaints in his petition of appeal. In the first ground of appeal, the appellant is

challenging his being sentenced on an improper conviction which is violative of section 312 (2) of the Criminal Procedure Act [CAP 20 R.E.2019] while in the second ground of appeal, the appellant's grievance is pegged on language barrier in that they did not reflect the language in which the said charge was read over to him, taking into account that he is conversant in French, his national language.

Having perused the trial court's record and considered the appellant's complaints in his petition of appeal and the submission by the learned Senior State Attorney and the appellant, I am in agreement with the learned Senior State Attorney that the appeal lacks basis.

With respect to the 1st ground of appeal, it is established that in order to convict on a plea of guilty, the court must be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal. Further that the facts to be adduced in support of the charge must disclose the ingredients of the charged offence. A case in point is **Saidi Omary Kombo v. R** [2000] TLR 315/.

In the present case, the charge was properly drafted and disclosed the offence charged. The facts adduced by the learned State Attorney disclosed the ingredients of the offence, that is unlawful presence in the United Republic of Tanzania and after reading the facts, the appellant admitted to have committed the offence. Even before me, the appellant admitted to have entered in Tanzania arguing that he was fleeing war and had no opportunity to seek any document. His version was the following:-

'My Lord, when I entered Tanzania I was running against the war and fortunately, I entered Tanzania. I had no opportunity to look for necessary documents. I pray for leniency'

In entering conviction, the learned Resident Magistrate at p. 2 of the typed proceedings is recorded to have stated:-

'Court: accused is convicted on his own plea of guilty'.

It is the appellant's complaint in this first ground of appeal that he was sentenced on an improper conviction which is violative of section 312 (2) of the Criminal Procedure Act [CAP 20 R.E.2019]. It is true that the section under which the appellant was convicted was not cited, but as rightly submitted by the learned Senior State Attorney, the facts are clear on the offence with which appellant was charged and of which he was convicted after he pleaded guilty, the omission was not fatal as it was an inadvertent omission which did not prejudice the appellant.

This first ground has no merit.

In the second ground, the appellant's complaint is that the charge which was read over and explained to him did not reflect the language taking into account that he is conversant in French, his national language.

This complaint lacks merit and is an afterthought. His conviction on his own plea cannot be faulted. The argument that he did not understand the language and therefore failed to understand the nature of the proceedings cannot be accepted. There is nothing on record that he raised the issue of language barrier, otherwise such fact could have

been reflected on the record. Before me, the appellant appeared to be well conversant in Kiswahili. This ground lacks merit as well.

For those reasons, I dismiss the appeal on conviction for want of merit.

The sentence meted out to the appellant was the bare minimum which the law prescribes. It needs no interference.

The appeal is dismissed in its entirety. It is ordered that the appellant, after serving the sentence, should be deported to his home country that is the Democratic Republic of the Congo (DRC).

Order accordingly.

W.P. Dyansobera

Judge

30.11.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 30th day of November, 2021 in the presence of the appellant and Mr. Lugano Mwasubila, learned State Attorney for the respondent

W.P. Dyansobera

Judge