IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 111 OF 2022

(Originating from the District Court of Sumbawanga at Sumbawanga in Criminal Case No. 80 of 2022)

VICTOR GAUDENCE KIHWELE.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

JUDGMENT

21st March & 16th May, 2024

MRISHA, J.

This is an appeal which originates from the District Court of Sumbawanga at Sumbawanga in Criminal Case No. 80 of 2022 (the trial court). In this case there were six accused persons who were arraigned before the trial court with two counts.

In the first count, two of them whose names were **Victor Gaudence Kihwele** and **Sunday Makene Magogera,** were charged with one count

of Smuggling Immigrants contrary to section 46(1)(c) and (2)(b) of the Immigration Act, [CAP 54 R.E. 2016], whereas, the remaining accused persons who were **Meharu Tesfaye Balla, Abate Degu Jema, Dellelle Godiso Burko** and **Abit Tamasgen Abate,** were charged with the second count of Unlawful being present within the United Republic of Tanzania contrary to section 45(1)(i) and (2) of the Immigration Act, [Cap 54 R.E. 2016].

All accused persons were convicted on their own plea of guilty to the charge and having admitted the facts constituting the offence narrated to them by the learned State Attorney, to be correct. Consequently, the 1st and 2nd accused persons were sentenced to pay fine to the tune of Tshs. 20,000,000/= and in default, to serve twenty years imprisonment each.

For the 3rd, 4th, 5th and 6th accused persons, they were ordered to pay fine to the tune of Tshs. 500,000/= and in default, to serve three years imprisonment.

The appellant **Victor Gaudence Kihwele** herein, was dissatisfied with the decision of the trial court; hence, appealed to this court. He preferred the present appeal to this court on the following grounds: -

1. That the Trial Magistrate grossly erred in law and fact by upholding the conviction and sentence of the appellant relying on unequivocal plea of guilty.
2. That the trial court erred in law and facts by relying on plea of guilty while failed to note that he was denied an opportunity to dispute or add anything relevant to the facts in order to make the court be satisfied on it.
3. That, proof of Tanzanian citizen was not taken into consideration hence (sic) impugneted decision.
4. That, the charge preferred against the appellant was defective and the same did not mention the time the alleged accusation was taken; hence miscarriage of justice.
5. There was mis joinder of counts; hence misleading the court.
6. That, the appellant was not afforded opportunity to understand his rights.
7. The trial Magistrate made a serious misdirection of law and facts by not considering the right to be considered as I was denied the right of hiring advocate; if that could be done the decision could come with (sic) deferent results.

8. That, the trial magistrate erred in law and fact to convict and sentence the appellant without considering that words used by the appellant to (sic) plea guilty, were not written in Kiswahili language which were spoken by the appellant.
9. That, the trial magistrate erred in law in convicting and sentencing the appellant without first thinking that it was my first time to appear and stand before the court; hence the charge sheet could be read twice line by line.

When the appeal was placed for hearing before this court, the appellant entered appearance in person, unrepresented whereas the respondent Republic had the services of Ms. Neema Nyagawa and Ms. Atupelye Makoga, both learned State Attorneys.

As it were, the appellant fully adopted the memorandum of appeal which I have reproduced above. In elaboration, the appellant insisted the court to consider his grounds of appeal because they are well explained. Hence, he prayed to this court to allow appeal and set him free.

In response to the appellant's submissions, Ms. Neema Nyagawa supported the appeal filed by the appellant on the first ground of appeal. She submitted that no appeal will be heard where the appellant is convicted

and sentenced on his own plea of guilty, except as to the extent or legality of sentence. To buttress her position, she referred section 360(1) of the Criminal Procedure Act (the CPA).

Again, to cement her proposition, she cited the case of **Omary Joachim v Republic**, Criminal Appeal No. 536 of 2016 CAT at page 9. In the said case, the Court of Appeal referred the case of **Laurence Mpinga v Republic** [1983] TLR 166 in which the circumstances which were enumerated in that case were; **One**, that his plea was imperfect, ambiguous or unfinished; **two**, that the appellant pleaded guilty as a result of a mistake or misapprehension; **three**, that the charge laid at his door disclosed no offence known to law; and **four**, that upon the admitted facts, he could not, in law, have been convicted of the offence charged.

Applying the above mentioned principle in the present case, the learned State Attorney referred page 2 of the typed proceedings and submitted that the charge sheet was read over and the appellant pleaded guilty by saying that, *"Kweli"* that means it is true. She was of the view that the said plea is not enough; it is unfinished plea.

Again, she argued that when the facts were read over to the appellant, the appellant pleaded by saying *"Nakubali"* that means he admitted that all

facts narrated to him were true; this is shown at page 5 of the typed proceedings. She was of the proposition that the trial court misdirected itself by holding that the plea was unambiguous.

Arguing in regards to the fourth circumstance as alluded in the **Laurence's case** (supra) that upon the admitted facts, the appellant could not, in law, have been convicted of the offence charged, the learned State Attorney summitted that the appellant was charged with the offence of Smuggling Immigrants contrary to section 46(1)(c) and (2)(b) of the Immigration Act, Cap 54 R.E. 2016.

However, it was her argument that the facts which were read over by the Public Prosecutor do not constitute the offence the appellant was charged with, although the appellant admitted all facts read over to him.

Finally, she concluded by supporting the appeal and prayed to this court to quash conviction and set aside sentence, just as the appellant implored the court to.

In rejoinder, the appellant had nothing to add because he is a lay man. In dealing with the appeal which lie where the accused person is convicted on

his own plea of guilty, the law under section 360(1) of the CPC regulates the appeals of the same nature.

This court is fortified with the submission of the learned State Attorney, that for the appellate court to entertain that kind of appeal, the appellant must prove existence of the requirements prescribed in the case of **Omary Joachim v Republic** (supra) and also the case of **Laurence Mpinga v Republic** (supra).

In view of the mentioned above position of the law and the submissions of both parties, the issue for determination is whether the appellant was convicted on the plea which was unequivocal.

In order to properly determine the issue in this appeal, it is essential to reproduce the appellant's plea of guilty as recorded by the trial court on 31st August, 2022. It reads:

> "***Coram:*** *Hon. G. William –SRM*
>
> ***Pros/SA****: Present*
>
> ***Accused:*** *Present*
>
> ***B/C:*** *Kessy*

Charge is read over and fully explained to the accused person who asked plead thereto.

1st Count,

1st Accused: *"Kweli".*

2nd Accused: *N/A*

Court: *EPG".*

The above excerpt clearly depicts that the charge at hand, the particulars of the offence as well as the facts of the charged offence as given by the prosecution, do not disclose the ingredients of the offence the appellant was charged with.

The records reveal that the appellant pleaded by saying that, *"It is true".* In my view such plea is equivocal because it was imperfect and unfinished. Nonetheless, the facts which were read over and narrated to the appellant regarding the charged offence of smuggling Immigrants, do not establish the alleged charged offence, as the learned State Attorney submitted.

In order to assure itself that a plea is unequivocal, the trial court must consider the steps in which the appellate court should consider, and those

steps were mentioned in the case of **Adan v Republic** [1973] 1 EA 445, where the Court held inter alia, that:

> *"...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 explain the facts or to add any relevant facts. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence..."*

The above mentioned principle applies to the instant case where it appears that, the appellant admitted all facts read over and narrated to him, and the trial court was pleased that his plea was complete.

Still, the narrated facts appear to have been admitted by the appellant without any dispute, addition of facts or alteration. Consequently, the appellant was convicted on his own plea.

A careful scrutiny of the trial court records on plea taken by the appellant after the charge was read over to him, indicates that the appellant took his plea by saying *"Kweli"* which literally means *"It is true"*.

In my view, to plead guilty on the charged offence by just saying, *"It is true"*, is not enough to warrant the court to enter plea of guilty and it makes such kind of plea to be unfinished and vague.

I agree with the submission of the Ms. Neema that the words *"Kweli"* or *"It is true"*, may be taken to have meant the truth of anything which makes them to be ambiguous. This court, based on the plea taken by the appellant before the trial court, is of the considered view that the purported appellant's plea of guilty at the trial court has not passed the test enunciated in the case of **Adan v Republic** (supra). Thus, I find it to be equivocal.

As the law requires, after the accused person pleads guilty, the facts constituting the offence charged must be narrated and the accused person must be given an opportunity to dispute, explain the facts or to add any relevant facts.

In the instant appeal, the appellant agreed the facts without making any alteration. However, the counsel for the respondent Republic in her submission argued that the facts narrated by the public prosecutor do not constitute the offence charged. She further contended that even though the appellant admitted to all facts, but that admission does not touch the offence charged.

The appellant was charged with the offence of Smuggling Immigrants contrary to section 46(1)(c) of the Immigration Act, Cap 54 R.E. 2016. After the appellant pleaded guilty to the charged offence, the facts were narrated to him and he admitted them. The facts narrated by learned State Attorney concerned the four accused persons who were **Meharu Tesfaye Balla, Abate Degu Jema, Dellelle Godiso Burko** and **Abit Tamasges Abate.**

Those facts narrated disclose the offence of Unlawful present within the United Republic of Tanzania of which the 3rd, 4th, 5th and 6th accused persons were charged with.

Likewise, on the offence of smuggling immigrants which the appellant was charged with, the facts were narrated by the prosecution Republic. Nonetheless do not establish the offence as alleged in the statement and

particulars of the offence. In their facts the prosecution Republic do not clearly and sufficiently explain the circumstances in which and how the offence of smuggling immigrants was committed which is contrary to the law and precedents. This position was propounded in the case of **Michael Andrian Chaki v Republic**, Criminal Appeal No. 339 of 2017 (unreported) the Court held that:

> *"Where an accused pleads guilty to the charge, before conviction, the law is that, the prosecution id duty bound and it must audibly and understandably narrate facts establishing the offences alleged in the statement and particulars of offence. That is, the prosecution must explain clearly and adequately the circumstances in which and how the offence was committed in specific and intelligible terms".*

Thus, the prosecution Republic failed to narrate circumstances in which and how the appellant committed the offence he was charged with. As that was not done, the plea of guilty entered by the trial magistrate was equivocal and the appellant was improperly convicted.

In short, so to say, the case for the prosecution fell short, much as upon the admitted facts to have been narrated to the appellant, it appears that the offence of smuggling immigrants was not established.

The above being said and done, I find merits in the instant appeal which is hereby allowed. In the consequent result, the appellant's conviction and sentence are respectively quashed and set aside. In the final event, I order that the appellant be released from the prison custody forthwith unless he is detained for some other lawful cause.

It is so ordered.

A.A. MRISHA
JUDGE
16.05.2024

DATED at **SUMBAWANGA** this 16th day of May, 2024.

A.A. MRISHA
JUDGE
16.05.2024