IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB- DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 47 OF 2022

(Originating from Criminal Case No. 342 of 2020 of Kigamboni District Court, at Bagamoyo before Hon. M.B. Mmanya RM*)*

KHASSIM ELIAS TELEKEZA..... 1ST APPELLANT

RASHID RAMADHANI MRISHO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 24th Nov, 2022

Date of Judgment: 17th Feb, 2023

E.E. KAKOLAKI, J.

Before the District Court of Bagamoyo in Criminal Case No. 342 of 2020 Khasim Elias Telekeza and Rashid Ramadhani Mrisho were charged, convicted and sentenced to pay fine of Tsh.20,000,000 or serve 20 years imprisonment basing on their own plea of guilty. They both stood charged with the offence of Hosting illegal immigrants, Contrary to section 46 (1) (b) (g) and 2 of the Immigration Act, [Cap 54 R.E 2019]. Alongside with them there were other 27 accused not subject of this appeal charged of Unlawfully Entry and Present in the United Republic of Tanzania, contrary to section

45(1)(i) and (2) of the Immigration Act, [Cap. 54 of R.E 2016], who were also found guilty as charged on their own pleas, convicted and sentenced accordingly. Displeased with both conviction and sentence, the appellants preferred this appeal fronting 4 grounds of appeal going thus;

1. *That the learned trial magistrate erred in both law and fact by convicting the appellants basing on their own plea of guilty which was not unequivocal.*
2. *That the learned trial magistrate erred in law and fact by treating the admitted facts and their pleas as plea of guilty.*
3. *That the learned trial magistrate erred in law and fact by convicting the appellants based on a case that was poorly prosecuted.*
4. *That the learned Magistrate erred both in law and facts by basing the appellants' conviction on plea of guilty which didn't fulfil the requirement of law.*

On the strength of the said ground of appeal, appellants pray this Court to allow the appeal, quash the conviction, set aside the sentence and let them free. When the appeal came for hearing both appellants who appeared in person unrepresented prayed the Court to proceed with hearing by way of written submissions, the prayer which was supported by Rose Ishabakaki the learned State Attorney representing the Respondent. The submissions filing schedule orders were complied with by both parties.

Submitting in support of the first ground of appeal appellants categorized their grounds into three issues and argued the same as such, while the respondent condensed the grounds into one ground of appeal. In this judgment, I am intending to consider and determine the ground by adopting the mode used by the State Attorney.

Submitting in support of the first issue, as to whether the appellants were unprocedurally convicted and sentenced basing on an equivocal plea of guilty, appellants submitted that, the issue is answered in positive basing on the following reasons. **One**, that the purported appellants plea of guilty was unfinished and lacking as there was no any elaboration such as the nationality of the said immigrants, their number and the place where said immigrant were kept and/hosted when giving the alleged plea of guilty. **Two**, the purported appellants' plea of guilty was ambiguous as the Court did not specify as to who among the 28th, 29th and 30th accused persons pleaded guilty to the charge. Appellants referred the court to page 2 of the typed proceedings and submitted that the same suggests that, the appellants plea was nothing but an equivocal, unfinished and ambiguous to be relied upon to convict the them of any offence known in law particularly in criminal matters where the prosecution has a statutory duty to prove the

charges beyond reasonable doubt. They bolstered their arguments by citing the case of **Safari Deemay Vs. R**, Criminal Appeal No. 269 of 2011 (CAT-unreported) at page 6-10.

On the second issue it was appellants contention that, the facts narrated by the prosecutor to the appellants were barely lacking as the facts were not read over to the accused person and require them to comment in their own words, whether or not they admit the alleged fact. In this, they referred the court to page 2 of the typing proceedings.

It was their further contention that, the facts do not explain as to who amongst the 30 accused person admitted to the charge and the facts of the case. In their view the omission is fatal and incurable under the provisions of section 388 of the CPA. [Cap 20 R.E 2019]. The appellants cemented their arguments with the cases of **Safari Deemay** (supra) and **Michael Adrian Chaki Vs. R,** Criminal Appeal No.399 of 2019 at pages 11-12. They thus invited the Court to allow the appeal by quashing the conviction, set aside the sentence meted on them and release them from the prison.

