IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 100 OF 2022

MAGDALENA GOTHARD UHWELLO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Criminal Case No. 89 of 2019)

JUDGMENT

6th September & 10th October, 2022

KISANYA, J.:

Magdalena Gorthard Uhwello, the appellant herein and Halima Badru Nsubuga who is not subject to this appeal (henceforth "the second accused person") were convicted on their own plea of guilty to offences of conducting a pyramid scheme and money laundering. In terms of the charge, the count of conducting a pyramid scheme was predicated under section 171A (1) and (3) of the Penal Code [Cap. 16, R.E. 2002] (now R.E. 2022). It was alleged that on diverse dates between 1st April and 30th June, 2017, at various places within the City and Region of Dar es Salaam and at different places within the United Republic of Tanzania, the appellant and second accused person, jointly and together, conducted a pyramid scheme by collecting money from the public on

promise that individual who contributed the money would receive sum of money in return which given all commercial consideration is greater than the money collected.

As regards the charge of money laundering, it was preferred under sections 12(b) and 13(1) (a) of the Anti-Money Laundering Act, No. 12 of 2006 read together with paragraph 22 of the First Schedule to, and sections 57(1) and 60(2) both of the Economic and Organized Crimes Control Act, [Cap. 200, R.E. 2002] as amended (now R.E 2022). The prosecution alleged that on diverse dates between 1st and 25th April, 2017, within the City and Region of Dar es Salaam, for purposes of concealing or disguising the illicit origin, the appellant and second accused person transferred a total sum of USD 262,567 to Bank Account No. 1002100721913 maintained at Equity Bank Uganda in the name of Smart Protus Magara, while they knew that the said money was proceeds of a predicate offence namely, pyramid scheme.

It is glanced from the record that, when the charged was read over and explained to the appellant and the second accused, they pleaded guilty to both counts. They also admitted all facts read to them as true and correct. The trial court went on convicting the appellant and second accused person on their own plea of guilty.

Upon convicting the appellant and second accused person, the trial court sentenced each of them to pay fine of one million shillings or one year imprisonment in jail on the offence of pyramid scheme; and fifty million shillings or twenty years imprisonment in jail on the second count of money laundering. In addition, USD 124,433.89 deposited in Account No. 3004211400319 at Equity Bank Tanzania and USD 263,567 deposited in Account No. 1002100721913 at Equity Bank in Uganda were forfeited to the Government.

Unamused, the appellant has come to the Court in this appeal premising her grievance on two grounds as follows: -

1. *That, the trial Resident Magistrate erred in law and in fact to enter conviction against the Appellant basing on equivocal plea of guilty hence rendering the subsequent sentence illegal.*
2. *That, the trial Magistrate erred in law and fact in passing excessive sentence against the Appellant for an offence she was convicted with.*

During the hearing of this appeal, the appellant who was present in person, was legally represented by Mr. Peter Madaha, learned counsel, whereas Ms. Lilian Rwetabura, learned Senior State Attorney appeared for the respondent/Republic.

Submitting on ground one, Mr. Madaha contended that the record does not show the plea entered by the appellant. He also faulted the trial court for failing to indicate the language in which the appellant entered her plea. It was his further argument that the appellant's response to the charge was incomplete. He was of the considered view that, given the seriousness of the offence laid against the appellant, the trial court ought to have ensured that every element of the offence is explained to the appellant. In view of all this, he submitted that the appellant's plea was equivocal.

Mr. Madaha further pointed out that the documents tendered by prosecution were not read over to the appellant upon being admitted. He then contended that some of the facts admitted by the appellant were no related to her.

It was further submitted that, the appellant's response to the charge sheet and facts implied that the said charge and facts did not disclose the offence preferred against her (the appellant). To cement his submission on the first ground, he cited the case of **Juma Tumbulija and 2 Others vs R** [1998] TLR 139 and **Ngassa Madina vs R**, Criminal Appeal No. 157 of 2005 (unreported).

Addressing the Court on ground two, the learned counsel submitted that the sentence meted upon the appellant was excessive. With respect to the second count, he submitted that its custodial sentence does not exceed five years. As to the first count, the learned counsel contended that the proper sentence is fine of Tshs 1,500,000 or imprisonment for a term of five years. It was also his further argument that the trial court ought to have considered the mitigation factors including, the time within which the appellant spent in custody and the fact that the appellant had pleaded guilty to the offence.

