

TANZANIA / JUDGMENT

alex raphael bilishanga vs republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF KIGOMA AT KIGOMA CRIMINAL APPEAL NO. 22 OF 2022 (Originating from Corruption Case No. 01 of the District Court of Kasulu) ALEX RAPHAEL BILISHANGA APPELLANT VERSUS REPUBLIC I ■ I ■ I I I. RES PONDENT

JUDGEMENT

30/09/2022 & 26/01/2023 MANYANDA, I. Alex Raphael Bilishanga, the Appellant, is aggrieved by a conviction and a sentence of imprisonment for three years meted on him after pleading guilty to a charge of corrupt transaction, contrary to section 1S(1)(a) and (2) of the Prevention and Combating of Corruption Act, [Cap. 329 R. E. 2019]. The particulars of the offence supporting the charge reads that the Appellant on 01/09/2021 at Tanzania Forest Reserve Camp of Makele South within Kasulu District in Kigoma Region being an employee of Shirika la Uzalishaji Mali la Jeshi la Kujenga Taifa (SUMA-JKT) did corruptly obtain TZS 200,000/= from one Gosbert Pius Yusuf as an inducement in order to forbear from taking legal action against the said Gosbert Pius Yusuf having been arrested for illegally entering into a forest reserve of Makele South, the matter which was in relation to his principal's affairs. In alternative, he was alleged to corruptly solicit the same amount from the same Gosbert Pius Yusuf as an inducement in order to forbear from taking legal action for the same illegal conduct against the said Gosbert Pius Yusuf. Initially, the Appellant pleaded not guilty, thereby making the prosecution to summon witnesses in order to prove the charge against him. In total, the prosecution summoned seven (7) witnesses and tendered 11 documents. The summary of their evidence is that after the Appellant been arrested in the forest reserve and put under the Appellant custody, he solicited for TZS 200,000/= so that he could release him. As the Appellant had none, he called his wife Salome Athanas Buyoya to send him the money so that he could be released. His wife heeded and sent the money by Mobile Money Transfer from her phone to the Appellant's phone. After closure of the prosecution's case, the trial court found that Page 2 of 11 the evidence of the witnesses and the tendered printouts supported this allegation hence, the Appellant was held to have a case to answer. However, instead of entering his defence, he changed his plea to that of guilty. Then, the prosecution adduced facts from which the trial court found as establishing the offence he was charged with, it

convicted him on his plea of guilty and sentenced him to imprisonment of three years without option of fine on reasons that it should be a lesson to other offenders who were not named. He has filed a petition of appeal bearing six grounds of appeal namely :-

1. That the trial magistrate erred in law and facts in convicting the appellant on the alleged plea of guilty which was ambiguous and unfinished.
2. That the Honourable trial magistrate misdirected herself in law and facts to hold that the appellant's plea was unequivocal.
3. That the Honourable trial magistrate erred in law and facts for failure to determine the facts adduced establishes all the elements of the offence charged: *o/nr\, l"/l1C. ~ I*
4. That the Honourable trial magistrate erred in law by imposing manifestly harsh and excessive sentence to the appellant which is inconsistent with the charge and facts as to read to the accused during trial (sic):
5. That the appellant's conviction and sentence was wrongly acted while the trial court failed to explain vividly to the appellant all on the facts (sic) and ingredients to all them (sk):
6. That the Honourable trial magistrate erred in law and facts for failure to note that the so-called plea of guilty was perfunctory taken by the trial court and the appellant was deprived an opportunity(sic) to plea after each of the memorandum of facts readout by the court. So, the plea against the appellant was not free and voluntary but involuntary plea which is void in law. At oral hearing of the appeal, the Republic was represented by Mr. Riziki Matitu, Senior State Attorney, while the Appellant argued the appeal personally unrepresented. When called upon to argue the appeal, the Appellant had nothing to add rather than adopting his grounds of appeal and wait to rejoin after the Senior State Attorney submissions. *P a g e 4 o f 1 ~ ;* Submitting in opposition to the appeal, Mr. Matitu argued grounds one two and six together because according to him, these grounds concerned with one complaint that the plea of guilty is equivocal. He submitted that earlier before changing his plea to that of guilty, the Appellant entered a plea of not guilty. Following that plea, the prosecution summoned a total of seven witnesses. At the closure of the prosecution evidence, the Appellant was found with a case to answer. That, instead of entering his defence, he chose to change his plea to that of guilty. The Senior State Attorney was of the views that the trial court recorded his response after the charge was reminded to him in words of the accused as required by section 228(2) of the Criminal Procedure Act, [Cap 20 R. E. 2022]. He was of further opinion that the facts read by the public prosecutor reveals all the ingredients of the offence of corrupt transaction he was charged with. The Appellant accepted the said facts without any qualification; hence was convicted forthwith. Mr. Matitu submitted that all the six steps in a plea of guilty conviction were followed as set out in the case of *Onesmo Alex Ngimba vs. Republic*, Criminal Appeal No. 157 of 2019 (unreported) where the Court of Appeal of Tanzania citing its earlier decision in the case of *Michael Adrian Chaki vs. Republic*, Criminal Appeal No. 399 of 2017 listed the said tests at page 5 of the judgement. The test as *b e i n g* accused is arraigned on a proper charge, the accused

