

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPEAL NO. 84 OF 2021

(Arising from Criminal Case No. 380 of 2021 before the District Court of Bagamoyo at
Bagamoyo, Mbafu, RM)

HAMIS KHALFAN JUMAAPPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 10/8/2022

Date of Judgment: 31/8/2022

MASABO, J.:-

The appellant together with 6 persons identified as Ethiopian citizens (not part to this appeal), were jointly charged before the trial court, the district court of Bagamoyo. His six co-accused were charged of the offence of unlawful presence in the United Republic of Tanzania contrary to section 45(1)(i) and (2) of the Immigration Act [Cap 54 RE 2016] and he was charged of transporting illegal migrants contrary to section 46(1) (c), (g) and (2) of the same Act. Upon his own plea of guilty he was sentenced to pay fine to a tune of Tshs 20,000,000/= or in the alternative, serve a jail term of 20 years.

Aggrieved, he is now before this court challenging the conviction and the sentence on the ground that his conviction was based on an equivocal plea.

At the viva voce hearing of the appeal, the appellant was represented by Abdul Kunambi, learned counsel whereas the respondent was represented by Ms. Sofa Bimbiga, learned State Attorney. Submitting in support of the appeal, Mr. Kunambi argued that the plea of guilty was equivocal because the procedure for recording a plea of guilty as set out in **Adan v R** [1973] EA 445 was not followed. Exemplifying the procedure, he submitted that the law requires that, *first*, the charges should be read over to the accused person and the court should record that. Then, the accused can proceed to enter a plea of guilty after which the facts will be read out and explained loudly and he will then be given an opportunity to admit them or dispute them, a procedure which was not followed by the trial court. *Second*, the plea is equivocal as the accused is recorded to have said "it is true I transport immigrants illegally". *Third*, the facts purportedly read over to the accused do not constitute the offence he was charged with as they do not show that there was transportation of illegal immigrants.

Objecting the reasoning by Mr. Kunambi, Ms. Bimbiga submitted that all the procedures were followed to the latter, The charge sheet was read over and explained to the appellant who admitted that he was transporting immigrants illegally. In addition, she argued that his mitigation during the sentence demonstrates that he understood the charges against him and he repented. She then cited the provision of section 360 of the Criminal Procedure Act [Cap 20 RE 2019] and the decision of the Court of Appeal in **Njile Samwel John v R**, Crim. Appeal No. 11 of 2018 and argued the court to dismiss the appeal on ground that a conviction on own plea of guilty is non appealable.

In rejoinder Mr. Kunambi reiterated that the plea was equivocal and cited the case of **Abdallah Jumanne Kambagwa v R**, Criminal Appeal No. 321 of 2017.

I have dispassionately considered the grounds of appeal and the submission by the learned counsel. The question for determination is whether the plea entered by the appellant was equivocal and if so, whether his conviction and sentence can be sustained. At the heart of these two questions is the provision of section 360(1) of the Criminal Procedure Act which bars appeals

from convictions based on the accused's own plea of guilty. The scope of this rule was well expounded in **Laurence Mpinga v Republic** [1983] TLR 166 where it was emphatically stated that, no appeal shall lie against a conviction on own plea of guilty save where the plea was imperfect, **ambiguous** or unfinished; the plea of guilty was premised on a mistake or misapprehension; the charge laid against the appellant disclosed no offence known to law; or that upon the admitted facts he could not in law have been convicted of the offence charged (Also see; **Josephat James v R**; Criminal Appeal No. 316 of 2010 and **Frank Mlukya v R** (supra)). An appeal challenging the legality of conviction on own plea of guilty would certainly fail if none of the special circumstances expounded in the above authorities is espoused.

The appellant in the preset case does not dispute to have made the plea. His lamentation is that, the plea he purportedly made was equivocal and in support, he has cited the case of **Adan v Republic** (supra). In this case, the East African Court of Appeal provided guidelines on how an unequivocal plea can be derived when it states thus:-

"When a person is charged, the charge and 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 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 to 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 guilty, the magistrate should record the change of plea to "**not guilty**" and proceed to hold a trial. If the accused person 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. Statement of facts and the accused's reply must, of course, be recorded..." (emphasis mine)

This finding was cementing a previous finding by the same court in **Rex v Yonasani Egalu and Others** (1942) EACA 65 at Page 67 where it stated thus:

In any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appellate court that he fully understood the charge and pleaded guilty to every element of it unequivocally (cited as cited by the Court of Appeal of Tanzania in **John Faya v Republic**, Criminal Appeal No. 198 of 2007)

In the present case, the charges were read over to the accused person after they were arraigned in court on 2nd December 2020. What transpired in court is as demonstrated in the following extract from page 1 and 2 of the word-processed proceedings of the trial court:

CORAM: B.E.Mbafu RM

PROS: Fadhili Festo for Immigration

CC: Rehema

Accused: All present

Pros: For Plea Taking, I have an interpreter:

Interpreter: Tegab Daniel, Adult, Christian, He is conversant with Ethiopian language and the language of the court. He is sworn to discharge the duty of an interpreter.