In rebuttal, Ms. Rwetabura did not support the appeal. Responding to ground one, she submitted that the appellant and the second accused person pleaded guilty to the charge. She also submitted that the appellant admitted the facts read by the prosecution to be true and correct. When probed by the Court on whether the facts read by the prosecution were recorded by the trial court, she submitted that the said facts were adopted as part of the proceedings/record as prayed by the prosecution.

Ms. Rwetabura further submitted that she was live to the position that this Court is required to satisfy itself on whether the plea was equivocal as held in the case of **Aidan vs R** [1973] EA 445. She went on to contend that the appellant knew the charge and facts read over to her. It was also her

submission that the facts read by the prosecution contained all elements of the offences preferred against the appellant. Considering further that the appellant was represented by an advocate whose duty included advising, the learned Senior State Attorney submitted that she (the appellant) understood the nature of offences laid against her.

With respect to the documentary exhibits, Ms. Rwetabura conceded that they were tendered in contravention of the law. However, she submitted that it is not a legal requirement to tender documents or exhibits when the accused person pleads guilty. She further argued that the plea will not be affected if the said exhibits are expunged from the record. On that account, the learned State Attorney asked this Court to dismiss ground one.

Reacting to ground two, Ms. Rwetabura, submitted that the sentence imposed on the first count was in accordance with the law. She contended that the fine of Tshs 50,000,000 imposed on the second count was according to the law on the ground that the maximum fine set out by the law is Tshs 500,000,000/=. The learned counsel was of the further argument that section 60(2) of the EOCCA provides for the minimum sentence of twenty years imprisonment imposed by the trial court. As regards the fine, the learned State

Attorney submitted that it is provided for under section 13 of the Anti-Money Laundering Act.

When Mr. Madaha rose to rejoin, he reiterated that the appellant's plea was equivocal and that the sentences on both counts were excessive.

Having considered the submissions of the learned counsel for both parties, the main issue for determination by this Court is whether the appeal is meritorious.

It is common ground that the appellant was convicted and sentenced after pleading guilty to the offence. In that regard, the general rule is to the effect that appeal is not allowed except as to the extent or legality of the sentence. This is pursuant to section 360(1) of the CPA. Further to this, the appellant is barred from appealing if the record satisfies this Court that the appellant understood the charge and the facts and that the plea is unequivocal as held by the Court of Appeal in case of **Khalid Athumani vs R** [2006] T.L.R. 79 that:-

> "*The Courts are enjoined to ensure that an accused person is convicted on his own plea where it is certain that he/she understands the charge that has been laid at his/her door, discloses an offence known under the law and that he/she has no defence to it. A plea of guilty having been recorded,*

a Court may entertain an appeal against conviction if it appears that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it; or that upon the admitted facts he could not in law have been convicted of the offence charged."

Case law has also established the circumstances under which the accused person to challenge a conviction premised on a plea of guilty. See for instance the case **Frank s/o Mlyuka and Another vs R**, Criminal Appeal No. 404 of 2018 (unreported) in which the Court Appeal cited with approval the decision of this Court (Samatta, J as he then was) in the case of **Laurence Mpinga vs Republic** [1983] TLR 166 where it was held that:-

"An accused person who has been convicted by any court of an offence on his own plea of guilty, may appeal against the conviction to a higher court on any of the following grounds:

1. that, even taking into consideration the admitted facts, his 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 he pleaded guilty as a result of mistake or misapprehension;

3. that the charge laid at his door disclosed no offence known to law; and

4. that upon the admitted facts he could not in law have been convicted of the offence charged."

In the instant case, ground one faults the trial court for treating the appellant's response to the charge and facts as a plea of guilty. The procedure to be complied with once an accused person pleads guilty to the charge were stated in the case of **Adan vs R** (supra) which was cited with approval in **Khalid Athuman vs Republic** [2006] TLR 79 as follows: -

"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 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 task 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***." (Emphasize supplied)

In order to understand whether the above procedure was complied with, I find it apposite to reproduce what transpired before the trial court. The handwritten proceedings read:-

> *"1/10/2019*
> *Coram: Hon. Mwaikambo-RM*
> *For Respond:- Wankyo S/A and Jackline Nyantori*
> *Accuseds (sic):*
> *CC: Ms Nyangi*
>
> ***Augustino Shio (Advocate and Benedict (Advocate)*** *for the accused persons.*
>
> ***SSA****: It is for mention. However, we pray to inform this Court that the investigation is complete. And DPP has granted Certificate to confer jurisdiction under section 12(3) and (4) of EOCCA and Consent under section 26(1) of the ECO, Cap 20, R.E. 2002 to proceed with the matter.*
>
> ***COURT:*** *Certificate issued under section 12(3) and (4) of EOCCA and Consent issued under section 26(1) of the ECO, Cap 20, R.E. 2002 tendered and admitted.*
>
> *Sgd*
> *RM*
> *1/10/2019*
>
> ***SSA:*** *Since this Court has been conferred with jurisdiction we pray to substitute the charge under section 234 CPA, Cap. 20, R.E 2002.*

Court: *Prayer granted*

Sgd
RM
1/10/2019

Court: *Charge read over and explained to the accused persons who are asked to plead thereto:*

Accused plea:

1st count

1st accused- It is true

2nd accused – It is true

2nd count

1st accused- It is true

2nd accused- It is true

Court*: EPG*

Sgd
RM
1/10/2019

SSA: *We pray to submit the facts to form part of proceedings in this case.*

Sgd
RM
1/10/2019

Court: *Facts has been read over to the accused persons and hereby asked as to whether they admit them as true and correct.*

1st accused- *I admit all facts read to me as true and correct.*

2nd accused – *I admit all facts read to me as true and correct.*

Memorandum of Undisputed Facts:

That all facts read to the accused persons are true and correct

1st accused *– sgd*

2nd accused *–sgd*

Advocate *– sgd*

SSA *- sgd*

S. 192(3) Cap 20 C/W

Sgd
RM
1/10/2019"

Thereafter, the prosecution tendered four documents which were admitted in evidence without being objected by the defence counsel. At the end of the day, the Court made the following finding:

Accused persons are hereby found guilty and convicted for conducting a pyramid scheme c/s 171A (1) and (3) of the Penal Code, Cap. 16, R.E. 2002 and Money Laundering c/s 13(1) (a) of the Anti-Money Laundering Act, No. 12 of 2006 read together with paragraph 22 of 1st Schedule to section 57(1) and (60)(2) of the ECO Cap. 2002(sic) R.E. 2002.

Order accordingly.

Sgd
RM
1/10/2019

In view of what transpired in the trial court, it is clear that section 228(1) of the CPA was complied. The charge was read over and duly explained to the appellant who was then asked to enter her plea. As shown herein, the appellant's response to each count was "it is true". This connotes the plea was recorded "as nearly as possible in the words" used by the appellant. Considering further that the law does require that the plea be recorded in the language used by the accused person, I am satisfied that the provisions section 228 (2) of the CPA were complied with.

It is also on record that after pleading guilty to the charge, the appellant admitted the facts read over to her to be true and correct. However, the facts which were read over to the appellant and second accused person are not known. This is so because the facts read over to the accused person were not recorded in the proceedings of the trial court. As rightly submitted by Ms. Rwetabura and shown above, the prosecution prayed to "submit the facts to form part of the proceedings" of the case. Unlike the Consent and Certificate Conferring Jurisdiction which were recorded to have been admitted, the proceedings do not show that the prayer made by the prosecution was granted. I have further noticed that the case file has facts which were signed by the State Attorney on 30th September, 2019. Further to that, the said facts show

that they were admitted on 1st October, 2019. However, the court's stamp thereon is dated 7th November, 2019.

In the circumstances, it is hard to tell whether the facts in the case file are the same facts read over to the appellant on 1st October, 2019. The trial court ought to have recorded the facts read by the prosecution in support of the charge preferred against the accused. Since this was not done, this Court is not placed in a better position of resolving whether the facts read over by the prosecution disclosed all ingredients of offences laid against the appellant in order to hold that the plea was unequivocal or otherwise. It follows that the trial court's proceedings are flawed with irregularities. As this ground is sufficient to dispose of this appeal, I find it not necessary to address the issue of sentence advanced in ground two.

For the reasons I have assigned, I hereby invoke this Court's revisional powers under section 372 and 373 and nullify the proceedings of the trial court, quash the conviction and set aside the order and sentences imposed on the appellant. Considering the serious nature of the offence, the gravity of the sentence on the second count, I find it appropriate to order for retrial of the matter before another magistrate. It is further directed that in the meantime, the appellant should remain in custody. In the event the new trial court finds

the appellant guilty, it is ordered that the time she spent in prison serving the sentences at hand be taken into account and deducted.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of October, 2022.

S.E. Kisanya
JUDGE

COURT: Ruling delivered this 10th day of October, 2022 in the presence of the appellant, Mr. Adam Kasegenye holding brief of Mr. Peter Madaha learned advocate for the appellant, Ms. Laurent Kimario, learned Senior State Attorney for the respondent and Ms. Bahati, court clerk.

Right of appeal explained.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. Kisanya
JUDGE
10/10/2022