IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

GEITA SUB-REGISTRY

AT GEITA

CRIMINAL APPEAL 11101 OF 2024

(Arising from the decision of the District Court of Chato in Criminal Case No. 619 of 2023)

JUMA MAGOMA AND TWO OTHERS.....APPELLANTS

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 23/05/2024
Date of Judgment: 14/06/2024

MWAKAPEJE, J.:

This is an appeal from the decision of the District Court of Chato in criminal case No. 619 of 2023, whereby the Appellants, Juma Magoma, Salmin Ramadhani, and Mathias Thobias, were convicted of criminal trespass contrary to section 299(a)and (b) of the Penal Code, Cap. 16 R.E. 2019 and being found in possession of a monofilament net in the Rubondo National Park contrary to Regulation 66(1)(a) and (4) of the Fisheries Regulations GN. No. 308 of 2009. The Appellants pleaded guilty to the offences and were sentenced to 4 months imprisonment and a fine of Tshs. 2,000,000.00 or 3 years imprisonment to the first and second counts, respectively. Dissatisfied with both the conviction and sentence

on their own plea of guilty, the Appellants have appealed to this Court with the following four grounds of appeal:

1. *That the trial court erred in law and fact by convicting the Appellants basing on equivocal plea of guilty.*
2. *That the trial court erred in law by convicting and sentencing the Appellants on the plea of guilty basing on the defective charge containing the offence which is variant to the summary of the facts and particulars of the offence.*
3. *That the trial court erred in law by convicting and sentencing the Appellants by relying on pleas of guilty whilst the ingredients of the offences were never read to the Appellants.*
4. *That the trial court erroneously expressed the right of appeal to the Appellants.*

The appeal was argued orally. The Appellants were represented by Mr Charles Kiteja, a learned advocate, while Mr Godfrey Odupoy, a learned State Attorney, represented the Respondent. During submissions, Mr Kiteja opted to abandon the fourth ground of appeal and remained with three grounds.

In addressing the first ground of appeal, Mr Kiteja argued that the Appellants were convicted and sentenced based on what was purported to be a plea of guilty. He contended that their guilty plea was equivocal because it failed to meet the standards of an unequivocal plea of guilty. He stated that the phrases *"Ni Kweli sikuwa na kibali hifadhini"* and *"Ni Kweli nilikutwa na timba hifadhini"* were equivocal. He further stated that the Appellants did not plead guilty to the elements of the offence as

required by the section they were charged under, which pertains to intimidation, annoyance, or possession of property as far as Section 299(b) of the Penal Code is concerned. He noted that no person claimed to have his property trespassed against, and no evidence of intimidation or annoyance was substantiated.

Mr Kiteja also raised an issue with compliance with the standards concerning the ingredients of the offences, stating that the Appellants should have pleaded guilty to each element of the offence. He cited the case of **Michael Adrian Chaki vs Republic,** Criminal Appeal No. 399 of 2019, to support his argument that the trial magistrate erred in convicting the Appellants on an equivocal plea of guilty. Moreover, Mr Kiteja contended that the term "*timba*," with which the Appellants pled guilty, as stated in the summary of the facts, is not recognised even in the Kiswahili dictionary.

On the second ground, Mr Kiteja argued that the facts contradicted the charge read to the Appellants and what they pleaded. To bolster his argument, he referred to the case of **Saidi Bangazula vs R,** Criminal Appeal No. 100 of 2003, where a similar situation led to the acquittal of the accused due to contradictions between the charge and the facts.

Regarding the third ground, Mr Kiteja reiterated his argument from the first ground, emphasising that failure to read the ingredients of the offence to the Appellants resulted in an injustice. To enhance his argument, he cited the case of **Juma Samuel Mkwanda vs R**, Criminal Appeal 50 of 2013, arguing that rectifying such errors while the sentence is still being served would lead to further injustice. He, therefore, prayed for the appeal to be allowed and the Appellants to be set free.

Mr. Godfrey, on the other hand, opposed the appeal. Due to their similarities, he addressed the first and third grounds together. He was of the stand that the plea was unambiguous, with the Appellants understanding the charges against them. He cited the case of **Suleman Juma Mkwanda vs R**, Criminal Appeal No. 10 of 2004 (unreported), to define an unequivocal plea and stated that the Appellants' plea matched this definition.

