

TANZANIA / JUDGMENT

criminal decision 2025 01 08 15 13 41

COURT
TANZLIIDECIDED
8 January 2025

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
KIGOMA DC. CRIMINAL APPEAL NO. 000009492 OF 2024 IDDY HUSSEN
COMPLAINANT / APPELLANT / APPLICANT VERSUS REPUBLIC
RESPONDENT / DEFENDANT

JUDGMENT

NKWABI, J 04/11/2024 & 08/01/2025 The appellants were charged, in the trial court, along with other two accused persons, who denied the charge, with the offence of possession of instruments of witchcraft, contrary to section 3 (b) of the Witchcraft Act, Cap 18 R.E. 2002. According to the particulars of the offence, the appellants, with their other two colleagues, on 18th day of January, 2024 at Buhigwe village within Buhigwe district which is situated in Kigoma region were found in possession of instruments of witchcraft namely a spear, one mirror, usinge and various traditional medicines. When the appellants were called upon to plea, they pleaded guilty to the charge. The facts of the case were read over and explained to the appellants. For the sake of glassiness, I reproduce the facts that were read over to the appellants as hereunder: "... That on 18/01/2024 around 17:00 hours the 1st, 2nd, and 3rd accused persons were at Buhigwe village within Buhigwe District in Kigoma Region and they were on transit from Kasulu to Manyovu by using a Toyota Probox Car. That it was then while passing at Buhigwe village around 17:00 hours at Buhigwe Manyovu road, their car was stopped by police officers and when they were searched, they were found in possession of instrument of witchcraft namely spear, one mirror, "usinge" and various traditional medicines. Page. 1 Hon... JOHN NKWABI After they were found in possession of those instruments, an emergency certificate of search and seizure was filled and it was signed by all three accused persons. Thereafter they were taken to Buhigwe police station for further legal action. After the investigation was complete, they were arraigned before this court with the offence of possession of instruments of witchcraft contrary to section 3 (b) of the Witchcraft Act Cap. 18 R. E. 2002 to which the 1st, 2nd and 3rd accused persons pleaded guilty." After being asked as to the truthfulness and correctness of the facts of the case, the appellants admitted the facts of the case to be true and correct. Next, the trial court convicted the appellants as charged on their own plea of guilty. Then it sentenced the appellants to three years imprisonment assigning a reason that there is a prevalence of breach of peace within Buhigwe district caused by witchcraft beliefs. The conviction and sentence of the appellants perplexed them. They are before this Court assailing the conviction and sentence with five justifications of

their grievances, I emulate.

1. That, the trial court magistrate erred in law and fact by convicting and sentencing the appellants by considering the own plea of guilty of appellants which was equivocal and ambiguous.
2. That the trial court magistrate erred in law and fact by convicting and sentencing the appellants based on appellants own plea of guilty which was equivocal and ambiguous due to the fact that the appellants were not pleaded if they heard and understand the facts stated by the prosecution side. That the conviction was erroneous based on equivocal plea.
3. That the conviction was erroneous based on equivocal plea.
4. That there was noncompliance with section 210 (1) (a) (b) (2) and (3) of Criminal Procedure Act by the trial court. The evidence of defence witness were not only read over to them but also were not signed by the appellants in order to ensure the authenticity of their recorded evidence which resulted to affect the total conviction and judgment of the appellants. See it on page 02 and 03 of the case proceedings copy attached.
5. That, the trial court magistrate erred in law and facts by sentencing the appellants to custodian sentence without option of fine due to the fact that: The appellants are first offender and as long as the offence said to be committed provides both fine and jail sentence. Hence trial court wronged in imposing a custodian sentence against appellants. The offence said to be committed isn't a wide spread one and nothing shown to be of serious nature see the Court of Appeal decision in Jeremia s/o Jonas @ Tehani v. Republic, Criminal Appeal No. 100 of 2017 CAT, Anania Clavery Batela v. Republic, Criminal Appeal No. 355 of 2017, CAT and Salum Shabani v. Republic [1985] T.L.R. 71 HC at page 73. Page. 2 Hon... JOHN NKWABI On account of the above grounds of appeal, the appellants request this Court as follows:
 1. This appeal be allowed.
 2. The conviction be quashed and sentence imposed to them be set aside and the appellants be set free.
 3. The appellants be present at hearing of the appeal.
 4. Another relief for the benefit of the appellants this honourable High Court may deem fit and just to grant. When the appeal was placed before me for hearing, the appellants appeared in person, unrepresented while the respondent was represented by Mr. Fortunatus Maricha, learned State Attorney. Before all else, I note that, on the hearing date, I inadvertently referred to some appellants as respondents, in the proceedings. Under the authority of Victor W. Meena & Another v. Arusha Technical College, Civil Appeal No. 515 of 2020, CAT, I correct the accidental error and make those appellants to be referred as appellant(s) in the proceedings. Turning to the submissions of both parties, it was the argument of Mr. Maricha, who appears to have faced a double bind, that the 1st, 2nd and 3rd grounds of

appeal are merited. He addressed them collectively. He conceded the grounds of appeal. He requested me to look at the 2nd page of the proceedings. For ends of justice, there is a great possibility that they did not understand what they were admitting, recapitulated Mr. Maricha. On the relief the appellants pray for, Mr. Maricha objected that they be acquitted. He proposed for a retrial in view of the fact that the criminal case was not heard on merit for the reason that the appellants admitted all the facts which constitute the offence. Mr. Maricha concluded by stating his stance that if the appellants opt to pay fine, he would not object. When it was a turn of the appellants to answer to the submission of Mr. Maricha, that was after they had opted the respondent to submit first, the 1st appellant merely entreated the Court considers their grounds of appeal, the conviction be set aside and they be acquitted. The 2nd Appellant added that the respondent is conceding the grounds of appeal, so they be acquitted. When the turn of the 3rd Appellant came for him to address the Court, pinning his hopes on the respondent's concession on the 1st, 2nd and 3rd grounds of appeal, the 3rd appellant encouraged me I conclude that the grounds of appeal merited and the appellants be acquitted. The above the addresses of both parties for and against the appeal, on my side, I kick off my deliberation of this appeal by addressing the 2nd ground of appeal which blends well with the 1st and 3rd grounds of appeal. I have already intimated above, the learned State Attorney for the respondent experienced a difficult. In the first place, he conceded the 1st, 2nd and 3rd grounds of appeal which maintain that the plea was equivocal, but later said the facts narrated and admitted by the appellants as true and correct constituted the offence they were charged and convicted Page. 3 Hon... JOHN NKWABI with. On their side, the appellants stressed that their plea was equivocal one which meant that the same was ambiguous and erroneous due to the fact that the appellants were not recorded if they heard and understand the facts stated by the prosecution side. I have carefully considered the views of both sides and also taken into account the position of the law of the land about what amounts to equivocal plea on the one hand and unequivocal on the other hand. I am unable to agree with the appellants that their plea was equivocal. I too fail to accept their claim that they did not understand the plea (facts of the case) because it is not recorded that they understood the same. The reason for my failure to accept their claim is that the plea was taken in Kiswahili, the language they understand. Neither in the trial court nor in this Court did they claim that they do not understand Kiswahili language. If it is that they did not understand the facts themselves but they understood Kiswahili language which was used to narrate the facts and its explanation thereto, why they admitted the facts to be true and correct? In my view, their claim that they did not understand the facts is mere afterthought, which cannot help the appellants. My review of the narrated facts leads to a finding that the facts are unambiguous. The appellants did not allege that the plea was incomplete, I would not proceed on that front. My view point on this appeal did not come from the vacuum. There is a nimiety of authorities on this matter. The position of the law that when a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then a language which he can speak or understand enunciated in *Adan v. Republic* [1973] E. A. 443 was followed by the trial court to the letter. But in *Samson Marco & Another v. Republic*, Criminal Appeal No. 446

of 2016, CAT (unreported), the conviction of the appellants on a plea of guilty was quashed because the Court of Appeal agreed that the narrated words “did use a panga in order to obtain and retain the said property” did not clarify to the appellants if they used or threatened to use violence to any particular person in order to obtain or retain the stolen property. The situation in that case is distinguishable with the situation in the case under my consideration. In yet another case, which was commended by the appellants, the case of Yeremia Jonas Tehani v. Republic, Criminal Appeal No. 100 of 2017, the Court of Appeal accepted appeal on one count of burglary because the broken into was not a dwelling house but an office, so, the plea was equivocal. It, nevertheless, upheld the conviction on the second count of stealing because the ingredients of the offence were clear, so the plea on it was Page. 4 Hon... JOHN NKWABI unequivocal. Further, in the case of Joel Mwangambako v. Republic, Criminal Appeal No. 516 of 2017, CAT (unreported), while rejecting the appeal against conviction of plea of guilty, the Court had these to emphasize: “The contention in the final ground of appeal that the charged offence was not proved is evidently beside the point. We accept Mr. Mtenga’s submission that there was no need of proof as the appellant’s conviction was soundly based upon his own unequivocal plea of guilty. Indeed, the applicable procedure when an accused person pleads guilty to a charged offence, as stated in numerous decisions of the Court, involves no production of proof of the charge but a procedure for ascertaining if the appellant’s plea is unequivocal – see the leading case of Adan v. Republic [1973] EA 445 decided by the Court of Appeal for East Africa. See also this Court’s decision in John Faya v. Republic, Criminal Appeal No. 198 of 2007; and Constantine Deus @ Ndinjai v. Republic, Criminal Appeal No. 54 of 2010 (both unreported). The fifth ground of appeal is unmerited. It falls by the wayside.” See also Jamali Ally @ Salum v. Republic, Criminal Appeal No. 52 of 2017 at page 17. Having deliberated as above, I turn down the 1st, 2nd and 3rd grounds of appeal. Presently, I throw my attention on the 4th ground of appeal which is that there was noncompliance with section 210 (1) (a) (b) (2) and (3) of Criminal Procedure Act by the trial court. The evidence of defence witness was not only read over to them but also were not signed by the appellants in order to ensure the authenticity of their recorded evidence which resulted to affect the total conviction and judgment of the appellants. See it on page 02 and 03 of the case proceedings copy attached. Mr. Maricha skipped discussing it. The appellants intimated that I consider the same and allow the appeal on the basis of the same too. I refuse to be get bogged down by this ground because it was somehow well discussed in Yeremia’s case (supra) in that where the accused person(s) plead guilty, there is no need of conducting a preliminary hearing. Likewise, there is no need of calling upon the prosecution to prove the charge which the accused person(s) pleaded guilty. I hold that the 4th ground of appeal is unmerited because the need to read over the evidence does not arise. Finally, I consider the 5th ground of appeal which is that the trial court magistrate erred in law and facts by sentencing the appellants to custodian sentence without option of fine due to the fact that. The appellants elaborated that they are first offender and as long as the offence said to be committed provides both fine and jail sentence, hence trial court wronged in imposing a custodian sentence against appellants. Page. 5 Hon... JOHN NKWABI The appellants too added that the offence said to be committed

isn't a wide spread one and nothing shown to be of serious nature. They parroted the Court of Appeal decisions in *Jeremia s/o Jonas @ Tehani v. Republic*, Criminal Appeal No. 100 of 2017 CAT, *Anania Clavery Batela v. Republic*, Criminal Appeal No. 355 of 2017, CAT and *Salum Shabani v. Republic* [1985] T.L.R. 71 HC at page 73. On his side, the learned State Attorney for the respondent did not support the sentence of imprisonment, he was open for a fine sentence to be imposed on the appellants despite the explanation by the learned trial magistrate that there is a prevalence of breach of peace within Buhigwe district caused by witchcraft beliefs. The decision of the trial court being that and the stances held by both parties being as such, this Court finds it opportune to explore the law with respect to sentencing and interference of the discretionary power of a trial court in sentencing. In *Hattan v. Republic* [1969] H.C.D. No. 234 Georges, C.J. held that: "Whenever a first offender is concerned the emphasis should always be on the reformatory aspect of punishment unless the offence is one of such serious nature that an exemplary punishment is required or unless the offence is so widespread that severe punishment is needed as shock deterrent." One of the cardinal principles upon which an appellate court may interfere with a sentence imposed by a trial court on the basis of severity of sentence is that an appellate court will not interfere unless such sentence is manifest excessive, see *Hatibu Gandhi v. Republic* [1996] T.L.R. 12. Else it is general rule is that an appellate court should not interfere the sentencing discretionary powers of the trial court unless it acted on wrong principle or overlooked some material factors, as stated in *Njile Samwel @ John v. Republic*, Criminal Appeal No. 31 of 2018, CAT and *James Yoram v. Republic* [1950] EACA 147. As it can be seen, while the trial magistrate had the view that the offence is widespread and causes breach of peace in the district, the appellants impress upon this Court to find that that is not the case. What should I do in the situation? First, I should look at the record. Did the parties address the trial court on that respect. It was only stated by the prosecutor when addressing the trial court on previous records. It was not stated in the facts of the case, where the appellants would have had a chance to agree or dispute, as they are trying to do at this appellate stage. If it were not done during the narration of the facts of the case, it ought to have been clearly done during the sentence hearing. It should have been raised by the prosecutor, if not and the trial magistrate had in mind of that situation, he ought to have put the same to the parties, so that they would submit on the same or bring evidence. In *Raza Somji*

- v. *Amina Salum* [1992] T.L.R. 208 it was held that: "The point raised sou motu and determined without affording parties chance to be heard such an issue or ground is invalid." Page. 6 Hon... JOHN NKWABI The decision that throws light on my difficult on this point is *Hatibu Gandhi's* (case supra) where it was underlined that: "The learned Principal State Attorneys who appeared for the respondent have complained that the learned Jaji Kiongozi allowed himself to be improperly influenced by matters extraneous to the present case, that is, by cases that he might have heard in the past. We think that the criticism by the learned Principal State Attorneys is justified. The learned Jaji Kiongozi ought to have confined himself to the evidence adduced in the present case concerning the allegations of torture and decided the matter accordingly. ..." Because the sentence imposed by the trial

magistrate was based on a ground which is illegal (invalid), because the ground used to impose such sentence was not clarified on the facts while that ground depended on fact(s) about such incidents or convictions, the sentence cannot stand. It has to be interfered with by this Court. The learned State Attorney, cognizant of the illegality of the sentence, proposed apart from this court imposes a fine sentence, this Court may order for a retrial. The appellants staunchly resist that approach to rectify the oddity. A true position for ordering a retrial was stated in *Merali & Others v. Republic* [1971] H.C.D. No. 145 (C.A.T.) where it was authoritatively stated that:

- (1) “It is clear that the original trial was neither illegal nor defective. It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal. A retrial causing prejudice to the accused ... (see *Ahmed All Dharamshi Sumar v. R.* (1964) EA 481 and *Fatehali Manji m. R.* [1966] EA 343). We are of the opinion that an order for a re-trial in this case was not justified and we accordingly set it aside.” I have already rejected the suggestion that the plea was equivocal. So, the proceedings or the trial cannot be held to be defective or illegal to justify an order for a retrial. The prayer for a retrial is spurn for that reason. Having held that the plea was unequivocal, the conviction not illegal so an order for retrial is unnecessary, but the sentence is illegal, what next? As intimated earlier, Mr. Maricha was open for a fine sentence being imposed instead of the custodial sentence. On their side, the appellants push for an acquittal. Truly, this court can interfere with the sentence imposed by the trial court as was done in the case of *Tehani* (supra). If I impose a fine sentence, there would be computation done by the prisoner officer, as to which amount should actually paid by the appellants. It should be remembered, however, that time spent in prison as convict or remanded person, as in this case at the moment, should strictly be considered as articulated in *Sano Sadiki & Another v. Republic*, Criminal Appeal No. 623 of 2021, CAT (unreported). On my side, since the sentence was imposed was illegal for consideration of extraneous matter which had not been clearly explained by indicating how prevalent it is or if there are convictions, I find it not advisable to commute the sentence to one of fine, regard being that the appellants have stayed in prison serving their sentence for a period of almost one year. I take that that period spent by the appellants is sufficient to meet the ends of justice and order that I impose a sentence of imprisonment of twelve months which leads to the release of the appellants from prison immediately. It is so ordered. Dated at KIGOMA this 8th of January 2025 . J. NKWABI JUDGE OF THE HIGH COURT Page. 8 Hon... JOHN NKWABI

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/324804/source_file/6302d15bd8ecb022/criminal-decision-2025-01-08_15_13_41.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/iddy-hussen-v-republic-Pleaofguilty-tanzlii-2025--6a3ea52e3b1caa912982714a

Prepared on 14 October 2026 · Esheria