IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A, MWAMBEGELE, J.A And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 394 OF 2016

JUMA S/O SELEMANI @ PAUL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 16th day of June, 2016
in
DC Criminal Appeal No. 167 of 2015

JUDGMENT OF THE COURT

2nd & 6th December, 2019

MWAMBEGELE, J. A.:

The District Court of Urambo convicted the appellant on his own plea of guilty to a charge of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 and sentenced him to the mandatory minimum sentence of thirty years in prison. He was the first accused among other two accused persons who pleaded not guilty to the same charge and, after a full trial, the second accused person was convicted and sentenced to serve a prison term of forty five years (45) years. The third accused person was acquitted

for having no case to answer at the closure of the prosecution case. The said other two accused persons are not party to this appeal

The appellant, ostensibly, was dissatisfied with the decision of the District Court. He thus appealed to the High Court of Tanzania at Tabora where his appeal was dismissed in its entirety. Still aggrieved, he appealed to this Court where his appeal was struck out on account of incompetency for the reason that the first appeal before the High Court was preferred out of time. The appellant never gave up. He, through Miscellaneous Criminal Application No. 82 of 2014, successfully sought and obtained extension of time to lodge a notice of intention to appeal to the High Court. Subsequently, he preferred a fresh appeal in the High Court of Tanzania at Tabora, but, again the same was barren of fruits, for the court was of the view that his plea was unequivocal to which no appeal against conviction lied. Undeterred, he lodged the present appeal on five grounds of complaint; namely:

> "1. *That, the first appellate court wrongly upheld the conviction without taking into consideration that the prosecution failed*

to prove the charge against me as required by the law; that is to say, to prove all ingredients of the offence;

2. *That the learned judge totally erred on point of law and fact when he failed to consider the discrepancy of date between 24.3.2010 and 24.4.2010 because the charge sheet at page No. 1 of typed proceedings shows that the incidence occurred on 24.4.2010 even when the charge reminded to the accused on 2.6.2010 the facts of the charge shows that the offence was committed on 24.3.2010 see page No. 5. My Lord Judges the above contradictory of the date renders the charge defective and the charge against the appellant to be nullity;*

3. *That, the first appellate court wrongly upheld the conviction without considering that there had has no justice which was done against me by the police officers since I was arrested on 25.3.2010 according to the facts of the charge sheet which the public prosecutor read before*

the court on 2.6.2010 and brought before the court on 5.5.2010 why I was not charged to the court within 24 hours as required by the law;

4. *That, the learned judge erred in law and fact when dismissing my appeal relying for the reason that I pleaded guilty to the charge without considering that why the police did not open the charge against me within 24 hours from the date when I was arrested and reached to the wrongly decision; and*

5. *That, from the above grounds of appeal, I therefore humbly pray that this Court allows my appeal, conviction and the meted out sentence be quashed and order my immediately release from the prison custody."*

When the appeal was called on for hearing before us on 02.12.2019, the appellant appeared in person, unrepresented. The respondent Republic had the services of Mr. Tumaini Pius, learned State Attorney. When we gave the floor to the appellant to argue his appeal, he adopted the grounds in the memorandum of appeal

without more and asked to hear the response of the learned State Attorney and reserved his right to rejoin if need would arise.

Mr. Pius, at the very outset, supported the appellant's conviction and sentence, for the plea was but unequivocal, he submitted. Elaborating his stance, he submitted that the appellant's initial plea on 05.05.2010 was "siyo kweli" but on 02.06.2010 after the charge sheet was substituted, when the case was called on, he prayed to be reminded of the charges levelled against them and at p. 5 he pleaded: *"ni kweli.* The facts were read out at page 5 to which he replied at page 6: "*Mheshimiwa, maelezo yote ni ya kweli na nakubaliana nayo".* Thereafter the trial court proceeded to find the appellant guilty as charged, and convicted him on his own plea of guilty and sentenced him accordingly.

