IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A; And MASSATI, J.A.)

CRIMINAL APPEAL NO. 198 OF 2007

JOHN FAYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal Against Consecutive Sentences of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 27th day of May, 2004
in
Criminal Sessions Case No. 114 of 2003

JUDGMENT OF THE COURT

10 & 15 FEBRUARY, 2011

MASSATI, J.A.:

The appellant was convicted on his own plea of guilty, to four counts of attempted murder, contrary to section 211(1) of the Penal Code (Cap. 16 of the Laws). It was alleged before the High Court (Masanche, J.) that, on the 14th August, 2002 at Nyalikunga village within Magu District, Mwanza region, the appellant set fire to a

house, in which NKWIMBA d/o MASHIKU, REBECA d/o JOSEPH, GRACE d/o MASHIKU, and SHIDA d/o KULOWA, were living. Each of the persons constituted the subject of a separate count. After pleading guilty, the trial court sentenced the appellant to 5 years imprisonment on each count, but ordered them to run consecutively. The order for the sentences to run consecutively is the gravamen of the present appeal before this Court.

At the hearing of the appeal the appellant was represented by Mr. Deya Outa, learned counsel, and the Republic/respondent was represented by Mr. Seth Mkemwa, learned State Attorney.

Although the appellant had previously filed his own memorandum of appeal with five grounds of appeal, Mr. Outa filed an additional memorandum containing only one ground. In the course of hearing, the learned counsel abandoned the original grounds and argued the only ground he had filed. That ground was:

"That the learned High Court Judge erred in principle in sentencing the appellant who pleaded guilty to all counts."

In essence, Mr. Outa's argument was that, although under section 168(1) of the Criminal Procedure Act (Cap. 20 – RE 2002) and section 36(1) of the Penal Code (Cap 16 – RE 2002) a trial court is empowered to order sentences to run consecutively, the practice of the courts in this country, is to order sentences to run concurrently if an accused is convicted of two or more offences, committed in the same transaction, and /or of the same nature. In the present appeal, the appellant was convicted of four counts arising from the same transaction, and so, argued Mr. Outa, the trial court should have ordered the 5 year prison terms to run concurrently. He referred us to a number of decisions decided by this Court and the High Court which for reasons that will be clear shortly we need not go into.

In the alternative, Mr. Outa submitted that the sentence of 20 years in total was too stiff in the circumstances of the case. He urged us to allow the appeal and reduce the sentence.

But Mr. Mkemwa, learned State Attorney had a different view. He contended that since under section 211(1) of the Penal Code, the maximum sentence was life imprisonment, and since section 168(1) of the Criminal Procedure Act empowers the trial court to order sentences for more than one offence to run consecutively, the order of the trial judge was lawful and the sentence not excessive. He also referred us to two unreported decisions, which, as hinted above, we do not find them relevant for the purposes of what we are going to decide in this appeal.

Towards the end of hearing the appeal, we asked both learned counsel to address us on whether the pleas of guilty, entered by the trial court before convicting, the appellant were unequivocal. At first Mr. Mkemwa, vigorously defended the pleas of guilty, but when the court drew his attention to the facts stated by the prosecution to

support the pleas, he prevaricated, and left it to the court to decide on it. On the other hand, Mr. Outa, readily conceded that the facts read out to the appellant did not disclose the offences with which the appellant was charged. What it means is that the pleas of guilty were not unequivocal, he submitted. In view of this development, Mr. Outa asked us to exercise our revisional powers, quash the convictions and set aside the sentences, and order his immediate release, considering that the appellant had already served a considerable time in prison.

Taking of "*pleas of guilty*" in trials before the High Court is governed by the Criminal Procedure Act. (Cap 20- RE 2002) Section 282 provides:

> *"282. If the accused person pleads "guilty," the plea shall be recorded and he may be convicted thereon":*

A similar wording appears in section 266 of the repealed Criminal Procedure Code, (which was later replaced by the Criminal Procedure Act 1985) which was operative when the present matter came for trial. Although the practice of the courts in this country (and we applaud it as sound) has been to outline the facts of the case after an accused has *"pleaded guilty"*, it is not an express statutory requirement.

However, in **R v. YONASANI EGALU AND OTHERS** (1942) 9 EA CA 65. at 67, the erstwhile Eastern African Court of appeal held:-

> ***"In any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should he explained to the accused but that he should be required to admit***

or deny every constituent and that what he says should be recorded in the form whlch will satisfy an appeal Court that he fully understood the charge and pleaded guilty to every element of it unequivocally."

The above passage was quoted with approval by this Court in **DANIEL SHAYO v. R.** Criminal Appeal to 234 of 2007 (CAT) (Arusha) (unreported). And in **HANDO s/o AKUNAAY v. R.** (1951) 18 EACA 307, the same Eastern African Court of Appeal, directed the mode of taking and recording a plea of guilty in the following words:

"Before convicting on a plea of guilty it is hlghly desirable not only that every constituent of

the charge should be explained to the accused, but that he should be required to admit or deny every such constituent".

It was also directed that:

"the actual words used by an accused in pleading guilty to a charge should be recorded verbatim."

(CHACHA s/o WAMBURA v. R. (1953) 20 EACA 339).

In the present case, when the appellant appeared before the trial Court, and asked to plead, he is recorded to have said:-

"It is true"

in all counts. We are not certain whether the words, *"It is true"* are a verbatim record of what the appellant said. According to the record also it is shown that:-

> ***Information is read over and explained to the accused in his own language and he is required to plead thereto."***

It is not indicated whether by this sentence it is meant that every ingredient of the offence was explained to the appellant. But, since in this case the court did not convict after the appellant had pleaded *"It is true"* as the statutory provision allows, but only after *"the facts"* were read over by the prosecution, "*the facts*" then can only be deemed to be part of the process of the plea. If that is so the "*facts*" outlined by the prosecution must have meant to explain every ingredient of the offences. And it is upon those facts that the Court "*convicted*" the appellant. However, with respect, not every

ingredient of the offences was explained. We say so, because, in the facts only the following facts were explained:-

1. that the appellant and his wife quarreled and separated,
2. that the wife with her daughter left to live with her sister called Grace s/o Mashiku,
3. that the appellant used to visit his estranged wife and threatened to torch the house they were living in,
4. that on 14/8/2002, at 2.00 a.m. the house was set on fire, and the ex wife and children sustained burns from the fire, and
5. that only ten hours had passed between the appellant's threat to burn the house and the actual fire.

These are the facts, to which the appellant pleaded *"The facts are correct"* followed by the conviction. But these facts are short of one essential ingredient that appears in the information, that it was the appellant who set the said fire.

In our view, the above scenario means that not every ingredient of the offence was explained to the appellant. Clearly, in

the present case the appellant did not admit that he was the one who set the fire, which was essential for a conviction. The failure by the trial court to explain and ask the appellant to plead to every ingredient of the offence has no doubt, occasioned a failure of justice, and is incurable. We cannot let it to stand. So, in exercise of our revisional powers under Section 4(2) of the Appellate Jurisdiction Act (Cap 141 – RE 2002), we revise all the High Court proceedings and quash the convictions. We also set aside the sentences imposed upon the appellant. Under ordinary circumstances, we would have remanded the record to the High Court for a retrial, but considering the 8 years that the appellant has already spent in prison, we do not think that, it is in the interests of justice to do so in this case. We therefore order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

Order accordingly.

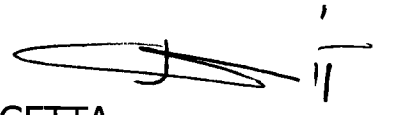
DATED at MWANZA this 11th day of February, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL