IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 83 OF 2022

(C/f Criminal Case No. 89 of 2021 District Court of Simanjiro at Orkesmet)

STEPHANO ATANASIO..... APPELLANT

VERSUS

THE DPP ..... RESPONDENT

JUDGMENT

03rd March & 28th April, 2023

TIGANGA, J.

This appeal emanates from the decision District Court of Simanjiro at Orkesmet (the trial court) where the appellant was arraigned for the offense of receiving the property stolen or unlawfully obtained contrary to section 311 of the Penal Code [Cap 16 R.E 2019] now (R.E 2022). He was found guilty on his plea, convicted, and consequently sentenced to four years of jail imprisonment.

Dissatisfied by both the conviction and sentence, he filed two grounds of appeal which goes as follows:

1. That the appellant was not aware that the property he bought was stolen as he was misdirected by the seller.

2. That the appellant prays that this Court reduces the sentence of four years imprisonment into a fine because the same was excessive in the circumstances of the case.

He insistently prayed that the appeal be allowed, and the sentence be reduced. At the hearing of the appeal, the appellant fendend for himself as he was unrepresented by Advocate while the respondent Republic was represented by Ms. Akisa Mhando, learned, SSA.

During the hearing of the appeal, the appellant submitted very briefly that, that the sentence of four years that was imposed on him is excessive therefore he prays the sentence either to be reduced or he be given an alternative sentence. He also asked the court to receive his handwritten paper which he said contained his arguments in support of his appeal so that the court can refer to it when composing the judgment.

In both his oral arguments and his written arguments he insisted on the second ground of appeal without much arguing on the first ground of appeal.

In reply Ms. Akisa Mhando, learned SSA, opposed the appeal in respect of the first ground of appeal in that, had the appellant been not aware that the property found in his possession was stolen he would have raised that

concern of unawareness when his plea was taken. But he did not do so to make the court aware of the said fact.

Therefore, she asked the court to find that, the conviction was properly entered. Regarding the sentence, she supported the argument that the sentence imposed on the appellant was excessive. The basis of that argument is that the law prescribes a maximum sentence of three years, but the appellant was sentenced to four years which is far beyond the statutory limit. He suggested that the court should invoke its powers under section 366 of the **Criminal Procedure Act** [Cap 20 R.E 2022] to reduce the sentence.

Now, in the petition of appeal, the grounds seek to challenge both the conviction and the sentence. The conviction is challenged on the ground that, the appellant was not aware that the property he bought was stolen. Therefore, he did not know the tainted nature of the property he bought. That means he contends that the court was not justified to find him guilty and convict him as he had no requisite *mens rea*. Regarding the part of sentence, he complains that the sentence imposed against him was excessive, that without further ado

While being aware that, the appellant did not argue the first ground of appeal, I do not think his failure to argue it meant that he was withdrawing the ground, but rather, I think it is due to his layman ship, he failed to argue both grounds. Therefore, although he did not argue it, I will nevertheless, consider and deal with it.

Now, regarding the appeal against the conviction, section 360(1) of the Criminal Procedure Act, [Cap 20 R.E 2022] (the CPA) provides that an appeal shall not be allowed in the case of any accused person who has pleaded guilty and has been convicted on such a plea by a subordinate Court except as to the extent or legality of the sentence. This has been interpreted in a plethora o cases one of them being the case of **Frank Mlyuka vrs The Republic,** Criminal Appeal No. 404 of 2018 (unreported). Nonetheless, it is also the position of the law as propounded by the decisions of the Court of Appeal that, under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. To this end, in **Laurent Mpinga vs. The Republic** [1983] TLR 166 a decision of the High Court which was affirmed by this Court of Appeal in the case of **Kalos Punda vs. The Republic,** Criminal Appeal No. 153 of 2005 (unreported), it was stated as follows: -

"An accused person who has been convicted by any court of an offence on his 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 a 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."*

Not only that but also the court of Appeal went on and held that:

"Noteworthy, earlier on the Court in ***Khalid Athuman vs. The Republic,*** *Criminal Appeal No. 103 of 2005 (unreported) adopted a similar proposition laid in the English decision of* ***Rex v. Folder*** *(1923) 2KB 400 which propounded that: -*

> *"A plea of guilty having been recorded; this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or (2) that upon the admitted facts he*

could not in law have been convicted of the offence charged."

