

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC. CRIMINAL APPEAL NO. 24 OF 2022

(Originating from the District Court of Mbinga in Economic Case No. 03 of 2021)

JOSEPH CASIAN NDUGURU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 12/09/2022

Date of Judgement: 28/09/2022

U.E MADEHA, J.

The Appellant, Joseph Casian Ndunguru was arraigned before the District Court of Mbinga for three (03) counts concerning the offence of unlawful possession of Government trophies. All the counts were contrary to *sections 86 (1)(2)(c) (iii) of Wildlife Conservation Act No. 5 of 2009 as amended by Section 59(a) and (b) of the Written Law (Miscellaneous Amendment) (No.2) Act No. 4 of 2016 read together with paragraph 14 of the first schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act. [Cap 200 Revised Edition 2019] as amended.*

Fortunately, the Appellant pleaded guilty to all the three counts hence on 4th day of July 2022 he was convicted and sentenced to serve

twenty (20) years imprisonment for each count where by the sentence is to run concurrently. Consequently, he became aggrieved with both conviction and sentence thus he lodged this first (1st) appeal basing on two (02) grounds of complaints. For easy reference I have reproduce them as follows:

1. *That, the Trial Court erroneously convicted and sentenced the Appellant on the equivocal plea of guilty, as the same was imperfect and unfinished.*
2. *That, the Trial Court erred in law by convicting and sentencing the Appellant un-procedurally.*

During hearing of the appeal, the Appellant was represented by Mr. Moses Ndunguru a Learned Advocate whereas Ms. Generosa Montana a Learned State Attorney appeared for the Respondent, Republic.

In addressing the first ground, Mr. Moses submitted that the District Court was wrong to convict the Appellant because his plea of guilty was equivocal. He made reference to *section 228 of the Criminal Procedure Act [Cap 20 Revised Edition 2022]* which elaborates the procedures to be taken in case an accused person pleads guilty. Moreover, Mr. Moses cited the case of **Adan v. Republic** (1973) 1 EA 445 Court of Appeal at Nairobi (CAN) whereby the Court explained the procedure which a trial

Magistrate must follow once the accused pleads guilty to a charge. That it was stated that:

"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 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 entered a plea of guilty, the magistrate should then ask the prosecutor to state the facts of the alleged offence and when the statement is complete, should give the accused person the opportunity to dispute or to explain the facts or to add any relevant facts. If the accused does not agree with the statement of the facts or assert the additional facts which, if true, might raise a question as to his guilt, the Magistrate should record a change to of plea to 'not guilty' and proceed to hold a trial..."

Regarding the question of procedural irregularity, Mr. Moses stated that the Magistrate did not explain the contents of the charge sheet to the Appellant (accused) in a language that he could understand. To back up his proposition he implored this Court to make reference to the case

of **Gefrey Kenedy @ George v. Republic** Criminal Appeal No. 115 of 2020 Court of Appeal of Tanzania at Bukoba, (unreported). Additionally, he cited the case of **Charles Sammweli Mbise v. The Republic** Criminal Appeal No. 355 of 2019 Court of Appeal of Tanzania at Iringa (unreported) where it was insisted that before conviction of an accused on a plea of guilty the Court has to confirm that he understood the charge.

Another illegality argued by Mr. Moses was that the essential ingredients of the charge was not explained to the Appellant as seen in page 8 of the trial Court proceedings. To fortify his point Mr. Moses, prayed to cite the case of **Michael Adrian Chaki v. Republic** Criminal Appeal No. 339 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported) where the Court in restating conditions for a valid conviction under an unequivocal plea stated among other that;

"The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged, and the same must be properly recorded and must be clear..."

He argued that, looking through the trial Courts records the ingredients were not explained to the Appellant. The Appellant never pleaded guilty to every ingredient as per the requirement of the law.

Thus, he claimed that under circumstances the plea of guilty was unequivocal.

Moreover, Mr. Moses contended that the punishment was not made clear to the Appellant before he was asked to plead. To verify his point, he referred this Court to the case of **Geofly Kenedy** (*Supra*) wherein it was stated inter alia that:

"It is, therefore, apparent that the Court must insure that not only does the accused understand the ingredients of an offence which he is charged at all the stages of the plea taken but that he also understands the sentence he faces when he opted to plead guilty."

