IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 31 OF 2018

NJILE SAMWEL @ JOHN..... APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Makani, J.)

dated the 29th day of November, 2016
in
DC Criminal Appeal No. 165 of 2016

JUDGMENT OF THE COURT

18th & 20th August, 2021.

MUGASHA, J.A.:

The appellant, Njile Samweli @ John was charged before the District Court of Bariadi, with two counts of unlawful possession of firearms and possession of ammunitions both contrary to sections 4(1) and (2) and 34(1) and (2) of the Arms and Ammunition Act [Cap 223 R.E 2002]. He was convicted on his own plea of guilty to the charge and having admitted the facts constituting the offence as narrated by the prosecution to be correct. Subsequently, he was sentenced to serve a jail term of fifteen years on both counts. The sentences were ordered to run concurrently. The appellant was aggrieved with both conviction and sentence. He unsuccessfully appealed to the High Court

where his appeal was dismissed. Still protesting for his innocence, the appellant has preferred the present appeal to this Court on the following grounds:-

1. *That, the trial court and the 1st appellate court grossly erred in law to accept the Exhibit P3 (the search Order) which contradicts with the charge sheet on the number of bullets/ammunitions.*
2. *That, the trial court and the 1st appellate court grossly erred in law in not considering that the plea of guilty to lower court was equivocally plea to the charge.*
3. *That, the trial court and the 1st appellate court grossly erred in law in misleading itself in not complying with section 29 of the Law of Evidence.*
4. *That, the trial of the case was unfairly as the appellant was not given right to call any relative to witness the caution statement when he was under police custody.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Jukael Reuben Jairo, learned State Attorney.

With leave of the Court the appellant was allowed to add a new ground of appeal in respect of the propriety of the sentence imposed. Thereafter, he adopted all grounds of appeal and prayed to initially hear the reply submission of the learned State Attorney.

In respect of the 2nd ground of appeal, he contended the complaint baseless because of the appellant's unequivocal plea of guilty and admission to the facts of the case which clearly stated the ingredients of the offences charged. On this account, he argued that the conviction of the appellant was proper and in accordance with the dictates of the provisions of section 228(2) of the Criminal Procedure Act (Cap. 20 R.E. 2019) (the CPA) which stipulates as follows:-

> *"(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."*

In the circumstances, the learned State Attorney argued that, since the conviction of the appellant followed his unequivocal plea of guilty, the present appeal is against the dictates of the law and it should not be entertained by the Court as it is in contravention of section 360 (1) of the CPA. To bolster his proposition, the learned State Attorney cited to us the case of **LAURENCE MPINGA VS REPUBLIC [1983] TLR 166**. On probing by the Court on the propriety of the remaining grounds raised for the first time before the

Court, he urged us not to consider them as they were not raised before the first appellate court. In relation to the additional ground on the propriety of the sentence imposed, the learned State Attorney submitted the same was justified considering the circumstances of the case. When probed by the Court if the assertion by the prosecution on the appellant being a first offender was considered by the trial court, he maintained his stance that the sentence is valid and that in imposing the sentence, the trial court exercised its discretion as found by the learned High Court Judge. Finally, he urged the Court to dismiss the appeal in its entirety.

In rejoinder, the appellant prayed the Court to reduce the term of sentence meted on him and also consider all the grounds contained in the Memorandum of Appeal.

In this appeal it is glaring that the 1st, 3rd and 4th grounds of complaint were not initially raised before the first appellate court. It is trite law that, this Court will not deal with new grounds of appeal which were not raised and determined by the first appellate court. (See: **HASSAN BUNDALA @ SWAGA VS REPUBLIC** Criminal Appeal No. 416 of 2013; **JAFARI MOHAMED VS REPUBLIC** Criminal Appeal No. 112 of 2006 and **HUSSEIN RAMADHANI VS REPUBLIC** Criminal Appeal No. 195 of 2015, **GALUS KITAYA VS REPUBLIC,**

Criminal Appeal No. 196 of 2015 (all unreported). In the latter case, the Court stated as follows:

> *"On comparing the grounds of appeal filed by the appellant in the High Court and this Court, we agree with the learned State Attorney that, ground one tom five are new grounds. As the Court said in the case of Nurdin Mussa Wailu vs Republic (supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to five of the appellant's grounds of appeal."*

Having critically examined the record, grounds one, three and four are complaints on factual matters which were not raised before the first appellate court. As such, we cannot entertain and determine the same because we have no jurisdiction to do so. We would have entertained those grounds if they were based on points of law which is not the case.