The court went further and held that,

"On the other hand, section 228 (1) and (2) of the CPA deals with the plea of the accused who is arraigned before a court and sets the following procedure to be followed by trial courts:

(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."

Further stressing the point, the court relied on its earlier decision in the case of **John Faya vs. The Republic,** Criminal Appeal No. 198 of 2007 (unreported) the Court emphasized that: -

"In every case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit every constituent of the offence and that what he says should be

recorded and in the form in which will satisfy an appeal court that he fully understood the charge and pleaded to every element".

In this case, when the charge was read over the accused person responded that *"It is true I was found in unlawful possession of stolen goods."* That was followed by the facts of the case which disclosed the ingredients of the case, he responded to them that all facts are true. In my view, the procedure stipulated under section 228 (1) and (2) of the CPA, and the principles in the above-cited cases. Therefore, the plea of guilty was properly entered by the trial court and the appellant was properly convicted on his plea of guilty which was clear, certain, and unambiguous. The first ground is therefore devoid of merit; it is thus dismissed.

Regarding the second ground of appeal, which raises a complaint that, the sentence of four years' imprisonment imposed on the appellant is excessive in the circumstances of the case. Therefore, the same be reduced or changed into an alternative sentence. That ground was supported by Ms. Akisa Mhando, learned SSA, that the offence he was found guilty of has a maximum of three years. Therefore, the sentence of four years is manifestly excessive. However, when I visited the provision upon which the accused person stood charged and was found guilty provides for a sentence of ten

years jail imprisonment, as opposed to three years that was said by the learned Senior State Attorney. However, in law, a person who pleads guilty and is found to be the first offender deserves the leniency of the court when considering the sentence to impose on him. See. **Benaderta Paulo vs The Republic** [1992] TLR 97.

It is also the law that one of the grounds upon which the appellate court can interfere with the sentence passed by the subordinate court is where it is established that the sentence is manifestly excessive. There is a plethora of decisions of the Court of Appeal on the circumstances under which an appellate court may interfere with a sentence. One of them is the case of **Nemes Myombe Ntalanda Versus Republic,** Criminal Appeal No. 1 of 2019, CAT- Mbeya in which the Court of Appeal relied on its previous decision of **Patrick Matabaro @ Siima and Another v. The Republic,** Criminal Appeal No. 333 of 2007 (unreported) in which inspiration was made to an excerpt from the **"Handbook on Sentencing: With particular reference to Tanzania"** by Brian Slattery published by the East African Literature Bureau, Nairobi in 1972, specifically at page 14 that: -

> *"The grounds on which an appeal court will after a sentence are relatively few, but are more numerous than is generally realized or stated in the cases. Perhaps the most common ground is that*

a sentence is "manifestly excessive," or as it is sometimes put, so excessive as to shock. It should be emphasized that "manifestly" is not mere decoration, and a court will not alter a sentence on appeal simply because it thinks it is severe. A closely related ground is when a sentence is "manifestly inadequate. A sentence will also be overturned when it is based upon ***a wrong principle of sentencing*** *...An appeal court will also alter a sentence when the trial court overlooked a material factor, such as that the accused is a first offender, or that he has committed the offence while under the influence of drink. In the same way, it will quash a sentence which has obviously been based on irrelevant considerations ... Finally, an appeal court will alter a sentence which is plainly illegal, as when corporal punishment is imposed for the offense of receiving stolen property."*

As earlier pointed out, the appellant was found guilty on his plea, he was also found to be the first offender as the there was no previous criminal record against him. In all measures, the appellant deserved much more leniency than he was sentenced. In my view, and here to borrow the word used in the case of **Bernadeta Paulo vs The Republic (supra)**, had the learned trial magistrate taken into account the appellant's plea of guilty to the offense with which she was charged and the fact that he was found to be the first offender he would no doubt have found that the appellant to entitled to a much more lenient sentence than the sentence of 4 years

imposed. That said I find the second ground of appeal to be merited because it has gone against the known principle of sentencing, I also allow it and consequently interfere with the sentence passed against the appellant, I set aside the sentence of four years, and substitute the same with 14 fourteen months' jail imprisonment.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 28th day of April 2023

J.C. TIGANGA

JUDGE