comprehended what faced him, charge been stated fully to him, facts adduced disclose all the ingredients of the offence charged, plead guilty to the said ingredients and the court satisfy that the facts constitute the ingredients. Mr. Matitu argued grounds three and five where the complaint is that the facts narrated neither disclosed nor proved the offence charged. The Senior State Attorney argued shortly that the facts adduced by the public prosecutor disclosed all the ingredients and hence were proved. As regard to ground six where the complaint is about excessive sentence, Mr. Matitu conceded that according to the circumstances of this case, the sentence is bad in law and erroneous for being manifestly high for lacking fine options. He cited the case of Salum Shaban vs. Republic [1985] TLR 71 where it was held that in a case where there is an option for fine to imprisonment, the court should ascertain that fine sentence is imposed. Hence, he invited this Court to dismiss the appeal and use its revisional powers to revise the sentence. Page 6 of 16~ ; The Appellant, decided to leave it to the court in his rejoinder. In law a person convicted on his or her plea of guilty is not permitted to appeal against the conviction. This is per the provisions of section 360(1) of the Criminal Procedure Act. It reads as follows: -

360. -(1) An appeal shall not 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. However, an appeal is allowable in respect of sentence under section 360(2) of the Criminal Procedure Act, save for appeals against fine not exceeding one thousand shillings only or of corporal punishment, in which case, leave of the court is needed, It reads as follows: - "(2) Except with the leave of the High Court no appeal shall be allowed in cases in which a subordinate court has passed a sentence of a fine not exceeding one thousand shillings or of corporal punishment only Criminal Procedure Act [CAP. 20 R.E 2022] 212 imposed on a person under sixteen years of age/ or from a sentence of imprisonment in default of the payment of a fine if no substantive sentence of imprisonment has been passed // 0':lno 7 nf 1t.: laa.a T h e r e m a y h a p p e n s o m e c i r c u m s t a n c e s i n w h i c h a n a p p e a l a g a i n s t a c o n v i c t i o n o n a p l e a o f g u i l t y i s a l l o w a b l e . S u c h c i r c u m s t a n c e s h a v e b e e n s p e l t b y t h e C o u r t o f A p p e a l i n m a n y o f i t s c a s e s i n c l u d i n g t h e r e c e n t c a s e o f E m m a n u e l A m b r o u s v s R e p u b l i c , C r i m i n a l A p p e a l N o . 5 5 5 o f 2 0 1 7 (u n r e p o r t e d) , d e c i d e d i n 2 0 2 1 , w h e r e i t s t a t e d a s f o l l o w s : - " ... notwithstanding the above provision, an appeal against conviction on a plea of guilty may be entertained under certain circumstances as an exception to the general rule. In Kalos Punda v. Republic, Criminal Appeal No. 153 of 2005 (unreported). the Court cited with approval a decision of the High Court (Samatta, 1., as he then was) in Laurence Mpinga v. Republic [1983] TLR 166 which, at page 168, articulated the criteria for interfering with a conviction based upon a plea of guilty thus: - '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; Page 8 of 16~ /
3. that the charge laid at his door disclosed no offence known to law; end.
4. that upon the admitted facts he could not in law have been convicted of the offence charged.
 " The Appellant in this appeal claims in grounds one, two and six that the plea was not unequivocal such that the conviction basing on it is illegal. The Senior State Attorney, on his side argued that the plea was unequivocal. I find it apposite to deal with grounds three and five also because the complaints are interrelated. The Appellant complains that the facts read out by the public prosecutors did not disclose all the ingredients of the offence the Appellant was charged with. The Senior State Attorney contended that the facts disclosed and added that the Appellant also heard the evidence that led to a ruling on a case to answer been pronounced against the Appellant. Hence the plea was unequivocal. Then, a question that arises is when a plea is said to unequivocal. The answer is found in the case of Ndaiyai Petro vs Republic, Criminal Appeal No. 277 of 2012 (unreported), where the Court of Appeal of Tanzania stated as follows: - o ~ n o O ,..., 1 t:. J.. a "... .it bears restating that an accused can only be convicted on his own plea of guilty if the court is satisfied that his plea is unequivocal. That is, where it is ascertained that he has accepted as correct facts which constitute all ingredients of the charged offence. H (emphasis added) Now did the facts read out led to an unequivocal plea of guilty? In my view, the answer is in affirmative. I will ponder this issue after considering the procedure for convicting on a plea of guilty as spelt by our Superior Court, the Court of Appeal in the case of Michael Adrian Chaki vs. Republic (supra). In that case the Court of Appeal stated at page 5 as follows: - •~.... there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met: -
 1. the appellant must be arraigned on a proper charge. That is to say, the offence, section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;
 2. the court must certify itself without any doubt and must be clear in its mind, that an accused fully Page 10 of 16 ~ / apprehends what he is actually faced with/ otherwise injustice may result·
 3. when the accused is called upon to plead to the charge/ the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the CPA/
 4. the facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged/
 5. the accused must be asked to plead and must actually plead guilty to each to each and every ingredient of the offence charged and the same must be properly recorded and must be clear/

