IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.68 OF 2019

(Originating from Criminal Case No. 7 of 2018 in the District Court of Masasi at Masasi before Hon. G.A.H. Kando, RM)

HUSSEIN KHALIFAN@MPAKATIKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

19 May & 16 June, 2020

JUDGMENT

DYANSOBERA, J.:

The District Court of Masasi at Masasi tried and convicted Hussein Khalifan @ Mpakatika the appellant herein, on a charge of grievous harm contrary to section 225 of the Penal Code Cap 16 R.E. 2002. It sentenced him to seven (7) years term of imprisonment. Dissatisfied, the appellant has appealed to this court.

The facts which led the appellant's arraignment and subsequent incarceration are that on 6th day of January 2018 at or about 17:30 hours at Nangoo village within Masasi District in Mtwara Region, both the

appellant and the victim one Kilian KletusMbata were at baptism ceremony in the house of Clara Kilian. An altercation then ensued and the appellant bit the victim's nose with his teeth and injured seriously the victim. The victim was medically examined by a Medical Officer at St. Benedict's Hospital at Ndanda who remarked that the wounds on the victim were stitched and a nasal vault adapted. He further remarked that the victim had deformed nasal vault permanently. The appellant was apprehended and upon being interrogated, he admitted the commission of the offence. A cautioned statement was recorded.

On 15th January, 2018 the appellant was arraigned in court and when the charge was read over and explained to him, he is recorded to have pleaded guilty to the charge. A preliminary hearing was then conducted and undisputed facts recorded. In the trial court, both the victim's PF 3 and the appellant's cautioned statement were tendered in court and admitted, respectively, as exhibits P 1 and P 2. The appellant was thereby convicted and punished accordingly. He was also ordered to pay to the victim Tshs. 3, 000,000/= as compensation for the injuries sustained. As said before, the appellant has appealed to this court challenging conviction, sentence and compensation order.

In his petition of appeal, the appellant had three grounds of appeal the appellant has filed the following three grounds of appeal.

1. That the trial Resident Magistrate Court erred in law and facts by failing to comply with section 312(2) of the Criminal Procedure Act [Cap 20 R.E. 2002] since the judgment failed to specify the offence of the section of the Penal Code or the law under which the was convicted on therefore it is clear that there was not conviction nor judgment.

2.That the trial Resident Magistrate erred in law and fact and missed the appellant in admitting the two exhibit P.1 and P.2 concurrently and also failing to address the appellant on his rights which are under the criminal procedure Act section 240(3) and also the alleged caution statement was never read n court prior to its admission.

3. That the trial Resident Magistrate erred in law and facts by relying on the alleged plea of guilty of the appellant while the facts which were read by the public prosecutor did not disclose any offence under which the appellant was charged. Clearly on the third sentence of undisputed facts its (sic) states that the appellant injured the victim Killian Cletus by cutting him his nose by teeth and thereby

cause him to suffer bodily injury. Honorable Justice, it is clearly that the offence was not fully disclosed by the facts through this narration, the real meaning of this sentence as narrated in the facts read meant that the appellant nose was the one that the appellant cut and gave to the alleged victim.

In addition to the above grounds of appeal, Ms EvetaLukanga, learned advocate who represented the appellant, did on 18th May, 2020 filea supplementary petition of appeal containing the following four grounds.

1. *That the plea was imperfect, ambiguous or unfinished and for that reason, the trial Court erred in law in treating it as a plea of guilty.*
2. *The honourable Trial Court erred in law and in fact by convicting appellant based on the facts of the case which was not read over and explained to the appellant contrary to the requirement of the law.*
3. *That the admitted documents tendered by the prosecution werenot read over contrary to the requirement of the law.*

4. The Honourable Trial Court erred in law and in fact by giving an order of Compensation of Tshs.3,000,000/= to a victim.

When this appeal was called for hearing on 19th May, 2020 the appellant was present virtually and represented by Ms. EvetaLukanga,the learned advocate whereas the respondent Republic enjoyed the services of Mr.Paul Kimweri, the learned Senior State Attorney.

