

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA SUB-REGISTRY)**

AT TABORA

CRIMINAL APPEAL NO. 08 OF 2023

*(From the decision of the District Court of Uyui in Criminal Case No. 59 of 2022, before
Hon. T.A. Mongi, SRM)*

HENERICO MATHEO @ JOHN 1ST APPELLANT

LUGONDA MPINGA 2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 20/11/2023

Date of Judgment: 26/02/2024

KADILU, J.

In the District Court of Uyui, the appellants and one Chambi Bulugu @ Nkwabi were jointly charged with two counts namely, burglary contrary to Section 294 (1) and (2) of the Penal Code, [Cap. 16 R.E. 2022] and stealing contrary to Sections 258 and 265 of the same Penal Code. The prosecution alleges that on 15/11/2022 around 20:00hrs at Ibelamirundi Village within Uyui District in Tabora Region, the trio broke into a house of Ngelela Koteja with intent to commit the offence therein. In the second count, they were alleged to have stolen from that house, a motorcycle with registration No. MC 618 DKB, SANLG making, the property of Ngelela Koteja.

When the charge was placed at the door of the appellants, they allegedly pleaded guilty to both counts, but the 3rd accused pleaded not

guilty. The trial Magistrate, however, entered a plea of guilty by all three accused persons. She ordered the case to proceed to the preliminary hearing according to Section 192 of the Criminal Procedure Act [Cap. 20 R.E. 2022]. On that date, when the appellants were reminded about the charge, the proceedings show that the 3rd accused pleaded not guilty to both counts whereas the 1st and 2nd accused pleaded guilty again.

The court invited the prosecution to narrate the facts constituting the appellants' case. In addition, the prosecution tendered cautioned statements of the 1st and 2nd accused. The learned Magistrate prepared "a memorandum of agreed and disputed facts" indicating that the 1st and 2nd accused have admitted all the facts. On the strength of the plea of guilty by the appellants, the court convicted them of both counts and sentenced them to six (6) years imprisonment. Dissatisfied with the decision, the appellants appealed against the conviction and sentence. They prayed for the court to allow the appeal, nullify the proceedings of the trial court, quash the conviction, and set aside the sentence on the ground that the trial Magistrate erred in law and fact for convicting them based on an equivocal plea.

During the hearing of the appeal, the appellants were represented by Ms. Flavia Francis, Advocate whereas the respondent was represented by Mr. Steven Mnzava, the learned State Attorney. I will consider the submissions by Counsel for both parties in the course of determining the grounds for appeal. From the outset, Ms. Flavia stated that the appellants are challenging the conviction and sentence because their alleged plea of

guilty was irregular. According to her, Section 360 (1) of the Criminal Procedure Act prohibits appeals against the conviction of the accused who pleaded guilty. Still, the provision exempts the appellant whose plea was ambiguous, irregular, or incomplete. She referred to the case of ***Sokoine Mtahali @ Chimongwa v R.***, Criminal Appeal No. 459 of 2018, Court of Appeal of Tanzania at Moshi where it was held that the accused person's plea of guilty was imperfect, ambiguous, or unfinished, such an accused person may challenge the conviction.

Ms. Flavia argued that the plea by the appellants was ambiguous because the proceedings indicate that there was one accused person, but the plea shows that there were three accused. She added that although the charge contains three accused persons, how the plea was taken makes it hard to ascertain as to who among the three accused pleaded guilty. She opined that the situation turned the plea into imperfect, ambiguous, and unfinished hence, the trial court erred in law in treating it as a plea of guilty.

Submitting in opposition to the appeal, Mr. Steven stated that the charge is clear that there were three accused persons and, in the plea, the learned Magistrate indicated clearly that it was the 1st and 2nd accused who pleaded guilty while the 3rd accused denied the accusations. He elaborated that there is no way the appellants' plea can be regarded as ambiguous, imperfect, and unfinished since they were eloquent that they broke the house and stole the motorcycle. Mr. Steven explained that the proceedings were indeed ambiguous, but the plea of guilty was perfect.

The learned State Attorney referred to the case of ***Frank Mlyuka v R.***, Criminal Appeal No. 404 of 2018, Court of Appeal of Tanzania at Iringa. He explained that a distinction should be made between ambiguous proceedings and ambiguous plea of guilty. Mr. Steven invited me to read Section 388 of the Criminal Procedure Act which provides that the remedy for errors on record of the lower court is not to alter the decision but to order a retrial of the accused. He argued that the trial court's failure to list the accused persons properly did not occasion any miscarriage of justice to justify the alteration of the conviction and sentence against the appellants.

The learned State Attorney explained that since the appellants did not object to the admission of their cautioned statements, and in mitigation they prayed for the court's leniency as they have dependents, they cannot be allowed to challenge the findings of the trial court.