6. before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged. In the present matter I have gone through the proceedings and found that, when the Appellant was reminded of the charge before he started to adduce evidence in defence after been found with a case to answer and opting to defend on oath, changed his plea from that of not guilty to that of guilty to the charge. The facts were read to him which he admitted as correct. He was recorded as responding as follows: - "Nakubali hoja zote ni kweli na sahihi kama zilivyosomwa. Literally means that I admit all the facts that they are true as read out. Then he signed and the public prosecutor signed followed by the trial magistrate. The Appellant was charged with an offence of corrupt transaction, contrary to section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act. The particulars of the offence that were read to him are to the effect that on 01/09/2021 at Tanzania Forest Reserve Camp of Makele South within Kasulu District in Kigoma Region being an employee of Shirika la Uzalishaji Mali la Jeshi la Kujenga Taifa (SUMA-JKT), the Appellant did corruptly obtain TZS 200,000/= from one Gosbert Pius Yusuf as an inducement in order to forbear from taking legal action against the said Gosbert Pius Yusuf having been arrested for illegally entering into a forest reserve of Makele South, the matter which was in relation to his principal's affairs. The facts read disclosed that on the fateful day 31/08/2021 one person called Gosbert Pius Yusuph was arrested for unlawful entry in Makere South, a forest reserve area. He was put under custody of the Appellant, the TFS agent. He asked for corruption TZS 200,000/= in order to forbear to take legal action against him. Then the Appellant obtained the said money which was sent into his phone by the wife of Gosbert Pius Yusuph called Salome Barnabas on instructions of the said Gosbert Pius Yusuph. As it can be seen, the particulars of offence disclosed all the ingredients of the offence of corrupt transaction under section 15(1)(a) and (2) of the Prevention and Combating of Corruption Act. Also the particulars disclosed all the ingredients. The elements are that the Appellant was an agent of TFS. Gosbert Pius Yusuph was under Appellant's custody after been arrested in a forest reserve which is a business affair of Appellant's Principal, the TFS. He obtained the money from the said Gosbert Pius Yusuph through instructions to his wife Salome Barnabas. Q.,,.,,.,. 1 ':- ~ 1 C L. I The response by the Appellant as recorded is, in my view clear and unambiguous. He made it clear that he understood all what was read to him and that that was the truth. In such circumstances, I don't see any where that the trial court went astray, it followed and met all the six tests stated in the case of Michael Adrian Chaki vs Republic (supra). That is not enough, in this case as rightly submitted by Mr. Matitu, the Appellant had an advantage of hearing whole of the prosecution's evidence, until when he was found with a prima facie case that he changed his plea. In my view, the facts narrated following registration of a plea of guilty at defence stage, were a summary of the prosecution's evidence which established the elements of the offence charged. I don't find any merit in grounds of appeal discussed herein. As regard to the sentence, I agree as conceded to by Mr. Matitu in his submissions that it was wrong for the trial court to met a custodial sentence of three years imprisonment without any option for fine on ground of punishing the Appellant as an example to other offenders. I say so because, there was no

sentencing hearing so that the trial court could find material facts on which to lay hands and come with such a sentence finding. It is trite law that fine is a best option to first Page 14 of 16AP\J offenders. In the case of Salum Shaban vs. Republic (supra) it was held as follows: - "Where the Legislature has given an option of a fine or imprisonment, the court, when imposing a sentence/ must ascertain that a sentence of fine should first be imposed and in default of payment of such fine/ then a sentence of imprisonment can be given. N In the circumstances, I find that the sentence meted on the Appellant was excessive. Ground four has merit. Moreover, the trial court imposed a sentence on the second count which was charged in alternative to the first count and ordered the same to be served concurrently. That is wrong in law, once a finding of guilty is found and conviction entered in the first count, it is not allowable by the law to make a finding of guilty and enter conviction in the charge preferred as an alternative to the first count. It is either of the two counts that a finding of guilty is made and conviction entered. In the upshot, I allow the appeal to the extent explained above. n ,.... ,.. 1c: ,...t1c. L, In exercise of revisional powers vested in this Court, I do hereby revise the proceedings and quash the sentence of three (3) years imprisonment imposed in the first count; In addition, I do hereby quash the finding of guilty and conviction in the second count and quash the sentence of three (3) years imprisonment illegally imposed in the second count. In lieu thereof, I impose the mandatory minimum sentence of fine of Tanzanian Shillings Five Hundred Thousand (TShs. 500,000/=) in respect of the conviction in first count only. In default, the Appellant to serve a period of three years imprisonment excluding the period he has already served. It is so ordered. Dated at Kigoma this 26th day of January, 2023 F.K~ DA JUDGE Pag e 1 6 of 1 6

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