Supporting the appeal, learned advocate challenged the trial court's conviction on a plea of guilty the ground submitted that the appellant's plea was imperfect, ambiguous and unfinished. She argued that although under Section 360 (1) of Criminal ProcedureAct, [Cap 20 R.E. 2002], the appeal against conviction on a plea of guilty is barred, save appeals against a sentence. She, however, contended that there are exceptions as stated in the case of **Lawrence Mpinga V.R** [1983] TLR page 166.

Learned advocate explained that in the present case, on 4.4.2018 the case went for plea and the prosecution requested to read the charge over to the appellant; the prayer was granted and the appellant said "Ni kweli".The trial court then entered a plea of guilty as seen at page 6 of the proceedings and thereafter the court convicted the appellant on the words"Nikweli". Ms Lukanga complained that the plea was unfinished and

ambiguous in that the mere pleading "Ni kweli" did not mean that the appellant admitted the facts. She relied on section 228(1) and (2) of the Criminal Procedure Act to support her argument. She stated that in this case, the trial court made no efforts to explain to the appellant whether he admitted or denied the facts. Reliance was also made on the case of **MitingeMihambov.R**, [2001] TLR page 348 and it was held that the accused should not be taken to admit an offence unless he pleads guilty to it in unmistakable terms with the appreciation of essential elements.

On whether or not the appellant understood the charge to which he was said to have pleaded guilty, learned counsel told this court that since the appellant had no legal representative, the court had make sure that the he understood the ingredients of the crime to which he pleaded guilty. To buttress her argument, learned advocated cited the case of **DPP.v.Paul Reuben Makuja** [1992] TLR page 2 on the authority that before accepting a plea of guilty by the accused the court must be satisfied that the accused's reply is nothing but a clear admission of guilt. This court was also referred to another case of **FeruziBakari and AjidaHalidi @Mlaponiv.R.**, Criminal Appeal No. 16 of 2014 in which this court agreed to the submissions by learned counsel for the appellant, quashed the

conviction and made no order for a re-trial on account that since the appellant had served a year jail term, a retrial would not be in the interests of justice.

In concluding this ground, learned advocate prayed the court to quash the conviction, set aside the sentence and refrain to order a re-trial on the ground that the appellant has already served two years term of jail and it would not be in the interest of justice.

The trial court's judgment was also challenged on the failure by the trial court to read over the facts to the appellant. Learned advocate argued that the law and various case laws require the facts of the case to be read over to the accused and they should also detail all essential elements of the crimeand the accused must be asked if he understands so that he admits or denies.She cited the case of **FeruziBakari**(supra) to support her argument. She clarified that on 4.4.2018 the case was before the court for preliminary hearing and after the charge was read over and a plea of guilty entered, the Public Prosecutor requested to read facts of the preliminary hearing and the trial court adopted the facts. Thereafter the accused was reminded of the charge and the court entered a plea of guilty but nowhere was the Public Prosecutor asked to read the facts of the case to the

appellant so that he was asked to admit or deny. She submitted that this failure went against the law which requires the facts of the case to be read to the accused and the ingredients to be explained to him and then asked if he admits or denies them.

On the fourth ground of appeal, Ms. EvataLukanga submitted that the court erred in ordering compensation. Admitting that there are offences attracting compensation orders as per section 31 of the Penal Code(supra) and section 348 (1) of Criminal Procedure Act(supra), learned counsel contended that the court is empowered to order compensation in offences in respect of bodily injury but upon compliance with some conditions as elucidated in the case of **ShijaSwekev.R**, [2003] TLR page 398 that compensation order must be clear and precise and must show under which provision of the law it is being made. The learned counsel also referred this court to the case of **MaswedeAdijav.R** [1992) TLR page 140 where Hon Chipeta J, (as he then was) set aside the order of compensation on the ground that it was not justified. It was learned counsel's argument that in this case, the trial Magistrate did not cite the section under which the order of compensation was given and there was no evidence of how the amount of compensation was assessed. Further that, the victim was not called to

explain and, likewise, the appellant was notgiven an opportunity to say anything such as admitting the amount of compensation to be awarded. Counsel was of the view that where the amount is big it is desirable for the complainant to file a civil suit. Reliance was made on the case of **StephanoRweyendelav.R** [1983] TLR where at page 204 where Hon. Moshi, J. stated at (i) and (ii) that the accused to be given a chance to admit the amount of compensation. With this submission, the learned advocate prayed that this court should set aside an order of compensation as it was not shown under which law it was given and the order was not justifiable.

On the complaint that the documents tendered at the preliminary hearing were not read to the appellant, learned advocate stated that the decisions on this aspect abound that in a case where the documents admitted in court are not read, they are expunged from the record. She cited the case of **DPP v. R AyoubBakariChindalima and KalingenjiRamadhani**, Criminal Appeal No. 3 of 2019 as one of the authority. She prayed the documents to be expunged from the record. She referred such documents to be PF3 and cautioned statement. She prayed

the court to allow the appeal, quash conviction and set aside the sentence and order of compensation.

Responding to learned advocate's submission, Mr. Paul Kimweri, learned Senior State Attorney undertook to argue first the legal point of time limitation. On this aspect, the learned Senior State Attorney argued that the record shows that the appeal was filed beyond the prescribed time limit. He submitted that this legal point can be raised even at the time of appeal as it is touches the jurisdiction of the court. According to him, this position was elucidated in the case of **DPP v.FaridHadiAhmedand 9 others**, Criminal Appeal No. 96 of 2013 – CAT sitting at Dar es Salaamat page 22, 1st paragraph state that "The question of jurisdiction can be raised at any stage even at the appeal stage". Further that, the Court of Appeal stated that the issue of time limitation touches the jurisdiction of the court. He relied on the case of **DED Kilwa District Council v. Bogeta Engineering Ltd**, Civil Appeal No. 37 of 2017, CAT sitting at Mtwara, in which the Court heldat page 14 last paragraph that, "It is the law that any appeal its foundation is a notice of appeal asit is a notice of appeal which institutes the appeal. In further emphasis, Mr. Kimweri also cited the case of **AziroSelemani, Mussa Athumani and JabiriAhamadi**

v. R., Criminal Appeal No. 102 of 2013 whereat page 2, last paragraph, the Court observed, "The notice of appeal in this case was filed against section. 361 (1) of the CPA which requires the appellant to give notice of intention within ten days from the date of judgment or decision."

As regards this case, Mr. Kimweri submitted that the judgment of the trial court was given on 6.4.2018 and the notice was brought in court and received on 16.4.2018 which is outside the prescribed time of ten days. He relied on the Law of Limitation Act, Cap 89 R.E. 2002, section 4 in particular. In his view, where an action is filed outside the prescribed time, the court lacks jurisdiction to entertain the matter and the consequences is to strike out it out. He relied on the Court of Appeal decision in the case of **YusuphVuaiZyuma v.MkuuwaJeshi la Ulinzi (TPDF) and 2 others,** Civil Appeal No. 15 of 2009 CAT – Zanzibar where at pages 6 and 7 it was held that where the appeal is time barred a court cannot entertain it and the consequences is to strike it out. Learned Senior State Attorney urged this court to find that this appeal is legally not competent before the court and should be struck out.

With respect to the merits of the ofappeal, Mr. Kimweri invited the court not to entertain itas the appeal is incompetent before it. He

contended that the complaint is substantially directed against the trial court on an improper pleafor which neither the prosecution nor the appellant is to blame. He pressed that it is not proper to shoulder the blame on the prosecution and that is why there is the provision of section 388 of the Criminal Procedure Act (supra) which are usually brought into play to cure that defect and a retrial is ordered. Learned Senior State Attorney was emphatic that what is important is the point of law that this appeal is incompetent for being time barred.

In a rejoinder, Ms. EvataLukangamaintained that the present appeal is competent and that the notice of appeal was filed in time it having filed the last day. She was of the view that the issue of time limitation is but a misconception. She pressed that the court has jurisdiction to entertain it.

Regarding an order of retrial, Ms. Eveta submitted that since the respondent seems to agree that the plea was ambiguous and imperfect, then an order for retrial will not meet the ends of justice because the appellant has served a jail term for two (2) years, a month and some days and the appellant cannot be punished for court's wrongdoings.

Let me, at this juncture tackle the issue of limitation first. As rightly pointed out byMr. Paul Kimweri, the issue of time limitation is fundamental

as it touches the jurisdiction of the court to entertain a matter before it. Besides, it is a correct legal position as submitted by learned Senior State Attorney that an appeal in a criminal matter like the present one, is founded on a notice of appeal which institutes the appeal. Likewise, it is true that section 361 (1)(a) of the Criminal Procedure Act(supra) requires the appellant to give notice of intention within ten days from the date of the finding, sentence or order. Equally, it is true that counting from 6th April, 2018 to 16th April, 2018, makes a total of eleven days.

The question I have to ask myself and answer is whether the jurisdiction of this court has been ousted. It is on record that the judgment of the trial court was delivered on 6th April, 2018 and a notice of intention of appeal was signed and dated on 7th April, 2018 though filed in court on 17th April, 2018. This means that a day had elapsed after the date of the decision. The appeal was therefore, filed beyond the prescribed period of ten days from the date of the decision of the trial court. That notwistanding, I am far from being convinced that the jurisdiction of this court to entertain this appeal is ousted. The following are my reasons.

First, the record indicate that the notice of intention of appeal was prepared, dated and signed by the appellant on 7th day of April, 2018. It was therefore prepared and signed by the appellant, only a day after the trial court gave its decision and was, therefore, prepared and signed by the appellant in time.

Second, the delay which, in view of the fact that the appellant was in prison and unrepresented and which delay is not inordinate, is not inexcusable.

Third, the appellant is seeking to impugn the validity of his plea of guilty entered by the trial court and the court has to inquire into his complaint. For the interest of justice, this court has to afford the appellant and the respondent, the rights to be heard.

I, therefore, find that the delay of one day which is not attributable to the appellant is excusable.

Now on the central issue on the merits of the present appeal. From the submissions, the grounds of appeal and the trial court's record, two issues call for determination by this court. It is trite that before entering a conviction, a trial court must ensure that and accused has first, fully understood and appreciated the charge laid against him and second, whether he intended to plead guilty thereto. These are the situations when a conviction resulting from a plea of guilty under circumstances arising therefrom, may be entertained by an appellate court as elaborated by the Court of Appeal in the case of **Josephat James v. R.** , Criminal Appeal No. 316 of 2010 (unreported).

Were these criteria met in the present case? Ms EvetaLukanga submitted that the appellant's plea was imperfect, ambiguous and unfinished. Although Mr. Paul Kimweri seemed not to agree, he did not submit much on this aspect.

On my part, to effectively determine whether or not the appellant's plea suffered from the complained deficiencies, I better reproduce the pertinent part of the trial court's proceedings. Pages 1 to 7 of the trial court' s proceedings read as follows:-

"Date: 02/04/2018

Coram: H.C. Kando- RM

For Pross: Jovina

Accused : Present

B.C.: Z. Mchola

PP: For Phg facts over ready (sic).

PP: Phg, I pray to read the charge against the accused.

Sgd. H.C KANDO- RM

04/ 04/2018

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

Sgd. H.C KANDO- RM

04/ 04/2018

ACCUSED'S PLEA

"Ni kweli"

Sgd. H.C KANDO- RM

04/ 04/2018

COURT: Entered plea of guilty.

Sgd. H.C KANDO-

RM

04/ 04/2018

PP: I pray to conduct Phg.

Sgd. H.C KANDO-

RM

04/ 04/2018

PHG CASE OPEN

COURT: Adopt the fact sheet to be part of this proceedings.

COURT: The accused person is reminded his charge and maintained his plea of guilty.

Sgd. H.C KANDO-

RM

04/ 04/2018

COURT: Entered plea of guilty.

Sgd. H.C KANDO-

RM

04/ 04/2018

UNDISPUTED FACTS.

Accused's personal particulars as per charge sheet.

