IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 49 OF 2023

(Originating from the decision of the District Court of Kiteto at Kibaya in Economic Case No. 1 of 2022 dated 18/4/2023)

SIMANGO KIBINDIA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

17/8/2023 & 6/9/2023

BARTHY, J.

The above-named appellant was arraigned before Kiteto District Court sitting at Kibaya (hereinafter referred as the trial court), charged with one count of unlawful possession of firearm contrary to section 20(1) & (2) of the Arms and Ammunition Control Act No. 2 of 2015.

It was alleged by the prosecution that, on 21st February 2022 at Engusero Sidani village within Kiteto District, the appellant (the accused person) was found in unlawful possession of one firearm known as "gobole" without a license or permit from authorized authority.

The appellant was convicted on his own plea of guilty and he was sentenced to twenty years imprisonment. Aggrieved with the conviction and sentence meted out against him, the appellant preferred the instant appeal with four (4) grounds of appeal as follows;

1. *The court erred in law and in fact by upholding the appellant plea of guilty without considering that the trial court never explained every ingredient of the alleged offence to the appellant.*
2. *That the appellant pleaded guilty as a result of misapprehension, and even takin into account the purported admitted facts, his plea was equivocal and full of ambiguities. For that reason, the lower court erred in taking as a plea of guilty.*
3. *That the appellant was convicted based on a defective charge.*
4. *The sentence of thirty [sic] (20) years imposed by the magistrate court is manifestly excessive in the circumstance of this case.*

When the appeal was called on for hearing, the appellant appeared in person while the respondent was represented by Ms. Leah Viosena learned state attorney.

When the appellant was called to expound the grounds of appeal, he adopted the grounds of appeal to form part of his submission. He had nothing further to explain.

On the respondent's side, Ms. Viosena opposed the appeal entirely. She went ahead to argue the first and second grounds of appeal jointly. She contended that the appellant was convicted on his own plea of guilty.

Therefore, the appellant cannot appeal against conviction, but only the sentence meted against him as provided under section 360(1) of the Criminal Procedure Act [CAP 20 RE 2022], (hereinafter referred to as the CPA). She then made reference to the case of Ally **Shaban Swalehe v. Republic**, Criminal Appeal No. 351 of 2020, Court of Appeal of Tanzania at Dodoma (unreported).

She further pointed out that, before the trial court, the charge was read out to the appellant who on his own words stated "it is true that I was found with the firearm". Thus, the appellant acknowledged his plea by signing it. Then, the facts were adduced which the appellant also admitted to be true.

Ms. Viosena was firm that the appellant's plea was not equivocal in terms of section 228 (a) of the CPA.

She further contended that, after the appellant was convicted, he was afforded the right to mitigate which re-affirmed his plea of guilty. To buttress her argument, she cited the case of **Zengo Benjamin v. Republic,** Criminal Appeal No. 562 of 2019 Court of Appeal of Tanzania at Shinyanga where it was held that; mitigation of the accused after being convicted from his own plea is clear that the he understood well his charge.

Ms. Viosena further argued that, the plea can be changed at any stage before sentence is imposed. She supported her arguments with the case of **Kamundi v. Republic** [1973] E.A 540.

It was therefore her submission that, the ingredients of the offence of unlawful possession of firearm were clear on the appellant's plea which was not unequivocal. She thus invited the court to dismiss the first and second grounds of appeal.

The appellant rejoined by stating that, the trial court did not take his plea.

Having heard the rival submission of the parties, going through the grounds of this appeal and the records of the trial court, this court is tasked to determine whether or not the appeal has the merit.

I will address the first and second grounds of appeal, as the appellant claimed his plea was equivocal due to misapprehension of facts, as the court did not explain the ingredients of the offence to him.

The records and submissions made before this court revealed that the appellant was convicted and sentenced before the trial court on his own plea of guilty. As rightly submitted by Ms. Viosena, it is settled law that no appeal against conviction resulting from plea of guilty shall be allowed as provided under section 360(1) of the CPA, except for the legality of sentence. The said provision reads;

> *360.-(1)* ***No appeal*** *shall be 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 the sentence.* [Emphasis added].

The court expounded on instances where appeal against conviction on plea of guilty can be preferred as decided in the case of **Laurence Mpinga v. Republic** [1983] TLR 66 where the court held that;

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

The issue in the instant appeal is whether the appellant's plea of guilt was an equivocal caused by misapprehension of facts. The trial court's record reveals that on 18/4/2023 when the charge was read over to the appellant, he replied as follows;

"it is true that I was found with the firearm"

Then, the prosecution briefly read the facts of the case and when the appellant was given chance to respond to the facts adduced by the prosecution he is quoted to have said;

"Facts are correct".

The record reveals further that, the prosecution prayed to tender several exhibits and when the appellant was availed chance to address on their admission of the exhibit to be tendered, he is quoted to have said;

"I have no objection on other exhibits ***but this is not the gun I was found with/arrested with****..."* [Emphasis added].

Following the appellant's objection, the prosecution prayed for short adjournment and when the trial resumed, the record reads that;

Public prosecutor: I have the firearm (gobore) as said.

An accused: Yes, that is the gun I was found with.

Upon his plea and admission to the facts and the exhibit tendered, the court went ahead to make its findings then convict and sentenced the appellant as shown above.

In the case of **The Director of Public Prosecutions v. Salum Madito**, Criminal Appeal No. 108 of 2019 (unreported) the Court of Appeal quoted the decision in **Adan v. Republic** (1973) E.A 445 where it was stated that;

> *"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty.* ***The magistrate*** *should next ask the prosecutor to state the facts of the alleged offence and* ***when the statement is complete, should give the accused an opportunity to dispute or to explain the facts or to add any relevant facts.*** *If the accused does not agree with the statement of facts or asserts additional facts which if true, might raise a question as to his guilty, the magistrate should record the change of plea to "not guilty" and proceed to hold a trial. If the accused person does not deny the alleged facts in any material aspect the magistrate should record a conviction and proceed to hear any further facts relevant*

to sentence. Statement of facts and the accused's reply must, of course, be recorded." [Emphasis added].

In the instant matter, the records are clear that the appellant after he made his plea and the facts were adduced by the prosecution side, he was afforded the right to respond to the facts where he admitted them to be correct.

With regard to the exhibit of firearm, the appellant explained to the court that it was the one he was found with. Another firearm was brought before the court by the prosecutor and the appellant identified it to be the one he was found with.

The proceedings of the trial court clearly indicates that the plea was unequivocal. In the case of See also the case of **Joel Mwangambako v. Republic,** Criminal Appeal 516 of 2017, Court of Appeal [2020] TZCA 1880 the court held that;

As long as the appellant pleaded guilty and then admitted the facts of the case that disclosed all the elements of the charged offence, his plea would be considered unequivocal.

I have also considered the arguments by Ms. Viosena and the authority she cited in **Zengo Benjamin v. Republic** (supra), that mitigation by the accused is an indication that he understood well the charge.

Going through the record, the appellant was availed a chance to mitigate and he simply stated;

"I pray for court leniency"

The plea of the accused can change even at the state of mitigation, in the circumstances of this clear the appellant's mitigation did not imply that he intended to change his plea. Therefore, I find the first and second ground of appeal without merit and therefore dismissed.

Turning to the third ground of appeal it basically faulting the conviction of the trial court to have come from the defective charge.

Ms. Viosena on her submission she argued that, the charge was properly laid before the court with proper provisions of law.

According to the records of the trial court, the appellant was charged with the offence of unlawful possession of firearms c/s 20(1) and (2) of the Arms and Ammunition Control Act No. 2 of 2015 (to be referred to as the Act) provides as follows;

20(1) A person shall not possess any firearm or firearm part unless he-

(a) holds a dealer's, manufacturer's or a gunsmith's licence or an import, export, on-transit or transporter's permit issued under this Act; or

(b) is authorized to do so under any other written law

In essence, the provision of section 20(1) of Act has sub part '(a)' and '(b)' which were necessary to be indicated in the charge sheet establishing the offence in order to allow the accused person understand the case against him and afford him fair trial. As it was stated by the Court of Appeal in the case of **Director of Public Prosecutions v. Pirbaksh Asharaf & others,** (Criminal Appeal 345 of 2017) [2018] TZCA 64 where the court held that;

The charge sheet ought to have specified, in the statement of the offence, the sub-section in which the offence was created

The court further stated that;

The prosecution and the trial court are duty bound to exercise care that the charge against the appellant is correct before the commencement of the hearing.

The charge laid against the appellant before the trial court did not specify the subsection which the offence was created. There is plethora of decisions where the courts find that, the charge which does not specify the subsection is defective, just to mention few see the case of **Abdallah Ally v. Republic**, Criminal Appeal No. 253 of 2013 (unreported).

The anomaly in charge laid before the trial court renders it incurable defective, which leads to unfair trial and therefore vitiate the proceedings.

Having found that the charge is incurable defect, the next question that this court is tasked to address is, what should be the remedy. Referring to the decision in the case of **Joakim Mwasakasanga v. Daniel Kamali and 4 others**, Criminal Appeal No. 412 of 2020, Court of Appeal at Mbeya it was held that;

> *Therefore, the answer to the point of law raised by the High Court for our consideration, and which is the main ground of appeal, namely whether it was correct for the court not to order a retrial, will always depend on the circumstance of each case.*

Since the charge laid the appellant before the trial court is incurable defective, the third ground has the merit and capable of disposing of the appeal entirely.

Hence, I allow the appeal, quash the proceedings of the trial court, set aside the conviction and sentence thereof. In the circumstances of this case, I find that it will be best to order retrial of the case after the amendment of the charge sheet. The trial of this case to be expediated within 45 days from the decision of this court, before another trial magistrate.

It is so ordered.

Dated at **Babati** this 6th September 2023

G. N. BARTHY

JUDGE