

TANZANIA / JUDGMENT

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'4). IN THE HIGH COURT OF TANZANIA AT MBEYA DC. CRIMINAL APPEAL NO.70 OF 2009
(Originating from DM Traffic Case No. 84 of 2009 of Mbeya District Court) JIIUHS1EIJN
SALIIVEIJN. ILPEEILILANT VERSUS THE
JIIIEPIJIBLIC RESPONDENT 21 /5/20 12 & 26/06/2012

JUDGEMENT

Before: Mmi11a, B. M. Judge.: DC Cr. Appeals Nos.. 70 of 2009 and 5 of 2010 were on 21.5.2012 consolidated on the request by learned state attorney Mwakilasa because 1)0th of them stemmed from the same original Traffic Case No. 84 of 2009 in the District Court of Ml)e ya. While the former appeal was instituted l)y Muhsein Salim, the latter appeal was filed by Yahya Khatibu. Before the District Court, the appellants were jointly charged with four counts; ihe first and second counts related to causing bodily injury through careless driving of a motor vehicle on a public road. c/s 41, 63 (2)

- (a) and 27 (i) (a) of the Road Traffic Act Cap. 168 of the Revised Edition, 2002, while the third. and fourth counts related to causing damage to motor vehicles through careless driving of motor vehicle on public road c/s 411 63 (2) (a) and 27 (i) (a) of the same Act. Let me point out at this initial stage that according to the particulars of the offences, each of the appellants had control over one of the two vehicles which were involved in the accident, the subject of these charges. Wliile Yaliva Kh atibu was the driver and in-ch arge of motor vehicle with Beg. No. KBD 861 G make Nissan - UD - bus, the property of Taqwa Company, Muhsein Salim was the driver and in-charge of motor vehicle with. Beg. No. STJ 9376, the property of Tanzania Revenue Authority (TRA). Also, it is important to note that the framers of the charges did not provide the statement of the offence in respect of the fourth count. One would have expected to find a substituted charge which would provide explanation why the court dealt with only three counts. It is unfortunate that the court record is silent on this aspect, also that there is no any substituted charge in that regard. This means that the fourth count was not addressed, although the record shows that the case was finalized.. I think that was improper, but I will revert to this at a later stage, if need there be. As the record. will show, the charged accident occurred oii 5.4.2009 and the appellants were charged on 13.4.2009. When the charges were read. to them on that day, 1)0th of theni pleaded not guilty in respect of all the counts. The case was adjourned to 2.11.2009 for mention. On that day,

instead of reading to them four charges as was reflected on the charge sheet, only three counts, to wit, the first, second, and third were read to them. Pleas of guilty were entered, following which they were convicted. They were each sentenced to pay a fine of shs.20,000/= in respect of each of the three counts in default of which each one was to serve twelve (12) months imprisonment term in respect of each count. That court also cancelled the appellants driving licences for 3 years in terms of the provisions of section 27(1) (a) of the Road Traffic Act Cap. 168 of the Revised Edition, 2002. Both appellants felt aggrieved, with the decision of the trial court, hence these appeals which are the subject of this judgment. The memorandum of appeal filed by learned counsel Mkumbe on behalf of Muhsein Salim has raised two grounds each of which is subdivided into two sub-grounds. Generally speaking, the complaints are that the charged counts were equivocal and did not constitute the ingredients of the charged offence, and secondly that the trial court erred in law when it cancelled the driving licence of this appellant without giving him chance to give special reasons, if any, before such cancellation was made. On the other hand, the memorandum of appeal in respect of Yahya Khatibu has in essence raised only one ground which refers to the severity of the sentence in as much as it suspended his driving licence for a period of three years, also that the court ought to have given him chance to give special reasons, if any, before cancelling his driving licence as it were. Let me point out at this stage that section 360 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 is instructive that no appeal lies to this court where an accused person has been convicted on his own plea of guilty save as regards legality of sentences meted out to him. See the cases of *Alfani Miaponi and Another v Republic* [1990] T.L.R. 104 and *Khalid Athurnani v. Republic* [2006] T.L.R. 79. It was held in the latter case of *Khalid Athurnani v. Republic* that: "...A plea of guilty having been recorded a court may entertain an appeal against conviction if it appears that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or that upon the admitted facts he could not in law have been convicted of the offence charged. I have carefully read the charges with which the appellants were faced in the present case as well as the proceedings of the lower court, the grounds which instituted this appeal and the submissions of both counsel for the parties. I hasten to say that learned counsel Mkumbe has valid points when he says the pleas were, in the first place ambiguous thus qualifying for consideration though emanating from pleas of guilty. As is evident from the record, when called upon to plead on 2.11.2009, each of the appellants was recorded to have said that "It is true" to each of the counts. Surely, such pleas without elaborations are quite unsatisfactory as they may not amount to admissions of every constituent element of the charge. The cases of *Buhimlia Mapembe v. Republic* [1988] T.L.R. 59, *Keneth Iliuila v. Republic* [1993] T.L.R. 107 and *Munisi Nkya v. Republic* [1989] T.L.R. 59 are amongst those which address this point. In the case of *Buhimila Mapembe v. Republic*, the appellant was charged with and convicted, purportedly on his own plea of guilty, of the offence of being in possession of government trophy, to wit, a lion's skin contrary to paragraph 16 (b) of the First Schedule to and sections 56 (1) and 59 (2) of the Economic and Organized Crime Control Act Cap.200 of the Revised Edition, 2002 read together with sections 67 (1) and (2) (a) and (g) of the Wildlife Conservation Act Cap. 283 of the Revised Edition,

