

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 2 OF 2022

*(Originating from Nanyumbu District Court in Criminal Case No. 140 of
2021)*

SAID JUMA HUSSEIN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 4/4/2022

Date of Judgment: 27/4/2022

LALTAIKA, J.:

The appellant herein **SAID JUMA HUSSEIN** was charged and convicted by the District Court of Nanyumbu at Mangaka on his own plea of guilty on two counts. The first count: stealing contrary to Section 258 (1) and the second count stealing contrary to section 258(1) of the Penal Code [Cap 16 R.E. 2019] respectively.

Particulars of the first count are that on the 28th day of August, 2021 at or about 00:00 hrs at NMB BANK in Ngalinje village within Nanyumbu District in Mtwara Region, the appellant did steal Tshs. 9,200,000/= (Nine Million and Two Hundred Thousand) through the NMB MOBILE Money

transfer from Bank Account No.71210019541 of one MAULID S/O ANJELIUS MPUNGA to his mobile phone Vodacom Number 0746799439.

Particulars of the second count are that at or about 00:00 hrs at NMB BANK in Ngalinje village within Nanyumbu District in Mtwara Region, the appellant did steal Tshs 200,000 (Two Hundred Thousand) through the NMB Account No.40810010669 of one EGEN D/O DANIEL NGUMBUKE to his Vodacom phone No. 0746799439 and Airtel No. 0685 871039.

The brief facts of the case are that the appellant was recruited and trained by one Lucas (now deceased) to steal money through mobile phones of their customers in Dar es Salaam. The appellant, having perfected the art, started to run a business of registering SIM cards and pretending to upgrade those cards from 3G to 4G.

The appellant would trick a customer into putting his or her password into their mobile phone as a way of upgrading the network. As the customer started pressing the phone keys, the appellant would carefully mark the numbers before asking to be given the handset and immediately went through the mobile banking App and transfer the money.

It is alleged by the prosecution that on the the 28th day of August 2021 the appellant applied the trick and managed to steal a total of 9,200,000/= (Nine Million and Two Hundred Thousand) from one MAULID S/O ANJELIUS MPUNGA and a total of 200,000 (Two Hundred Thousand) from one EGEN D/O DANIEL NGUMBUKE.

The appellant was later arrested at Mtwara and arraigned in court. He was charged for two counts as already alluded to. He pleaded guilty and was convicted accordingly on his own plea of guilty. Upon such

conviction, the trial court meted a sentence of five (5) years for each count. The sentences were ordered to run concurrently.

The appellant is aggrieved and dissatisfied with the decision of the trial court. He has approached this court in its appellate jurisdiction as an attempt to demonstrate his innocence. The appellant has filed a petition of appeal comprised of four grounds. The sum total of the four grounds and three additional grounds filed upon obtaining leave from this court is faulting the trial court for convicting him on his own plea which he asserts that it was not equivocal. I take the liberty not to reproduce the grounds here.

When this appeal came for hearing on 04/04/2022 the appellant appeared in person, unrepresented whereas Mr. Wilbroad Ndunguru, learned Senior State Attorney appeared for the respondent, Republic. As the appellant was invited to submit, he submitted that he was charged with cybercrimes. He went on to assert further that he was beaten up by the police and that is why he admitted to have committed the offence.

It is the appellant's submission that he is surprised that he was charged for stealing money in the midnight by using a mobile phone to and asserted that he couldn't possibly do so because he was not there with the complainants as each of them was at their respective homes by then and he (the appellant) too was at his home at midnight.

The appellant prayed that the written grounds of appeal and the additional ones be considered by this court. The appellant insisted that he was dissatisfied with the sentence of 5 years imprisonment. He also insisted that he did not commit the offence though the trial court used bank statements and his cautioned statement to convict him. He

concluded by yet another insistency that the cautioned statement used by the trial court to convict him was obtained as a result of beatings by the police.

It was time for the counsel for the respondent Republic to respond to the grounds of appeal. Mr. Ndunguru announced on the outset that he was not in support of the appeal as he thought it was baseless.

It is Mr. Ndunguru's submission that according to Section 360(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] when an accused person is convicted on his own plea he can appeal against the sentence and not his own plea. In the light of that submission, the learned Senior State Attorney argued that the sentences meted against the accused were proper. Expounding on his submission, the learned Senior State Attorney stated that the appelland was sentenced to five (5) years imprisonment based on his own plea of guilty.

Referring to the first and second grounds of appeal as they appear in the petition of appeal read together with the second and third grounds of the additional grounds of appeal which are on the plea, the learned Senior State Attorney stressed that they had no merit as the plea was unequivocal. To cement his argument, he referred this court to page 1 to 5 of the typed proceedings of the trial court whereby the learned trial Magistrate recorded the plea of the appelland where he said:

"Ni kweli niliiba fedha hizo kiasi cha shilingi milioni tisa na laki mbili mali ya Maulidi Angelius Mpunga". (Literally translated "It is true I stole the money amounting to Nine Million the property of Maulidi Angelius Mpunga"

The learned Senior State Attorney argued further that the on the second count, the appellant pleaded in the like manner only that he admitted to have stolen Tshs. 200,000/= from Egen Daniel Ngumbuke.

It is Mr. Ndunguru's submission that the facts of the case provided a detailed account on how the offences were committed by the appellant. To fortify his argument, the learned Senior State Attorney referred this court to page 5 of the trial court proceedings where, Mr. Ndunguru asserts, the learned trial Magistrate explained the facts in Kiswahili to the appellant who responded to those facts as correct and was in agreement with the same. Mr. Ndunguru emphasized that there was nowhere in the proceedings suggesting that the appellant did not understand the offence or the crime he was charged with. As a result, the learned Senior State Attorney concluded this part by asserting that the case of **Lawrence Mpinga vs Republic** [1983] TLR 86 cited by the appellant was distinguishable from the present case.

Moving on to documentary exhibits used by the trial court, Mr. Ndunguru submitted that the Bank Statements of Maulid Angelius Mpunga and Egen Daniel Ngumbuke and the cautioned statement of the appellant were the documentary exhibits in question. The learned Senior State Attorney stressed that those exhibits were shown to the appellant who did not object their admission as it is reflected at page 6 of the typed proceedings of the trial court.

It is Mr. Ndunguru's submission the exhibits he mentioned had merely supported the plea of guilty of the appellant. The learned Senior State Attorney was quick to argue however that even if those documentary exhibits were not admitted, they would not have affected

the plea of guilty of the appellant. To that end, the learned Senior State Attorney opined that since the same were admitted without objection they corroborated the plea of the appellant during plea taking. To substantiate his argument, Mr. Ndunguru referred this court to the case of **Chande Zuberi Ngayaga and Another vs Republic**, Criminal Appeal No. 258 of 2020 CAT at Mtwara in which the Apex Court upheld conviction of the accused because he had not objected his cautioned statement when it was tendered in court during trial.

Before leaving the podium, Mr. Ndunguru submitted on the sentence of five years' imprisonment meted to the accused. It is Mr. Ndunguru's submission that the sentence was merited and it was pronounced by a Principal Resident Magistrate as per Section 170(2) of the Criminal Procedure Act. To this end he prayed that the appeal be dismissed with its entirety.

In rejoinder, the appellant had nothing to add but left this court to decide his fate.

Having dispassionately considered submissions by both parties, I am inclined to determine the merits or demerits of this appeal. I have made a keen review of the lower court records including the cautioned statement in which the appellant narrated how he was recruited, trained and started working as a mobile phone repairer and seller of sim cards. The appellant had told the police that he travelled from Dar es Salaam to Nanyumbu District in Mtwara just to exploit the ignorance of the masses in order to obtain improper advantage.

The method he used to still the money from the complainants doesn't require one to be particularly skilled in ICT. That is why I have no any intention to question the relevance of the section of the law used to convict the appellant even though I am fully aware that his offence could as well be covered by the Cybercrimes Act No 14 of 2015. The only skill required to accomplish the intention was ability to be trusted.

I will start my deliberation on the first and second grounds of appeal in the petition of appeal read together with the second ground in the additional grounds of appeal. These are, essentially, centred on the plea of guilty of the appellant. In view of those grounds, the issue to resolved is whether appellant's plea was unequivocal and unambiguous to have attracted conviction and if so, does the appellant have a right of appeal against conviction?

In order to underscore what transpired in the trial court when it took the plea of the appellant, I perused the trial court proceedings and I wish to reproduce the relevant part as follows: -

"Date: 22/11/2021

Coram: Hon. C.T. Mnzava-PRM

For Prosecution: F.9012 DCPL Deus"

Accused Persons: Present

B/Clerk: M.M. Mohamedi -RMA

Pros: This is a fresh case we pray to read the charge sheet to the accused person.

Court: The charge sheet is read over and fully explained to the accused who is asked to plead thereto:

Accused person's plea:

1st Count "Ni kweli niliiba fedha hizo kiasi cha Tshs.9,200,000/= mali ya Maulid S/O Anjelius Mpunga".

2nd Count: Ni kweli niliiba shilingi laki mbili (200,000) kutoka kwa Egen D/O Daniel Ngumbuke.

C.T. Mnzava-PRM

7
H. S. Mnzava

22/11/2021"

Now I need to examine whether the plea taken by the trial court had passed a test underscored in a plethora of decided cases such as the often-quoted **Laurent Mpinga v. R.** [1983] T.L.R. 166. The test which was adopted by the Court of Appeal in the case of **Kalos Punda vs. R.**, Criminal Appeal No. 153 of 2005 (unreported) is to the effect that a plea of guilty is to be disregarded if:

- 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 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."*

It is my finding that the plead entered by the appellant was not occasioned by any of the above shortfalls. As reproduced earlier on, the plea was clear, complete and unambiguous. It mentioned not only the names of the victims but also the amount of money stolen therefrom. With regards to misapprehension, the appellant had asserted that he had been bitten by the police only at the appeal level and without providing any proof. I consider this an afterthought. The offences of stealing as charged, in my view, especially when no particular technical skill has been applied, are wide enough to cover incidences of theft of money in its digital form.

This brings me to yet another dimension of conviction based on plea of guilty. In the case of **Rex v. Yonasani Egalu and Others** (1942)

EACA 65 cited with approval by the Court of Appeal in **John Faya v. R**, Criminal Appeal No. 198 of 2007 (unreported) the procedure requires the trial court to explain to the accused every constituent of the charge on which he admits and that he fully understands them before entering a plea of guilty.

I have gone through the trial court proceedings to find out if this was done. At page 5 of the typed proceedings the learned trial Magistrate did the following with regards to the facts of the matter: -

"Court: Facts adduced by prosecution side are read over and well explained to the accused person in Swahili language and then he is asked to reply thereto;

Accused person: Your honour all the facts adduced by the prosecution side are true and correct and so I admit them.

Accused person sign: "Signed"

PP sign: "Signed"

*C.T. Mnzava-PRM
22/11/2021"*

In the light of the above, it is my finding that the trial magistrate complied with the principles articulated in the cases of **Rex v. Yonasani Egalu and Others** (supra) and **John Faya v. R** (supra).

This brings me to the first additional ground of appeal, where the appellant complains that exhibit P1, P2 and P3 were admitted unprocedurally because they were not read in court. This has exercised my mind quite a bit. The question that has been running through my mind is whether it is necessary for the documentary evidence to be read out loud in court when the accused person has unequivocally pleaded guilty to the charge.

In the quest to explore this mind stretching part of the judgement, I obtained the assistance I needed from the Apex Court of this jurisdiction. For instance, in the case of **Mathias Barua vs Republic**, Criminal Appeal No.105 of 2015 CAT at Tanga (unreported): -

"We wish to point out that once it is shown on record that the accused person on his own free will pleaded guilty to the offence unequivocally then that is enough to support the charge with which the accused is charged. Tendering of exhibit be it an object or document is not a legal requirement though is desirable to do so, to ground conviction."

In view of the cited case, it was not necessary for the prosecution to tender those exhibits since the appellant unequivocally pleaded guilty to the offences charged. However, I should insist here that it was desirable to tender those exhibits.

Regarding the third additional grounds of appeal that the trial court did not consider that the appellant was the first offender, it is my finding that this was not among his mitigation factors. Nevertheless, it was featured in the previous records aired out by the respondent. For clarity the following is an excerpt covering appellant's mitigation factors: -

"Accused person: Your honour my siblings depend to me (sic!) and also my mother who is a widow depends on me. Also, I am sick and so, I pray for lenient sentence and punishment. That is all."

Since the issue of being the first offender was not brought during mitigation, I should also emphasize that the trial court could not possibly consider something which the appellant did not pray for. Therefore, I find this ground without merits and it is hereby dismissed.

Before I pen off, I wish to emphasize that conmanship in digital finance is on the increase. Although the country is still in the early stages of developing laws and policies that are upbeat with the fast-changing technology, there are crimes that are committed which do not fall under these technologies per-se. It wouldn't be prudent to allow anyone to benefit from ill-gotten monies or proceeds of crime especially upon entering a plea of guilty. This has prompted me to seriously consider ordering compensation to the victims of this outright theft which has, undoubtedly, affected them greatly both economically and socially.

From the foregoing reasons, this appeal is dismissed and accordingly, the conviction and sentence are endorsed. Since the victims have suffered material loss, I hereby order the appellant to pay a compensation of Tshs. 9,200,000/= and Tshs.200,000/= to Maulid Anjelius Mpunga and Egen Daniel Ngumbuke, respectively. I have made this order pursuant to section 348(1) of the CPA.

It is so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

27.04.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 27th day of April,2022 in the presence of the Mr. Wilbroad Ndunguru, learned Senior State Attorney and the appellant who has appeared unrepresented.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika".

JUDGE

27.04.2022