That on 6/1/2018 the accused and Killian were at Nangoo Village in the house of Clara Killian in baptism ceremony.

That the accused at around 17:30 hrs misunderstanding occurs and occurs and accused injured the victim Killian Cletus by cutting him his nose by his teeth and thereby cause him to suffer bodly injury.

That on 10/1/2018 the accused were(sic) arrested and sent to Ndanda police Station.

That on the same day the accused were (sic)interrogated and admitted to commit that offence.

That on 15/1/2018 the accused were (sic) brought before this court.

Sgd. H.C KANDO-

RM

04/ 04/2018

ACCUSED: XXXXXXXX

PP: XXXXXXXXXXXX

PP: *I pray to tender PF3, of victim and accused's C/statement as Exhibits.*

Sgd. H.C

KANDO- RM

04/ 04/2018

ACCUSED: *I have no objection over PF3 and caution statement as Exhibits P2.*

Sgd. H.C KANDO-

RM

04/ 04/2018

COURT: *Admit PF3 and mark as Exhibits P1 and cautioned statement as Exhibits P2.*

Sgd. H.C KANDO-

RM

04/ 04/2018

COURT: *I'msatisfied that the accused plea and admission of all fact are certain and I hereby convict him accordingly".*

As the above excerpt reveals,when the charge was read over and explained to the appellant, he is recorded to have pleaded guilty.As rightly

pointed out by Ms EvetaLukanga, the pleading in Kiswahili: "nikweli" which, literally translated, means in English "it is true" does not necessarily mean that the accused's plea was unequivocal.

In principle, an appeal against conviction for an accused convicted on his own plea is barred save an appeal against the legality of sentence. This is provided for under section 360 (1) of the Criminal Procedure Act, Cap 20 of R.E. 2002 which reads:-

> *"(l) 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.*
>
> *(2).....(not relevant)*

The above provision which clearly envisages that upon a plea of guilty, there is no right of appeal unless it is on extent of legality of the sentence is a general rule which is not without exceptions. These exceptions were amply elucidated by this court in the case of **Laurent Mpinga** (supra) which are the following:-

1. *"That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished;*

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

Back to the two issues. On the 1st issue, it is the argument of learned counsel for the appellant that the plea was imperfect, ambiguous and unfinished. She elaborated on this aspect. On his part, Mr. Paul Kimweri contended that the anomaly pointed out by the learned advocate of the appellant is attributable to neither the prosecution nor the appellant. he invited this court to invoke the provisions of section 388 of the Criminal Procedure Act to cure the defect by ordering a re-trial.

This court in the case of **MitingeMihambo v. R**. (supra) cited by Ms EvetaLukanga held that the accused should not be taken to admit an offence unless he pleads guilty to it in unmistakable terms with the appreciation of essential elements. This court was, obviously, in mind of the provisions of section 228 (1) (2) of the Criminal Procedure Act which enacts as hereunder:-.

"228.

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If 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 concept underlying the application of section 228 of the Criminal Procedure Act was considered by the Court of Appeal in various cases. Examples of such cases includes the case of **Khalid Athuman V. Republic,** Criminal Appeal No. 103 of 2005 and the case of **Juma Selemani @Paul vsRepublic,** Criminal Appeal No. 394 of 2016 (both unreported). The guidelines given by the Court of Appeal are found in the following observations:-

"When a person is charged, the charge and theparticulars should be read out to him so far aspossible in his own language, but if that is notpossible, then in a language which he can speakand understand. The magistrate should then explainto the accused person all the essential ingredients ofthe offence charged. If the accused then admits allthose essential elements, the magistrate shouldrecord what the accused has said, as nearly as possible in his own words, and then formerly entera plea of guilty. The magistrate should next ask theprosecutor to state the facts of the alleged offenceand, when the statement is complete, should givethe accused an opportunity to dispute or explain theiracts or to add any relevant facts. If the accused does not agree with the statement of the facts orasserts additional facts which, if true, might raise aquestion as to his guilt, the magistrate should recorda change of plea to "not guilty" and proceed to hold atrial. 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 offacts and the accused's reply must, of course, berecorded".