The learned State Attorney went on to submit that given the above, the plea of the appellant was unequivocal and thus he was precluded by law from appealing against conviction. The learned counsel buttressed that position with section 361 (1) of Criminal Procedure Act (henceforth "the CPA") and **Alfani Mlaponi & Others v. Republic** [1990] TLR 104; a decision of the High Court. That case

falls in all fours with the present, he submitted. The learned State Attorney also referred us to **Laurence Mpinga v. Republic** [1983] TLR 166 wherein the High Court laid down exceptional circumstances under which an accused person who was convicted on his own plea of guilty may appeal against that conviction. The learned State Attorney was, however, quick to state that the present appeal does not fall within any of the exceptions in **Laurence Mpinga** (supra). He added that the fact that the appellant was not taken to court within 24 hours, a complaint encapsulated in the fourth ground of appeal, did not affect the appellant's unequivocal plea. As for the sentence, the learned State Attorney submitted that it was the minimum provided by the law.

Mr. Pius, having argued the gist of the fourth ground of appeal as above, he briefly argued against the rest of the grounds but in the alternative; just in case the fourth ground would collapse.

On the first ground which is a complaint to the effect that the appellate court wrongly upheld the conviction without taking into consideration that the prosecution did not prove all ingredients of the offence, he argued that the prosecution complied with section 228 of

the CPA which requires that an accused person must be called upon to plead. He pleaded and the ingredients of the offence were quite correct in the charge sheet and appeared in the facts read out to the appellant, he submitted. This ground of appeal should be dismissed, he prayed.

On the second ground of appeal which is a complaint on the discrepancy in the dates of the commission of the offence, Mr. Pius submitted that he was aware that the charge sheet shows that the offence was committed on 24.04.2010 but the facts narrated to the appellant after he pleaded indicate that the offence was committed on 24.03.2010. He submitted that the mention of the date of the commission of the offence in the facts as 24.03.2010 instead of 24.04.2010 was out of inadvertency and, either a typing error on the part of the trial court, or a slip of the tongue on the part of the Public Prosecutor who narrated those facts to the court. That inadvertence, he argued, did not occasion any injustice and, therefore, can be glossed over. He added that the discrepancy, if any, between the charge sheet and the facts narrated to the appellant did not affect the plea of the appellant. If anything, he submitted, all the witnesses who

testified against the other two accused persons who pleaded not guilty to the charge speak of 24.04.2010; not 24.03.2010 as shown in the facts narrated to the appellant. Having said so, the learned State Attorney implored us to dismiss the second ground of appeal.

The third ground of appeal challenges the respondent for not taking him to court within 24 hours as required by law. On this, the learned State Attorney agreed that the appellant was not taken to the court of law within the prescribed time. However, he was quick to reiterate that the ailment, if any, did not affect the plea and therefore no injustice had been occasioned.

The above said, the learned State Attorney submitted that the fifth ground of appeal had no merits in that the prosecution proved the case beyond reasonable doubt. In the premises, he prayed the appeal be dismissed in its entirety.

Rejoining, the appellant submitted that he did not plead guilty to the charge. He insisted that he said "siyo kweli". He went on to state that he did not say: "*Mheshimiwa, maelezo yote ni ya kweli na nakubaliana nayo*". The appellant impeached the court record as not

depicting what actually transpired in court on that date. Ultimately, he prayed for his appeal to be allowed and that the Court sets him free as he has spent some considerable time behind bars.

We have, with great care, subjected the rival arguments by the parties to this appeal to the proper sieve they deserve. We now turn to confront the grounds of contention in this appeal. Like Mr. Pius, we think this appeal must be determined first on the fourth ground of appeal which is a challenge on the unequivocality of the plea.