2002. When the charge was read over and explained to the accused, he was asked to plead and he said "It is true", and on being briefed of the facts he said "the facts are correct." The court entered a plea of guilty and convicted him. He appealed to the High Court against the conviction arguing that the plea was equivocal. It was held that: - 5 " (i) In any case in which a conviction is likely to proceed on a plea of guilty, it is most 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 element of it unequivocally. (ii) The words "it is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one." The importance and necessity of articulately recording the accused's plea was similarly expressed by the Court of Appeal of Eastern Africa in the cases of *Chacha Wambura v Rep. 20 EACA 339* and *Rep. v Yonasani Egalu and 3 others (C942-1943) IX-X EACA 65*. In the latter case of *Yonasani Egalu and 3 others*, the four appellants were originally tried with two other persons on information containing two counts. The first charged the accused persons with murder, the second with being accessories after the fact to murder. The trial judge decided that it would be embarrassing to try the two counts together. The murder charge was therefore first proceeded with, the result being the four appellants and one of the other persons were acquitted of murder while the other accused, Andrea, was convicted. Thereafter the five accused persons who had been acquitted of murder were put on trial on the second charge. All of them made statements which were regarded as pleas of guilty and on those pleas they were convicted and sentenced to serve jail terms ranging from 4 months to twelve months. Subsequently, Andrea, who had been convicted of murder, successfully appealed to the East African Court of Appeal. His appeal succeeded on various grounds, including the improper admission of certain evidence and the insufficiency and doubtful nature of the rest of the evidence. As a result, although it was beyond doubt that murder was committed by some person or persons, nobody was made amenable for that crime. The appellants appealed on the ground that as the one who was sentenced to death had been released, they did not see the reason why they could stay in prison. On this point, it was held by that court that: any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most 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 constituent and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally'. Emphasis is mine. In our present case, it is a fact and I agree with Mr. Mkumbe that the trial court did the opposite. In the first place, the phrase common in the three counts for which the appellants pleaded guilty on 2.11.2009 was "having regard to all the circumstances of the case careless to the public". The appellants were not told what those "circumstances of the case" were. Also, in all the three counts, the appellants were told that the said unspecified "circumstances" were "careless to the public" (sic). As correctly submitted by Mr. Mkumbe, the alleged carelessness was not divulged to the appellants. It must be stressed here that to found a

conviction on the offence of careless driving, it must be shown that the driver charged with such an offence was guilty of some actor omission which was careless and which was a departure from the standard of driving expected of a reasonably prudent driver. 7 it is certain in our cases that the prosecution failed to put to the accused (appellants) the alleged acts of carelessness so that they could have known for example, whether the said carelessness involved over-speeding, or having worn-out tyres, or driving to the right –hand side of the road etc. Again, as submitted by Mr. Mkumbe, this is what pleading unequivocally is all about. Where this is the case, there is failure of justice, therefore that the defect is incurable. There is also this aspect that the facts of the case as presented by the prosecution were contrary to the findings of the three motor vehicles involved in the accident. As submitted by Mr. Mkumbe, in presenting the facts, the public prosecutor stated that the three motor vehicles were positioned such that the motor vehicle with Reg. No. STG 1.376 which was being driven by Muhsein Salim was behind the other two motor vehicles. The prosecution contended that the said motor vehicle hit the motor vehicle which was being driven by Yahya Khatibu, a bus with Reg. No. K.BD 861 G from behind and thereby forcing the said bus to hit the third motor vehicle, a Hiace bus with Reg. No. T 388 ARP. The intention of the prosecution was clearly to show that Muhsein Salim was the cause of that accident. I take side with Mr. Mkumbe that such a view is incorrect on account that the sketch map which was tendered at the trial showed completely a different scenario. The said map shows that motor vehicle with Reg. No. STG 1376 which was being driven by Muhsein Salim was in the middle and was hit from behind by motor vehicle with Reg. No. KBD 861 G. This is supported by the statement in the map that "sehemu amliapo gari No. KBC 861 Nissan ilipogonga gari No. STG 1376 nayo kugonga (gari) No. T 388 ARP". (Emphasis provided). With such contradictions, it is clear that it is not possible to gauge as to which motor vehicle really hit the other. In the place I once again agree with Mr. Mkumbe that the admitted facts were equivocal. For these reasons, I hold that the first ground of appeal has merits and is allowed. I wish to emphasize however the desirability of magistrates to go through the charge before admitting the same. Such an exercise should not be done mechanically but diligently and for a purpose. 7 There is also this other complaint based on the provisions of section 27 (1) (a) of the Road Traffic Act. The gist of the complaint is that the trial court wrongly made orders whereby it cancelled the respondents' driving licences without requiring them to advance special reasons if they had any. In my opinion, this again cannot be said to be insubstantial. It is unmistakably clear from the record that the trial court did not call upon the respondents to advance any special reasons on which to base its deliberations on whether or not to cancel their driving licences. Section 27 (1) (a) of the Road Traffic Act, 1973 provides that:- "27 (1) Any court before which a person is convicted of -

