IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 31 of 2023

(Originating from the District Court of Mpanda at Mpanda in Criminal Case No. 30 of 2023)

1. **EMPHRAIM MWAKITITU**
2. **GHATI MUGHARE NYANSONGO** .....**APPELLANTS**
3. **JUMA SOSTANES MWIKWABE**

VERSUS

REPUBLIC.....**RESPONDENT**

JUDGMENT

30th January & 21st February,2024

MRISHA, J.

The appellants **Emphraim Mwakititu**, **Ghati Mughare Nyamsongo**, **Juma Sostanes Mwikabwe** henceforth the first, second and third appellants respectively and other twenty (24) persons who are not part of the present appeal, were jointly and together charged before the District Court of Mpanda at Mpanda (the trial court) with one count of Aiding Immigrants to Unlawful Enter and Present within Tanzania contrary to section 45 (1) (p) and (2) of Immigration Act, [Cap 54 R.E 2016] (the Immigration Act).

In that count which was the second in the charge sheet that was tabled before the trial court, it was alleged that on the 24th day of April, 2023 at Katavi National Park within Mpanda District in Katavi Region, the said appellants aided 24 Ethiopian immigrants to unlawfully enter and present within Tanzania by transporting them to Sumbawanga Region in three private cars namely **Toyota Athlete Crown** with registration number T. 523 DQM and chases number 182-0021026 the property of Ally Salim Bakari, **Toyota Suceed** with registration number T. 420 DXR and chases number NCP 58-0081368 the property of Charles Joseph Mwitusya and **Toyota Probox** with registration number T. 113 DUZ with chases number NCP 51-0178377 the property of Charles Joseph Mwitusya.

When the charge was read over and explained to them, the first, second and third appellants pleaded guilty to the abovenamed second count and were consequently convicted after confirming to the trial court that the facts were read over and explained to them subsequent to their pleas of guilty, were correctly.

After conducting the pre-sentencing hearing, the trial court sentenced each of them to pay a fine of Tshs. (Tanzania Shillings) 500,000/= or to serve a custodian sentence for a term of six months in default.

Thereafter, the trial court made several orders including forfeiture of the above bolded private cars which were admitted collectively as Exhibit P2 at the stage of reading facts following the appellants' pleas of guilty, as it is shown at page 20 of the trial court typed proceedings.

It is due to the above convictions, sentences and order of the trial court that the appellants decided to approach this court with a Petition of Appeal containing the following six (6) grounds of grievances: -

1. That, the Honourable Trial Magistrate grossly erred in law and fact for convicting the Appellants based on equivocal plea which the court illegally alleged to be unequivocal plea.
2. That, the Honourable Trial Magistrate grossly erred in law and fact for admitting exhibits without proper procedures.
3. That, the Honourable Trial Magistrate grossly erred in law and fact for (sic) order forfeiture of three cars namely Toyota Crown with registration No. T. 523 DUM, Toyota Succeed with registration No. T. 42 DXR and Toyota Probox with registration No. T. 113 to the government admitting exhibits without proper legal procedures.
4. That, the Honourable Trial Magistrate grossly erred in law and facts for reaching convictions basing on the proceedings which

(sic) was tainted with illegalities, irregularities, and confusions which prejudices the Appellants.

5. That, the Honourable Trial Magistrate grossly erred in law and facts for failure to accord the Appellants the right to be heard.
6. That, the Honourable Trial Magistrate grossly erred in law and fact for failure to consider that the Appellants were convicted on an incurably defective charge.

When the appeal was called on for hearing both parties were duly represented by learned advocates. While the appellants were represented by Mr. Dominic Jeremiah Chacha, learned Advocate, the respondent Republic was represented by Mr. Gregory Muhangwa, learned State Attorney who was assisted by Ms. Safi Kashindi and Maula Tweve, also learned State Attorneys.

In submitting before the court in respect of grounds number 1, 4 and 6 which he proposed to combine and argue together, Mr. Chacha came up with four reasons in order to show that the convictions entered by the trial court against the appellants based on equivocal pleas which is not required in law.

His first reason was that the pleas of the appellants were not certain and clear as it is shown at page 18 of the typed proceedings. The records

show that in making their pleas the appellants just said, *"It is true"* without going further. Hence, he was of the view that the words, *"It is true"* were not enough to warrant an unequivocal plea. He also said that at page 15 of the typed proceedings, it is shown that the appellants denied the offence. He added at page 18 of the typed proceedings, it is not shown if the facts were clarified to the appellants after they pleaded to the charged offence.

In the circumstance, the appellants counsel, argued that it was difficult for the appellants to understand the nature of the offence they stood charged because the offence was technical and the appellants were unrepresented. To support his argument, the counsel for the appellant cited the provisions of section 228 (2) of the Criminal Procedure Act, Cap 20 R.E 2022 which deals with accused plea and he also referred the court to the case of **Munisi Marco Nkya vs Republic** [1999] TLR 59 where it was stated that:

"The law requires that the plea of guilty must be clear and certain"

In addition to the above, he submitted the accused pleas has to be taken with great care and the trial court has to be unsured of what the accused is doing and must record what exactly the accused say in his plea. Having argued so, Mr. Chacha concluded his submission on the first

reason by saying that the words, *"It is true"* were not enough to warrant unequivocal plea.

His second reason was that the particulars of the charge sheet and the facts of the case read where read over to the appellants did not establish the charged offence, thus the appellants' pleas were equivocal. He clarified that the facts were insufficient and they did not disclose the charged offence, therefore the convictions of the appellants were bad in the eyes of the law.

As for the particulars of the charge sheet in the second count, Mr. Chacha submitted that the same failed to disclose the names of the Ethiopians whom the appellant were alleged to have aided to unlawful enter and present in Tanzania. He said the rationale behind naming those persons in the charge sheet is to avoid fabrication of evidence. Hence, to him that was an illegality which makes the charge sheet incurably defective.

He cited the cases of **Mussa Mwaikunda vs Republic** [2006] TLR 387 CAT and **Idd Riganya vs Republic**, Criminal Appeal No. 190 of 2015 (unreported) to back up his argumentation. He added that section 135 of the CPA provides that the ingredients of the offence must be disclosed in order to establish the offence, but in the case before the

trial court, the charge sheet does not disclose the essential ingredients of the offence the appellants were charged with; hence they could not understand what they were pleading to.

Turning to the third reason, Mr. Chacha had it that the appellant were not given an opportunity to say whether they had any reservation to the facts which were read over to them and the prosecutor did not elaborate those facts to show that they disclosed the ingredients of the charged offence, as it is shown at page 19 of the typed proceedings, which is contrary to what was emphasized by the Court in the cases of **Sokoine Mtatula @Chimongwa vs Republic**, Criminal Appeal No. 459 of 2018 (unreported) **George Sanga Mussa vs Republic**, Criminal Appeal No. 108 of 2018 (unreported) and **Said Kombo vs Republic** [2000] TLR 315.

In regards to the fourth reason, the appellants' counsel submitted that the contents of the admitted exhibits were not read out to the appellants which is contrary to the trite law that unequivocal plea of guilty cannot stand where the contents of the admitted exhibit are not read out to the accused in order to enable him to know the contents of the tendered exhibit and decide whether to agree the intended exhibit or reject it and change his plea of guilty.

To bolster his proposition, Mr. Chacha referred the court to the cases of **Erneo Kidilo and Another vs Repubic**, Criminal Appeal No. 206 of 2017, CAT at Iringa and **Richard Lionya @Simageni vs Republic**, Criminal Appeal No. 14 of 2020, CAT at Dar es Salaam (all unreported) which provide six tests to be passed for an unequivocal plea to be sustained.

Having said so, the counsel for the appellant submitted that in totality of the above submissions and the authorities he had cited, he is of the view that the trial court convicted the appellants based on the equivocal plea. Hence, he prayed that grounds number 1, 4 and 6 of the appeal be found to have merit and the appeal be allowed.

Reverting back to the second ground which he proposed to argue separately, Mr. Chacha submitted that the exhibits P1 (Certificate of Seizure, P2 (the three private cars that is Toyota Athlet Crown, Toyota Succeed and Toyota Probox); also exhibits P3 (the smart phone and one mobile phone make Tecno) and P4 which is Tanzania Cash money 520,000/= and the appellants Caution statements which were admitted collectively as Exhibit P5, were improperly admitted by the trial court due to the following reasons:-

One, the appellants were not given an opportunity to comment on the admitted exhibits before reception of the same which infringed their rights. He referred the cases of **Salum Said Malangwa @Pagandufu vs Republic**, Criminal Appeal No. 292 of 2018 CAT at Dar es Salaam (unreported) which emphasized on the need to avail the accused with an opportunity to comment on the intended exhibit before its reception.

Two, the appellants counsel submitted that the contents of the exhibits were not read out after their admission which is contrary to the law that after any document is cleared for admission and actually admitted as an exhibit, its contents should be read out to the accused the purpose being to make the accused understand the nature and substance of the particular exhibit.

He submitted that the records are silent whether the contents of the exhibits were read out and that failure to do so is fatal, as it was stated in the cases of **Geofrey Jonathan @Kitomari vs Republic**, Criminal Appeal No. 237 of 2017 CAT at Arusha (unreported), at pages 12,13 and 14 and **Daniel Malago Makasi and 2 Others vs Republic**, Consolidated Criminal Appeal Nos. 346 of 2020; 475 & 476 of 2021 CAT at Dodoma , at pages 11 and 12.

Three, Mr. Chacha submitted that the prosecution was not a competent person to tender those exhibits before the trial court for he was not a prosecution witness hence not competent to tender the said exhibits. He added that the prosecution ought to have called the witness to tender those exhibits and not allow the prosecution to do so. He referred the court to page 6 of the case of **Vicent Kija vs Republic**, Criminal Appeal No. 232 of 2017 CAT at Shinyanga in order to cement the above proposition.

Four, the counsel for the appellants submitted that exhibit P2 which refers to the three private motor vehicles, was admitted by the trial court without it see the said motor vehicles. He said the records are silent whether the trial court had an opportunity to see and inspect the said private cars before admitting them. Having said so, the appellants counsel prayed the court to consider that the second ground of appeal has merit and order that the said motor vehicles be returned to the appellants.

In submitting about grounds number 3 and 5 of appeal which also were combined and argued by him together, Mr. Chacha submitted that those grounds deal with forfeiture procedure. According to him, the procedure

of ordering forfeiture was not complied with and the appellants were not afforded an opportunity to be heard; hence their rights were violated.

The learned appellants' counsel submitted further that the trial court did not comply with the forfeiture procedure as stipulated under section 392A (3) of the CPA which requires the trial court upon receiving an application for the forfeiture to afford both the applicant and the respondent a right to be heard, but that was not done by the trial court after receiving an application for forfeiture from the State Attorney, as it is shown at page 23 of the trial court proceedings; hence, the fundamental right of the appellants to be heard which is provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the URT Constitution) was infringed.

He cemented his argument by citing the case of **Michael Kabongo vs Republic** [1989] TLR 31 in which the Court faulted the trial magistrate for offending one of the cornerstone principles of natural justice for his failure to give the accused the notice of forfeiture and an opportunity to be heard, and finally submitted that from what he had submitted above regarding grounds number 3 and 5, he prays the court to find merit in those and other grounds of appeal and proceed to allow the instant appeal.

In response, Mr. Muhangwa did not mince words for he unhesitant submitted that as the respondent Republic, they oppose the present appeal, but he indicated that he will not submit in the manner proposed by his counterpart.

He began his submission by notifying the court that they have observed that there is irregularity on the face of a Notice filed by the appellants because first, the same was filed under section 361 (1) of the CPA which he argued is not a proper provision of the law.

Secondly, he submitted that the said Notice is defective for failure to mention properly the names of the appellants because it mentions only the name of *"Faris Bamud and 27 Others"* instead of mentioning the full names of the three appellants before the court and other persons.

To bolster his proposition, he cited the case of **Farijalah Shaban Hussein and Another vs Republic**, Criminal Appeal No. 274 of 2012 CAT at Dar es Salaam where the Court emphasized that the Notice of Appeal should have cited the appellant by name failure of which it cannot be said that the Notice of Appeal validly instituted a joint appeal; hence become incurably defective and renders the appeal incompetent.

Having argued so, Mr. Muhangwa submitted that on the above cited case and given the circumstances of the case at hand, it was his prayer that

the Notice of Appeal filed by the appellants be declared defective and their appeal be struct out and, in the alternative, he said the respondent Republic was read to proceed in accordance with the submission of the counsel for the applicants.

After that submission by her learned friend, Ms. Safi Kashindi began by reiterating her learned friend's position that the respondent Republic opposes the appeal which emanates from the pleas of guilty entered by the trial court after the appellants had agreed to each and every fact read over to them. She said the appellants' appeal contain six (6) grounds of appeal which all stem from their plea of guilty.

To make her point clear, Ms. Safi Kashindi cited the provisions of section 360 (1) of the CPA which prevents the appellate court to allow the appeal by the appellant who has been convicted on his own plea of guilty except as to the extent and legality of the sentence. To make it clearer, she referred the court to the case of **Mtuma Silima @Bonge vs Republic**, Criminal Appeal No. 11 of 2019 CAT at Dar es Salaam (unreported), at page 12 in which the Court paraphrased the provision of section 360 (1) of the CPA.

Having cited the above provision of the law and caselaw, Ms. Safi Kashindi submitted that the appeal before the court is improper because

the appellants were convicted and sentenced on their own pleas of guilty. After making those arguments, the learned State Attorney backstepped and began to address the grounds of appeal filed by the appellants one after another.

She began with the first ground of appeal and submitted that the same has no merit because it is clearly shown at page 18 of the typed proceedings that on 05.05.2023 when the case came before the trial court for preliminary hearing, a charge was read over and explained to the appellant who pleaded guilty to the second count by each of them saying, *"It is true"* and the trial magistrate entered their plea of guilty by recording that, *"Charge is read over and explained to accused person who is asked to plead thereto"* meaning that the charge sheet was read over and explained to the appellants who respondent by saying, *"It is true"*.

According to Ms. Safi Kashindi, what was done by trial magistrate was proper and in accordance with the provisions of section 228 (1) of the CPA which requires the trial magistrate to record the plea of guilty as nearly as possible in the words used by the accused person and proceed to enter his plea of guilty.

Stressing more on that point, the learned counsel submitted that the trial magistrate did not end there because the facts of the case were also read over to the appellants and they constituted the ingredients of the charged offence, and upon being asked to comment on the correctness or otherwise of the said facts, the appellant confirmed to the trial court that the said facts were true and correct, as it is shown at pages 19 to 22 of the trial court typed proceedings.

In addition to the above, Ms. Safi Kashindi submitted that the charge sheet that was filed with the trial court complied with the provisions of section 132 of the CPA because the statement of the offence in that charge sheet was proper, the particulars of the offence were very clear and the appellants pleaded guilty.