In reply it was Ms. Ishabakaki's submission that, looking at page 2 of the proceedings, the 5th and 6th lines, it is apparent that the charge was read to

the appellants and the Magistrate recorded their plea that *"it is true"*. To her, it is not clear as to who between the 28,29 and 30 accused pleaded to the charge. According to her the plea was too general. She went on submitting that, even when the facts were narrated to the appellants and other accused persons, the Magistrate recorded that the 1st to 30th accused persons admitted to all facts without considering that, 1st to 27th accused persons were charged with a difference offence. She expounded that, under section 228 (1) of the Criminal Procedure Act, the court is required to read over the charge to the accused person who shall thereafter enter a plea, be it guilty plea or not guilty and under subsection (2) where the accused person so admits the truth of the charge his admission shall be recorded as nearly as possible in the words he uses and thereafter the Magistrate shall convict him and pass sentence.

In her view, the requirements of the law was not adhered to, as the Hon. trial magistrate treated the plea too general, hence difficult to comprehend who entered a plea of guilty and who did not. The learned State Attorney referred the Court to the case of **Frank Mlyuka Vs. Republic,** Criminal Appeal No. 404 of 2018 at age 12 where the Court quoted with approval the case of **Laurence Mapinga Vs. R**, (1983) TLR 166 which pointed out

circumstances under which the plea of guilty can be appealed against, one of them being taking into consideration the admitted facts, his plea was imperfect, ambiguous, or unfinished hence lower court's violation of the law in treating it as a plea of guilty.

In this matter she took the view that, the plea of guilty recorded does not reflect who exactly entered it, whether it was of 1st and 2nd appellants or not as even the narrated facts were recorded generally hence difficult to tell who exactly admitted them. On that account it was her prayer that, this Court order retrial of the case so that proper plea can be taken and proper trial conducted. To fortify her stance she referred the Court to the case of **Mussa Abdallah Mwiba & Others Vs. R,** Criminal Appeal No.200 of 2016 (CAT-unreported) which quoted with approval the case of **Fatehali Manji Vs. R**, (1996) EA at page 15 which shows when retrial can be conducted. She implored the Court to order retrial for the interest of justice.

In a short rejoinder applicants attacked the prayer for retrial, in their view, the same will result into injustice for being prejudicial on their party as the illegal immigrants alleged to be hosted by the appellants are nowhere to be found. Secondly they argued, the learned State Attorney did not consider the time they have spent in prison and thirdly, that the respondent did not

guarantee before the court on whether or not, they have enough evidence to support their charge. They reiterated their prayer as advanced in the submission in chief.

I have taken time to peruse the trial court's record as well as consider the rivalry submissions from both parties on the merit or otherwise of this ground of appeal. The lingering question before this Court is whether the appellants' plea was equivocal as alleged hence wrongly convicted and sentenced. Notably, under the provisions of section 360(1) of CPA, a person convicted on his own plea of guilty is barred from appealing against conviction as he can only appeal against sentence. However, as rightly submitted by the learned State Attorney the submission which I embrace, there are some circumstances under which a plea of guilty may be rendered equivocal hence subjected to appeal. Expounding on the said circumstances the Court of Appeal in the case of **Karlos Punda Vs. R**, Criminal Appeal No. 153 of 2005 (unreported) when referring to the case of **Laurent Mpinga Vs. R** [1983] TLR 166, observed that, conviction founded on plea of guilty cannot be faulted unless these conditions exist:

1. ***That even taking into consideration the admitted facts, the 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 the appellant pleaded guilty as a result of mistake or misapprehension;

3. That the charge laid at the appellant's door disclosed no offence known to law; and

4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged. (Emphasis supplied)

In the case at hand, it is uncontroverted fact that, appellants were charged with 28 others in two different counts and offences, the appellants and another fellow subject of this appeal being the 28th to 30th accused persons facing the second count. However, as page 2 of the proceedings suggest and rightly so submitted by both parties, it is not known/clear as to who amongst the three accused persons pleaded guilty to the offence facing the appellants as the plea recorded was a single one covering all accused persons. I find it worthy to quote part of the said proceedings at page 2 of the typed proceedings:

Court: *Charge read over and explained to the accused person who is asked to plea there to:-*
1st count for 1st -27th accused

It is true I entered in Tanzania unlawfully

2nd count for 28th -30th accused

It is true.

