IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 67 OF 2023

(Arising from the District Court of Sengerema in Criminal Case No. 68 of 2023.)

DEUS MAGILI ..... 1st APPELLANT

MEDRICK LUSOLANYA ..... 2nd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

26th October & 17th November, 2023.

MUSOKWA, J.

This is an appeal from the conviction and sentence that was entered against the appellants herein, by the District Court of Sengerema (Kisoka- SRM) on 6th April, 2023 upon their plea of guilty. The appellants, together with four (4) other accused persons, were jointly charged with the offence of armed robbery, contrary to section 287A of the Penal Code, Cap. 16, R.E. 2022 (Penal Code) and were sentenced to serve thirty (30) years imprisonment. Two (2) out of the six (6) accused persons, namely Deus Magili and Medrick Lusolanya preferred to challenge the conviction and sentence in the present appeal. The brief facts of the matter are provided hereunder:

It is alleged that on 29th March, 2023 at Buzilasoga village, around night time, the accused persons stole several items, the properties of one Halima Daudi. The stolen items were valued at Tshs. 275,000/=. It is alleged further that before and after the commission of the offence, they used a weapon namely '*panga*' to retain the said properties. All accused persons pleaded guilty to the charge before the trial court. Accordingly, the trial court convicted and sentenced them accordingly. Being aggrieved with both conviction and sentence, two of the accused persons have approached this Court with the following grounds of appeal: -

1. *That, the honourable senior resident magistrate made a grave error in law and in fact by convicting and eventually sentencing the appellants herein on an alleged plea of guilty which was imperfect, ambiguous and unfinished, and which ought not to have been treated as a plea of guilty.*
2. *That, the honourable senior resident magistrate made a grave error in law and in fact by convicting and eventually sentencing the appellants herein on an alleged plea of guilty which was equivocal and could not sustain a valid conviction given the fact that the trial court did not satisfy itself and with clarity of mind, that the appellants were made to apprehend what they were*

actually faced with, before recording the alleged plea of guilty.

3. *That the honourable senior resident magistrate made a grave error in law by failing to ensure that the appellants were afforded a fair trial by making sure all the processes and procedures during the taking of the plea of guilty were strictly followed and adhered to, hence wrongly convicting and sentencing the appellants herein on an invalid plea of guilty.*

When the matter came for hearing, the appellants were represented by learned counsel Constantine Ramadhani. The learned state attorneys Evans Kaizer and John Joss appeared for the respondent.

The learned counsel for the appellant opted to submit on the 1st and 2nd grounds of appeal collectively, while the 3rd ground of appeal was argued separately. Mr. Ramadhani commenced his submission by stating that; the admission by the accused persons of their guilt to the charged offence is undisputed. However, the basis of their contention is to the effect that the plea recorded was equivocal and therefore not complete and consequently, falls short of the requirements of the law. On this basis, the learned counsel submitted that the court erred to record and proceed with conviction upon an equivocal plea.

It was further submitted by the applicant's counsel that a valid conviction can only be founded upon a plea that is unequivocal. For a plea to be unequivocal, he stated that certain conditions must be met. The conditions thereof, ought to be strictly and conjunctively complied with. The Court of Appeal case of **Michael Adrian Chaki Vs. The Republic**, Criminal Appeal No. 399 of 2019 (unreported) was cited. The conditions referred to are provided hereinunder: -

> *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 plead to the charge, the charge is stated and fully explained to him before he is 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 facts 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.

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 the elements of the offence charged.

Mr. Ramadhani proceeded by making an analysis of the application of the aforementioned conditions by the trial court in the course of the proceedings. To that effect, he submitted that conditions 1,4,5 & 6 aforementioned were not observed. Addressing the first condition, the learned counsel argued that the appellants were not arraigned on a proper charge. It was his submission that this condition was not met, as the charge was defective for failure to explicitly describe the person who was allegedly threatened by the weapon.

Mr. Ramadhani argued that while the charge sheet initially provided that the stolen property belonged to one Halima Daudi, evidently female; the charge sheet later refers to the person who was threatened by the weapon as "him", implying that the said person was male. The learned counsel argued that a charge on armed robbery is incurably defective if it does not clearly disclose the identity of the person against whom the weapon was used.