She also referred the court to the case of **Mtuma Silima** (supra) which quoted with approval the case of **Laurence Mpinga vs Republic** [1983] TLR 166 in which the court highlighted the circumstances the appellant can rely on to challenge the decision which led to conviction on his own plea of guilty. They include the following: -

1. That even taking into consideration the given facts the plea was imperfect, ambiguous and unfinished,

2. That the appellant pleaded guilty as a result of mistake or misapprehension,
3. That the charge laid at the appellant's door discloses no offence known to law,
4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged.

In connection to the above decision, Ms. Kashindi submitted that upon examining the charge sheet and the facts which were read over to the appellants, she was certain that the appellants understood the nature of the offence they were charged with; also, the words used in their response, are very clear and unambiguous and there was no misapprehension of the entered plea.

Hence, it was her view that the appellants pleas were unequivocal and the trial court was right to convict them. She concluded her submission by contending that the appellants' pleas were unequivocal and she prayed that their first ground of appeal be dismissed.

Having done with the first ground, Ms. Safi Kashindi proposed to combine grounds number 2 and 3 of appeal and submitted that she is aware of the procedure of tendering exhibits, but she pointed out that such procedure is applicable when the case goes to a full trial. She cited

the case of n **Robinson Mwanjisi and Three Others vs The Republic** [2003] T.L.R. 218 to support her argumentation.

She also said that a Certificate of Seizure referred by the appellants' counsel is one of the exhibits of which contents must be read out to the accused person, but so long as the appellants' case did not go to a full trial, it was not necessary for those contents to be read out to the appellants, as it was stated in the case **Robinson Mwanjisi vs Republic** (supra) that:

> *"Failure to read them was not fatal because tendering such exhibits in the case where the appellant pleaded guilty is not a requirement of the law"*

As if that was not enough, Ms. Safi Kashindi submitted that failure to read the contents of the exhibit in a case where the appellant pleaded guilty to the charged offence does not vitiate the proceedings.

As regards the third ground of appeal, the learned counsel submitted that the same too has no merit because section 392A (1) of the CPA cited by the counsel for the appellant deals with an application made in court orally or in written form and subsection (2) of that provision provides for the modality of writing an application by way of Chamber summons supported by an affidavit, sub section (3) (a) requires the

applicant to be served with a notice within thirty (30) days of the application and subsection (3) (b) and subsection (3) (b) deals with oral application where the respondent is required to respond to the application as the court may direct.

Conversely, Ms. Safi Kashindi submitted that in our case, the forfeiture proceedings were conducted during the recording of Aggravating factors and the trial court came up with the order of forfeiture, as it is shown at page 23 of the trial court typed proceedings.

Having argued so, the learned counsel submitted that according to the circumstance of the case at hand, section 392A (3) (b) does not apply. Hence, she prayed to court to dismiss the third ground of appeal as well.

As for the fourth ground of appeal, the learned State Attorney submitted that the same too has no merit because from the beginning of the trial court proceedings to the end, there is nowhere it is shown that the trial court prejudiced the appellants. Also, there are not illegalities, irregularities and confusions occasioned in the case before the trial court.

She also challenged the counsel for the appellants who submitted that the charge sheet was not read over and explained to the appellants stating that at page 17 of the typed proceedings, it is clearly shown that

on 05.05.2023 the charge sheet was read over and explained to the appellants who were asked to plead thereto. Hence, it was her submission that the argument that the charge sheet was not read over and explained to the appellants, does not hold water.

The learned State Attorney further submitted that the facts of the case which contain the ingredients of the charged offence, were read over to the appellants who confirmed that the same ware correct and true, as it is show at pages 19 to 22 of the typed proceedings. She concluded on that ground by submitting that there were no any procedural irregularities committed by the trial court.

Coming to the fifth ground of appeal, Ms. Safi Kashindi submitted that the same does not have merit as no rights of the appellants were infringed in this case contrary to Article 13 (6) (a) of the URT Constitution. Her reason was that when the case was called for hearing, the charge sheet was read over and explained to the appellants and they were asked to plead there to, then the pleaded guilty to the charged offence.

That also upon the facts being read over to them, the appellants were given an opportunity to comment on those facts and they confirmed to the trial court that the same were correct and true, as it is shown at

page 22 of the typed proceedings which all indicates that the appellants were given the right to be heard. Basing on those reasons, the learned State Attorney prayed that the fifth ground of appeal be dismissed for want of merit.

Her last submission focused on the sixth ground of appeal in which she contended that she does not see any merit on it because the charge sheet that was filed with the trial court, was not defective for it complied with the provisions of section 132 of the CPA and section 135 of the CPA which deals with framing of a charge sheet.

Concerning the argument of the appellants' counsel that the charge sheet is defective for not disclosing the names of the persons whom the appellants are alleged to have aided which is contrary to the requirement of the law, as stated in the case of **Idd Riganya** (supra), Ms. Safi Kashindi contended that the above cited case is distinguishable to the circumstances of the case at hand as the same was dealing with the offence of armed robbery, not aiding persons to enter and present within Tanzania, and there was variation of prosecution evidence which led to the appellate court to hold that the charged offence was not proved beyond any reasonable doubts.

