IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 63 OF 2022

(Arising from Criminal Case No. 108 of 2022 in the District Court of Masasi at Masasi before Hon. Kashusha – RM dated 01.06.2022)

Mohamed Rashid @ Mnihapuka ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 26.06.2023

Date of Judgment: 04.08.2023

Ebrahim, J.:

The appellant herein was convicted and sentenced to a term of ten years' imprisonment on his own plea of guilty. The appellant was charged with the offence of stealing by Agent **c/s 273(b) of the Penal Code Cap 16 RE 2019** (now 2022).

Aggrieved by conviction and sentence, the appellant lodged the instant appeal raising two grounds of appeal complaining that the

trial Magistrate erred in law by convicting him basing on the equivocal plea of guilty whilst he did not understand the nature of the plea and the offence as ingredients of the offence were not explained to him. He complained also that court records do not reflect the language used to read and explain the facts/charge to the appellant.

On 30.11.2022, the appellant filed two additional grounds of appeal in which he complained about the same issue of equivocal plea.

At the hearing of the instant appeal the Appellant appeared in person unrepresented and the Respondent was represented by Mr. Edson Mwapili, learned State Attorney.

The Appellant prayed for the State Attorney to begin while reserving his right to rejoin.

Mr. Mwapili supported the conviction and referred the court to the general position of the law i.e., **section 360(1) of the Criminal Procedure Act, Cap 20 Re 2022** which disallows appeal on a plea of guilty. He contended however that, an appeal on a plea of guilty can only be preferred in the circumstances where the plea is

imperfect, ambiguous or unfinished; appellant pleaded guilty by mistake or misapprehension; charge did not disclose the offence known to law; or the appellant could not have been convicted – **Lawrence Mpinga V R**, [1983] TLR 169; and **Karlos Punda V R**, Criminal Appeal No 153 of 2015 which were cited with authority in the Court of Appeal case of **Michael Adrian Chaki Vs The Republic**, Criminal Appeal No. 399 of 2019.

Mr. Mwapili contended therefore that the Appellant understood the offence he was charged with as reflected at pages 1-3 of the court records of which he pleaded by explaining himself. He also referred to the facts of the case which disclosed the elements of the offence. He concluded that the plea was unequivocal and prayed for the appeal to be dismissed.

In rejoinder, the Appellant insisted that he did not understand and that he pleaded guilty because he was tortured and did not know the impact.

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, firstly it must be established that the plea was unequivocal. In different occasions, this court and the Court of Appeal 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 reflected in the records of the trial court, the appellant unequivocally pleaded guilty to the charge. In answering the posed issue my reliance shall be confined to 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."*

To begin with the claim by the Appellant in his rejoinder submission that he was tortured at the police that was why he pleaded guilty; Out-rightly, I find such argument not to hold water because the fact that he was in police custody did not feature as his ground of appeal nor as his defence of pleading guilty. More-so there is no record to show that he was forced to do so.

The proceedings on record show that on 31.05.2022 the charge was read over and explained to the accused person and he was asked to plead. The accused was recorded replying that:

"It is true; I was given money by victim for business but I did not perform our agreement"

The response of the Appellant made me go back to the particulars in the charge sheet to see what was the issue. The particulars of the

offence reveal that between March 2019 and 19th May 2022 at Jidah area within Masasi District in Mtwara Region the Appellant did steal cash money Tshs. 17,500,000/- which was entrusted to him for business purposes by Ashura D/O Nassoro but instead he converted the money to his own benefits.

Matching the response of the Appellant to the particulars of offence it clear that the Appellant understood what was asked of him. Thus, there is neither the issue of language nor misapprehension because his response corresponds well with the particulars of the offence showing that he understood what he was asked to plead and what he was pleading guilty to. Further, did he have issues with understanding the language, he would have informed the court which would have made the provision for the same. Therefore, the fact that which language was used does not feature in the proceedings does not mean that the Appellant did not understand the language used in so far as his response is concerned. Therefore, I find that ground of appeal to be an afterthought and I dismiss it.

The issue for consideration is whether the plea was unequivocal?

In this case the Public Prosecutor read the facts of the case which are to the effect that the Appellant herein in March 2019 agreed to be employed by one Ashura Nassoro to do money pesa transactions including Mpesa, Tigo Pesa Airtel money etc. the Appellant was availed Tshs. 14,500,000/- as capital but come to May 2022, the capital gross enlarged to Tshs. 17,500,000/- of which the Appellant used for his own benefit. Hence, the victim sued him.

In responding to the above facts, the Appellant said that what has been submitted by the public prosecution is true account and he signed.

From his own admission of facts, the trial court went ahead to convict the Appellant on his own plea of guilty. The admission of facts of the offence by the appellant was not only clear but also un-ambiguous meaning that he comprehended the offence and the facts forming the said offence.

I therefore, hasten to agree with the counsel for the Respondent that the Appellant un-equivocally pleaded guilty and he well understood the facts of the offence. More –so the facts of the offence outlined the ingredient of the offence chargeable in law.

Conversely, the appeal by the Appellant does not fall within the exceptions set by the law or the case law.

Nevertheless, what caught the attention of this court is the sentence imposed by the trial Magistrate.

The law i.e., **section 170 (1) (a) of the Criminal Procedure Act, CAP 20, R.E. 2022** provides for the maximum sentence which the subordinate Court can impose to the accused in offences which are not scheduled to be five years. The provision is worded thus:

> *"(1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences–*
>
> *(a)* ***imprisonment for a term not exceeding five years;*** *save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;"* **(Emphasis supplied).**

The exception to the above position of the law is provided in proviso under **subsection 2 of section 170** of the same law to the

effect that conditions set in section 170(1) of Cap 20 shall not apply to the sentence set by the Senior Resident Magistrate of any grade.

The fact that the offence which the appellant stood charged with was not a scheduled offence, in light of what has been stipulated in the above quoted provision of law, it was improper for the learned trial Resident Magistrate to impose a jail sentence of ten years without confirmation from the High Court. The sentence imposed by the trial magistrate was un-procedural and illegal and thus this court is required to interfere as the factors fit with the position illustrated by the Court of Appeal in the case of **Shida Manyama V. R** Criminal Appeal No. 323/2014. In the cited case, the Court of Appeal, quoted with approval the case of **Silvanus Leonard Nguruwe V Republic** (1981) TLR 66 which listed factors to be in place before the appellant Court can interfere with the sentence of the trial Court. The factors are:

1. *The sentence imposed was manifestly excessive or*
2. *The trial judge in passing sentence ignored to consider important matter or circumstances which he ought to have considered*
3. *The sentence imposed was wrong in principle.*

It follows that, the trial Magistrate imposed sentence which was wrong in principle.

Having read the antecedents and the mitigation factors, one can learn that the Appellant is a habitual offender who is also serving a two years sentence for the same offence in respect of Criminal Case No. 107 of 2022. However, the trial Magistrate had no mandate to pass a sentence of more than five years. In the absence of which, the sentence imposed is legal.

In the circumstances therefore, having found that the imposed sentence was illegal, I accordingly reduce the same and impose a sentence of two years from the date he was sentenced at the trial court.

Accordingly ordered.

R.A. Ebrahim

JUDGE.

Mtwara

04.08.2023