

TANZANIA / JUDGMENT

kwizi edgar lubava and another vs republic 2023 tzhc 20720 1 september 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IRINGA REGISTRY AT IRINGA
CRIMINAL APPEAL NO. 13 OF 2023 (Originating from Criminal Case No. 01 of 2020 in the District
Court of Iringa at Iringa) KNIZI EDGAR LUBAVA— 1st APPELLANT DECLAY
DONATUS @ MGAYA— ----- — 2nd APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGEMENT

Date of Last Order: 14/08/2023 Date of Judgment: 01/08/2023 A. E. Mwipopo, J. Kwizi Edgar Lubava and Declay Donatus @ Mgaya, the appellants, were charged at the District Court of Iringa District at Iringa in Criminal Case No. 67 of 2018 for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.R. 2022. The particulars of the offence reveal that the appellants on or about 23 rd of November, 2022, at Mafinga Stand area i in Mafinga Township within Mufindi District in Iririga Region, jointly and together robbed shillings 600,000/-, one mobile phone to wit Techno make valued at shillings 50,000/=, Azania Bank A.T.M. card and driving license from one Matokeo Ghumbula and immediately before such robbery they assaulted Matokeo Chambula with heavy stick "banzi" on the left side of his eye to obtain the said stolen properties. Appellants pleaded guilty to the offence. The Court recorded the plea of guilty against the appellant. The prosecution narrated the facts of the case, and the appellant admitted the facts narrated to be correct. The trial District Court convicted both appellants for the offence of armed robbery as charged and sentenced each appellant to serve 30 years imprisonment. The decision of the trial District Court did not satisfy both appellants, and they filed the present appeal. The petition of appeal filed by the appellant contains six grounds of appeal as follows:-

1. That, the trial Court grossly erred in law and facts to convict the appellants without observing the mandatory requirement of sections 235(1) and 312 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019.
2. That, the trial court erred in law and facts to convict and sentence the appellant based on the defective charge. The appellant was 2 charged with armed robbery contrary to section 287A of the Penal Code but was convicted under section 228 (1) of the Criminal Procedure Act.

3. That, the trial court erred in law and facts by ordering the motorcycle with registration No. MC 315 DGA Bajaj Boxer be forfeited contrary to the law as the motorcycle was not tendered in Court as an exhibit for the Court inspection nor mentioned as an exhibit.
4. That, the trial Court grossly erred in law and facts by convicting the appellant based on the confession statement.
5. That, the purported plea of guilt is marred by procedural irregularities, which makes the whole plea a nullity.
6. That, the conviction by the trial Court was not proper as there is a variance between the charge sheet and the facts narrated by the prosecution. At the hearing, advocate Baraka Uswege represented the appellant, and Ms. Rehema Ndege, State Attorney, represented the respondent. The Court ordered the appeal hearing to proceed by way of written submission following the appellant's prayer, which the counsel for the respondent supported. The appellant abandoned the 1st, 2nd, and 3rd grounds of appeal and submitted jointly on the 4th, 5th, and 6th grounds of appeal. It was the 3 appellants' submission that the appellant's plea of guilty was equivocal, and the procedures of convicting the appellants were marred with irregularities. The Court was supposed to be satisfied that the appellants' plea amounted to admission of every constituent of the charge, and admission was unequivocal before conviction. In the instant case, the appellants' plea was imperfect, ambiguous and unfinished as their admission was not in respect of all constituents of the offence of armed robbery. The record of proceedings reveals that the appellants' replied that "it is true" when the charge was read over to them. It was impossible to ascertain what the appellant meant by saying it was true. The trial Court was supposed to seek additional information from the appellants to know what they admit. The counsel relied on the decision in the case of Josephat James vs. Republic, Criminal Appeal No. 316 of 2010, Court of Appeal of Tanzania at Arusha (unreported), to support the position. The appellants submitted further that the trial Court should have allowed the appellants to respond to every fact narrated by the prosecution. The appellants' reply that they admit the facts are correct is not sufficient to conclude that the appellants understood the charge. The appellants cited the 4 case of Michael Adrian Chaki vs. Republic, Criminal Appeal No. 399 of 2019, Court of Appeal of Tanzania at Dar Es Salaam (unreported). It was submitted further by the appellants that the facts narrated by the prosecution contradicted the particulars of the offence. The facts narrated show that the incident occurred on the 23rd of November, 2022, around night hours, while particulars of the offence did not state that the incident happened in the night hours, In reply submission, the respondent stated that both appellants' pleas were unequivocal. The appellants admitted that the facts narrated by the prosecution were correct. Not every plea should be explained as contended by the appellants. What is required is for the appellate Court to be satisfied from the record that the accused person fully understood the charge and pleaded to every element. The appellants supported the position relying on the case of John Faya vs. Republic, Criminal Appeal No. 198 of 2007, Court of Appeal of Tanzania at Mwanza (unreported); and Kato vs. Republic, (1971) E.A. 542.