Mr Godfrey referred to the trial court's records, highlighting that the Appellants clearly understood and admitted to the offences of criminal trespass and unlawful possession of monofilament nets. He stated that the word "*timba*" is commonly used to refer to monofilament nets in the fishing community. He argued that the trial court followed the legal provisions for recording the plea. Reinforcing his argument, he referred to the case of **Ramji Mhapa vs Republic** Criminal Appeal No. 88 of

2014, where the case of **Khalid Athumani vs Republic** Criminal Appeal 103 of 2005 (unreported) was referenced. He concluded that the grounds of appeal paraded by the Appellants were afterthought and violated section 360(1) of the Criminal Procedure Act.

Furthermore, Mr Godfrey contended that it was an afterthought for the counsel for the Appellants to state that the charge and ingredients of an offence were not read to the Appellants. He cemented his point when he referred the court to pages 1 -5 of the trial court's proceedings and stipulated that the charge was read over to the Appellants, and the Appellants knew what they pleaded. To enhance his argument, he referred to the case of **Frank Mnyukwa vs R,** Criminal Appeal 404 of 2018.

On the second ground, Mr Godfrey argued that there were no variations between the charge, particulars of the offence, and the facts presented and read in court. He maintained that the word "*timba*" was correctly understood within the context and prayed for the dismissal of the appeal.

In his rejoinder, Mr Kiteja argued that the appeal was not contrary to section 360(1) of the CPA and cited the case of **Michael Adrian Chaki** *(supra)* to support his position that an equivocal plea can be challenged

on appeal. Mr. Kiteja also disputed the interpretation of the word "*timba*" provided by the State Attorney, asserting that it is an ambiguous and unknown term. He maintained that the trial magistrate failed to ensure that the Appellants understood the charges, resulting in an unjust conviction and sentence.

Having carefully considered the submissions by both parties to this appeal, it is now crucial to consider the advanced grounds of appeal. In doing so, I will address the first and third grounds of appeal together as they are intertwined, and the second will be dealt with separately. The very question that I will be answering is whether the pleas by the Appellants herein were equivocal.

The general principle, as provided for in section 360(1) of the Criminal Procedure Act, is that no appeal may lie on one's own plea of guilty unless the same challenges conviction and sentence. The said section provides that:

> *"360.-(1) An appeal shall not be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."*

However, it has been established by this court and confirmed by the Court of Appeal that in certain circumstances, one may appeal in their

own plea of guilty. In the case of **Laurent Mpinga vs Republic** [1983] TLR 166, which was referred by the Court of Appeal with approval in the case of **Kalos Punda vs Republic** (Criminal Appeal 153 of 2005) [2009] TZCA 14, the following factors were set for one to appeal on his own plea of guilty. These are:-

> "*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 charge."*

In conjunction with these factors, the Court of Appeal, in the case of **Michael Adrian Chaki vs Republic** *(supra),* stated the conditions to be met where a person is considered to have unequivocally pleaded guilty. The conditions are thus:

> "*1. The appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;*
>
> *2. The court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends*

what he is actually faced with, otherwise injustice may result;

3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA.

4. The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

5. The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see Akbarali Damji vs R. 2 TLR 137 cited by the Court in Thuway Akoonay vs Republic [1987] T.L.R. 92);

6. Before a conviction on a plea of guilty is entered, the the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged."

Guided by these authorities, I wish to revisit the charge laid against the Appellants. The same read as follows:

"FIRST COUNT

STATEMENT OF OFFENCE

CRIMINAL TRESPASS contrary to section 299(a) and (b) of the Penal Code [Cap 16 R.E. 2022]

PARTICULARS OF OFFENCE

JUMA S/O MAGOMA, SALIMIN S/O RAMADHAN, and MATHIAS s/o THOBIAS entered the IRUMO area in Rubondo Island National Park, within Chato District and Region of Geita, on the 9th day of September 2023, without permit from the conservation commissioner of Tanzania National Parks with intent to commit an offence.

SECOND COUNT

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF MONOFILAMENT NET WITHIN NATIONAL PARK contrary to regulation 66(1)(a) and 66(4) of the Fisheries Regulation GN no. 308 of 2009.

PARTICULARS OF OFFENCE

JUMA S/O MAGOMA, SALIMIN S/O RAMADHAN, and MATHIAS s/o THOBIAS on the 9th day of September 2023 at IRUMO area in Rubondo Island National Park, within Chato District and Region of Geita, were found in unlawful possession of one monofilament net for the purpose of fishing in freshwater."

