THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 102 OF 2021

ELISHA S/O MSANGAWALE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Mpanda District Court in Criminal Case No. 130 of 2021)

JUDGMENT

Date of Last Order: 12th May 2022

Date of Judgement: 15th July 2022

NDUNGURU, J:

In the Mpanda District Court (henceforth the District Court), the appellant was charged with two offences of stealing contrary to **Section 258 (1) and 265 of the Penal Code, CAP. 16 RE 2019** (henceforth the CAP. 16) as first count and conversion contrary to **Section 284 of CAP 16.**

According to the record he was convicted on his own plea of guilty and sentenced to two (2) years and six (6) months terms in

prison on the first and second count respectively. He however, aggrieved by the conviction and sentence by the District Court, hence this appeal.

Being unrepresented, the appellant lodged four grounds petition of appeal. The grounds are as hereunder; -

1. **That the learned magistrate erred both at law and fact by deciding a case on incurable defective charge sheet.**
2. **That the learned magistrate erred both at law and fact by considering a traffic case as a criminal case.**
3. **That the trial court erred at law and fact by entering plea of guilty despite the plea being equivocal as it was not disclosed and explained to the accused all the ingredient or elements of the offence charged.**
4. **That the trial court erred at law and fact by convicting and sentencing the appellant on**

the case which was not proved beyond reasonable doubt as required by law.

When the appellant was called on for hearing, the appellant appeared in person; unrepresented whereas, the respondent Republic had the legal services of Ms. Marietha Magutta, the learned State Attorney to argue this appeal.

Arguing in support of the appeal, the appellant submitted that he has three grounds of appeal, he prayed for the court to adopt them and allow the appeal.

On her part, Ms. Magutta partly conceded to the appeal. She submitted that when the accused enters plea of guilty the law bars him to appeal unless on sentence only as per **section 360 (1)** of CPA. The case of **Laurent Mpinga vs Republic** [1983] TLR provides for the circumstances where the appeal on plea of guilty can be allowed. she further submitted that the grounds of appeal are basically on factors (evidence) not on sentence. Yet still in the second count there are no facts adduced explaining the offence. Thus, she prayed for the appellant's appeal be allowed on the second count.

As far as the first count she finds the plea was unequivocal and there was no need for the prosecution to adduce evidence. Thus, she supported conviction and sentence on the 1st count.

In rejoinder, the appellant said to have admitted before the court his names and particulars, but never admitted to have stolen diesel, battery and starter. He further submitted that if he could have stolen the said items how could he has driven the vehicle back to Mafinga.

I have keenly passed through the records of the District Court. I have as well read between the lines the appellant's grounds of appeal, his submission and that of Ms. Magutta.

First and foremost, as general rule, a person convicted of his own plea of guilty ordinarily, has no room in law, to appeal against such conviction of the offence to which he pleaded guilty. This is provided under **section 360(1) of the Criminal Procedure Act, CAP. 20** (henceforth the CPA). The said **subsection (1) of section 360 of the CPA** provides and I quoted as follows;

> **"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 statutory position has been upheld in a number of decided cases by this court as well by the Court of Appeal. There is exception to that general rule. There are instances whereby a person convicted of his own plea of guilty, appeal against the legality or extent of the custodial sentence imposed upon him. That's one. Two, he can as well appeal against a conviction which was founded on equivocal plea of guilty. That position is fortified by the decision in the case of **Juma Tumbilija & Two Others versus Republic**: [1998] TLR. 139 whereby it was *inter alia* held that:

"According to S. 360 of the Criminal Procedure Act 1985 an appeal against conviction upon a plea of guilty can only be competent after determining that the plea of guilty was not unequivocal"

(See also this court decision in the case of **Laurence Mpinga versus Republic** (1983) TLR 166).

Having such legal positions, I now find it desirable to examine closely what transpired in the District Court as reflected on the record. On 17/09/2021 when the charge was read over and explained to the accused who was asked to plead his plea was:

> "***ACCUSED'S PLEAS***
>
> ***1ST COUNT***
>
> *It is true.*
>
> ***2ND COUNT***
>
> *It is true.*

However, the trial magistrate did not enter a plea of guilty, instead thereafter facts of the offence were narrated to the accused who was asked to plead thereto. The reply by the appellant was recorded as hereunder;

> "***ACCUSED RESPONCE***
>
> ***Facts in respect of the names and address***
>
> *It is true.*
>
> ***Facts in respect of the first count:***

It is true

Facts in respect of the second count:

It is true

Thereafter, the exhibits a Motor Vehicle Registration Card, Vehicle Inspection Report and Information Sheet for Party's Address were tendered and admitted by the court as exhibits P1 collectively, however, the same were not read over to the accused person as per the requirement of the law.