COURT: Charge read over and explained to accused person who are all asked to plead thereto:-

1st Count

1st -6th Accused Person "it is true we enter into Tanzania without any permit which allow us to enter and stay".

2nd count:

7th accused person "it is true I transport immigrant illegally"

Court: Plea of guilty is entered against all accused person in respect of both counts.

Signed B.E. Mbafu

DRM

02/12/2020

Pros: facts are ready

FACTS OF THE CASE:

1st to 6th accused persons are Ethiopians by citizenship and the 7th accused person is a Tanzanian by citizen. That on 27th day of November

2020 around 11:00 hours 1st to 6th accused persons were found at Msata Mizani area within Bagamoyo District in Coast Region. They were arrested and after being interrogated by immigration officials each accused person admitted enter into the United Republic of Tanzania illegality without any passport or visa. And the 7th accused person on the material day at around 11:000 hours he was found at Msata Mizani area transporting illegal one of the six immigrant. After that discovery they decide to brought to this court to answer their case.

1st -7th accused persons- We admit all facts as read over by the prosecutor.

Signed B.E. Mbafu

DRM

02/12/2020

Based on these facts, conviction was entered against all the accused persons. When the principle expounded in the above cited authorities is applied to the extracts above, the shortcoming in the becomes conspicuous in numerous ways. **First**, contrary to the requirement of the law, the proceedings are silent on the language on which the charges were read out and whether the said language was understood by the appellant. As the

proceedings vividly demonstrate the first 6 accused persons were Ethiopians, the accused was a Tanzanian and there was an interpreter presumably brought to interpret for the 1st to 6th accused person. As per the record, the interpreter was conversant with 'Ethiopian and the language of the court'. Thus, even if it was to be assumed that the charges were read in the "language of the court" and not "Ethiopian", it remains unclear whether "the language" was understood by the appellant. Hence, it can not be told with precision that the appellant understood the charges read out to him.

Second, apart from being an 'omnibus plea', the plea entered by the court after the charges were read over to the accused and after they had made their plea, that is, "Plea of guilty is entered against all accused persons in respect of both counts" is in itself ambiguous as it presupposes that all the accused persons were jointly charged in the two counts and they all entered plea of guilty in both charges which is not the case. As demonstrated earlier on, the first six accused persons were charged on the first count and the appellant was separately charged on the second count of transporting immigrants illegally.

Third, contrary to the requirement that the accused be called upon to admit to the facts of the case after they are read over to him by the prosecution, the proceedings in the current appeal, does not suggest that after the facts were read out each of the accused person was given an opportunity to dispute or to explain the facts or to add any relevant facts. The reply that "*we admit all facts as read over by the prosecutor*" leaves a lot to be desired. As there were seven accused persons and the appellant was charged on a separate count, it was crucial for the appellant and each of the accused person to be given an opportunity to admit or dispute the charges against him and not to lump the comment/admission as done by the trial court.

In the foregoing, I am compelled to state that the procedure adopted by the magistrate was improper as it did not comply with procedure stated in the cited case. Thus, on the face of record, the appellant's plea was ambiguous and could not lead the magistrate to record the plea of guilty and proceed to convict and sentence him. I am further fortified in my finding by the decision of the Court of Appeal in **Baraka Lazaro v R, Criminal Appeal No. 24 of 2016** where it underscored that:

Where a conviction proceeds on a plea of guilty, we have in mind what was stated in the case of **Yonasan Egalu and 30 others v Rex** (1942-1943) IX-X-E.A.C.A 65. It was held in that case as follows: -

“That in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable that not only that every constituent of the charge should be explained to the accused, but that he should be required to admit to or deny every constituent and that what he says should be recorded in a form which will satisfy an appellate court that he fully understood the charge and pleaded guilty to every element of it unequivocally.” (see **Abdallah Jumanne Kambangwa v R** (supra))

As that was not done, I agree with Mr. Kunambi that the appellant's lamentation that his plea was equivocal merits and I allow it. Accordingly, I allow the appeal, quash the conviction and set aside the appellants' sentence. I further order an immediate release of the appellant from prison unless he is detained for some other lawful cause.

DATED at DAR ES SALAAM this 31st day of August 2022.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

31/08/2022

Judgment delivered remotely via virtual court this 31st day of August 2022 in the presence of the appellant and his counsel, Mr. Abdul Kunambi, and in the absence of the Respondent.

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

31/08/2022

