IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 72 OF 2021

(Arising from the District Court of Lindi at Lindi in Criminal Case No. 52 of 2021 dated 15th September 2021)

1. **Issa Omari Magwira**
2. **Mohamed Abdulrahman Njenga**
3. **Juma Lupanga Wangondo**
4. **Jaffari Hamisi Mtondo**
5. **Ahmad Alphan Salum**

APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 08.05.2023

Date of Judgment: 05.07.2023

Ebrahim, J.:

The appellants herein were convicted and sentenced to a term of twenty years' imprisonment on their own plea of guilty.

The appellants were charged with three counts namely: Organizing smuggling of Immigrants **c/s 46(1)(d) of the Immigration Act Cap 54**

RE 2016; Smuggling Immigrants **c/s 46(1)(a) of CAP 54 RE 2016** for the 1st and 2nd appellants only; and Transporting prohibited Immigrants **c/s 46(1)(g) of the Immigration Act, Cap 54 RE 2016** for the 1st and 2nd appellants only.

Aggrieved by conviction and sentence, the appellants have lodged the instant appeal raising two grounds of appeal as follows:

1. That the trial Magistrate erred in law by convicting the appellants basing on the defective charge and equivocal plea of guilty.
2. That the trial Magistrate erred in law and fact by not taking into consideration mitigation factors and consequently imposed heavy sentence.

Advocate Emmanuel Ngongi represented the appellants and Mr. Edson Mwapili, learned State Attorney represented the respondent.

Advocate Ngongi argued before the court that the circumstances under which the accused person would be permitted by the law to appeal against own plea of guilty as provided under **section 360(1) of the Criminal Procedure Code, Cap 20 RE 2022.** He expounded further that the Court of Appeal of Tanzania in the case of

Lawrence Mkinga V R, [1983] TLR 166 provided further circumstances under which one can appeal on plea of guilty. Among which is where the plea was imperfect, ambiguous or unfinished or where a person pleaded guilty as a result of mistake or mis-apprehension. In explaining his argument, he associated the plea of his clients with the fact that they were not sent to court on time hence they were deceived and pleaded guilty on the same day they went to court.

He argued further that the charge sheet was defective in terms of **section 135(d) of the Criminal Procedure Code** as the names of the two Ethiopian citizens were not mentioned and that it was not said that those foreign citizens were found guilty by the court.

Referring to the case of **John Charles Vs R**, Criminal Appeal No. 554 of 2017 pg 18, Mr. Ngongi challenged the fact that the 3rd, 4th and 5th appellants' pleas were not recorded contrary to the position of the law which requires accused plea to be recorded in his/her own words. He also referred to the case of **Kigundu Francis and Another Vs R**, Criminal Appeal No. 314 of 2010 to cement the position that the admission must be in the words as nearly as possible that the accused used. He stressed that since the appellants were under

the custody of police for almost 2 months before being taken to court, then there was no fair trial.

On the heavy sentence, advocate Ngongi submitted that where the law provides for fine and sentence, court is advised to first impose fine. He submitted also that the trial magistrate did not consider the mitigating factors of the appellants and the mitigation of the 5th accused was not recorded.

In response, counsel for the Respondent contended that the charge sheet was not defective as per **section 135(d) of the Criminal Procedure Act** which requires the information to be as reasonably sufficient. He said the charge sheet reasonably mentioned "two citizens of Ethiopia".

He contended further that the plea of the appellants from page 2 of the typed proceedings show that they comprehended the offence and met the standards set by the law as stated in the case of **Michael Adrian Chaki Vs R**, Criminal Appeal No. 399/2019 (CAT-DSM) which discussed the circumstances under the cited case of **Lawrence Mkinga (supra)** that the six elements must be conjunctively met. He referred to the statement of the 1st accused

who said *"Ni kweli nilipanga mipango ya kusafirisha wahamiaji haramu"*.

He referred to the typed proceedings and submitted that the charges were read over and explained to the accused persons and the facts disclosed the elements of the offence. Also, on every charge the accused persons were asked if it is true. Thus, the charge was not defective and plea was unequivocal.