Ms. Safi Kashindi went on submitting that looking on the statement of the offence in the second count and the particulars of that offence, it is apparent that the offence of Aiding Immigrants to unlawful enter and present within Tanzania were mentioned and the names of all the three appellants were mentioned as Ephraim Leonard Mwakititu, Ghati Mughare Ngausongo and Juma Sostanes Mwikwabe. Hence, she argued that under such circumstances, it cannot be said that the charge sheet is defective. After making such argument, Ms. Saif Kashindi maintained that the six ground of appeal lacks merit and therefore, she prayed that the appeal be dismissed and the convictions and sentences of the appellants be sustained.

Before the closure of the respondent's submissions, Mr. Muhangwa emerged for the second time and submitted that although the counsel for the appellants cited many cases to show that the procedure of tendering exhibits was not complied with, that could not vitiate the trial court proceedings because it is not a mandatory requirement to tender exhibits if the accused persons has pleaded guilty to the charged offence.

To justify the above proposition, the learned State Attorney referred the cases of **Joel Mwangambako vs Republic**, Criminal Appeal No. 516

of 2017 (unreported) and **Kabula Massanja and Another vs Republic**, Consolidated Criminal Appeal Nos. 42 and 46 of 2022 HCT in which a case of **Mathias Barua vs Republic**, Criminal Appeal No. 105 of 2015 to appreciate the holding of the Court of Appeal that:

> *"...once it is shown on record that the accused person on his own free will pleaded guilty to the offence unequivocally, thein it is enough to support the charge with which the accused is charged. Tendering of the exhibit, be it an object or document, is not a legal requirement though it is desirable to do so, to ground a conviction".*

Concerning the submission of the learned advocate for the appellants that the prosecutor who tendered the exhibits was not a competent person to do so, Mr. Muhangwa contended that the prosecutor may tender the document, but it depends on the stage of the case. He further stated that in the case at hand, the prosecutor tendered the exhibits at the stage of a Preliminary Hearing which, the counsel argued, was correct.

He referred the court to Guideline 2.4.1 of the **Exhibit Management Guidelines**, which provides that:

"Exhibit may be tendered during preliminary hearing by the legal counsel or prosecutor if not objected"

In rejoinder, Mr. Chacha submitted that he is aware of the provisions of section 360 (1) of the CPA which bars the appeal against conviction where the accused person has been convicted by the subordinate court on his own plea of guilty, but he said there are exception to that general rule.

To support his argumentation, he cited the case of **Joel Mwangambako vs Republic** (supra) where the court referred to the case of **Laurent Mpinga vs Republic** (supra) which provides the circumstances in which an accused person may be allowed to appeal against conviction resulted from his plea of guilty. He added that the circumstances outlined at page 9 of that decision, fits the ones in the present case.

Concerning forfeiture of the private cars, the appellants' counsel reiterated his previous stance by submitting that the procedure of forfeiting those cars was not complied with and therefore the process was illegal. He said upon the oral application by the State Attorney under section 351 (a) to have those private cars been forfeited, the

appellant ought to have been given an opportunity to comment on such application.

However, according to him, the trial court did not give the appellants a right to comment on such application; hence, there was infringement of their fundamental right to be heard as enshrined under Article 13 (6) of the URT Constitution.

Concerning the charge sheet, Mr. Chacha recited the case of **Iddy Riganya** (supra) and emphasized that since the said charge sheet did not mention the names of immigrant whom the appellants were alleged to have aided them to unlawful enter and present within Tanzania, then that made the charge sheet to be defective. He added that failure to name those immigrants led to unfair trial.

Regarding the cases of **Kabula Massanja vs Republic** (supra) and **Joel Mwaangambako** (supra) cited by the counsel for the respondent Republic, Mr. Chacha submitted that though they provide that it is desirable to comply with the procedure of tendering documents or object, still the procedure of tendering the exhibits before the trial court was not complied with because the appellants were not given the right to comment on the prayer for admission of those documents.

He added that even the Exhibit Management Guideline referred to by the counsel for the respondent Republic, was not complied with as the appellants were not given the right to comment on the exhibits sought to be tendered before the trial court. In the end, Mr. Chacha prayed to this court to consider his submissions regarding the presented grounds, allow the appeal, quash the convictions entered against the appellants and set aside the sentences imposed upon them.

The above marks the end of the rival submissions by the counsel for both parties in this case. Basically, this court is supposed to consider each and every ground of appeal as presented by the appellants. However, having gone through the proceedings of the trial court, the grounds of appeal and the rival submissions by the counsel for the parties herein, I think this appeal can only be disposed of by grounds number **one** and **three**.

I say so because ground number one deals with a complaint regarding the appellants pleas of guilty which led to their incarceration. So, if the same is determined in their favour, they will be free, and ground number three deals with forfeiture of the private cars allegedly used by the to commit the offence. Likewise, if the same will be dismissed, the said

cars will be ordered to be returned to them and that is exactly what their advocate has implored this court to do.

In dealing with those grounds, I will in the end be in a good position to find out whether the present appeal is meritorious and proceed to make a decision. I will therefore, start with the first ground of appeal before I deal with the third.