- (a) a first offence under section 40 41 42 or 44 or paragraph (c) of section 52 shall cancel such person's driving licence for a period of not less than three years and shall declare that person to be disqualified from obtaining a driving licence of any type during such period; 9)' unless the court for special reasons thinks fit to order a shorter period of cancellation or

suspension of that J)CrSOIIS driving licence and to order him to be disqualified from obtaining a drivin g licence for a shorter period or not to order him to be disqualified." I the case of Nassor Hainudu v. Republic, (1977) L.R.T. 37, the appellant was convicted of causing death through dangerous driving of a motor vehicle c/s 40 (1), 63 (2) (a) and 27 of the Road Traffic Act., 1973. Following the said conviction the trial court cancelled the appellants driving licence without giving him opportunity to provided. special reasons, if he had any, before such cancellation. It wa held that:- 44 the order for disqualification was not properly made as required by s. 27 of the Road Traffic Act for the appellant was not called (upon) to advance special reasons as to why disqualification should not be ordered." In niv opmion. had the trial court properly construed the provisions of that section s it would have realized that it was a prerequisite condition that special reasons must be advanced by the accused and the court must make a finding on the same. In that this was not done in the present case that was an irregularity, though not fatal to the proceedings in that but for the fate of the first ground of appeal, would he curable under section 388 of the Criminal Procedure A.ct, 1985. In view of the above, this court holds that this ground too is meritorious and succeeds. In consequence, the convictionsare hereby quashed and the sentences passed thereon are accordingly set aside, together with the •resultant Ii orders. The fines of shs.20, 000/= which were paid in respect of each of the said counts should now be refunded to them. Having concluded however, that the proceedings were tainted with incurable irregularities the next question is; what follows? Unfortunately, both counsel did not make any suggestions on whether or not the court may exercise its discretion to order retrnal which is what I think is the most appropriate direction in the circumstances of this case. The principles U1)Ofi which retrial should be ordered have in the ias1 I)een expressed in many cases including those of Manji v. Republic [1966]EA 343, Joseph Stephen v. Republic, Cr. Appeal No. 65 of 1982, High Court (T) andHassau Kangamav. Republic

[2000] T.L.R. 200 It was stated in the former case of Manji v. Republic that:- in general a retrial wil] be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the p11'pose of ellal)lir)g the prosecution fill UI) gaj)s in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. it does not necessarily follow that, a retrial should be ordered; each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person" The catch pliiase here is that such an order should be made where interests of justice so demand. Also, while it was expressed in the case ofHassan Kangamav. Republic

[2000] T.L.R. 200ihat retrial shoul d not be ordered where it is likely to cause 'injustice to the accused it is worthy pointing out what was stated in the case of Joseph Slepheu v. Republic, an expression which in my viewprovides proper guidance supposed to he followed in the circumstances of our present case. In that case s Chipeta. J. (Rtd) held that:- "In general, a retrial will be ordered only when the original trial was illegal or

defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. [each] case (however), must depend on its own particular (set) of facts and circumstances and order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person. I am satisfied in our present case that the trial was defective, also that the question of the prosecution side filling up gaps in its evidence at the first trial does not arise as no evidence was ever recorded. I am further satisfied that no injustice will be occasioned if a retrial will be ordered. In the result I order that the original case starts afresh before the District Court of Mbeya before another magistrate of competent jurisdiction. Order accordingly. B. Al. H. Judge.

26. 06.2012. 12

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