When the Appellants were called to plea thereto on 18th September 2023, they all in both counts, stated as follows:

"1st count

1st accused person: Ni kweli sikuwa na kibali hifadhini

2nd accused person: Ni kweli sikuwa na kibali hifadhini

3rd Accused Person: Ni kweli sikuwa na kibali hifadhini

2nd count

1st accused person: Ni kweli nilikutwa na timba hifadhini

2nd accused person: Ni kweli nilikutwa na timba hifadhini

3rd Accused Person: Ni kweli nilikutwa na timba hifadhini"

As a principle of law, after the Appellants have entered their plea, what comes next is for the prosecution to read the facts of the case. The facts of the case read in the trial court were brief and can be reproduced as follows:

> *"……That, on 9/9/2023 at about 19:00 hrs at ILUMO AREA, found in Rubondo National Park within Chato District. The Conservation Officer Juma Mwangwa and his fellows were on Patrol in that area using a special boat of TANAPA at that area, they arrested the accused in dock who were at that area for the purpose of fishing into fresh water. Accused were searched, and they had no permit, but also, they were unlawfully found possessing one Timba into the Canoe they had used as a means of transport. Certificate of Seizure was prepared, it was signed by accused in dock and witnesses. Sketch Map was prepared. The accused and exhibits were taken to Rubondo's Main Office. They were transported to Rubambangwe Police, the case opened against them. Accused recorded statements by way of caution, and they confessed. Today accused have pleaded guilty in court after a charge to have read out to them.*
>
> *PP: I pray Certificate of Seizure and Sketch Map to form part of these summary of facts. That is all.*
>
> ***Court:** Accused are called upon to respond to the summary of facts:*
>
> *1st Accused person: All facts are true and correct.*
>
> *2nd Accused person: All facts are true and correct*
>
> *3rd Accused person: All facts are true and correct"*

The first count was criminal trespass. Section 299(a) and (b), under which the accused persons were charged, states as follows:

> "*299. Any person who-*
>
> *(a) unlawfully enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property; or*
>
> *(b) having lawfully entered into or upon the property unlawfully remains there with intent thereby to intimidate, insult or annoy the person in possession of the property or with intent to commit an offence,……"*

As previously mentioned in the case of **Michael Adrian Chaki vs Republic** (*supra*), the court must ensure that the appellant was properly charged when entering a plea of guilty. The first count of the charge against the Appellants was for criminal trespass, which involves either unlawfully entering a property with the intent to commit an offence or lawfully entering and then unlawfully remaining with the same intent. Upon examining the statement of the offence in the first count, it is evident that the Appellants were charged under both paragraphs (a) and (b) of section 299. Paragraph (a) pertains to the initial unlawful entry with a specific intent, while paragraph (b) concerns unlawfully remaining after a lawful entry with a specific intent. Charging someone under both

paragraphs for the same act is contradictory since one cannot simultaneously unlawfully enter and unlawfully remain after a lawful entry. Therefore, a plea arising from such a charge, as in this case, cannot be deemed unequivocal.

Furthermore, the particulars of the offence lack essential details as they fail to specify the ingredients of the offence of criminal trespass as per section 299 of the Penal Code. They do not clarify whether the entrance was unlawful, apart from stating the absence of a permit from the conservator, which is not sufficient for criminal trespass. It is well-established that particulars of the offence must outline the elements of the offence, which was not the case in this instance. A plea resulting from such a vague charge is inherently ambiguous. Recognising the deficiencies in the particulars of the offence of charges related to criminal trespasses, like the present case, I propose a template for the particulars of the offence that the prosecution should apply, and the same has to immediately come after the statement of offence as follows:

> *"PARTICULARS OF OFFENCE*
>
> *That ……XYX……., on the ……..day of ……..* 20…., *at approximately ……..(hrs), in the District and Region of ……..did unlawfully enter upon the ……..National Park, the property of the ……..(e.g. Tanzania National Parks), with the intent to commit an offence, to wit, ……."*

In this appeal, therefore and as argued by Mr Kiteja, the ingredients of the charge and its particulars in this appeal fell short of what is required by the law.

Apart from that, the facts (evidence), especially in cases of pleas of guilty, should delineate the statutory boundaries of protected areas within which the Appellants were unlawfully present. Given that the boundaries of the park are legally defined, there needs to be evidence proving that the Appellants were within the established limits of Rubondo National Park. In the case of **Cheyonga Samson @ Nyambare vs Republic** (Criminal Appeal No. 510 of 2019) [2021] TZCA 607 (25 October 2021), it was emphasised that:

> *"Since the game reserve boundaries are defined, the evidence must place the accused inside the statutory limits of the reserve."*

In the present case, no evidence was provided in the trial court that specified the description of the restricted area where the Appellants were found intending to fish in freshwater, making their prosecution questionable.

