IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 38 OF 2013

(Appeal from the decision of the District Court of Nkasi in Original Criminal Case No. 8 of 2005)

LACK PILI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

15th August & 3rd October, 2013

JUDGMENT

MWAMBEGELE, J.:

The appellant Lack Pili was arraigned in the District Court of Nkasi upon a charge of attempted armed robbery contrary to section 187 of the Penal Code, Cap. 16 of the Revised Edition, 2002. He was convicted on his own plea of guilty and sentenced to fifteen years imprisonment and ten strokes of the cane. He has appealed to this court advancing five grounds of appeal challenging both conviction and sentence.

At the hearing of this appeal Mr. Mwashubila, learned State Attorney, appeared and argued the appeal for and on behalf of the respondent Republic while the appellant appeared in person and unrepresented and argued the appeal by himself.

At the hearing of the appeal, the appellant elected to rely on what he stated in the Memorandum of Appeal. He, however, added that he, being a Zambian, did not understand the nature of the proceedings against him as he did not understand Kiswahili in which language the proceedings of the trial court were conducted. The little Kiswahili he spoke during the hearing of the appeal, he submitted before me, was learnt in jail. I take note that the appellant, in the Memorandum of Appeal, has cited some cases in support of his appeal. These are: ***Jackson Sumuni Vs R.*** (1967) HCD n. 152, ***Rajabu Ayubu Vs R.*** (1972) HCD n. 172, ***Thomas Mjengi Vs R.*** [1992] TLR 157, ***Joseph Maweta Vs Lekitetyi Karasi*** [1992] TLR 70 and ***R. Vs Kenneth Kizito*** [1992] TLR 269.

For the respondent Republic, the learned State Attorney supports the Appellant's conviction and sentence. He argues that the Appellant pleaded gulilty and was accordingly convicted on his own plea of guilty. Under the provisions of section 360 (1) of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2002, the learned State Attorney submits, the appellant is barred from appealing against

conviction. After perusal of the record of proceedings of the trial court, the learned State Attorney charged, it is obvious that the Appellant's plea was but an unequivocal plea of guilty. The learned State Attorney went on to submit that the charges were read over to the Appellant to which he replied "it is true I had so attempted to steal" and when the facts of the case constituting the ingredients of the offence were read over to him, the Appellant admitted the facts to be true and correct. This, the learned State Attorney submits, was but an unequivocal plea of guilty to which he is prohibited from appealing against conviction. To buttress his argument, the learned State Attorney cited to me the case of ***Laurence Mpinga Vs Republic*** [1983] TLR 166. As for the sentence, the learned State Attorney is of the considered view that, in the circumstances of this case, it was but appropriate.

Admittedly, the provisions of subsection (1) of section 360 of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2002, no appeal against conviction is permitted on the accused person's plea of guilty. This subsection provides:

> "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."

For the avoidance of doubts, I wish to observe at this juncture that by using the word "shall", the subsection is couched in mandatory terms. It is an elementary principle of statutory interpretation that once the word "shall" is used in a provision, it should be interpreted to mean that the provision is mandatory. This position is provided for by subsection (3) of section 53 of the Interpretation Act, Cap. 1 of the Revised Edition, 2002. This subsection provides:

> "Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Did the appellant, in the light of the evidence on record, plead guilty to the charges levelled against him? Or, put differently, was the accused person's plea, in the light of the evidence on record, an unequivocal plea of guilty? This is the question to which I now turn.

As already alluded to above, under normal circumstances, save for an appeal against sentence, no appeal is allowed by law on a plea of guilty. There are, however, some exceptional instances under which an accused person may be allowed to appeal against conviction on a plea of guilty. These circumstances were set out by this court [Samatta, J. (as he then was)] in the ***Laurence Mpinga*** case

(supra), a case cited to me by the learned State Attorney. In that case, His Lordship lucidly stated:

> "... 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."

In the case at hand, did any of the circumstances above, or any of them, exist? Let the trial court record paint the picture of what

actually transpired the day the Appellant's plea was taken by the court:

"**21/2/2005**:

Coram - F.C.P. Mdendemi - R.M.

Public Prosecutor - A/Insp. Cleophas

C/C - C. Kasuku

Accused - Present

Court: CRO & E to the accused who pleads

Accused: It is true that I had so attempted to steal.

Court: EPG to the charge for the accused.

Sgd: F.C.P.Mdendemi

R.M.