We start our determination by a statement that the law as it stands now does not permit any appeal on one's own plea of guilty, except as to the extent or legality of the sentence. This is the tenor and import of the provisions of section 360 (1) of the CPA. For ease of reference, we take the liberty to reproduce the subsection as under:

> *"No appeal shall 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".*

As already shown above, the record of appeal bears it out that when the charge was read over and explained to the accused persons, the appellant is recorded as pleading in Kiswahili: "ni kweli" which, literally translated, means in English "it is true". His fellow accused persons pleaded: "siyo kweli". The facts constituting the ingredient of the offence, were narrated to him. Those facts, which appears at p. 5 of the record included the following facts; **one**, personal particulars of the appellant as appearing in the amended charge sheet, **two**, that the complainant was Abdallah s/o Ashelli, Mnyiramba, 42 years of age, peasant and resident of Uyowa village within the Urambo District of Tabora Region, **three**, that on 24.03.2010 at 15.00hrs at Kalemela village within Urambo District in Tabora Region, the appellant and others being armed with a locally made firearm commonly known as *Gobore* did set logs on the road and threatened to shoot the complainant who at the material time was riding a motorcycle make SANLG with Registration No. T957 AZS and ordered him to stop, **four**, the appellant and his co-accused persons then did steal the said motorcycle and made away with it, **five**, on 25.03.2010, the accused persons were arrested at Tabora town at about 09.00hrs whilst in the

process of finding a prospective buyer of the motorcycle in question, **six**, after being arrested, they led the police to the village known as Mtakuja which is within Tabora Municipality and they willingly showed the firearm they used in committing the alleged offence, **seven**, the appellant and the fellow accused persons were brought to Urambo Police Station with the stolen motorcycle and their statements were taken, **eight**, the appellant and the second accused persons were brought to court on 05.05.2010 to answer the charges against them while the third accused person was joined on 11.05.2010, and, **nine**, that the exhibit which was a motorcycle was in the custody of police while investigation was still in progress.

After the above facts constituting the ingredients of the offence were narrated to the appellant and the trial magistrate besought his response, he is recorded as replying: *"Mheshimiwa, maelezo yote ni ya kweli na nakubaliana nayo" which* literally translated means "all the facts depict the truth and I endorse them as correct". The appellant was then made to append his signature to that concession. The trial court and the Public Prosecutor also appended theirs. The trial court, subsequently, made a finding that the accused person admitted the

facts constituting the offence and, consequently, found him guilty as charged, convicted him accordingly and proceeded to sentence him as shown hereinabove.

The question which comes to the fore at this juncture is: did the appellant, on the face of record plead guilty to the charge levelled against him? Put differently, was the appellant's plea unequivocal? This is the question to which we now turn to resolve.

Before we answer the above questions, we wish to underscore the law on the point. As already said, under normal circumstances, no appeal against conviction is allowed by law on an accused person's own plea of guilty, except as regards the extent and legality of sentence. There are, however, some exceptional instances under which an accused may be allowed to appeal against a conviction on his own plea of guilty. These circumstances were set out by the High Court [Samatta, J. (as he then was)] in **Laurence Mpinga** (supra) and approved by the Court in **Kalos Punda v. Republic**, Criminal Appeal No. 153 of 2005, **Josephat James v. Republic,** Criminal Appeal No. 316 of 2010, **Ramadhani Haima v. Republic,** Criminal

Appeal No. 213 of 2009 and **Baraka Lazaro v. Republic**, Criminal Appeal No. 24 of 2016 (all unreported). In **Laurence Mpinga**, it was held:

> *"... an accused person who has been convicted by any court of an offence "on his own plea of guilty" may in certain circumstances appeal against the conviction to a higher court. Such an accused person may challenge the conviction on any of the following grounds: 1. 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; 2. That he pleaded guilty as a result of mistake or misapprehension; 3. That the charge laid at his door disclosed no offence known to law; and, 4. That upon the admitted facts he could not in law have been convicted of the offence charged."*

The question we have posed above is: was the appellant's plea unequivocal? This question calls upon us to define what really amounts to an unequivocal plea. In **Abdallah Jumanne**

Kambangwa v. Republic, Criminal Appeal No. 321 of 2017 (unreported) we defined an equivocal plea as simply meaning:

