

TANZANIA / JUDGMENT

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
SHINYANGA CRIMINAL APPEAL NO. 000013932 OF 2024 CASE REFERENCE NO.
202405232000013932 KENYATA PASTORY APPELLANT
VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

24th & 27th June 2024 F.H.Mahimbali The appellant was a prisoner at Maswa District Prison having been convicted for the offence of stealing a motor cycle. On 31st August 2021 while being a prisoner under custody of under imprisonment and under the custody of one B. 9423 Cpl Emmanuel of Tanzania Prison Force, escaped from the lawful custody. In February 2023, was arrested at Kisesa – Magu within Mwanza Region and eventually charged for the offence of escape from lawful custody. When charged again before Maswa District Court, the appellant pleaded guilty and thus dully convicted and sentenced to serve a custodial sentence of five years in prison. 1 Dissatisfied by both conviction and sentence, the appellant has opted for this appeal armed up with three grounds of appeal, namely:

1. That the sentence imposed is so harsh, him having pleaded guilty.
2. That the facts adduced did not establish the ingredients of the charged offence.
3. That he was induced by police to plead guilty as it was not his own volition. During then hearing of the appeal, the appellant prayed that his grounds of appeal be adopted as they are to form part of his appeal submission. In addition, he pressed for his appeal be allowed, conviction quashed and sentence meted out be set aside and finally that he be acquitted. On his part, Mr. Kadata learned state attorney for the Respondent resisted the appeal save for the first ground of appeal on the lengthy of the sentence. Otherwise, he considered this appeal as merit less and it should be dismissed in its entirety. On the first ground of appeal, Mr. Kadata submitted that in consideration of the fact that the sentence being so harsh against the appellant he having pleaded guilty to the charge, he partly admitted that the charging section (section 116) of the Penal Code does not provide for the sentence. Therefore, the invoking of section 35 of the penal code on general punishment, two years provided is the maximum. As 2 the trial court had discretion, it ought to have considered the fact that the appellant had pleaded guilty to the charge. Consideration of the plea of guilty

ought to have been considered by the trial court in the assessment of the facts of the case. As regards to the second ground of appeal, he considered it to be meritless as the records are clear that the appellant had freely pleaded guilty to the charge on the language he understood thoroughly. Furthermore, the appellant freely admitted all the facts explained in the commission of the said offence. Reading P1 exhibit (confession statement), in which he had not objected its admission, the appellant's ground of appeal is a mere afterthought. Furthermore, the readout, facts clearly established the commission of the offence on the ingredients of the offence of escape from lawful custody as per section 116 of the Penal Code. With the third ground of appeal, he submitted that the same is meritless as there is no any evidence how the appellant was exposed under coercion, or duress by the Republic during the said confession making. There being no such proof of inducement, the alleged ground of appeal is a mere afterthought. All this said and done, he humbly prayed that this appeal be dismissed for being meritless as submitted above. 3 In his rejoinder submission, the appellant argued that, during the recording of his cautioned statement he was so much beaten by police and was told that unless he had admitted the commission of the offence, he would have been tortured much further. That was all. Having heard both parties on merit, I have now to determine this appeal and the issue for deliberation is whether this appeal has been brought with sufficient cause. The appellant on the first ground, has complained of severe punishment meted out against him and that there were procedural irregularities. I have endeavored my mind to go through the records of the trial court. The issue for consideration is whether the appellant's plea before the trial court are unequivocal. It is a common practice that once the accused is first brought before the court of law, charges must be read and explained to him in the language he understands; he must be asked if he admits the offence or not. The accused's reply must be recorded immediately as soon as possible. In the case of *Kibori Ramadhani V. Republic* [1980] TLR 136 it was well settled that the substance of the charge shall be stated to the accused person by the court and shall be 4 asked whether he admits or denies the content of the charge. See the case of *Buhimila Mapembe V. Republic* [1988] TLR No. 174. In another case of *Republic V. Tilu Petro* [1998] TLR No. 395 High Court Tabora, it was insisted that a plea of guilty must be express and not implied. On importance of reading the facts and recording the reply by the accused person on each of ingredient fact – see also *Adan V. Republic* (1973)EA 445. In order for the plea of guilty to be valid to purpose convictions without trial under Section 228(2) Criminal Procedure Act, it must meet conditions as set out by the CAT in the case of *Michael Adrian Chaki V. Republic*, Criminal Appeal No. 399 of 2017 (Unreported). For an unequivocal plea of guilty to be valid, the following conditions must exist.

