IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 41 OF 2020

(Originating from Mlele District Court Criminal Case No. 4 of 2016)

OMARY S/O ALLY @ KAKONKOTI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: *14/12/2021*
Date of Judgment: *18/02/2022*

NDUNGURU, J.

The appellant in this appeal one Omary s/o Ally@ Kakonkoti is appealing against the conviction and sentence meted against him by Mlele District Court in Criminal case No 4 of 2016.

Before Mlele District Court, the appellant was charged for two counts. The first 1st count was Burglary Contrary to Section 294(1)(a) and (2) of the Penal Code Cap. 16 [RE 2002]. Prosecution alleged that on 29th day of March 2016 at about 03.00 hours at Inyonga village within Mlele District, Katavi Region, the appellant did break and entered

the dwelling house of one Alfred s/o Sungura with intent to commit an offence therein to wit stealing.

The 2nd count was stealing c/s 258(1) and (2)(a) and 265 of the Penal Code. It was alleged that on 29th day of March, 2016, at about 03.00 hours at Inyonga village within Mlele District Katavi Region the appellant did steal one laptop valued at Tsh. 1,800,000/= the property of Mlele District Counsel.

The record of the trial court reveals that on 04/04/2016 when the charge was read and explained to the appellant, he pleaded guilty on both counts. The court then convicted the accused person to serve twenty years imprisonment in respect of the 1st count and three years second count. Further the court ordered sentences to run concurrently

Aggrieved with the conviction and sentence imposed against him, he appealed to this court. In his petition of appeal, the appellant advanced three grounds of appeal as hereunder.

1. That it was wrong for the Magistrate to take facts as per the charge sheet.
2. That, the charge against the appellant was actually not read over to the accused person to understand the nature of the

offence, no provision, on which was charged. See page 1 of the typed proceedings.

3. That, the plea of the appellant was ambiguous one, appellant was not given his full basic rights at every stage of the case.
4. That, the appellant did not understand the charge which was not read to him and could not as certain to what the plea amounts.

When the appeal was called upon for hearing, the appellant appeared in person while Mr. Peresi learned State Attorney appeared for the respondent/Republic. The appellant being a layman had nothing substantial to submit he rather prayed his grounds of appeal be adopted by the court, and thus his appeal be allowed.

Resisting the appeal, the learned State Attorney was of the argument that the conviction and sentence of the appellant being meted to him upon his own plea of guilty, the dictate of section 360(1) of the Criminal Procedure Act is to the effect that the case is only appealable on sentence ground only not against conviction. He fortified his argument by referring the court the case of **Laurent Mpinga V. Republic** (1983) TLR.

The learned State Attorney submitted further that though cautioned statement was not properly tendered/admitted, by itself cannot challenge the appellant's admission to the charge. He thus urged the court to dismiss the appeal.

I have followed the submission by the parties. With respect, I agree that the position of law **section 360(1) of Criminal Procedure Act** is to the effect that no appeal is 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 sentence.

The appellant's petition of appeal, para/line states;

*"Appellant comes to the Honorable High Court for appeal against conviction and "**Sentence"** imposed against him on the following grounds: (emphasis added)".*

That means the appellant impugns against sentence as well. Though no ground of appeal is challenging the extent or legality of sentence, that does not halt this court from going deep into looking for the extent and legality of the sentence imposed against the appellant.

Having gone through the record of the trial court, and particularly sentence imposed against the appellant on the 1st count which is

burglary c/s 294(1) and (2), the maximum sentence is 20 (twenty) years. The provision which creates such an offence use the words "shall be liable". The court practices is that if the law reads "shall be liable then this sets out a discretionally sentence up to a maximum amount.

In the sentencing process the trial Magistrate had the duty to determine the statutory range of the sentence that means starting to maximum range which he did not do. Had he determined the range he would not have reached to that amount of sentence because the sentence is discretionary. Again if he intended to impose the maximum sentence, the trial Magistrate was duty bound to give reasons to such a maximum sentence. In the absence of reasons the sentence is arbitrary.

The record of the trial court shows that the sentence was mandatory because the law has used the word "shall". That was a misconception on the part of the trial Magistrate.

In the premises, I allow the appeal on the fact that the sentence has no basis. The term the appellant had served in prison in quite enough and appropriate had the trial Magistrate acted diligently.

I further order that the appellant be released from the prison forthwith unless otherwise lawfully held.

It is so ordered.

D. B. Ndunguru

JUDGE

18. 02. 2022