On the issue of variance between the charge and the facts narrated, the respondent submitted that the facts disclosed all ingredients of an armed 5 robbery offence. The appellants' pleas were clear, complete and perfect. The respondent was of the opinion that the last ground of appeal has no merits. To support the position, the respondent relied on the case of Laurent Mpinga vs. Republic, [1983] TLR 166, and Charles Samweli Mbise vs. Republic, Criminal Appeal No. 355 of 2019, Court of Appeal of Tanzania at Iringa (unreported), at page 10. The appellants did not file a rejoinder submission. From the submissions, the Court is called upon to determine whether the appeal before this Court has merits. A person convicted of an offence on his plea of guilty, as a general rule, is barred from appealing against conviction. The person can only appeal against the extent or legality of the sentence imposed. It is in accordance with section 360(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the C.P.A.). The section provides that:- "360.-(1) 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." However, as it was stated in both submissions, there are circumstances which may render a plea to be equivocal. In such circumstances, a conviction on one's guilty plea may successfully be challenged through an appeal. The Court of Appeal stated the position in the case of Karlos Punda vs. Republic, Criminal Appeal No. 153 of 2005, Court of Appeal of Tanzania at Mtwara (unreported), and Laurent Mpinga vs. Republic (supra). In Karlos Punda's case (supra), the Court of Appeal set four factors that render the plea equivocal. The said factors include that the plea was imperfect, ambiguous or unfinished; the appellant pleaded guilty as a result of mistake or misapprehension; the charge laid at the appellant's door disclosed no offence known to law; or upon the admitted facts, the appellant could not in law have been convicted of the offence charged. The Court of appeal illustrated more on the unequivocal plea in the case of Michael Adrian Chaki vs. Republic, (supra) that for the plea to be considered as unequivocal, the appellant must be arraigned on a proper charge and must fully understand what he is actually faced with and the charge has to be stated and thoroughly explained to the appellant before his plea is recorded or before he admit every particular ingredient of the offence. Another condition stated is the facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged, and the appellant must be asked to plead to every ingredient of the offence charged, and the same must be properly recorded. The last condition is the trial Court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged before a conviction on a plea of guilty is entered. In the case at hand, appellants submitted in the 4th and 5th grounds of appeal that their pleas were equivocal. They claimed that the charge sheet was not explained and fully understood, and their answer that it is true does not reflect which ingredient of the offence was admitted to be true. The appellants submitted further that they were not given an opportunity to admit each of the facts narrated, and their answer does not show that they understood the charge. In contention, the respondent submitted that the appellants' plea was unequivocal, and the appellants' reply to the facts reveals that they understood the charge. They admitted each ingredient of the offence. The Criminal Procedure Act, Cap. 20 R.E. 2022 provides in section

- (2) for the procedures to be followed where the accused person admits the truth of the charge before the subordinate Court. The law provides that where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses. The magistrate shall 8 convict him and pass sentence upon or make an order against him unless there appears to be sufficient cause to the contrary. The Court of Appeal explained further about the procedure in the case of Khalid Athumani vs. Republic, Criminal Appeal No. 103 of 2005, Court of Appeal of Tanzania sitting at Arusha (Unreported). The Court cited with approval the procedure explained by Spry V.P. in Adan vs. Republic (1973) EA 445 on page 446 in the following words;- "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 in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear 9 any further facts relevant to the sentence. The statement of facts and the accused's reply must, of course, be recorded (see also Chamrunu vs. S.M.Z. (1988 L.R.C. (Crim.) 26 at page 29)." This Court stated a similar position in the case of Geoffrey Kenedy @ George vs. Republic, Criminal Appeal No. 115 of 2020, High Court Bukoba District Registry at Bukoba (Unreported). I have perused the record of the trial District Court. The record shows on pages 1 and 2 that when the charge sheet was read to the appellants, both answered it was true, meaning they admitted to committing the offence. The trial Court recorded that the appellants have pleaded not guilty to the offence. Despite the fact that the trial Court recorded that the appellants have pleaded not guilty to the offence, it proceeded to record facts of the case narrated by the prosecution. I take it as a slip of the pen on the trial Court side. The record shows further the prosecution narrated the facts of the case, and both appellants admitted the facts to be correct. The 1st appellant replied that the facts narrated are correct, they indeed robbed after attacking the victim with a piece of heavy stick (banzi). The 2nd appellant answered that he is admitting that the facts are correct. 10 As the appellants were charged with the offence of armed robbery, the prosecution was duty bound to prove from the facts there was an act of stealing, at or immediately after the said stealing, the perpetrator was armed with any dangerous or offensive weapon or instrument, and he used or threatened to use actual violence to obtain or retain the stolen property. In the case of Haji Said Seleman vs. Republic, Criminal Appeal No. 98 of 2020, Court of Appeal of Tanzania at Dar Es Salaam (Unreported), the Court of

Appeal held, that: to prove the offence of armed robbery, the prosecution must establish that there was an act of stealing; that, at or immediately after the said stealing, the perpetrator was armed with any dangerous or offensive weapon or instrument and that he used or threatened to use actual violence to obtain or retain the stolen property." Facts, as narrated by the prosecution in this case, proved that there was stealing of shillings 600,000/=, one mobile phone valued at shillings 50,000/=, an Azania bank A.T.M. card and a driver's license from Matokeo Chumbula. The facts also proved that immediately before the stealing, the accused assaulted Matokeo Chambula with a heavy stick (banzi) on the left side of his eyes to obtain the stolen property. The facts do not state who ii among the appellants assaulted the victim, namely Matokeo Chambula, with the heavy stick or if both attacked the victim with a piece of stick. When the facts were read over to the appellants, the 1st appellant replied that the facts narrated were correct and that they robbed the victim by attacking him with a piece of heavy stick (banzi). The 2nd appellant answered that he is admitting that the facts are correct. Despite the failure of facts narrated by the prosecution to show who among the appellants or if it was all of them assaulted the victim, the facts and appellants answer indicate that the offence was committed by both appellants with common intention to prosecute an unlawful purpose in conjunction. Thus, each of them is deemed to commit the offence under the principle of common intention provided by section 23 of the Penal Code, Cap. 16 R.E. 2022. Regarding the variance between the charge and the facts narrated, the appellant said there was a variance between the charge and facts narrated by the prosecution as to the time of the incident. In the charge sheet, the time was not stated, while the facts said that the incident occurred at night. In contention, the respondent submitted that the facts narrated disclosed all 12 the ingredients of an armed robbery offence. The appellants' pleas were clear, complete and perfect. The facts narrated by prosecution reveal that the incident occurred at night, while the charge sheet did not provide such information in its particulars. But, the said difference is not fatal. Under normal circumstances, facts of the case are supposed to provide in detail the ingredients of the offence and elaborate further on the particulars of the offence. Stating the time of the incident in the narrated facts of the case does not in any way prejudice the appellants. The facts narrated provided all required ingredients of the armed robbery offence that there was stealing of the properties, and immediately before such stealing, the appellants assaulted the victim with a stick (banzi) to obtain and retain the stolen properties. Therefore, the 4th, 5th, and 6th grounds of appeal are devoid of merits. The appellant's plea was unequivocal. Consequently, I dismiss the appeal for want of merits. It is so ordered. JUDGE 01/09/2023 13

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