With regard to the remaining grounds, before addressing them it is crucial to state the position of the law regulating the appeals of this nature. In terms of section 360 (1) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA) no appeal lies where the accused person

is convicted on his own plea of guilty. This provision stipulates as follows:

> *"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."*

This was emphasised in the case of **LAURENCE MPINGA VS REPUBLIC** (*supra*) where it was held:-

> *"(i) An appeal against a conviction based on an unequivocal plea of guilty generally cannot be sustained, although an appeal against sentence may stand;*
>
> *(ii) an accused person who has been convicted by any court of an offence "on his own plea of guilty" may appeal against the conviction to a higher court 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."*

We fully subscribe to the said decision. A similar stance was made in the case of **MSAFIRI MGANGA VS REPUBLIC**, Criminal Appeal No. 57 of 2012 (unreported), the Court in addition stated as follows:

> *"... This goes to insist therefore that in order to convict on a plea of guilty,* ***the court must in the first place be satisfied that the plea amounts to an admission of every constituent of the charge and the admission is unequivocal."***
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> [Emphasis added].

In view of the stated position of the law, the remaining issues for determination are: **one,** whether the appellant was convicted on the plea which was unequivocal and **two,** whether the complaint against the sentence stands.

As to the propriety or otherwise of the plea made by the appellant, it is glaring on the record that when called upon to plead to the charge he replied, *"It is true"* on both counts. The phrase "it is true" does not mean that the plea was unequivocal. This was emphasised in the case of **ABDALAH JUMANNE KAMBANGWA VS THE REPUBLIC**, Criminal Appeal no. 321 of 2017, the Court defined an equivocal plea of guilty as follows:-

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

In the matter under scrutiny, after the appellant pleaded "it is true" to both counts. Subsequently, after the facts of the case were read over to him he replied as follows:-

"My name is Njile Samwei @ John aged 46 years old, Sukuma, resident of Yoma and Lyalu in Bariadi Town. That, on 6/01/2015 at Lyalu area in Bariadi town I was found with gun make SMG with No. PB 3402 and 59 bullets of SAR/SMG without permit...."

The above facts which the appellant admitted to be true and correct, disclosed the ingredients of the offence and as such, the appellant understood the nature of the charges and the narrated facts establishing the offence. (See: **RASHID NJOVU VS REPUBLIC**, Criminal Appeal No. 545 of 2016 (unreported). Given the circumstances, as rightly found by the first appellate court, there is no doubt that the appellant was convicted on his own unequivocal and unblemished plea of guilty. In this regard, as correctly submitted by the learned State Attorney, in terms of section 360 (1) of the CPA the appellant was barred to appeal against conviction which resulted from his own plea of guilty except on the severity of the sentence. This takes us to the appellant's complaint in the additional ground of appeal, the propriety or otherwise of the sentence. The appellant was convicted under the provisions of section 34 (2) of the Arms and Ammunition Act, as amended by The Written Laws (Misc. Amendment Act) No. 3 of 2010 states:-

"Any person who commits an offence under this Act shall upon conviction be liable, except where any other penalty is provided, to imprisonment for a term not exceeding fifteen years or to both a fine not exceeding shillings thirty million or to both."

We have gathered that words "except where any other penalty is provided" were inadvertently omitted as they are in reference to the Economic and Organised Crime Control Act [CAP 200 R.E.2002] (the EOCCA) when the offence under the Firearms and Ammunition Act was also an economic offence in terms of paragraph 19 of the Schedule to the EOCCA. However, paragraph 19 of the First Schedule was deleted pursuant to Amendment Act No. 2 of 2010. Apparently, those words continue to appear in section 60 of the current Firearms and Ammunition Controls Act, No. 2 of 2015. We propose that the respective provision be harmonised accordingly in line with Act No. 2 of 2010 because the offences under the Firearms and Ammunition Controls Act are no longer offences under the EOCCA.