Moreover, considering the plea of guilty by the Appellants, i.e., "*Ni kweli sikuwa na kibali hifadhini,"* is not related to a plea for the offence of criminal trespass with which they were charged; it is rather related to

being found in the national park without having a permit of the said conservation commissioner under the National Parks Act, Cap. 228. It is unfortunate that the said Act, which is specific to conservation, has no such an offence as was observed in the case of ***Dogo Marwa @ Sigana & Another vs Republic*** (Criminal Appeal No. 512 of 2019) [2021] TZCA 593. The issues raised by the Court of Appeal in the **Dogo Marwa** case with regard to section 21 of the said Act have not been sorted out to date, hence compelling the prosecution to apply section 299 of the Penal Code in cases like the present appeal. Now, since the prosecution has opted to apply the general law, i.e., the Penal Code, then the charge, particulars and facts on criminal trespass in the national parks should have enabled the Appellants to understand the nature of the offence charged subject to section 132 of the Criminal Procedure Act, Cap. 20 R.E.2019. The section reads:

> *"132. 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****." [Emphasis supplied]*

It is unfortunate that the trial court did not consider the provisions of this section nor the conditions set in handling cases when recording the Appellants' purported plea of guilty.

In relation to the second ground of appeal, the Appellants pleaded guilty to having been found in possession of *timba* in the park while in the charge, it was stated that they were found in unlawful possession of a monofilament net. It was a pity that after a charge was read, followed by purported guilty pleas by the Appellants, i.e. *Ni kweli nilikutwa na timba hifadhini",* the prosecution fell into the trap of using the term "*timba*" in the facts read to the Appellants in court which was not in the charge. I disagree with Mr. Godfrey's argument that *timba* is a fishing community's alternative term for a monofilament net.

Further, I should explicitly state here that for an item to be the basis of an unlawful possession charge, it typically needs to be clearly defined in statutory law. If the item is not recognised or defined by law, as the word *timba* in this appeal, which was not the term used in the charge, and a supposed plea of guilty followed thereafter, it, therefore, implies nothing but an equivocal plea. The facts read, which were in lieu of witness testimonies should the Appellants have pleaded not guilty, were at variance with the charge, as noted by Mr Kiteja. In short, what was pleaded to the charge was contrary to what was responded to the summary of the facts read to the Appellants since they differed from the charge. The facts could not be true and correct, while its contents and that of the charge were different. The circumstances of the cases of

Suleman Juma Mkwanda vs R and **Frank Mnyukwa vs R** (*supra*), as referred by Mr Godfrey, and the circumstances of this case are distinguishable. Therefore, one cannot be said to have pleaded guilty to the charge and facts of this nature. Therefore, the trial court had a duty to ascertain the correctness of the charge, facts and the guilty plea entered by the appellant.

It is a fundamental tenet that when the evidence, particularly the facts presented, contradicts the charge, the Appellants are entitled to the presumption of innocence; see the case of **Issa Mwanjiku @ White vs Republic** (Criminal Appeal 175 of 2018) [2020] TZCA 180. Therefore, a plea of guilt based on the conflicting charge and facts undermines the appellant's right to a just trial, thereby contravening the objectives of the charge outlined in section 132 of the Criminal Procedure Act, Cap. 20 R.E. 2019.

In this instance, the disparities between the charge and the facts disclosed to the Appellants are irreparable, as these flaws strike at the heart of the case; see the case of **Jackson Venat vs Republic** (Criminal Appeal 118 of 2018) [2018] TZCA 187. Consequently, the Appellants should be afforded the benefit of the doubt due to the ambiguous nature of their guilty pleas.

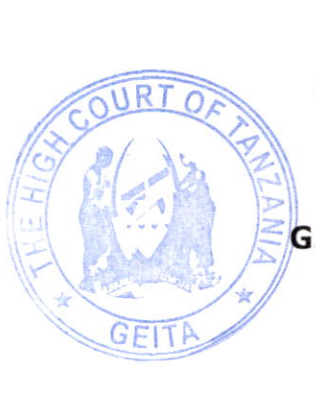
From the foregoing, and since the plea of guilty entered in the present appeal did not meet all the conditions set in **Michael's case** *(supra),* I find merit in the appeal, and I hereby allow it, quash the conviction and set aside the sentence meted out against the Appellants. Further, I order the immediate release of the Appellants herein from prison unless they are continually lawfully held.

It is so ordered.

DATED and **DELIVERED** at Geita this 14th day of June 2024.

G.V. MWAKAPEJE
JUDGE

Judgment is delivered this 14th day of June 2024 in the presence of Mr Godfrey Odupoy and Mr Musa Mlawa, both learned State Attorneys for the Republic, and Mr Charles Kiteja, a learned advocate for the 1st, 2nd, and 3rd Appellants who are also present.



G.V. MWAKAPEJE
JUDGE