He argued on the issue of heavy sentence that the same is a discretion of the trial court and no error was committed. Mr. Mwapili again referred the court to page 11 of the proceedings and argued that the trial court considered the mitigation factors. He thus prayed for the appeal to be dismissed.

In rejoinder, Mr. Ngongi explained to the court that Counsel for the Republic has not said anything on the plea of the 3rd, 4th and 5th appellants therefore there is no plea and also that the mitigation of the 5th appellant was not recorded hence not considered. He reiterated their earlier prayers.

The position of the law i.e., **Section 360 (1) of the Criminal Procedure Act, Cap 20 R.E 2022 (CPA)** disallows appeals against

conviction where such conviction was a result of the appellant's own plea of guilty save for the extent or legality of the sentence. For easy of reference, the section reads:

> *"360 (1) No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted of such plea by a subordinate court except as to the extent or legality of the sentence"*

The above notwithstanding, in applying the above prohibition against the appellant, it must first be established that the plea was unequivocal. In different occasions, this court and the Court of Appeal has highlighted the circumstances under which an appeal on plea of guilty against conviction may be allowed. **In Lawrence Mpinga v. Republic (supra)** it was held that:

> *"An accused person who had been convicted by court of an offence on his own plea of guilty, may appeal against the conviction to a higher court on the following grounds:*
>
> *1. That 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 an offence not known to law; and

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

That being the position of the law, the issue for consideration is whether looking at the proceedings and facts as reflected from the record of the trial court, the appellants unequivocally pleaded guilty to the charge. In answering the above posed issue my reliance shall be confined in the conditions set in the case of **Michael Adrian Chaki V. Republic** (supra). In that case the Court of Appeal of Tanzania set conditions which must be conjunctively met for a valid conviction to be found on an unequivocal plea. These conditions are as follows:

1. *"The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;*
2. *The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.*
3. *When the accused is called upon to plea to the charge, the charge is stated and fully explained to him before he asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228 (1) of the CPA.*

4. *The fact adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.*
5. *The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see* ***Akbarali Damji vs R.*** *2 TLR 137 cited by the court in* ***Thuway Akoonay vs Republic*** *[1987] T.L.R. 92);*
6. *Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all elements of the offence charged."*

I shall begin with the issue of defective charge sheet that the same does not disclose the name of the said foreign citizens.

Undoubtedly, the charge sheet read on the first count that the appellants on dubious date of July 2021 within the United Republic of Tanzania did organize to smuggle prohibited Immigrants into the United Republic of Tanzania to wit: they entered two citizens of Ethiopia without permit.

Guided by the same observation made by the Court of Appeal in the cited case of **John Charles V Republic (supra)** faced with almost the similar situation said that the substance of the charge was being found transporting eight (8) Illegal Immigrants of Ethiopian National. The Court only imposed the responsibility to the

prosecution to lead facts that the appellants were found transporting illegal immigrants. The same position applies in the circumstances of this case and Mr. Ngongi has not told this court which law requires that the said illegal Immigrants must first be found guilty by the court for the perpetrators of their illegal immigration to be taken to court. In the circumstances therefore, I agree with Mr. Mwapili that the charge was not defective.

Again, as to the issue that the appellants spent almost two months in police custody hence their plea was equivocal, the same does not hold water because the fact there were in police custody did not feature as their defence of pleading guilty and also that there is no record to show that they were forced to do so.

The proceedings on record show on 14.09.2021 charges were read over and explained to the accused persons and they were asked to plead. Clearly, the issue of misapprehension here does not arise since the records show that the charge was explained to the appellants as correctly observed by Mr. Mwapili. The issue for consideration is what was their plea.

On the first count that concerns all five appellants the record show that the trial court only recorded the plea of the 1st and 2nd

appellants in their own language where they said: *"Ni kweli nilipanga mipango ya kusafirisha wahamiaji haramu"*. The opposite is true in respect of the 3rd, 4th and 5th appellants were the trial court plainly recorded the words **"do".**

In ordinary course of the day the word "do" following a series of a list means the same as above. Nevertheless, the admission or denial of the commission of the offence is not an ordinary listing as it has dire consequences of the person's curtailment to liberty. Therefore, the dictates of the law i.e., **section 228(2) of the Criminal Procedure Act Cap 20 RE 2022**, in ensuring that ends of justice are met, provides clearly that the said admission must be recorded as **nearly as possible in the words that the person uses** (see the cited case of **Kigundu Francis and Another (supra)** This is to ensive with certainty that the accused unequivocally pleaded guilty out of his own volition and is ready for the consequences thereafter.

In the circumstances of the instance case, the word **"do"** is far from the such dictate of the law that ***"his admission shall be recorded as nearly as possible, in the words he uses..."***. If at all it is presumptive and one should never presume in justice.

The above notwithstanding, the facts of the case read to the appellants in respect of the charged offence explains how each of the appellant was involved in respect of the 1st count of organizing the immigration of the immigrants. All five appellants were recorded to admit their particulars as per the charge sheet by saying "Ni kweli". In reading the charge sheet in so far as the 1st count is concerned, it shows that the Appellants admitted their names and the fact that they organized to smuggle prohibited immigrants i.e., they entered two citizens of Ethiopia without permit.

After finishing reading the facts of the case all appellants at page 7-8 of the proceedings were recorded admitting that they committed the offences they were charged with and the facts read by prosecution in court are correct. To wit:- " *Maelezo yote niliyosomewa hapa Mahakamani na mwendesha mashtaka ni sahihi kabisa na ninayakubali yote*"

The 3rd, 4th and 5th appellants even pleaded on the facts that:

3rd accused – "Ni kweli nilikuwa nasubiri kuwapokea wahamiaji hao haramu wawili katika Kijiji cha Mkunya"

4th accused – "Ni kweli nilikuwa nasubiri kuwapokea wahamiaji haramu hao na kuwasafirisha kwa pikipiki kwenda Mtwara"

5th accused – "Ni kweli nilikuwa nasubiri kuwapokea wahamiaji haramu hao na kuwasafirisha kwa pikipiki kwenda Mtwara"

In fact, the admission of facts of the offence by the appellants was not only clear but also descriptive which un-ambiguously shows that they comprehended the offence they were charged with and the facts of the said offence.

At this juncture, I hasten to agree with the counsel for the respondents that much as the court had initially recorded the plea of the 3rd, 4th and 5th appellants as "do" the further reading of the facts and the response of the appellants proves that they un-equivocally pleaded guilty and the facts by the respondent supported the charge to which the appellant admitted.

As for consideration of the mitigation factors, I agree with Mr. Mwampili that the trial court considered the mitigation factors prayed by the 1st to the 4th appellants against the security of our Nation and exercised its discretionary powers to impose a legal

sentence. However, again, there was no mitigation that was recorded in respect of the 5th appellant.

Never the less, this being the first appeal and upon going through the facts of the case, I find it appropriate to make my findings on the sentence meted to the appellants.

I am alive to the principle of the law that maximum punishment should be reserved for the worst offence of the class of which the punishment is provided as stated in the case of **Juma Mniko Muhere V R**, Criminal Appeal No. 211 of 2014 (Unreported).

In the antecedents, the prosecution apart from praying for the severe sentence on the reason of the security of the nation, they were not recorded to have said that the appellants are habitual offenders. It means they do not have such records of the Appellants.

I am inspired by the spirit of the Court of Appeal in the case of **Lubaga Senga Vs R**, [1992] TLR 357 which held as that:

"(i) Every sentencing process cannot and should not, unless a statutory minimum sentence is being administered, avoid individualization of the offence, and the circumstances of the offender, otherwise the whole exercise becomes mechanical;

(ii) the appellant was, in the circumstances, entitled to more lenient treatment than he was accorded".

In this case the appellants pleaded guilty to the charged offence. And as alluded earlier there was no record that they were habitual offenders. In that case since the sentence is not mandatory minimum sentence, they deserved some lenience.

I would have ordered the file to be remitted to the trial court to record the mitigation of the 5th appellant. However, I find that no ends of justice would justify the same.

In the circumstances therefore, I find that the sentence was excessive on the circumstances of the case and I accordingly reduce the same and impose a sentence that would result to an immediate release of all five accused persons from prison unless otherwise held for other lawful cause.

Accordingly ordered.

R.A. Ebrahim

JUDGE.

Mtwara

05.07.2023