21/2/2005

FACTS OF THE CASE

Pros. The accused's particulars are as per charge sheet. On 17th February 2005 at about 1.00 a.m. at Kazovu area in Nkasi District the accused with 2 other accomplices did attack fishermen in Lake Tanganyika with

intentions to steal from them engines for their boats plus fishing materials.

The accused had used an SMG in the course of the attack so as to threaten the victims of the crimes. They were however confronted properly by the fishermen and in so doing one of the accused's accomplices had been killed at (sic) the spot. The accused and another one had been (sic) arrested and taken to Kazovu village where the 2nd suspect had also been (sic) killed at the hands of angry mob justice. The SMG used by the accused and his accomplices had been (sic) thrown into Lake Tanganyika. The police had been (sic) notified and when they went to this camp/village they'd simply rescued the accused in the dock. He'd been (sic) interrogated and had admitted liability for the crime. He also agreed that he had used an SMG in the crime commission which they brought from Zaire.

He'd (sic) finally been brought to Nkasi police station where he had been (sic) charged.

Sgd: F.C.P. Mdendemi

R.M.

21/2/2005

Accused: The facts are true and correct as narrated by the Public Prosecutor.

Sgd: F.C.P. Mdendemi

R.M.

21/2/2005

Court: The accused is convicted as charged.

Sgd: F.C.P. Mdendemi

R.M.

21/2/2005

Antecedents: I do not have the accused's past record. I pray for a deterrent sentence since the class of crimes committed by the accused is prevalent in the lake.

Sgd: F.C.P. Mdendemi

R.M.

21/2/2005 .

Mitigations: I am a stranger in this country. I had simply committed the crime. I come from Zambia and I am 18 years of age. I am still a bachelor but my parents do not depend on me entirely.

Sgd: F.C.P. Mdendemi
R.M.
21/2/2005

Sentence

The accused is a first offender and it is possible that the crime is prevalent at the lake as submitted by the Public Prosecutor. I sympathise with the accused's tender age. I sentence him to fifteen (15) years imprisonment plus ten (10) strokes corporal punishment.

Sgd: F.C.P. Mdendemi
R.M.
21/2/2005

Appeal: Right of Appeal explained.

Sgd: F.C.P. Mdendemi
R.M.
21/2/2005"

For the avoidance of doubt, the abbreviations CRO & E, EPG and SMG, respectively, stand for "Charge Read Over and Explained", "Entered as a Plea of Guilty" and "Sub-Machine Gun". However, the quotation would augur (fit in) well if the "had been"; words frequently appearing in the proceedings above quoted could be substituted for them by the word "was" or "were" as appropriate. But the message coming out of the proceedings of the trial court as quoted, despite some trivial linguistic flaws, is loudly clear. After the charges were read over to the accused person; the Appellant herein he pleaded:

"It is true I had so attempted to steal"

After the above plea, the facts of the case constituting the ingredients of the offence were read over to him; the accused person; the Appellant herein to which replied:

"The facts are true and correct as narrated
by the Public Prosecutor".

With respect, I find myself in the same basket with the learned State Attorney that the accused person's plea was undoubtedly an unequivocal plea of guilty to the charges leveled against the Appellant. The charges were read over to him to which he elaborately replied "it is true I had so attempted to steal" and when the facts of the case constituting the ingredients of the offence were read over to him by the Public Prosecutor, the Appellant admitted the facts, as narrated by the Public Prosecutor, to be true and correct. The elaborate manner in which the Appellant responded to the charge and facts of the case after they were read over to him is clear testimony that he was fully aware of and did grasp the nature of the proceedings and charges leveled against him. In view of this, the trial magistrate had no alternative but to find him guilty on his own plea of guilty and to, accordingly, convict him as charged; for the plea had no characteristics other than those of an unequivocal plea of guilty from which he is prohibited to appeal against conviction.

It is the practice of criminal procedure in this jurisdiction that when a case is called on for hearing, a charge must be read over to the accused person who must be asked to plead thereto in the language he understands. If the court finds that the accused plea is unequivocal, the prosecution should proceed to narrate the facts of the case forming all the ingredients of the offence with which the accused person is charged. Thereafter, the accused should be required to admit or deny every such ingredient as narrated to him.

The requirement that each and every ingredient of the offence must be explained to the accused person who should be required to admit or deny every such ingredient was well articulated by the defunct Court of Appeal for East Africa in ***Hando Akunaay Vs R.*** (1951), 18 E.A.C.A. 307, in the following terms:

> "As has been said before by this court, before convicting on any such plea, it is highly 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".

This case has often been referred to on the subject and consistently followed in East Africa ever since it was promulgated in 1951 over a decade before independence of the East African countries. Such cases are ***Wanjiru Vs Republic*** [1975] 1 EA 5 (HCK), ***Desai Vs Republic*** [1971] 1 EA 416 (CAD) or [1971] HCD n. 297, ***Republic Vs Odera*** [1973] 1 EA 392 (HCK) and ***Juma Tumbilija and two others Vs R*** [1998] TLR 139 to mention but a few. See also: ***Kato Vs Republic,*** [1971] E.A. 542 or [1971] HCD n. 364 and ***Bujukano Vs R*** [1971] HCD n. 446.

In view of the above decisions, some of which are of persuasive value, but to which I fully subscribe, I am satisfied that each and every constituent of the offence of attempted armed robbery was explained to the accused person; the appellant herein in a detailed fashion and that he pleaded guilty to each and every such constituent unequivocally. His plea was certainly an unequivocal plea of guilty. The provisions of section 360 (2) of the CPA are therefore applicable in the present case. In the premises, the appellant's appeal against conviction is unfounded.

I cannot resist the temptation of reverberating what was quoted by the Court of Appeal in ***Samson Kitundu Vs Republic***, Criminal Appeal No. 195 of 2004 (unreported) in which an English decision of ***S [an infant] Vs Manchester City Recorder and Others*** (1969) 3 All E.R. 1230 was referred; wherein Lord Reid said:

> "... The desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty. The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty. Guilt may be proved by evidence. But also it may be confessed. The court, will however, have great concern if any doubt exists as to

whether a confession was intended or as to whether it ought to have ever been made ...".

For the avoidance of doubts, I wish to state here that I have read between the lines the decisions cited by the Appellant in his Memorandum of Appeal. I must admit that the Appellant has brought all his arsenals in the forefront to support his appeal. This is evidenced by the way and nature of cases he has supported his appeal with. He casted his net too wide in a bid to leave no stone unturned. I commend him for his industry. However, with respect, though remotely connected, the cases cited have no much of a bearing in his case. If anything, they are distinguishable from the present case. I shall demonstrate. In the ***Rajab s/o Ayub*** case the plea at issue was one of "it is true" and the facts constituting the ingredients of the offence were not framed such as to disclose the ingredients of the offence. The court held that such facts did not throw sufficient light on the matter. This is not the case in the instant case. Likewise the ***Jackson s/o Sumuni*** case, again, involved the "it is true" plea. The court held that "It is true" is not an adequate plea of guilty. Again, this is not the case in the instant case. In the instant case, the Appellant pleaded "it is not true" but went on to elaborate that he did commit the offence in the manner stated in the charge sheet by saying: "It is true I had so attempted to steal". In the ***Joseph Maweta*** case, the case proceeded when the accused

person did not understand Kiswashili. The court held that conducting trial against a person who did not know Kiswahili, without the assistance of an interpreter was an unincurable irregularity. In the present case, save for his word during the hearing of this appeal, there is no record that the Appellant did not understand Kiswahili. I am not convinced with the defence of being ignorant at the Kiswahili language as it is being raised at the appellate stage. In the ***Kenneth Kizito*** case the accused person was aged fifteen and was charged with and convicted of robbery and sentenced to a custodial sentence of fifteen years. This court held that since the accused was below sixteen years when he was convicted, the learned District Magistrate erred when he imposed a sentence of fifteen years imprisonment under the Minimum Sentences Act, 1972. The court added that the applicable law was the Children and Young Persons Ordinance, which has since been repealed and replaced by the Law of the Child, 2009; Cap. 13 of the Laws of Tanzania. In the case at hand, the accused person was not a child. Neither was he below the age of sixteen at the time he committed the offence. Under the current Law of the Child Act, also Cap. 13 (the new child legislation was renamed Cap. 13 by the Chief Parliamentary Draftsman) a child is a person of below the age of eighteen [see section 4 (1)]. Even under the defunct Children and Young Persons Act, also Cap. 13 of the then Revised Laws, a child was defined as a person under the age of twelve years (see section 2). The Appellant in this appeal, as per both legislation,