The case of **Marwa Kachang'a Vs. The Republic,** Criminal Appeal No. 471 of 2017, (unreported) was preferred which held that "*the charge was found to be wanting for failure to disclose particulars regarding the person against whom threat was directed".* The learned counsel for the appellants in continuing with his analysis, reiterated that the fourth condition was also not complied with. This condition provides that the facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged. He invited the court to refer to page 2 of the typed proceedings of the trial court where he pointed out that the facts adduced failed to disclose the person against whom threat was directed; which in his view is a key element in a charge of armed robbery. Mr. Ramadhani contended that in the matter before the trial court, the plea of guilty of the appellants was equivocal as the facts did not disclose all the ingredients of the offence of armed robbery.

The 5th and 6th conditions were argued collectively by learned counsel for the appellants. The conditions provide that the accused must be asked to plead, and in the event, he pleads guilty, he must plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear. Furthermore, before a conviction on a plea of guilty is entered, the court must satisfy itself without any

doubt that the facts adduced disclose all the elements of the offence charged. The learned counsel submitted that the trial court did not explain each of the elements of the charged offence of armed robbery. Further that, the appellants were not afforded an opportunity to respond to each of the facts distinctively. Instead, the accused persons collectively responded to all the ingredients of the offence with a blanket statement. The court was urged to make a perusal of page 3 of the typed proceedings which reads as reproduced hereinafter: -

> ***"Court: -***
>
> *All accused are addressed as per the facts of the case and reply.*
>
> *1st Accused: The facts of the case are true and correct.*
>
> *2nd Accused: The facts of the case are true and correct.*
>
> *3rd Accused: The facts of the case are true and correct.*
>
> *4th Accused: The facts of the case are true and correct.*
>
> *5th Accused: The facts of the case are true and correct.*
>
> *6th Accused: The facts of the case are true and correct."*

Mr. Ramadhani emphasized that the trial magistrate erred by failing to ensure that all the ingredients of the offence of armed robbery were disclosed and individually admitted before convicting the appellants.

There were additional observations which were raised with concern by counsel for the appellants. These include discrepancies between the charge sheet and the facts of the case on the time of the commission of the offence. While the charge sheet provides 03:20hrs as the time of the commission of the offence, the facts of the case are silent. In addition to the foregoing, the charge sheet mentions the District and Region in which the alleged offence was committed, however, the facts only mention the name of the village without naming the District and Region thereof.

Furthermore, in the charge, the make of the stolen TV is "sundar" while in the facts of case the make of the TV is "sunda" as reflected on page 2 of the typed proceedings. The charge also mentions one (1) solar battery whereas the facts do not disclose the number of solar batteries stolen. Mr. Ramadhani argued that the existing discrepancies prove the fact that the appellants entered a plea of guilty based upon a defective charge and facts which did not disclose the ingredients of the offence. To that effect, the learned counsel reiterated that the plea of the appellants was imperfect and ambiguous therefore, the same resulted in a plea that is equivocal.

The learned counsel in support of his submission in chief referred to the case of **Paulo Kaparage Vs Republic***,* criminal appeal No. 73 of

2021 (unreported). He further added that the appellants, being lay persons and unfamiliar with court proceedings, were prejudiced, the result of which they pleaded guilty to a fatally defective charge in ignorance.

The learned counsel concluded his submission in chief by arguing the third ground of appeal. He submitted on the existence of anomalies in the trial procedure which were in contravention of the principles laid down in the case of **Paul Kaparage's** (supra). Mr. Ramadhani contended that when a person is charged with an offence, the charge and particulars of the offence should be read out to him in his own language; and the facts must be explained before he can plead thereto. It was his humble submission that the appellants were not given the opportunity to dispute or explain the facts, or to add any facts which they may have considered relevant. In light of the foregoing, Mr. Ramadhani was of the opinion that the proceedings of the trial court could not be deemed to have been fair.

In support of his argument with regard to unfairness of the proceedings, he submitted that the exhibits were not read out to the appellants upon their admission by the trial court during the preliminary hearing. The exhibits referred to are the cautioned statements and the

certificate of seizure. The learned counsel submitted that it was the right of the appellants to be made aware of the contents of the exhibits. In that regard, the case of **Robison Mwanjise & Others Vs. The Republic** [TLR] 2003, was cited whereby the court held that failure to read out the contents of documents is a fatal irregularity. Mr. Ramadhani also raised concern as to whether the appellants comprehended the language that was used during the proceedings. While the typed proceedings of the trial Court at page 1 indicate that the charge was read out in Kiswahili; thereafter, the proceedings do not disclose in which language the facts were read.

It was the prayer of the learned counsel that this court should consider the plea to be equivocal on the basis of the foregoing reasons. Mr. Ramadhani further prayed that this court be pleased to allow the appeal, and order the release of the appellants from custody and an order re-mitting the matter to the trial court for trial.

In his response, the learned state attorney Mr. Kaizer affirmed the conviction and sentence entered by the trial court. He proceeded to state that the appeal has no merit. In contesting the appeal, he cited section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (CPA), which prohibits a person convicted on his own plea of guilty to appeal on

conviction with the proviso that he may appeal against the sentence. Mr. Kaizer chose to argue the first and second grounds of appeal simultaneously. In opposing the arguments advanced by counsel for the appellants, that the charge was incurably defective by failing to adhere to the principles narrated in the case of **Michael Adrian** (supra), the learned state attorney deliberated as hereinunder: -

The appellants were correctly charged under section 287A of the Penal Code, which establishes the offence of armed robbery. Mr. Kaizer further submitted that the particulars which establish the offence of armed robbery were in order. The facts of the case, he argued, explicitly provided for the ingredients of the charged offence by enlisting the stolen items, and further identifying the person with title to the stolen property and against whom the weapon was directed. He contended further that the appellants herein admitted to have committed the offence against Halima Daudi. Referring to page 2 of the typed proceedings of the trial Court, he noted that the 1st appellant, who was the 4th accused in the trial court; and the 2nd appellant who was the 6th accused, both stated as hereinunder: -

"It is true, I did steal and use panga to threaten her"

Accordingly, the learned state attorney submitted that the aforementioned statement is proof of the fact that the appellants herein were in admission of the charged offence. Furthermore, the appellants were cognizant of the fact that the person against whom the offence was committed was a female person; and that they threatened her by using a weapon. Mr. Kaizer added that substituting the word 'him' for 'her' was a minor typing error that is curable under section 388 of the CPA, further that; under no circumstances can an error of such nature prejudice an accused person.

The counsel for the respondent challenged the authorities relied upon by the counsel for the appellants, describing them as distinguishable to the present case. Mr. Kaizer vehemently disputed the issue raised by the appellant's counsel that the facts did not establish all the elements of the offence charged. In support of his claim, he referred to page 2 of the typed proceedings of the trial Court. Pointing out the ingredients of armed robbery which include stealing and use of a weapon, he proceeded to state that the facts of the case clearly established the offence of armed robbery to which the appellants were charged with.

The learned state attorney addressed the concern raised by the opponent counsel on the existing discrepancies between the charge sheet

and the facts of the case. He argued that discrepancies as to the time of commission of the offence, the model or quantity of the stolen items, including the omission to name the region within which the offence took place were minor errors which by no means affected the rights of the accused persons. He went on further to state that between the charge sheet and the facts of the case, all relevant information of the case was catered for; hence the arguments advanced by the appellants' counsel were futile and the contested documents were in good order.

Submitting on the issue of the language of the trial court during the proceedings, Mr. Kaizer contended that an assumption to the effect that the charge would be read out in Kiswahili, and the facts thereof read out in a different language is rather absurd. The appellants, he added, were afforded the opportunity to respond to the facts, contrary to the misconceived perceptions of the appellant's counsel. Their responses were accordingly entered to form part of the record, and their signatures appended therein. The case of **Joel Mwangambako Vs. The Republic** criminal appeal No. 514 of 2017, was preferred in support thereof.

Concurring with the opponent counsel, the learned state attorney submitted that an exhibit that is not read out should be expunged from the record. However, he added that; whether or not the exhibits had

been expunged from the records, this would have no effect on the matter before the trial Court as the appellants had already entered a plea of guilty. Therefore, the said exhibits had no impact on the plea of the appellants, which, he emphasized, was unequivocal. Mr. Kaizer explained further that when an accused has been convicted on his own plea of guilty, the tendering of exhibits is inconsequential to the proceedings before the trial court.

In winding up his submissions, the counsel for the respondent reiterated that the honourable trial magistrate entered conviction and thereafter the sentence, upon being satisfied that the plea of guilty entered by the appellants was unequivocal. Mr. Kaizer prayed that the appeal be dismissed for want of merit.

The fellow state attorney, Mr. John Joss focused his submission on the 3rd ground of appeal. He contested the 3rd ground of appeal; that the trial magistrate failed to ensure that the appellants were afforded a fair trial. The learned state attorney submitted that the manner in which the preliminary hearing was conducted was in adherence to the legal standards. In support of his submission, he cited the case of **Richard s/o Liongo @ Simageni Vs. The Republic,** Criminal Appeal No. 14 of 2020 which outlines the procedure in conducting a preliminary hearing.

Mr. John Joss prayed that in the event the court is dissatisfied with the manner in which the preliminary hearing was conducted, then the remedy to be preferred should be to order a re-trial. It was his prayer that the appeal be dismissed and the decision of the trial court be upheld.

Mr. Ramadhani in his rejoinder submissions re-affirmed his previous arguments. In contention of certain aspects of his opponent's submission, the learned counsel refused to ignore the use of the pronoun 'him' instead of 'her'. He declined the arguments advanced by the counsel for the respondent that it was a mere typing error having no adverse effects to the rights of the appellants. He reiterated that the admission of the appellants was based on misconceived facts as surely, they could not have admitted to committing the offence against a male person. This, he added, should have raised an alarm to the court that the appellants were unaware of the facts they were conceding to.

The learned counsel questioned the respondents' inaction to amend the charge while they had the opportunity to do so. The fact that they did not amend the charge, he argued, confirms that they were satisfied with the contents of the charge and presented the same before the court. Mr. Ramadhani stated further that; a defective charge cannot be cured by section 388 of the CPA**.** This is in accordance with the case of **Paula**

Kaparage (supra). Addressing the discrepancies between the charge and the facts, he contended that the remedy is not mere submissions; he claimed that the same can only be cured by presenting evidence.

Mr. Ramadhani underscored the significance of the language of the court and its relevance in ensuring transparency of the proceedings. Insisting that the ingredients of the offence of armed robbery were not established in both the charge and the facts of the case, he referred to the case of **Joel Mwangambako** (supra). Emphatically, he submitted that in consideration of the numerous irregularities aforementioned, the proceedings of the trial court cannot stand the test of a fair trial.

The learned counsel prayed that the appeal be allowed. Objecting the prayer of the respondent that the court should order a re-trial, he opined that by granting the same, the respondent will use the opportunity to fill in the gaps in his case, to the detriment of the appellants.

After conclusion of the submissions from both parties, I will start quoting section 287A of the Penal Code which creates the offence of armed robbery. The section provides that: -

> *"A person who steals anything, and at or immediately before or after stealing* ***is armed with any dangerous or offensive weapon or instrument*** *and at or immediately*

before or after stealing uses or ***threatens to use violence to any person in order to obtain or retain the stolen property,*** *commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment".*

From the quoted section above, the offence of armed robbery is generally established by stealing something, being armed with offensive weapon or instrument, and threaten to use violence in order to obtain or retain the stolen property. During the plea taking, the appellants and the other co accused persons uniformly stated *"it is true, I did steal and use panga to threaten her".* The next step was for the prosecution to read the facts that establish the offence under consideration. I have perused the records of the trail court; the proceedings indicate the following: -

"FACTS OF THE CASE

Accused name and address as per the charges sheet. That they are charged with 1st count of armed robbery C/S 287A of the Penal Code Cap. 16. On 29/3/2023 around at night at Buziloga village all the accused parsons did steal ***1TV 17 inch*** *make SUNDA Tshs 150,000/-;* ***2 cell phones*** *make TECHNO, worth 70,000/-,* ***solar battery*** *valued 35,000 Tshs,* ***1flash*** *valued 15,000/-* ***cash money 5,000*** *Total 275000/- property of Halima Daudi and before and after the stealing they* ***used panga***

> ***to retain the said properties****. On 30/3/2023 all accused were arrested and taken to Sengerema Police Station, where they all interrogated and confess, certificate of seizer was filled and all accused signed". [Emphasis added].*

Again, upon the facts being read over, the appellants and the other co accused persons responded that *"the facts of the case are true and correct"*. Thereafter, the prosecution, tendered the Certificate of Seizer and Caution Statement for all six accused persons. The same were admitted as Exhibit P1 collectively without objection from all accused persons. It should be noted that the facts are in lieu of the evidence that the prosecution ought to produce and prove the charge beyond reasonable doubt. For emphasis, the court of appeal in the case of **Michael Adrian Chaki Vs. The Republic***,* Criminal Appeal No. 399 of 2019 (unreported) held that: -

> *"…**in the absence of those facts which were necessary for establishing the offence charged, the appellants' plea cannot be taken to have been a plea of guilty.** The facts, as they are, did not disclose any offence known to law. The appellants' plea of guilty cannot stand. The same is thereby impaired and is rendered nugatory because he cannot be taken to have pleaded guilty to a non-existent offence. In short, a plea of guilty relieves*

the prosecution the burden of calling witnesses to prove the charge but it does not relieve them from narrating facts correctly, clearly and sufficient enough to support the offence charged [see Salehe Mohamed v. R (supra)]. ***Actually, the facts narrated are in lieu of the otherwise evidence that the prosecution would be required to lead in court by calling witnesses so as to prove the charge beyond reasonable doubt****". [Emphasis added].*

Generally, no criminal appeal can lie against a conviction on a plea of guilty except as to the extent or legality of the sentence. This legal principle is expressed under section 360 (1) of the CPA and it states as hereunder: -

"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].

In exceptional circumstances, an appeal from a plea of guilty may be entertained. This includes certain circumstances which may render a plea equivocal and a conviction on one's plea of guilty may successfully be challenged by way of appeal. The main issue for determination in this appeal is whether or not the plea entered by the appellants herein was equivocal. To be specific, the crucial issue is whether or not the

appellants' conviction could be founded on the facts as adduced by the prosecution after the appellants had pleaded guilty to the charge.

The counsel for the appellants raised a number of discrepancies on the proceedings of the trial court. These include the use of the word 'him' instead of 'her', being the victim of the alleged armed robbery. In addition, the brand of the stollen TV was indicated as "Sunda" instead of "Sundar"; and the facts indicated a village alone; but did not indicate the District and Region within which the offence was committed. In response thereof, the learned state attorney submitted that it was a minor typing errors which are curable under section 388 of the CPA and further that; under no circumstances can an error of such nature prejudice an accused person. I have carefully read section 388 of the CPA and as the result, I am in agreement with the learned state attorney that the said discrepancies do not in any way occasion a failure of justice.

The submission by the appellant's counsel that the facts did not establish all the elements of the offence charged was vehemently disputed by the respondent. This court made reference on page 2 of the typed proceedings of the trial Court. The records show the items stolen, dangerous or offensive weapon used (panga) and the fact regarding the use of violence toward the victim. Similarly, the facts quoted above

indicates all necessary elements of the armed robbery. In that regard, I find no merit on this ground and it is hereby dismissed.

Regarding the issue of the language of the trial court during the proceedings, it is not disputed that the charge was read out in Kiswahili. The appellants entered a plea that " *"It is true, I did steal and use panga to threaten her".* The facts were read and the appellants' response were recorded as *"the facts of the case are true and correct"*, and their signatures appended as part of the records. Mr. Ramadhani attempted, without success, to persuade this court that the language used during the reading of the charge by the trial court was different to the language used to read the facts after the appellants' own plea of guilty. Similarly, Mr. Ramadhani submitted that "a blanket statement" as the response upon reading the facts was not proper. Thus, I find this ground baseless in its entirety based on the holding in the case of **Joel Mwangambako Vs. The Republic** Criminal Appeal No. 514 of 2017 (unreported) where the court of appeal held that: -

> *"Next, we deal with the contention that the appellant's plea of guilty was equivocal. As we indicated earlier, the appellant pleaded to the charge after it was read over and explained to him that "**it is true I was found cultivating cannabis sativa plants."** Also, we showed earlier that his*

response as to whether the narrated facts of the case were true or not was, ***"I have heard the facts of the case as given by the PP. That statement is truth."*** *Having scrutinized the facts of the case, we entertain no doubt that the said narrative sufficiently disclosed the essence of the charged offence, …* ***Bearing that in mind and that the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said narrative,*** *we find without demur that he was rightly convicted as his plea was unequivocal and unmistakable. The ground of appeal at hand is bereft of merit. It fails". [Emphasis added].*

Both parties proposed that an exhibit that is not read out should be expunged from the court record. However, the learned state attorney submitted further that whether or not the exhibits had been expunged from the records, it would not affect the appellants' unequivocal plea of guilty. It was stated in addition that since the appellants were convicted on their own plea of guilty, the tendering of exhibits was inconsequential to the proceedings before the trial court. I agree with the position of the learned state attorney that upon a plea of guilty, tendering of exhibit is not a legal requirement. This guidance was declared in the case of **Mathias Barua Vs. Republic** Criminal Appeal No. 105 of 2025 (unreported) and the Court of Appeal held that: -

"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"****. [Emphasis added].*

The ground of appeal relating to fair trial does not detain me because I have held that the appellants on their own free will pleaded guilty unequivocally to the offence and that was enough to support the conviction and sentence on the charge of armed robbery.

In consideration of the foregoing reasons, the appeal lacks merit. It is hereby dismissed in its entirety.

I order accordingly.

DATED at **MWANZA** this 17th day of November, 2023.

I.D. MUSOKWA

JUDGE