**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO 66 OF 2022**

*(Arising from Resident Magistrate Court of Musoma in Criminal Case No 32 of 2022)*

**STELLA ADAMBA..... APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

8th & 8th November, 2022

**BEFORE F.H. MAHIMBALI, J.**

The appellant Stella Adamba has been aggrieved by the decision of the trial court (Musoma Rm's Court) in which convicted and sentenced her to serve a custodial sentence of 9 months and a fine of Tsh. 500,000/= for the offence of being unlawfully present within the United Republic of Tanzania contrary to section of 45 (1) (i) and (2) of the Immigration Act, Cap 54 R.E 2016.

The particulars of the offence state that Stella Adamba being a citizen of Kenya on 27th May 2022 at Kirumi barrier within Rorya District in Mara Region, was found unlawfully present within the United Republic of Tanzania.

It was alleged by the prosecution that on the said date of 27th May 2022, at Kirumi barrier within Rorya District in Mara Region, the accused without having a valid permit or her passport stamped, she was unlawfully found present within Tanzania. As she had no permit and her passport stamped, she was then arrested and sent to Musoma Immigration office. Upon interrogation and satisfaction that she had been present within the United Republic of Tanzania unlawfully from Kenya, she was arraigned before the Resident Magistrate Court of Musoma charged with the offence of being unlawfully present within the United Republic of Tanzania.

When charged, she is recorded to have pleaded guilty to the charge and thereafter dully convicted. Upon that conviction, she was sentenced to a custodial sentence of 9 months and also pay a fine of 500,000/= Tsh. She has been aggrieved, thus the basis of this appeal, basing on four grounds of appeal, namely:

1. *That the trial magistrate erred in law and fact to convict and sentence the appellant since the plea of guilty of imperfect, unfinished, ambiguous, and misapprehended.*

2. *That the trial magistrate erred in law and fact to pass a sentence against the appellant immediately following the plea of guilty by the appellant as he failed to explain to the appellant before convicting her the circumstances of the case as one of the procedural requirements before the Court.*

3. *That the trial magistrate erred in law and fact to convict and sentence the appellant as the procedure passed to reach conviction and sentence by the trial court were irregular in the eyes of the law since the appellant was denied her rights to be heard during the hearing of the case.*

4. *That the sentence imposed were excessive and humiliated one bearing in mind that the appellant was denied the privilege to pay fine since the offence alleged to have been committed has the option of paying fine and be released but the trial court passed conviction by sentencing the appellant to both paying fine and serving custodial sentence.*

During the hearing of the appeal, the appellant appeared in person whereas the respondent was dully represented by Ms Monica Hokororo, learned senior state attorney. On her part, the appellant had nothing

material to submit but just prayed that she be acquitted based on her grounds of appeal and that as she has a breast feeding baby, this Court should find mercy on her for the interests of her child.

On her part, Ms Monica Hokororo learned senior state attorney in her submission supported the appeal arguing that the plea of guilty was not unequivocal as per law. She elaborated that, the plea of the appellant that *"Ninaongea vizuri Kiswahili, hili shitaka ni la kweli"* did not reflect the real response of the charge for it to be relied for conviction. Similarly, she challenged the facts of the case as not reflecting the real ingredients of the offence of being unlawfully present within the United Republic of Tanzania.

As what is the way forward, she submitted that as the appellant was convicted and sentenced to 9 months imprisonment and pay a fine of 500,000/= Tshs on 30th May 2022 and today is 8th November, 2022, for the interests of justice, retrial is not merited in the circumstances of this case. In support of her submission, she relied in the position of the case of **Jelada Chuma Vs. Rep**, Criminal Appeal No. 114 of 2016, CAT at Mbeya. On that basis, she prayed that the appeal be allowed, and the appellant be set free for the best interest of the child.

From the facts and submission, the sole issue before this Court for determination is whether the appellant's plea of guilty was unequivocal. The starting point will be to review the provision of Section 228 of the Criminal Procedure Act, Cap. 20 (the CPA) that guides the procedure of plea taking at the subordinate courts. It provides:

> *"228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *(2) If the accused person admits the truth of the charge/ his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."*

As to what entails the substance of the charge which the accused person should be asked by the trial magistrate has been well articulated in the case of **Andambike Mwankuga v. Republic**, Criminal Appeal No. 144 of 2010 (unreported) where it cited the case of **R v. Yonasani Egalu and Others** (1942) 9 EACA 65 and stated:

> *"In any case in which a conviction is likely to proceed on a plea of guilty, it is more 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."*

The procedure to be adopted by the subordinate courts in taking the plea of the accused person is explained in detail in the case of **Aden v. Republic** [1973] EA 445 cited in **Jelada Chuma v. Republic, Criminal Appeal No. 114 of 2016, CAT Mbeya** referred to me by the learned State Attorney that:

> *"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 the language which he can speak and understand. The magistrate should then explain to the accused person all the ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused said, as nearly possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecution 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 fact. If the accused does not agree with the statement of facts or asserts addition facts which, if true, might raise a question as to his guilt the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused 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. The statement of facts and the accused reply must, of course be recorded. "(Emphasis is added).*

(See also **Khalid Athuman v. Republic,** Criminal Appeal No. 103 of 2005 and **Waziri Saidi v. Republic**, Criminal Appeal No. 39 of 2012 (both unreported)). In the present appeal, it has been indicated that the charge sheet was read out and explained to the appellant who pleaded thereto. Thereafter, the facts were read out by the Prosecutor to the appellant and after reading of the facts, the appellant was given an opportunity either to dispute or add anything to the facts. She is recorded to have replied: *"Maelezo ni ya kweli, nayakubali".*

There is neither that Kenyan passport tendered in the trial court nor the said cautioned statement as interrogated. It is my conviction that the

appellant's plea at the trial court did not establish agreeing with the charged offence. The "purported plea" in my firm view was not clear as to what was pleaded. It was therefore unequivocal plea as per law. Considering the fact that the said plea was unequivocal, the stated facts in my considered view did not explain the material facts explicitly for one to get satisfied that the reply to the facts perfected the purported plea of guilty. What can be gathered from the proceedings of the trial court is this, both the plea and the facts of the case did not establish the charged offence. It was a rushed proceedings in my considered view. With respect, I think, if the trial court had looked and digested properly into this point, it would have found the appellant's plea was equivocal and not "perfect and finished'. Since the appellant's plea was equivocal then no conviction and sentence could be made against the appellant. I therefore quash and set aside conviction and sentence meted out.

As what is the best way forward, in the case of **Jelada Chuma v. Republic**, Criminal Appeal No. 114 of 2016, CAT Mbeya referred to me by the learned State Attorney, they ordered retrial of the case. That was a rape case, punishable with life sentence. This present case involves an

offence of unlawful presence in Tanzania. It is punishable with maximum sentence of three years. However, each case must be considered on its own merits depending on the facts of the case. As per circumstances of this case, considering the fact that the appellant is an East African citizen, she committed no any other offence but just being present unlawfully, wisdom must have dictated the trial magistrate whether it was so compelling that she being a first offender was supposed to be punitively punished that much. In my opinion, one is not a good judge or magistrate by imposing harsh sentence to convicts. Wisdom must always dictate the whims of justice. In the circumstances of this case, I think it was not necessary that both fine and custodial sentence be inflicted together unless one was a habitual offender or his second time conviction.

That said, retrial is not suitable as the custodial sentence imposed has almost been served by the appellant. Thus, retrial will not serve any good purpose as per law but just an academic exercise, in which I am neither a tutorial assistant nor a thesis candidate for that discourse.

All said, I allow this appeal for the reasons given, quash the conviction and set aside the sentence. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

DATED at MUSOMA this 8th day of November, 2022.

F.H. Mahimbali

Judge

**Court:** Judgment delivered today the 8th of August, 2022 in the presence of the appellant linked from Musoma prison and Ms Hokororo, learned senior state attorney, connected from NPS office, Musoma and Mr. Mugoa, RMA, present in Chamber Court.

Right of appeal is explained.

F.H. Mahimbali

Judge