Through their first ground of appeal, the appellants have submitted that the trial magistrate grossly erred in law and fact for convicting the appellants based on equivocal plea which the court illegally alleged to be unequivocal.

Generally, both parties have locked horns on the propriety or otherwise of the pleas taken from the appellants. The records of the trial court typed proceedings reveal that when the charge was read over and explained to them on 05.05.2023, each of the appellants were recorded as saying that,

"It is true"

Subsequently to such plea, the trial magistrate recorded the appellants' pleas in the following manner:

"Entered as a plea of guilty"

This is shown at page 18 of the trial court typed proceedings. Admittedly, it is a trite law that an accused who has been convicted by a court of law on his own plea of guilty cannot be allowed to appeal against his conviction unless on the extent or legality of a sentence imposed upon him. This position is provided under section 360 (1) of the CPA.

However, there are exceptions to the above general rule, as stipulated in the case of **Laurence Mpinga vs Republic** (supra); they include the following: -

One, 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; **Two**, that he pleaded guilty as a result of 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.

There is no doubt that the counsel for the appellants relied on the above factors to raise the first ground of appeal in challenging the propriety of a plea taken by the trial court, though this learned friends have

contended that the circumstances of the present case do not fit the application of those exceptional circumstances.

The first factor above is to the effect 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. The issue here is whether the appellants' pleas qualified to be treated as pleas of guilty.

In order to be treated as plea of guilty, the accused's plea need not be imperfect, ambiguous or unfinished and it include such plea taken in words like, *"It is true"*. This position was stated by the Court of Appeal in the case of **Njile Samwel @John vs The Republic**, Criminal Appeal No. 31 of 2018 (CAT at Shinyanga, unreported) where it was stated that:

> *"As to the propriety or otherwise of the plea made by the appellant, it is glaring on the record that when called upon to plead to the charge he replied, "It is true" on both counts. The phrase "it is true" does not mean that the plea was unequivocal."*

The duty of the trial court in such situation is therefore to ensure that the facts are being read over and explained to the accused and let the accused to admit or deny to the given facts before ruling out the plea is

unequivocal or not. This was stated in the case of **Abdalah Jumanne Kambangwa vs The Republic**, Criminal Appeal no. 321 of 2017, where it was stated that:

> *"Plea in such terms as admit, nilikosa or that is correct and the like" though prima facie appears to be plea of guilty, may not necessarily be so. In fact, invariably such plea is equivocal. It is for this reason that where an accused reply to the charge in such similar terms, the facts must be given and accused asked to deny or admit them. Only by doing so can a magistrate be certain that an accused plea was of not guilty or unequivocal plea of guilty"*

The records of the trial court typed proceedings shows clearly that though the appellants pleas were recorded in such terms as, *"It is true"*, the trial magistrate complied with the above requirements as stated in the case of **Abdalah Jumanne Kambangwa vs The Republic** (supra). This is shown at page 18 of the typed proceeding where it was recorded as follows: -

> ***"2nd Count.***
>
> ***25th*** *Accused: it is true*
>
> ***26th*** *Accused: it is true*

27th *Accused: it is true*

Court*: Entered as a plea of guilty.*

Sgd

SRM

05/05/2023

PP: *Facts are ready we pray to read (sic) it*

Court: *Prayer is granted facts be (sic) reads over.*

Sgd

SRM

05/05/2023"

Then after the said facts were read over and explained to the appellants, the trial magistrate gave them the right to either admit or deny those facts and each of them responded at page 22 of the typed proceedings, as follows: -

"Facts are true and correctly"

It is apparent from the above excerpts that by stating that, *"the facts are true and correctly"*, the appellant, understood the facts read over to them which as correctly stated by the trial magistrate, constituted the ingredients of the charged offence including, but not listed to aiding the

24 Ethiopians to unlawfully enter and present within Tanzania by transporting them to Rukwa Region in three private cars.

I say so because, each of them had an opportunity to hear the said facts and was in good position to admit or deny those facts, but elected to admit them. Thus, I agree with the counsel for the respondent Republic that the appellants' pleas were unequivocal and not as argued by the counsel for the appellant.

The second factor which may be relied to appeal against a conviction resulted from a plea of guilty is that the appellant pleaded guilty as a result of mistake or misapprehension. There is nowhere in the submissions of the counsel for the appellants it is complained that the appellants pleaded guilty to the charged offence as a result of mistake or misapprehension. Hence, I find that this factor does not apply in the circumstances of the present case.

The third factor the charge laid at the accused's door disclosed no offence know to law. On this the counsel for the appellant has argued that actually the charge sheet in respect of the second count the appellants ware arraigned with before the trial court disclosed no offence known to law, but his learned friends have maintained that the said charge sheet clearly discloses the offence known to law.

I had spent enough time to examined the charge sheet which is said to have disclosed no offence known to law. The same reads as follows: -

"IN THE DISTRICT COURT OF MPANDA DISTRICT

AT MPANDA

CRIMINAL CASE NO. 30 OF 2023

REPUBLIC

VERSUS

1. ,,, *N/A*

25. EPHRAIM S/O MWAKITITU

26. GHATI S/O MUGHARE NYANSONGO

27. JUMA S/O SOSTANES MWIKWABE

CHARGE

1ST COUNT *,,,N/A*

2ND COUNT FOR 25TH, 26TH AND 27TH ACCUSED PERSONS

ONLY

STATEMENT OF OFFENCE

AIDING IMMIGRANTS TO UNLAWFULLY ENTER AND

PRESENT WITHIN TANZANIA*: Contrary to section 45 (1) (p)*

and (2) of Immigration Act, [Cap 54 R.E 2016]

PARTICULARS OF OFFENCE

EPHRAIM S/O LENARD MWAKITITU, GHATI S/O MUGHARE NYAMSONGO *and* ***JUMA S/O SOSTENES MWIKWABE****, on 21st day of April, 2023 at Katavi National Park within Mpanda District in Katavi Region, aided 24 Ethiopian immigrants to unlawfully enter and present within Tanzania by transporting them to (sic) Sumbawanga Region in three private cars...."*

Looking on the above quoted particulars of the charge sheet, it is obvious that the offence of aiding immigrants to unlawfully enter and present within Tanzania contrary to section 45 (1) (p) and (2) of Immigration Act, [Cap 54 R:E 2016] was disclosed in the charge sheet presented at the appellants' dock. Hence, I find no merit in the above complaint.

The last to be tested, is the fourth factor which is to the effect that upon the admitted facts the accused/appellant could not in law have been convicted of the offence charged. The issue here is whether upon the admitted facts the appellants could not have been convicted of the offence charged.

As I have pointed above, the charge sheet placed before the trial court disclosed the charged offence known to law and the appellants pleaded

guilty to it. I have also pointed out that the appellants admitted to the facts after the same were read over and explained to each of them.

The same can be reproduced as hereunder:

> *"That on 21/04/2023 Charles Myenye who is a park ranger together with other office mate one Azizi Ramadhani and Mohamed Waziri, were patrolling at Magogo area within Katavi National Park. That around 3.30 hours they saw a car on the way from Stalike road to Sumbawanga. They stopped it but it could not stop. They followed it and stopped. Inside the car there were two (sic) Tanzanian who are 26th and 27th accused.*
>
> *They were ordered to return back. But on the way back they met with another car make Toyota Athlete crown with Reg No. T523 DQM which was being driven by 25th Accused inside were 14 people who were (sic) Ethiopian but they had no (sic) permite hence they were illegally transported. They were arrested and matched at the TANAPA office..."*
>
> *Your honour at the immigration office, the three accused were cautioned and confessed to the offence..."*

The above excerpt depicts that the appellants were alleged to have been found by Tanapa park rangers transporting the immigrant Ethiopians through their private cars from Stalike Mpanda to Sumbawanga in

Rukwa Region and that the said immigrants had no permit to have entered and present themselves within Tanzania. They have also displayed the date the alleged offence of aiding immigrants to unlawfully enter and present within Tanzania, was committed. Yet the appellants confirmed to the trial court that those facts were true and correct, as it is shown at page 22 of the trial court typed proceedings.

With the above observation, it is my settled view that the facts upon which the appellant admitted after the same were read over and explained to them, were sufficient to find the first, second and third appellant guilty of the charged offence and convict them on their own unequivocal pleas of guilty. Hence, I do not see any sufficient reasons to fault the findings of the trial magistrate who found that the facts read over to the appellants and admitted by them, constituted the ingredients of the charged offence and proceeded to convict them on their own pleas of guilty.

In their third ground of appeal, the appellants have complained that the Honourable Trial Magistrate grossly erred in law and fact for ordering forfeiture of three cars namely Toyota Crown with registration No. T. 523 DUM, Toyota Succeed with registration No. T. 42 DXR and Toyota Probox with registration No. T. 133 DUZ to the government without proper procedures.

In submitting about that ground, the counsel for the appellant has argued that the law is very clear that when the application for forfeiture is made, the respondent has to be given an opportunity to reply to the application within time as the court my determine and he has said that such legal requirement is provided under section 392A (3) of the CPA.

According to him, that provision of the law was not complied with by the trial court, as it is shown at page 23 of the trial court proceedings due to the fact that the trial court did not avail the appellants with the right to respondent to the oral application made by the counsel for the prosecution Republic.

It is his view that failure by the court to provide a right to be heard to the appellants, had infringed their right to be heard which is provided under Article 13 (6)(a) of the URT Constitution. On the adversary side, the counsel for the respondent Republic has taken a different approach and submitted briefly that the provisions of section 392A (3) cited by her learned friend does not apply in the circumstance of the case at hand where the alleged application was made at the stage of recording aggravating factors.

Before, I dwell into determining who is right between the two counsels regarding that aspect, I find it apt to reproduce the whole of the

provisions of section 392A (3) which the counsel for the parties have locked horns on. The same provides as follows: -

"392A.-(1) ,,,N/A

(2) ,,,N/A

(3) The applicant shall-

(a) in case of written applications, serve the respondent with a copy of application within thirty days from the date the application was filed;

(b) in case of oral application, the respondent shall reply to the application within the time as the court may determine"

In my understanding of the above provisions of the law, what the same provides, is the requirement for the applicant to serve the respondent with a copy of his application and the time limits for the applicant to serve such copy and for the respondent to reply to the application filed by the application upon the same being determined by the court before which such application has been lodged.

There is nowhere in those provisions of the law it is expressly provided that when the application for forfeiture is made by the applicant, the respondent has an opportunity to reply to the application within time as

the court may determine, as the counsel for the appellants has attempted to make this court believe so.

It is therefore, my considered opinion that the above provision is too general as it provides for the procedure of lodging applications under the CPA, as clearly indicated under sub section (1) of section 392A (1) (2) of the CPA which provides that:

> *"392A.-(1) Every application under this Act shall be made before a court either orally or in written form.*
>
> *(2) An application made in written form shall be by way of a chamber summons supported by affidavit."*

At this juncture, I wish to emphasize that sub section (3) of section 392A should not be read in isolation with the preceding sub sections which are sub sections (1) and (2) of section 392A. This is because it is those sub sections which gives a lee way to application of sub section (3) without which the functions indicated under sub section (3) cannot properly be performed.

While sub section (1) of section 392A directs that all applications under the CPA shall be made before a court either orally or in written form, sub section (2) of section 392A provides a mandatory requirement that a written application shall be made by way of chamber summons.

Now reverting back to the centre of contention between the counsel for the parties herein, it appears to me that the application for the forfeiture of the private cars made by the State Attorney before the trial court, was made orally during the pre-sentencing hearing which is normally conducted after the trial court has convicted an accused person of the offence, he/she was charged with.

At that stage the trial court is normally expected to gather some evidence from the prosecution Republic about the criminal records of a convict and to give the accused person or his advocate a chance to present the mitigating factors so that the trial court can use those aggravating and mitigating factors in assessing a proper sentence to be imposed upon the accused person whom it has convicted.

Therefore, what the State Attorney did after presenting the aggravating factors, was to remind the trial court that it has power to made an order of forfeiture of the properties used by the appellants in committing the offence they stood charged with, just after sentencing them, and that is what the trial court did.

This is shown at page 23 of the trial court proceedings where the Hon. Trial Magistrate recorded as follows: -

"S.A: There is no any previous record against the accused person, we pray for sentence as per the law. But we also pray before this court to consider S. 392 (A) (i) read together with S. 351 (a) of Criminal Procedure Act, Cap 20 R.E 2022, we pray the forfeiture of the three mentioned cars as the instrument of crime used to facilitate the commitment of crime..."

And at page 24 of the trial court typed proceedings the Hon. Trial magistrate is quoted to have made the following order: -

"i. I hereby order the forfeiture of three cars to the (sic) governments. Namely Toyota Athlete crown with Registration No. T. 523 DUM, and chases No. 182 – 0021026, Toyota Succeed with Registration number T. 420 DXR and chases number NCP – 58-0081 and last is Toyota probox with Registration number T. 113 DOZ with chases number NCP 51-0178377".

The above excerptions indicate that the order of forfeiture of the three private cars the subject of this appeal, was made under the dual provisions of the law namely sections 392A (1) read together with section 351 (1) (a) of the CPA, save for some slight typing errors as quoted above. I am saying so because the CPA does not have the

provisions as section *"392 (A) (i) or section 351 (a)"*; the correct ones are sections 392A (1) and 351 (1) (a) of the CPA.

As I have alluded above, section 392A (1) of the CPA provides for applications under the CPA which may be made either orally or in written form. So, a party who wants to lodge any application under the CPA, has to cite that general provision together with the relevant provision of the law which touches his area of grievance. For instance, in our case since the order of forfeiture of the three private cars was made under the provisions of section 351 (a) of Criminal Procedure Act, Cap 20 R.E 2022, then the relevant provisions of the law to be invoked could be sections 392A (1) (2) of the CPA read together with section 353 (3) of the CPA.

The latter provision of the law provides that:

"Disposal of exhibits

353.-(1) ,,,N/A

(2) ,,, N/A

(3) Notwithstanding the provisions of subsection (1), the court may, ***if it is satisfied that it would be just and equitable so to do, order that anything tendered, or put or intended to***

be put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto*, subject to such conditions as the court may see fit to impose." [Emphasis is mine]*

In my view, that is a relevant provision of the law to be applied along with section 392A (1) (2) of the CPA to apply for restoration of the property forfeited by the trial court, because it provides for a room any interested person whose property has been forfeited, can use to h apply to the trial court for restoration of such property.

In conclusion, it is my considered opinion that had the counsel for the appellant properly directed his mind on the application of section 392A and section 351(1)(a), CPA he would have filed an application to the trial court for restoration of the said cars, by using sections 353(3) and 392A (a) as the enabling provisions. Due to the above reasons, I find that ground number three has no merit at all and I proceed to dismiss it on its entirety.

Therefore, due to the above reasons, it is my settled view that the present appeal is without merit and I dismiss it accordingly.

It is so ordered.

A.A. MRISHA
JUDGE
21.02.2024

DATED at **SUMBAWANGA** this 21st day of February, 2024.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA

A.A. MRISHA
JUDGE
21.02.2024