The Counsel asserted on the basis of the records at the Trial Court the sentence was not made clear to the Appellant while twenty (20) years sentence was obviously was a heavy sentence. To cement his argument, the Counsel made reference to the case of **Maiko Adrian Chaki** (*Supra*) where the Court laid six (06) conditions for a plea of guilty to be equivocal.

Moreso, he averred that though from the record the Appellant pleaded guilty but his plea was not clear as he raised the defense that

he used government trophies as a witch doctor. That under the circumstances the Trial Court was required to change the plea.

In regard to the second (02) ground of appeal that the trial Court erred in law by convicting and sentencing the Appellant unprocedural. Mr. Moses submitted that when the case was heard, procedure was not properly followed due to the following reasons; - **Firstly**, the charge sheet was not read to the Appellant in his own language that he could understand. **Secondly**, the essential ingredients of the offence were not explained to the accused. **Thirdly**, the records of the trial Court do not show that the documents which were tendered in Court by the prosecution were read to the Appellant. Additionally, if they were read over, the particulars of the trophy that is the valuation report did not show the photographs of the trophies identified if he was found with such trophies.

Finally, Mr. Ndunguru argued that when the Appellant asserted for the second time that he was found with such government trophies because he was a witchdoctor hence used them in his office, he had changed his plea to not guilty and the trial Court was to record that change instead it proceeded to convict and sentence him illegally. He

prayed the Court to be pleased to dismiss the proceedings, verdict and sentence of the trial Court while the Appellant to be set free.

On the contrary, Ms. Generosa supported the Appellant's conviction by stating that he was rightly convicted. That the Court confirmed that the Appellant committed the alleged offence since he admitted the offence. She strongly contended that, the Appellant's plea of guilty was unequivocal and all the procedures of convicting him were followed.

She stated that Appellant's Learned Advocate argued that the essential ingredients of the charge were not clearly explained to the Appellant. Ms. Generosa submitted that such argument was not genuine because, as seen at page 13 of the typed proceedings the Appellant stated that all facts read by prosecution are true and correct that he was found with government trophies because he was a witch doctor and that he was using them in his office.

To substantiate her point, Ms. Generosa referred this Court to the case of **Karlos Punda v. The Republic**, Criminal Appeal No.153 of 2005 Court of Appeal of Tanzania at Mtwara No. 153 of 2005 (unreported) where the Court was of the settled view that the Appellant's plea was unequivocal because he accepted the facts as read

by the prosecution to be true. Ms. Generosa further reasoned that the fact that the accused admitted all the facts by the prosecution and offered an additional explanation that he is a witch doctor and used the trophies in his office shows that he understood the charge against him and the same was a continued explanation of his plea of guilty and not a defence.

Additionally, she averred that as seen in page 8 of the typed proceeding the words spoken by the Appellant were in Kiswahili language this proves that the charge was explained to the Appellant in the language which he understands. In that regard, she asserted that the Appellant understood the nature of the charge that's why he pleaded guilty hence his plea was unequivocal.

Concerning the issue of exhibits which were not read before the Court, Ms Generosa stated that such is not a requirement of law the plea of guilty was enough to convict the Appellant. About the photographs which were not shown to the Appellant, Ms Generosa averred that the same was required to be shown if there was an objection. Eventually, she prayed that this appeal be dismissed.

In rejoinder submissions, Mr. Moses resisted the Respondent Counsel submission he clarified that Swahili language was not used to

read the charge but to reply the charge. Therefore, it was his humble submission that the language which the trial Court used in reading the charge is based on the assumption. Thus, he maintained that the charge sheet was read but it was not explained to the Appellant.

The Counsel reiterated that the Appellant did not understand the charge against him. As a matter of fact, he thoroughly elaborated that the ingredients of the offence were not well communicated to the Appellant. In the end he prayed that the appeal be allowed.

Having studied the grounds of appeal plus submissions from both sides it is my considered view that the main issue capable of disposing of this appeal is; whether the plea of guilty by the Appellant herein was equivocal or unequivocal?

Principally, a person convicted of an offence on his own plea of guilty cannot appeal against that conviction. He can however appeal on the extent or legality of the sentence imposed. Reference to this may be made to *section 360(1) of Criminal Procedure Act [Cap 20 Revised Edition 2022]*. Also, in the case of **Alfani Mlaponi and Another v. Republic** [1990] TLR 104 the Court held that:

"There can be no appeal against conviction on a plea of guilty."

However, further advancement by the Court on the law on the plea of guilty has revealed that a plea of guilty may be successfully challenged via an appeal where it proves to be ambiguous, imperfect or unfinished, the Appellant pleaded guilty as a result of a mistake or misapprehension, that in consideration to the admitted facts the Appellant could not have been convicted of the offence charged, in a nut shell where the plea is equivocal. This has been stated in several cases such as **Lawrence Mpinga v. Republic** [1983] TLR 166, **Karlos Punda** (*supra*).

Furthermore, Courts have pronounced conditions which must exist simultaneously in order for a conviction on an unequivocal plea of guilty to be declared valid. Reference to this may be made at pages seven (7), eight (8) and nine (9) of the judgement in the case of **Michael Adrian Chaki** (*supra*).

Reverting to the case at hand, a keen observation of the proceedings which reflect what transpired in the Trial Court does in my view suggests that the plea of guilty by the Appellant was invalidly unequivocal. That it was equivocal as rightly argued by the Counsel for the Appellant. This is due to the following reasons:

Although the Appellant was arraigned on a proper charge, which constituted three offence both concerning unlawful possession of government trophy whereby the offences, sections and the particulars thereof were properly framed hence disclosed the offence of unlawful possession of government trophies. Nevertheless, from the records it is doubtful as to whether the Appellant did properly understand what he was charged with.

It is evident in page 8 of the typed proceeding that the Appellant admitted '*Ni kweli*' for each of the count, but the proceeding is silent as to what/ which language the charge was read, whether the charge was explained in a language he understands, whether the Appellant was fully aware of what he was admitting. All this is merely a guess work as argued by the Counsel for the Appellant. It is my considered view that the fact that the Appellant replied the same in Kiswahili does not absolutely suffice a conclusion that he could fully comprehend what the Court read to him as such there remain doubts on this aspect.

Again, the law under *section 228 of the Criminal Procedure Act (supra)* requires the Court to explain to the Accused person before he or she is asked to plea the substance of the charge. Looking through the

record in the present case it is doubtful as to whether this requirement was met.

Also going by the record, it is not certain as to whether the Appellant was asked to plead guilty to each and every ingredient of the offence of unlawful possession of government trophies and thus admitted the facts of the case which discloses all the elements of the offence. At page 13 of the typed proceedings, it is evident that he admitted all the facts narrated by the prosecution in a general sense plus an additional reservation.

Additionally, owing to the nature of the offence the Court ought to have explained to the Appellant the punishment thereto. Reference to this may be made from the case of **Jonas Ngolida v. Republic**, Criminal Appeal No. 351 of 2017 which was cited with approval at pages four and five in the case of **Geoffrey Kennedy** (*supra*) where the Court stated that:

*"From the case of **Jonas Ngolida**, (*supra*) it is clear that the trial Court has the duty to explain to the accused not only the ingredients of the offence but also the punishment that is to follow should the accused person be convicted"*

Basing on the foregoing, it is my considered view point, that under the surrounding circumstances of this case the plea of guilty by the Appellant was equivocal, it denied him a fair consideration of his case due to the pointed irregularities.

Henceforth, for the sake of justice, I allow the appeal, quash the conviction and set aside the sentence of twenty (20) years imprisonment imposed against the Appellant. I proceed to order that the record of the Trial Court be remitted back to the Trial Court for it to deal with the Appellant as if he pleaded not guilty, meaning the trial court has to proceed with the case from where it had ended before the Appellant purportedly pleaded guilty. Simply, the Trial Court has to conduct the preliminary hearing and proceed with the trial. Taking into consideration the time the Appellant has spent in prison I direct immediate commencement of his trial.

DATED at SONGEA this 28th Day of September 2022



U.E. MADEHA

JUDGE

28/09/2022