Back to the substantive matter, as a general rule, the Court will not readily interfere with the discretion of the trial court, exercised when passing sentence, unless it is evident that it has acted on a

wrong principle, or overlooked some material factors. [See - **JAMES S/O YORAM VS REPUBLIC (1950)** 18 EACA 147, **KATINDA SIMBILA @ NG'WANINANA VS REPUBLIC,** Criminal Appeal No. 15 of 2008, **WILLY WALOSHA VS REPUBLIC,** Criminal Appeal No. 7 of 2002 (all unreported) and **RAMADHANI IBRAHIM VS REPUBLIC**, (*supra*). In the latter case, the Court said:-

> *"Generally, an appellate court will alter a sentence if it is evident that it is manifestly excessive. What is implied here is that the appellate court will not interfere with a sentence assessed by a trial court merely because it appears to be severe.* ***It will only interfere if it is plainly excessive in the circumstances of the case."***
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> [Emphasis supplied].

It is as well a general rule that, imprisonment should not be imposed on a first offender save where the offence is particularly grave or widespread. See: **YEREMIA @JONAS TEHANI VS THE REPUBLIC**, Criminal Appeal No. 100 of 2017, **UHURU JACOB ICHODE VS THE REPUBLIC**, Criminal Appeal No. 462, and **WILLY WALOSHA VS THE REPUBLIC**, (*supra*). In the latter case, the Court was faced with a situation whereby the appellant being a first offender who had readily pleaded guilty to the charge of manslaughter was

given a sentence of twenty (20) years imprisonment. This was considered excessive and reduced to four years after among other things, the Court had observed the following:-

> *"It appears to us that, with respect, although ostensibly a judge may say that he has taken into consideration mitigating circumstances in assessing sentence, it is not always apparent that he has in fact done so.* ***.... For example, first offenders who plead guilty to the charge are usually sentenced leniently, unless there are aggravating circumstances."***
>
> *[Emphasis added].*

In the present matter, after the appellant was convicted, the prosecutor intimated to the trial court that, apart from not having any previous criminal record of the appellant, they prayed for severe sentence against the appellant. Then, the appellant gave the mitigation factors and left it to the court to decide on the sentence. The appellant was sentenced to imprisonment to a term of fifteen years for each count, to run concurrently. However, in assessing the sentence the magistrate did not consider that the appellant was a first offender as asserted by the prosecution.

When such circumstances are considered together with the appellant being repentant on what he did on account of having pleaded guilty and being a first offender, with respect, it is glaring that both the courts below failed to consider material factors which normally entitle an offender to leniency. The learned High Court Judge made a finding at page 36 of the record that, the option to impose custodial sentence without a fine was the discretion of the trial court. We have no qualms that the trial court has discretion to impose the sentence. However, the discretion must be judiciously exercised. We found the assessment of the sentence wanting and we shall state our reasons. We had the opportunity of looking at the general principles upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal in the case of **CREDO SIWALE VS THE REPUBLIC**, Criminal Appeal No. 417 of 2013 relying on the case of **MBOGO AND ANOTHER VS SHAH** (1968) EA 93 the Court said:-

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have not have acted; or*

(iii) it has failed to take into consideration matters which it should have taken into consideration,

*And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable – See-**PINKSTAFF VS BLACK & DECKTZ** (US) Inc, 211 S.W 361."*

Since in the present matter the penal provision has an option of fine or imprisonment, **firstly,** the trial court ought to have given the appellant an option to pay fine or in case of default custodial sentence. **Secondly,** considering that the appellant was a first offender, he was entitled to leniency and as such, the maximum sentence of fifteen years was on the higher side. In this regard, we are satisfied that the trial court with respect, failed to exercise the discretion judiciously. This warrants the interference by the Court to do what the courts below court ought to have done having failed to take into consideration matters which it should have taken into consideration and arrived at wrong conclusion.

In the circumstances, having considered all the above factors, as earlier stated, we think the sentence of fifteen years' imprisonment was on the higher side. Therefore, since the appellant was arraigned on 21/5/2015, he has spent more than six years behind bars. We find this to be sufficient punishment considering what we have endeavoured to explain. In the upshot, the appeal is therefore allowed to that extent and we order the appellant to be released forthwith.

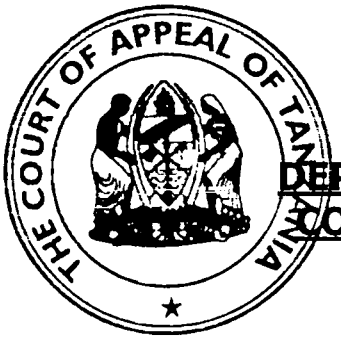
DATED at **SHINYANGA** this 19th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 20th day of August, 2021 in the presence of the Appellant in person, unrepresented and Ms. Wampumbulya Shani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL