

**IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA**

DC. CRIMINAL APPEAL NO.107 OF 2021

AYUB GEORGE SIMWANZA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT
(Originating from Kalambo District Court Economic Case No. 4 of 2021)

JUDGMENT

Date of Last Order: 28/09/2022

Date of Judgement: 27/10/2022

NDUNGURU, J:

At Kalambo District Court (henceforth the District Trial Court), an accused person, now appellant namely Ayub George @ Simwanza was charged with two counts, one count in respect of unlawful possession of fire arms without license contrary to section 20 (1) (a) and (2) of the Firearms and Ammunition Control Act No. 2 of 2015 read together with paragraph 31 of the first Schedule to section 57 (1) and 60 (2) Economic and Organised Crime Control Act Cap 200 RE 2019. Second count with respect to unlawful possession of ammunition without license contrary to section 21 (a) of the Firearms and Ammunition Control Act No. 2 of 2015

read together with paragraph 31 of the first Schedule to section 57 (1) and 60 (2) of Economic and Organised Control Act, Cap 200 RE 2019.

According to the records of this appeal, he was found guilty of the said offence, convicted on his own plea of guilty and subsequently he was sentenced to serve twenty (20) years terms in prison in respect each count. The sentence was to run concurrently. However, he aggrieved by the conviction and sentence imposed by the District Trial Court, hence this appeal.

In his petition of appeal, the appellant fielded four (4) grounds of appeal as hereunder quoted; -

- 1. That the trial magistrate erred in law and facts to convict and sentence the appellant on equivocal plea.*
- 2. That, the trial court erred in law and fact to convict and sentence the appellant relying on plea of guilty of the appellant while he was not cautioned.*
- 3. That the trial magistrate erred in law and fact by convicting and sentence the appellant without considering the charge and plea*
- 4. That, the trial magistrate erred in law and facts for convicting and sentence the appellant contrary to the law and without following proper procedures.*

Having read his grounds of appeal I found, in brief his complaint hinge on one ground that he was convicted on equivocal plea of guilty.

When the appeal was called on for hearing, the appellant was represented by Ms Tunu Mahundi, learned advocate; 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, Ms. Mahundi prayed first for the grounds of appeal be adopted as part of submission. Ms. Mahundi submitted that it is the legal requirement that if the accused pleads guilty, his plea must be equivocal. In the case at hand when the appellant pleaded guilty his plea is equivocal. The wording of the appellant does not show that his plea was unequivocal. Even the facts adduced did not show that the accused understood the elements constituting the offence he was charged with. That the accused was required to understand the charge and the facts had to clarify the offence. That was not done. She referenced the case of **Abdallah Juma vs Republic**, Criminal Appeal No. 321 of 2017, HC, unreported where the court ordered retrial as the plea was equivocal.

As to the second ground, Ms Mahundi submitted that after plea of guilty the accused was explained in detail his offence the record does not

show if the court explained to him on his offence thus the appellant did not understand what he was pleading.

In the fourth ground, it was her submission that following the plea the court proceeded to adduce facts and then the accused was given opportunity to state but what is found in the wording is typical legal wording of the appellant. further, it had to be shown that the accused had pleaded guilty under section 228 of Criminal Procedure Code, Cap 33 RE 2019. She concluded that the court did not adhere to law and procedure. She prayed for the appeal be allowed.

In reply, Ms. Magutta, submitted that **Section 360 (1) of the Criminal Procedure Act, CAP. 20** (henceforth the CPA) does not allow appeal on the offence where the accused pleaded guilty except on the legality of sentence. However, Ms. Maguttha submitted that there are some circumstances when the appellant can appeal having pleaded guilty as per the case of **Laurent Mpinga vs Republic** [1983] TLR 166. When the charge is defective or plea was ambiguous.

As to the 2nd and 4th grounds, Ms. Magutta submitted that there is no law which provides that the court should keep on explaining the charge to the accused. Section 228 of CPA is very clear that the court should record in the words the accused uses. When the charge read the accused pleaded

very clear that *ni kweli nilikutwa na gobore bila kibali*. She submitted that the law does not provide mandatory requirement for the court to quote section 228 of CPA when the accused person had pleaded guilty.

As to the first ground, Ms. Magutta supported the appellant's appeal on the irregularity found in the record. She submitted that at page 2 of the proceedings the accused pleaded in the count which was not proper. The plea of being found with firearm is not found anywhere, thus the appellant did not understand what he was pleading. Further, she submitted that even the facts were not proper as the charge was not properly pleaded, thus she supported the appellant's appeal. She said the remedy is for the case be remitted back for retrial.

In rejoinder, Ms. Mahundi prayed for the court to look the circumstances of the case and decide whether the case is fit for retrial or not.

I have thoroughly gone through the records of the District Court. I have as well read between the lines the appellants' grounds of complaints, and submissions of both learned counsels.

First and foremost, as general rule, as rightly submitted by Ms. Magutta, 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 except on legality of sentence. 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 Tumbiliya & 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"

However, as submitted by learned State Attorney for the Republic, the appellant pleaded in the count which was not proper. The plea in respect of being found with firearm is not found in the proceedings. Thus, the appellant was not subjected to a fair trial as he did not understand what he was pleading.

The fault also affects the facts of the case, as the charge was not properly pleaded.

In the circumstance, a retrial seems to be inevitable. But I did warn myself over this as I have been guided by the decision in the case of **Dogo Marwa @ Sigana & Another vs Republic**, Criminal Appeal No. 512 of 2019, unreported, which quoted with approval the former Eastern African Court of Appeal in **Fatehali Manji vs Republic** [1966] 1 EA 343, in which it has provided a helpful guide to courts in Tanzania when considering whether to order a retrial. It was held that,

"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when conviction is set aside because of insufficiency of evidence or for the purpose of

enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

At this juncture, a mistake as explained above was done by a trial court for which the prosecution is not to blame. I allow the appeal, quash the conviction and set aside the sentence. The fact that conviction and sentence is not set aside because of insufficiency of evidence, I order the case be remitted back to the trial court for plea taking and trial. The trial be done expeditiously. The appellant be returned to Kalambo District Court where he can exercise his right to bail

It is so ordered.




D.B. NDUNGURU

JUDGE

27.10.2022