***Court**: entered plea of guilty to all accused person*

Signed:M.B Mmanya

RM

09/11/2020

Glancing at the above excerpt I entertain no doubt that, the recorded plea was in clear infraction of section 228 1) and (2) of the CPA Cap 20 R.E 2019, enjoining the Court with the duty of asking the accused person whether he admits or denies the truth of the charge in which his answer is to be recorded in the words he used. The said section 228(1) and (2) of the CPA provides that:

> *228.-(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) Where 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.*

The essence of the above provision of the law in my considered opinion is to, **one**, elicit the truth and unequivocal plea from the accused when

pleading to the charge and ensuring that his rights under fair trial are preserved. **Two**, to assist the higher court appreciate voluntariness of accused/appellant's plea when challenged, in that it was recorded in his own words after understanding every constituency of the charge hence unequivocal plea. So it is imperative that every court of law must comply with the procedure set out in section 228(1) and (2) of the CPA, when taking accused's plea of guilty and before entering conviction. This emphasis was also given by the Court of Appeal in the case of **John Faya vs. R**, Criminal Appeal No. 198 of 2007 (CAT-unreported) which quoted with approval the case of **Rex Vs. Yonasani Egalu and Others** (1942) EACA 65 at Page 67, the case which laid down the procedure to be followed by the court of law in case the plea of guilty is entered by the accused person. It was stated in that case that:

> *"In any 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 or deny every constituent* ***and that what he says should be recorded in a form which will satisfy an appellate court that he fully understood the charge and pleaded guilty to every element of it unequivocally***."

In the instant case as alluded to above, the plea recorded was ambiguous as the court did not record the plea of every accused person instead lumped up them into single plea of three accused person. Further the plea was not complete as it is not enough to say "it is true" without qualifying the accused's admission to the offence. The conclusion obtained in this respect single plea I hold is that, it was unworthy of reliance treating the appellants' pleas as plea of guilty and proceed to convict them without the trial Court inviting each and every appellant to plead to the charge and record his own plea in the used words. The issue is therefore answered in affirmative that, the plea was equivocal hence the trial magistrate strayed to rely on the same to convict and sentence the appellants as he did. This ground of appeal is sufficient to dispose of the appeal and I do not find any useful reason to spend much energy considering the rest of the grounds of appeal.

Having been satisfied that the appellants' conviction and sentence emanated from equivocal pleas, I allow the appeal, invoke revisionary powers of this Court under section 373(1)(a) of the CPA and proceed to quash the conviction entered against appellants and set aside the sentence meted on them.

The follow up question after taking such course is what remedy are the appellants' entitled after quashing their conviction and set aside the sentence. The learned State Attorney implored this Court to order for retrial of the matter, the prayer which was vehemently challenged by the appellants on account that it will be prejudicial to their fate given the fact that, they have already served sentence obtained from a wrong conviction. I purchase the proposition by the learned State Attorney as to take the appellants back to the trial court though not to be retried but to stand their trial since b entering equivocal plea as already found by this Court, they never stood their trial for this court to order for their re-trial. The Court of Appeal in the case of **Michael Adrian Chaki** (supra) in a situation akin to the present one, deliberating on what it entail to stand a retrial had this to say:

> *We are alive to the usual course taken by courts where the appellants plea is found to be equivocal that the case is remitted back to the trial court for it to proceed with the trial as if the appellant had denied the charge. That is to say, he has pleaded not guilty to the charge. (See* ***Juma Mohamed vs Republic****, Criminal Appeal No. 272 of 2011 (unreported)* ***In fact the proceedings on plea of guilty did not involve calling of witnesses and it is supposed to be so. In the real sense, therefore the appellant did not stand trial.***

> ***So, by been taken back to the trial court for him to stand trial as if he had pleaded not guilty to the charge it does not amount to a trial denovo or re-trial as the learned State Attorney has put it. Actually, it is then when he stands trial****. (Emphasis supplied)*

As the circumstances in the above cited case are similar to the ones in the present matter, I invoke the wisdom of the apex Court of the land on what course to be taken under the circumstances and proceed to order that, the case file to be remitted to the trial court for the appellants to take a fresh plea and the matter to proceed there before another competent magistrate in accordance with the law. It is further ordered that, the appellants' trial should commence with immediately effect and, in the event, they are found guilty of the charged offence, then the period of time spent in prison serving the current sentence be taken into account when passing the sentence. Considering the nature of the case, I direct that the appellants, be remanded in custody until pending their trial.

It is so ordered.

Dated at Dar es Salaam this 17th February, 2023.

E. E. KAKOLAKI

JUDGE

17/02/2023.

The Judgment has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of the appellants in person, Mr. Paul Kimweri, State Attorney for the respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
17/02/2023.