In the instant case, the trial court's record at pages 4 and 5 of the typed proceedings shows thatthe learned Resident Magistrate did not

explain to the appellant all the essential ingredients of the offence charged and afford him an opportunity to admit or deny before entering a plea of guilty. In such circumstances, it cannot be gainsaid that the appellant's plea was imperfect, ambiguous and unfinished. In the case of **DPP v. Reuben Makujaa** [1992] the Court observed at page 2 that before accepting a plea of guilty by the accused, the court must be satisfied that the accused's reply is nothing but a clear admission of guilty. The accused cannot be said to have admitted if he did not understand the ingredients of the offence charged. To be safe, the trial court was duty bound to explain to the appellant all essential ingredients of the offence before recording a plea of guilty. In the circumstances of the case I am far from being satisfied that the appellant fully understood and appreciated the charge laid against him

Besides, the trial court's record at page 5 indicates that a preliminary hearing was conducted and undisputed facts adopted. No facts of the alleged offence were stated and the appellant was not given an opportunity to dispute or explain the facts or add any relevant fact.

Surely, the law was violated in two aspects, first, no facts of the alleged offence were stated and the appellant was not given an

opportunity to dispute or explain the facts or add any relevant fact. Second, the learned trial Resident Magistrate treated the matter as if the appellant had pleaded not guilty to the charge and that is why he conducted a preliminary hearing and adopted matters not in dispute. With due respect, he miserably went off tangent. The conduct of preliminary hearing does not apply where the accused pleads guilty. It only applies where the accused denies the charge and a plea of not guilty is entered, then for purposes of accelerating the trial and disposal of the case, the preliminary hearing is conducted under section 192 read together with Accelerated Trials and Disposal of Cases Rules, GN No. 192 of 1998. For instance, rule 2 of the said Rules provides:-

"2. Preliminary hearing

In every case where a person charged pleads not guilty to the charge the presiding magistrate or judge shall hold a preliminary hearing on the day when the person is charged in the presence of his advocate either at his first or subsequent appearance in court or, if this is not possible, then as soon as it is practical".

Section 192 should be read together with section 229 of the same Act.

The trial District Court, therefore, in the present case, adopted a wrong procedure by applying inapplicable law as indicated above. That occasioned miscarriage of justice as the appellant was treated as if he had pleaded not guilty and was convicted as if a trial was conducted. It is difficult to say with certainty that the appellant intended to plead guilty to the charged offence.

For the reasons I have endeavored to explain, I find that the appellant's plea was unequivocal. The conviction and sentence were therefore, illegal. This caused injustice to the appellant.

Since the conviction and sentence were premised on violation of the law of the land, they cannot be allowed to stand.

I find the trial court misdirected itself on essential legal procedure which occasioned miscarriage of justice. I declare the whole trial court's proceedings, judgment and subsequent order a nullity. The same are quashed and set aside. The conviction is thereby quashed and sentence set aside.

Should I order a re-trial? The general rule is that where a trial is nullified on the basis that the trial was illegal or defective, the remedy is to order a retrial unless there are reasonable grounds for making a different

order. This position was echoed in the case of **Rex versus Dinu d/o Sombi and 2 Others** Vol.14 EACA 136 in which the Court of Appeal of Eastern Africa nullified the trial and ordered a retrial in a murder case because the learned trial Judge had not complied with the provisions of Sections 279 to 283 of the Criminal Procedure Code, Tanganyika, which omission might have affected the opinion of the assessors and therefore occasioned a failure of justice.

In this case, I find to be in the interest of justice to order a fresh trial. In consequence thereof, I order the case to be remitted back to the District Court for re-trial before another Magistrate of competent jurisdiction. I direct that in case the appellant is convicted, the term of imprisonment he has already served in custody should be taken into account.

Appeal allowed to that extent.

W.P.Dyansobera

JUDGE

16.6.2020

This judgment is delivered under my hand and the seal of this Court on this 16th day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent Republic and in the presence of the appellant (virtually present in court).

Rights of appeal to the Court of Appeal explained.

W.P.Dyansobera

JUDGE