> *"... an ambiguous or vague plea that is a plea in which it is not clear whether the accused denies or admits the truth of the charge. Pleas in such term as "I admit" "nilikosa" or "that is correct" and the like, though prima facie appear to be pleas of guilty may not necessarily be so. In fact, invariably such pleas are equivocal. It is for this reason that where an accused person replies to the charge in such or similar terms, facts must be given and accused asked to deny or admit them. Only by doing so can a magistrate be certain that accused's plea is one of "not guilty" or "unequivocal plea of guilty."*

We have dispassionately considered the appellant's plea and the facts read out to him consisting the ingredients of the offence as appearing at p. 5 of the record of appeal and, having so done, we are of a firm view that the learned first appellate Judge was correct to conclude that the appellant's appeal was misconceived as his appeal was not equivocal but unequivocal. We respectfully think that the

appellant's plea was unequivocal as it was unambiguous, straight-forward, not vague in any way and, to clinch it all, he admitted to every ingredient of the offence as narrated to him by the prosecution. Given the circumstances, we think, the appellant could not benefit from any of the four criteria reproduced above in **Laurence Mpinga** (supra) to warrant any interference with his conviction following his unequivocal plea of guilty.

We are certain in our mind that the District Court which convicted the appellant complied to the letter with our direction in **Waziri Saidi v. Republic**, Criminal Appeal No. 39 of 2017 (unreported) in which we quoted the decision of the erstwhile Court of Appeal of East Africa in **Adan v. Republic** [1973] EA 445 which underscored the procedure to be followed when an accused person pleads guilty. It was articulated at p. 446:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own 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 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 agree with the statement of 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 sentence. The statement of facts and the accused's reply must, of course, be recorded."*

[Emphasis supplied].

In the matter at hand, it is no gainsaying that the court which convicted the appellant was quite meticulous in following the procedure articulated in **Adan** and followed **Waziri Saidi** (both supra) and the first appellate court was quite justified to uphold the conviction.

In view of the above, it is our considered opinion that an accused person who pleads guilty cannot be aggrieved by being convicted and, accordingly, in terms of section 361 (1) of the CPA, does not have a right of appeal against that conviction.

For the avoidance of doubt, with respect to discrepancy of the date of the commission of the offence in the charge sheet and the one in the facts narrated to the appellant when he pleaded guilty to the charge, we are in agreement with the learned State Attorney that the same was either a *lapsus calami* on the part of the trial court which recorded the same or a slip of the tongue in respect of the public prosecutor who narrated the facts to the trial court. We say so because the date indicated in the charge sheet which was read to the appellant indicated 24.04.2010 and this is the charge to which the appellant was aware he was facing. The discrepancy is therefore an

advertence which did not cause any injustice and which, therefore, was not fatal and could be glossed over. We are, however, not prepared to justify the ailment with what the witnesses testified against the other two accused persons who pleaded not guilty to the charge stated as Mr. Pius would want us to. Those testimonies did not cater for the appellant. As such the same cannot be used in his respect.

With respect to the sentence, we are alive to the fact that the appellant did not complain in respect of it and to our mind rightly so as the same was the mandatory minimum provided by the law.

For the avoidance of doubt we are certain and entertain no doubt that the appellant's endeavours by an appeal and to impeach the court record is but an afterthought in a bid to save the otherwise sinking boat. The appellant never impeached the court record in his first appeal. He cannot be legally justified to impeach it now. We, with respect, decline from entertaining his complaint over the trial court record not depicting what actually transpired in court.

The fourth ground alone suffices to dispose of this appeal. In the premises, we refrain from determining the rest of the grounds, for that course of action will not serve any useful purpose now. Maybe at some other opportune moment.

The upshot of the above is that we find this appeal wanting in merits and dismiss it entirely.

Order accordingly.

DATED at **TABORA** this 5th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of December, 2019 in the presence of the applicant in person unrepresented and Mr. Tumaini Pius, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL