

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC CRIMINAL APPEAL NO. 31 OF 2022

*(Originating from Criminal Case No. 107 of 2021, Namtumbo District Court at
Namtumbo)*

HAMISI ALICE MAULIDI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 03/10/2022
Date of Judgement: 07/10/2022

MLYAMBINA, J.

The Appellant was arraigned and convicted before the District Court of Namtumbo at Namtumbo (hence forth the Trial Court) for the offence of stealing by agent contrary to *section 273 (b) of the Penal Code [Cap 16 Revised Edition 2019]*. Upon conviction, he was sentenced to serve ten years imprisonment. The Appellant was aggrieved with both conviction and sentence; hence he filed his petition of appeal containing four grounds of appeal, namely:

1. That, the Trial Court erred in law and fact for convicting the Accused relying on his plea of guilt while the Accused plea was equivocal.

2. That, the Trial Court erred in law and fact to convict the Appellant basing on his plea of guilt while it is obvious that the words "it is true" when used by an Accused person may not necessarily, amount to a plea of guilty particularly when the offence is technical one.
3. That, the Trial Court erred in law and procedure due to the fact that the Appellant was sentenced without being convicted as per *section 312 of the Criminal Procedure Act [Cap 20 Revised Edition 2019]*.
4. That, the trial proceeding is defective as the prepared memorandum of agreed facts were not read before the Accused person signed. This defect is fatal as the Accused was prejudiced due to the fact that he failed to understand the offence which was stated in technical terms.

This appeal was heard orally. At the date scheduled for the hearing, the Appellant appeared in person unrepresented while Mr. Hebel Kihaka learned Senior State Attorney appeared for the Respondent, the Republic. As per the Court record, out of the public

eyes on different dates between November and December 2021 at Amani Village, Ms. Hawa Said Chilimba intrusted the Appellant herein and gave him some of money worth TZs 2,315,000/= (Two Million Three Hundred and Fifteen Thousand Tanzania Shillings) to buy paddy on her behalf. But he used the money for his own benefits.

The Appellant was arrested on 10th December, 2021. During the interrogation, the Appellant confessed to commit the offence. He further pleaded guilty before the trial Court hence he was convicted for his own plea of guilty. The Appellant was aggrieved with the conviction and sentence of ten (10) years imprisonment imposed to him, hence this appeal.

As regard to the first and second grounds of appeal, the Appellant averred that, the trial Court convicted him based on the plea of guilty which was equivocal. The Appellant conceded to have been entrusted TZs 2,315, 000/= for purchasing 27 bags of paddy. He talked to the complainant and he started to repay back the money. It was the view of the Appellant that he was convicted on civil case.

In reply, Mr. Hebel Kihaka started by supporting the conviction entered against the Appellant because the Appellant plea was in accordance to the law. According to Mr. Kihaka, the plea on both charge and facts was legal. Mr. Hebel Kihaka insisted that; *section 360 (1) of*

the Criminal Procedure Act [Cap 20 Revised Edition 2019] prohibit the appeal preceded from the conviction based on plea of guilty except to the extent and legality of sentence. Mr. Hebel Kihaka referred this Court at page 2 of the proceedings where the Appellant confessed to have been intrusted with the money afore mentioned. But he used the money for his own benefit instead of purchasing 27 sacks of paddy. He therefore prayed for this Court to find that the first and second grounds of appeal are of no merit.

Prior to the determination of the first and second grounds of appeal, it is pertinent to highlight the provision of *section 360 (1) of the Criminal Procedure Act [Cap 20 Revised Edition 2022]* in which the Appellant was charged. For easy of reference, *section 360 (1)* provides:

360.-(1) an appeal shall not 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.

From the quoted provision of the law, it is crystal clear that the law prohibits the appeal which is grounded from a conviction based on Appellant's plea of guilty before the trial Court. But there are circumstances where the Appellant who was convicted for his own plea of guilty can appeal as per *section 360 (1) of the Criminal Procedure Act*

(*supra*). There is *plethora* of decision in which the Court of law reiterated what has been provided by the law. The Court while interpreting the afore mentioned section, provides the circumstances in which the Appellant who was convicted on his own plea of guilty can appeal. To mention the few, the case of **Michael Adrian Chaki v. The Republic**, Criminal Appeal No. 399 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported), the case of **Laurent Mpinga v. The Republic** [1983] TLR 166, the case of **Karlos Punda v. The Republic**, Criminal Appeal 153 of 2005, Court of Appeal of Tanzania at Mtwara. In the last-mentioned case of **Karlos Punda's case** (*supra*) the Court of Appeal outlined the circumstances in which the Appellant who was convicted in his own plea of guilty can appeal on the conviction entered against him, thus:

1. That, even taking into consideration the admitted facts, the 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, the Appellant pleaded guilty as a result of mistake or misapprehension;
3. That, the charge laid at the Appellant's door disclosed no offence known to law; and

4. That, upon the admitted facts the Appellant could not in law have been convicted of the offence charged.

After scrutinizing the above mentioned criteria, this Court is of the findings that the plea of the Accused person cannot be considered as plea of guilty unless it passes the followings test cumulatively: *First*, the Accused person must have been charged properly, means the offence, section and particulars has to be properly framed. *Second*, it is upon the Court in its satisfaction that the Accused was placed in a situation in which he clearly understood the nature of offence faced him. *Third*, the charge and its ingredients of offence facing him was expressly explained before he was asked to plea there to. *Forth*, the facts which was read disclosed all elements of the offence. *Fifth*, each ingredient of the offence has to be pleaded and recorded clear and separately and *Sixth*, the facts have to disclose all the element of the offence charged against the Accused. See the case of **Michael Adrian Chaki** (*supra*).

It is the finding of this Court that the Appellant plea of guilty which was recorded by the trial Court has passed all the test analysed above except for the fifth test. It is evident that the Appellant was given an opportunity to plea each ingredient read to him. Thereafter, the Accused pleaded:

"All facts stated by the Public Prosecutor are true and correct"

The Court of appeal in the case of **Michael Adrian Chaki** (*supra*) insisted that each and every particular of the offence has to be explained to the Accused and the Court has to record clearly to the extent that the appellate Court would understand.

I therefore agree with Mr. Hebel Kihaka's submission that the Appellant plea on both charge and facts was legal. Therefore, the Appellant plea of guilty was unequivocal.

Coming to the third ground, the Appellant submitted that, he was sentenced without being convicted. In opposite Mr. Hebel Kihaka opposed and stated that the proceedings reveal the Appellant was convicted based on his own plea of guilty under the provision of *section 228 (2) of the Criminal Procedure Act (supra)*. He added that; the appeal based on plea can be successful only if the extent and legality of sentence is questionable. He supported his argument with the case of **Lawrence Mpinga** (*supra*) where the Court listed four grounds in which the Appellant convicted on plea can appeal. Also, the case of **Carlos Punda** (*supra*) at page 8.

Furthermore, Mr. Hebel Kihaka went further and insisted that; based on *section 360 of the Criminal Procedure Act (supra)*, the charge

and the plea of the Accused was proper under the law. He backed up his assertion with the provision of *section 273 of the Penal code [Cap 16 Revised Edition 2019]*.

As rightly as stated by Mr. Hebel Kihaka, under the provision of *section 360 (1) of the Criminal Procedure Act (supra)*, the appeal on conviction based on plea can be successful only if the extent and legality of sentence is questionable. But in the case at hand, the plea of the Accused person (the Appellant herein) was unequivocal capable to ground a legal conviction as argued in the first and second grounds. This was also a position in the case of **Samson Marco and Another v. The Republic**, Criminal Appeal No. 446 of 2016, Court of Appeal of Tanzania at Mwanza at page 16 (unreported).

On the fourth ground, the Appellant complained that the memorandum of agreed fact was not read to him but compelled to sign. Unfortunately, Mr. Hebel Kihaka did not submit on the last ground of appeal. *Section 282 of the Criminal Procedure Act (supra)* provides on what to do when the Accused person plead guilty. I quote it hereinafter for easy of reference:

Where the Accused person pleads "guilty", the plea shall be recorded and he may be convicted thereon.

The provision quoted above do not provide for the procedure on what has to be the next step but it only empowers the Court to convict the Accused following plea of the Accused. The Court of Appeal sitting at Tabora in the case of **Joseph Mhona @ Joseph Mboje @ Majembe Mboje v. The Republic**, Criminal Appeal No. 541 of 2015 was encountered with the same situation. In this case, the Court quoted with approval the case of **Adan v. Republic** (1973), EA 445 at 446, where the Court analysed the stages to be followed after the Accused pleads guilty to the charge laid against him:

1. The charge and all the ingredients of the offence should be explained to the Accused in his language or in a language he understands.
2. The Accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
3. The prosecution should then immediately state the facts and the Accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

4. If the Accused does not agree with the facts or raised any question of his guilty, his reply must be recorded and change of plea entered.
5. If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the Accused's reply should be recorded.

From the quoted passage, there is no any stage which provides for the memorandum of agreed facts either to be recorded or to be read as party of the procedure required to be followed after the Accused plead guilty to the charge. For those reasons, the third ground of appeal has no merit.

Notwithstanding the above arguments in relation to the Appellant grounds of appeal, Mr. Hebel Kihaka while replying the Appellant submission in chief, he revealed that the sentence imposed to the Appellant was not proper taking into consideration that the Accused was the first offender and he pleaded guilty from the beginning.

The Appellant was charged with the offence of stealing by agent contrary to *section 273 (b) of the Penal Code (supra)*. When the Accused is found guilty and convicted under the aforementioned section, according to *section 273 of the Penal Code (supra)*, has to serve ten

(10) years imprisonment. That is a statutory punishment. But before the Trial Magistrate sentenced the Accused person before him, he has to take into consideration the aggravating and mitigating factors. If the Accused has pleaded guilty to the offence, the Trial Magistrate has to take into consideration and reduce the sentence. See the case of **Republic v. Frank Mashaka**, Criminal Session No. 46 of 2020, High Court of Tanzania at Babati (unreported) at page 4. Failure to reduce the sentence to the Accused who pleaded guilty to the offence, the Trial Magistrate has to state the reason for his denial. This was the position in the case of **Silvanus Leonard Nguruwe v. The Republic** [1982] TLR 66.

In the premises, having found that the Accused plea of guilty was unequivocal, the conviction was lawful and the sentence imposed upon him is set aside and substituted with a conditional discharge. For justice to be seen done, the Appellant is ordered to pay the remaining balance of TZs 2,115,000/= (Two Million One Hundred and Fifteen Thousand Tanzanian Shillings) within two weeks from the date of this order. Henceforth, the appeal is hereby partly allowed. The Appellant be released from custody unless he is confined legally for other lawful cause.

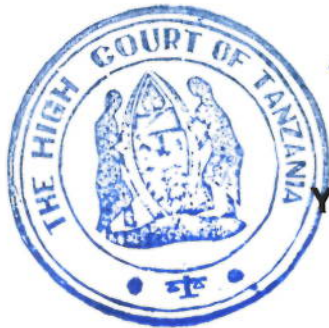


Y. J. MLYAMBINA

JUDGE

07/10/2022

Judgement pronounced and dated 7th October, 2022 in the presence of the Appellant and learned Senior State Attorney Hebel Kihaka for the Republic. Right of Appeal fully explained.



Y. J. MLYAMBINA

JUDGE

07/10/2022