1. The appellant must be arraigned on a proper charge. That is to say, the offence, section and particulars thereof must be properly framed and must explicitly disclose the offence known to law.
2. The court must satisfy itself without any doubt and must be clear in its mind that an accused fully comprehends what he is actually faced with, otherwise injustice may result. 5

3. When an 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 Criminal Procedure Act Cap 20 RE2022.
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 finally be asked to plead to each and every ingredient of the offence charged and the answer must be properly recorded and must be clear.
6. Before 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... See also the decision on similar situation in the case of *Rex V. Folder* (1923) 2KB 400, *Laurab Mpanga V. Republic* [1983] TCR No. 166, and *Kalos Punda V. Republic*, Criminal Appeal No 153 of 2005 (Unreported), all discussing the same point. In the instant matter the charge was read to the appellant where he pleaded guilty. When facts of the case were read over, clearly the appellant admitted them all as being true and correct. The argument that his plea was due to coercion against him cannot hold water as per evidence in record, rebutting his assertion. I agree with Mr. Kadata that the argument by the appellant is an afterthought and the same does not qualify impeachment of the plea of guilty entered into equivocal plea. Consequently, it is easier to conclude that the appellant's plea was unequivocal. This ground has no merits and is accordingly dismissed in its entirety. Generally, a person convicted of an offence on his own plea of guilty is barred from appealing against conviction. He can only appeal against the extent or legality of the sentence imposed. That is in terms of section 360(1) of the Criminal Procedure Act, Cap. 20 R. E. 2022 (the CPA). That strictness of the law notwithstanding, courts have taken cognizant of certain circumstances which may render a plea equivocal when a conviction on one's plea of guilty may successfully be challenged by way of an appeal. The guiding cases on that are *Rex vs Folder* (1923) 2 KB 400, *Laurent Mpinga vs Republic* [1983] TLR 166 and later cited with approval in *Karlos Punda vs Republic*, Criminal Appeal No. 153 of 2005 (unreported).⁷ Clearly, the appellant had complained over excessive sentence meted out against him. Apparently, the appellant was sentenced to suffer five years' imprisonment. Mindful, the appellant was charged under section 116 of the Penal Code (supra). I found prudent to reproduce it. Section 116 reads; A person who escapes from lawful custody is guilty of an offence." Acknowledging the provision herein, there is no sentence imposed by the law. Now where is the sentence provided for. The answer is as provided under section 35 of the Penal Code. The same is coached this way: "When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both...." I am of the firm view that, the provision fixes discretion to the court in passing a sentence to a person convicted of such an offence not exceeding two years for a custodial sentence. In other words, depending on the nature and circumstances on the commission of the charged offence, the sentence can range from custodial sentence to fine

or both. 8 In the instant matter, the trial court passed the sentence beyond what is provided by the law i.e five years imprisonment. I am persuaded to believe that, though the appellant had escaped from lawful custody, that perse was not a warranty to pass over a sentence not provided by law. Thus, the sentence is reduced to two years as authorized by law. With all the said, I find this appeal to have been brought without any sufficient cause on a plea of guilty, but on the length of sentence passed. The sentence of five years, is thus quashed and set aside, instead passes a sentence of two years from the date of conviction in lieu of. Sentences to run consecutively pursuant to section 36 of the Penal Code, i.e it is directed that it shall be executed after the expiration of the former sentence. Right of appeal explained. DATED at SHINYANGA this 27th day of June, 2024. F.H. Mahimbali Judge. 9 10

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