Thereafter, the court find the accused guilty of the offences charged with and proceeded to convict him.

Such pleas, it is to be observed at once that it is to my mind, most unusual.

The issue to be resolved is whether the plea of guilty on which the conviction of the appellant rests unequivocal?

My starting point is **Section 228 of the Criminal Procedure Act, Cap. 20** (henceforth the CPA). The section provides for the procedures on how accused's plea should be taken and recorded. The section reads thus;

"If the accused 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 court of law as well gave guidelines on what to do before it proceeds to convict the accused on plea of guilty. In the case of **Republic versus Yonasani Egalu and Others** (1942) EACA 69 the predecessor East Africa Court of Appeal said; -

"In any case in which a conviction is likely to proceed on a plea of guilty, it must desirable not only that every constituent of the charge should be explained to the accused but that should be required to admit or deny every constituent and what he says should be recorded in a form that will satisfy an

appeal court that he fully understood the charge and pleaded guilty to every element if it is unequivocally."

Again, in the case of **Hando s/o Akunay versus Republic** [1951]18 EACA 307 the Court held that; -

"Before convicting on a plea of guilty every ingredient of the offence must be explained to the accused and asked to plead. Otherwise, the conviction would be faulted."

The procedures of taking and recording accused plea were also laid down in the case of **Adan versus Republic** [1973] EA 445 where the Court held thus; -

"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 formally 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 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." [Underlines added]

When the charge was read over to the accused/appellant and asked to plead he stated that the it is true in respect of the first and second count, however, as hinted above the trial magistrate did not enter formal plea of guilty. To my view, failure by the trial magistrate to enter plea of guilty and proceeded to record facts is fatal. It is wrong to treat that there was admission of facts by the appellant/accused as while the plea was imperfect, ambiguous and unfinished. (See; the decision in the case of **Laurent Mpinga versus Republic** [1983] TLR 166).

It is very clear that the appellant was charged with the offences of theft and conversion and upon his admission of the facts adduced he was convicted on his own plea of guilty. A crucial issue for my

determination is whether or not, given the set of facts narrated by the prosecution and the principles of law elucidated above, the appellant's plea could be taken to be unequivocal.

To respond the question above, let us look the contents of the charge. The substance of the charge was that the appellant stole six hundred and sixty diesel fuel worth TZS 980,000/=, Two (2) N. 150 battery worth TZS 1,000,000/=, One (1) sharter motor worth 1,000,000/= in the said car all items valued at Tshs. 2,980,000/= the properties of Qwihaya General Enterprises Co. Limited of Mafinga. The duty of the prosecution was to adduce facts supporting the charge to which the accused was to be required to admit or deny. It was expected for the prosecution to lead facts proving the offence of theft of the things outlined in the charge as well the offence of conversion.

In the instant case and on the adduced facts as appear from the records, it is very clear that the facts adduced fell far short of proving that the appellant stole the things outlined in the charge as well the offence of conversion of the motor vehicle. In short, the facts purported to support the charge was "*copy* and *paste*" from the

particulars of offence as narrated in the charge. I can say with strong conviction that the facts narrated by the prosecution to support the charge did not establish all the elements of the two offences as laid in the charge. In the absence of those facts which were necessary for establishing the offences charged, the appellant's plea of guilty cannot taken to have been a plea of guilty, the facts did not disclose any offence, thus cannot stand.

In addition, the charge sheet is vague, thus defective in respect of the first count as failed to describe what is six hundred and sixty (660) diesel fuel, I think they meant litres! Also, the particulars of offence read sharter motor instead of starter motor. For these reasons, the trial court erred to find it as a plea of guilty. The conviction cannot, therefore stand. The same is hereby quashed and the sentence is set aside.

For the foregoing reasons, I allow the appeal, and for the interest of justice and in the circumstances of this case, I find an order for retrial is not preferable; instead, I order immediate release of the appellant **Elisha Msangawale** from prison forthwith unless otherwise he is held on some other lawful cause.

It is so ordered.

D.B. NDUNGURU
JUDGE
15.07.2022