I hinted earlier that the appellants' grievance is that they were unlawfully convicted based on an equivocal plea of guilty, thereby rendering the conviction and sentence unjustifiable. Therefore, the crucial issue that calls for determination in the instant appeal is whether the pleas that were entered by the appellants to the charges that were read over to them were unequivocal. To appreciate the gist of the complaint, it is apt to quote the relevant parts of the trial court's proceedings:

Date: 1/12/2022

Coram: T.A. Mongi

PP: A.F. Shimba – Insp.

Accused: Present

B/C: Dawai T

PP: We pray to read the charge to the accused persons.

Court: The charge is read over and explained to the accused persons in the language they understand and are asked to plead thereto.

1st count:

1st accused plea: "Ni kweli nilivunja na kuingia kwenye nyumba kwa nia ya kutaka kutenda kosa."

Signature of the 1st accused.

Signed: T.A. Mongi– SRM

1/12/2022.

Court: Entered a plea of guilty.

Signed: T.A. Mongi– SRM

1/12/2022.

2nd Accused plea: "Ni kweli nilivunja na kuingia kwenye nyumba kwa nia ya kutaka kutenda kosa."

Signature of the 2nd accused.

Signed: T.A. Mongi– SRM

1/12/2022.

Court: 2nd accused entered a plea of guilty.

Signed: T.A. Mongi– SRM

1/12/2022.

3rd Accused plea: It is not true (Siyo Kweli)

Court: 3rd accused entered a plea of not guilty.

Signed: T.A. Mongi– SRM

1/12/2022.

2nd count:

1st Accused plea: "Ni kweli niliiba pikipiki."

Signature of the first accused.

Signed: T.A. Mongi– SRM

1/12/2022.

2nd accused plea: "Ni kweli niliiba pikipiki."

Signature of the 2nd accused.

Signed: T.A. Mongi– SRM

1/12/2022.

3rd Accused plea: Siyo kweli. Sijaiba pikipiki.

Court: Entered plea of guilty.

Signed: T.A. Mongi– SRM

1/12/2022.

PP: Since the 1st and 2nd accused persons have entered a plea of guilty, we pray to proceed with the preliminary hearing.

Court: Preliminary Hearing begins:

The names and particulars of the accused persons are as per the charge sheet.

Signatures:

1st accused: It is true.

2nd accused: It is true.

3rd Accused: It is true.

Signed: T.A. Mongi– SRM

1/12/2022.

PP: I pray to tender caution statements of the 1st and 2nd accused persons as exhibits.

1st Accused: No objection

2nd Accused: No objection

Court: Caution statements of the 1st and 2nd Accused persons are hereby admitted as exhibit P1 collectively.

Signed: T.A. Mongi– SRM
1/12/2022.

Court: Section 193 (3) of the CPA, Cap. 20 R.E. 2022 complied with.

Signed: T.A. Mongi– SRM
1/12/2022.

Court's finding:

On their own plea of guilty and admission of facts read over, the 1st and 2nd Accused persons are hereby found guilty and convicted forthwith for offences of burglary contrary to Section 294 (1) and (2) of the Penal Code Cap. 16 R.E. 2022 and the offence of stealing contrary to Sections 258 and 265 of the Penal Code Cap. 16 R.E. 2022.

It is so ordered.

Signed: T.A. Mongi– SRM
1/12/2022.

Then the court heard the previous criminal records of the accused persons as well as the mitigating factors before it sentenced them as shown earlier. The court's sentence was as follows:

Sentence

I have considered the accused persons' mitigating factors and the fact that they are the first offenders. This court is hereby sentencing the 1st and 2nd accused persons to serve six (6) years imprisonment.

It is so ordered.

Signed: T.A. Mongi– SRM
1/12/2022.

Court: The right of appeal against the sentence is hereby explained.

Signed: T.A. Mongi– SRM

1/12/2022.

I want to point out from the outset that the procedure for dealing with a plea of guilty is stipulated under Section 228 (2) of the CPA which provides:

"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 provision quoted above was interpreted in the case of **Khalid Athuman v R.**, Criminal Appeal No. 103 of 2005 thus:

"When a person is charged, the charge and the particulars should be read out to him so far as possible in his language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused 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 allow the accused to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of the facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change

of plea to "not guilty" and proceed to hold a trial. 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 the sentence. The statement of facts and the accused's reply must, of course, be recorded."

In the instant case, the trial Magistrate was supposed to follow the steps presented above to satisfy herself that the appellants' plea of guilty was unequivocal. In ***Michael Adrian Chaki v. R.*** Criminal Appeal No. 399 of 2017, the Court of Appeal established the circumstances in which a plea of guilty may be deemed to be unequivocal for purposes of conviction before the trial court. It held that for a plea of guilty to be unequivocal and therefore valid:

First, 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; **second**, the court must satisfy itself without any doubt and must be clear in its mind that, an accused fully comprehends what he is faced with, otherwise injustice may result. **Third**, 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 every ingredient of the offence. **Fourth**, the facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged. **Fifth**, the accused must be asked to plead and must in fact plead guilty to every ingredient of the offence charged and the same must be properly recorded and must be clear.

In the instant case, the appellants were charged with the offence of burglary and stealing. It is undisputed that the charge names Lugonda Mpinga, Henerico Matheo @ John, and Chambi Bulugu @ Nkwabi as the accused persons. Nevertheless, the proceedings and original record consist of Lugonda Mpinga alone as the accused person. I am certain that any criminal suspect is arraigned in court through a charge sheet that initiates criminal proceedings. Thus, criminal accusations against the accused persons are based on the charge sheets, not the proceedings of the court.

The law is clear under Section 132 of the Criminal Procedure Act that every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. I am of the settled view that, the authenticity of the court's proceedings is out of the control of the parties. Besides, under Section 89 of the Evidence Act [Cap. 6 R.E. 2022], the court's proceedings are presumed to be genuine unless proved otherwise. For these reasons and without prejudice, I think that the learned trial Magistrate made an uncalculated omission when recording the names of the parties to the case in the proceedings.

Ordinarily, the omission could be regarded as a normal typographical error and that did not go to the root of the case considering that the charge sheet is clear about who were the accused persons. However, since the conviction and sentences were based on the plea of guilty of the appellants,

their names and positions needed to tally with the names in the charge sheet. Short of that, I subscribe to the views of the Advocate for the appellants that there was ambiguity as to who among the accused persons appearing on the charge sheet pleaded guilty and who pleaded not guilty to the charge. As a result, the plea of guilty by the appellants cannot be considered perfect, unambiguous, or complete upon which to ground a valid conviction against the appellants.

I also wish to observe in passing that it was improper for the trial Magistrate to conduct a preliminary hearing under Section 192 of the CPA after the accused persons had pleaded guilty instead of invoking the provisions of Section 228 (2) of the CPA in conducting plea of guilty proceedings. In Paulo **Kaparage v R.**, Criminal Appeal No. 73 of 2021, Court of Appeal of Tanzania at Tabora, it was observed that:

"There is no doubt that the ultimate result of holding a preliminary hearing under section 192 of the CPA is to expedite the trial by not calling unnecessary witnesses to prove undisputed facts hence shortening the trial period of the case."

The procedure for conducting plea of guilty proceedings under Section 228 of the CPA is different from the procedure for conducting preliminary hearing proceedings in terms of Section 192 of the CPA. In the case of **Hyansint Nchimbi v R.**, Criminal Appeal No. 109 of 2017, it was stated that:

"We have found it opportune to, once again draw the attention of magistrates to the difference between the procedure under section 228 of the CPA and that obtaining under section 192 of the CPA. The former provision applies when an accused admits the charge and the facts. The facts that are adduced under section 228 of the CPA are not by any means in the form of a Memorandum, but they are mere facts supporting the charge. The latter provision applies during the preliminary hearing when the accused has pleaded not guilty and the prosecution adduces facts with the view of ascertaining which of them are not disputed to speed up the trial and avoid the costs of calling witnesses to undisputed facts. At the end of the procedure under section 192 of the CPA, a Memorandum of undisputed fact, if any, is prepared. At the end of the procedure under section 228 of the CPA, a conviction is probably entered."

By deviating from the procedure for conducting plea of guilty proceedings, the appellants lacked an opportunity to admit every element of the offence charged and to dispute or explain the facts or to add any relevant facts as required by the law. The trial Magistrate only recorded the facts admitted by the appellants after the charge was read over and explained to them.

As to the way forward, after having established that the appellants never entered any lawful plea and were never legally tried, the next step is to consider an appropriate order to make. Whereas Mr. Steven opined that this is a fit case to order a retrial under Section 388 of the CPA, Ms. Flavia implored the court to nullify the proceedings of the trial court and set aside the conviction and sentences meted against the appellants. Section 388 of

the CPA provides that no finding, sentence, or order made or passed by a court of competent jurisdiction should be reversed or altered on appeal or revision on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry except where on appeal or revision, the court is satisfied that such error, omission or irregularity has occasioned a failure of justice. In such circumstances, the Act warrants the appellate court to order a retrial or make such other order as it may consider just and equitable.

After considering submissions by both learned minds and the facts of this case, I am satisfied that the complained omission has occasioned a failure of justice. Therefore, I cannot order an acquittal of the appellants because their innocence or otherwise was not determined by the court of competent jurisdiction. Thus, I nullify the disputed plea and the proceedings of the trial court. I further quash the conviction of the appellants based on the imperfect plea of guilty and set aside the sentence imposed on them. Consequently, I allow the appeal and direct the case file in Criminal Case No. 59 of 2022 to be remitted back to the district court of Uyui for hearing before a different Magistrate according to the law. The right of appeal is explained for any party aggrieved by this decision.

Order accordingly.




KADILU, M.J.
JUDGE
26/02/2024

Judgment delivered in chamber on the 26th Day of February, 2024 in the presence of Ms. Flavia Francis, Advocate for the appellants, and Ms. Tunosye John Luketa, State Attorney for the Respondent.



A handwritten signature in blue ink, appearing to read "R.M. Ngimilanga", is written over a horizontal line.

R.M. NGIMILANGA
DEPUTY REGISTRAR
26/02/2024