

TANZANIA / JUDGMENT

final judgment SAMWEL MARKO Tanzlii

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TANZLIIDECIDED
15 March 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB - REGISTRY AT
MOSHI CRIMINAL APPEAL NO. 20500 OF 2024 (Appeal from the decision of the District Court of
Moshi at Moshi dated 15th March, 2023 in Criminal Case No. 56 of 2023) SAMWEL S/O MARKO @
MINJA @ MAGHANGU..... APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

17th Sept. & 15th Oct. 20124 A.P. KILIMI, J.: The appellant was charged with unnatural offence under section 154(1) (a) and (2) of the Penal Code Cap 16 R.E 2019. On 15/3/2023, when the charge was read over and explained to him, he is recorded to have pleaded, "It is not true." When the facts of the offence were outlined to him, he is recorded to have said, "It is true". Consequently, the trial magistrate entered a plea of guilty and went on convicting him on his own plea of guilty and sentenced him to a mandatory term of life imprisonment. The appellant was aggrieved and has filed this appeal, relying on three grounds all of which are centered on the complaint that his plea of 1 guilty was equivocal. In particular the appellant contended that he was never asked as to which fact he denied and admitted rather he was just asked to sign the memorandum. At the hearing of the appeal, the appellant appeared in person and had no legal representation, whereas the republic was represented by Ms. Ruth Kamola who prayed for the court to consider his grounds of appeal and find him not guilty. In her brief submissions, Ms. Kamola supported the appeal. According to her, the plea was equivocal because on 15/3/2023 the records show that upon charge being read to the appellant, he replied that it was not true but the record show that the trial court magistrate recorded that the appellant pleaded guilty to the charge. She submitted that the records are silent on whether the appellant pleaded guilty to the offence he was charged with. She also submitted that the records do not show as to whether the facts constituting the offence against the appellant were read to him. She submitted that the position of the law concerning the procedure to be followed in the plea of guilty is provided for under section 228(3) and 2 229 of the Criminal Procedure Act, Cap 20 R.E.2022. She further submitted that according to the trial court proceedings, the trial court did not abide with the procedure provided. She was therefore of the view that the appellant was wrongly found guilty and convicted by the trial court. On the strength of her submission she prayed for the appeal to be allowed and that for the purpose of justice, she prayed for the case to be ordered for retrial before another trial Magistrate. She further supported her submission with the case of Adrian Chaki vs. Republic

Criminal Appeal No. 399 of 2019 CAT at Dar-es-Salaam at page 16. and Article 13(6) (a) of the Constitution of United Republic of Tanzania. The appellant on the other side had nothing much to add rather he prayed for this court to consider his grounds of appeal and release him. Now, the issue for determination of this appeal is whether the appellant's conviction was based on an equivocal plea. In the case of Keneth Manda vs Republic [1993] T.L.R. 107 the court held that: "An accused person can only be convicted on his own plea of guilty if his plea is unequivocal. That is, where it is ascertained that he has accepted as correct facts which constitute all the ingredients of the offence." 3 Having studied the record, I agree with Ms. Kamola that the appellant's plea was equivocal. This is because from the beginning when the charge was read over and explained to him, he pleaded not guilty to the charge. Again, the record which is handwritten shows on the day preliminary hearing was conducted on 15/3/2023 after the facts were read out the accused was asked again to plea and he responded, "It is true". From that point the proceedings show that the appellant was caused to sign under his plea and the state attorney also signed then the trial magistrate entered a plea of guilty and proceeded to convict the appellant on his own plea. However, based on my examination of the record, it is also my finding that the appellant's plea was equivocal. This is because the appellant's plea initially was that he was not guilty when the charge was read over and explained to him but the plea changed after the facts were read out to him during the preliminary hearing. The purpose for holding a preliminary hearing is normally to ascertain matters not in dispute after the facts are read out. The procedure for carrying out a preliminary hearing is provided for under section 192 of the Criminal Procedure Act, Cap 29 R.E 2022 (CPA). The law provides under section 192 (2) that; 4 2. "In ascertaining such matters that are not in dispute, the court shall explain to an accused person who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation". [Emphasis added] Based on the above quoted provision, the law requires the court to explain to the accused person who does not have legal representation about the nature and purpose of the preliminary hearing. Based on the trial court record this was never done and this is where the problem started. The appellant complained under his first ground of appeal that he mistakenly pleaded guilty. This means after the facts were read out to him and he was once again asked to plea he did not understand. This is possible because he did not understand the purpose for preliminary hearing that it was to ascertain facts not in dispute. Nevertheless, the facts read did not only include the particulars of the offence charged but also particulars of the accused person as to his names 5 and address among other things. Therefore, in ascertaining matters not in dispute the law requires for the trial court to prepare a memorandum of facts to that effect. This is provided for under subsection three of this section which states; "(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused person in a language that he understands, signed by the accused person and his advocate, if any, and by the public prosecutor, and then filed". [Emphasis added] Again, the provision above clearly wants the trial court to prepare a memorandum of matters agreed. In the present case the record shows that a memorandum of facts was recorded as per the above provision. However immediately thereafter it is recorded accused plea and said it is true; according to the above law, the trial court

ought to have asked the appellant which facts he agree thus are not in dispute, again the record is silence whether the same was asked. Since that was the next step, 6 therefore by mere trial court entering accused plea, in my view the trial court flawed on the procedure which indeed prejudiced the appellant when he replied without being directed what was required to do at that step. Be as it may, according to the said read facts which bares the heading “preliminary takes off section 192 (3) of Criminal Procedure Act Cap. 20 R.E. 2022” paragraph 4 provides for the facts which create exculpatory statement to the said plea the trial court believed the appellant confessed the offence charged, and for reference purposes I hereby reproduce hereunder; “4. That accused was interrogated and refuted to have committed such an offence.” [Emphasis added] Based on the memorandum of facts not in dispute as above, it is clear that the accused did not confess to have committed the offence. This is because the facts read to appellant in inclusion of the above statement quoted did cause elements of offence charged to be certain and clear as per offence charged. 7 In the case of Director of Public Prosecutions vs Salum Madito (Criminal Appeal 108 of 2019) 2020 TZCA 311 (TANZLII) at page 8, the court referred with approval the decision of the defunct East Africa Court of Appeal in Rex v. Yonasani Egalu & 3 Others [1942 - 1943] IX - X EACA 65, where it reasoned in the following words: "That in 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 the form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it "unequivocally". [Emphasis added] As observed above the said words in paragraph 4, changed totally the meaning of the appellant plea of guilty since by saying that it is true 8 means he also accommodated the above paragraph which in conclusion thereof means he was admitting to the facts which make him not guilty or challenged his accusation since he was interrogated and refuted to commit the crime. In the circumstance as explained above, it is the finding of this court that the trial court erred by not adhering to the procedure as required by the law under section 192 and 228 of the CPA. The whole procedure is marred with errors. Therefore, failure to comply with the law in regards the procedure is what caused confusion during trial of the appellant and made the purported plea of guilty equivocal. The recorded plea of guilty cannot be said to have been made unequivocal as alluded above. Having said as above, I have entirely considered the circumstances of this matter which indeed the case was not heard on merit. I am of considered view that in this matter, in the interests of justice requires that I should order retrial, and this is because as revealed above, I cannot hold that the prosecution when given this chance will fill the gaps which at all is no where to be found since prosecution never started to adduce evidence. 9 (See Fatehali Manji vs R [1966] E.A 343; Shaban Said vs Republic Criminal Appeal No. 267 of 2009 and Mussa Abdallah Mwiba and Two Others vs Republic, Criminal Appeal No. 200 of 2016 (unreported). Consequently, I nullify the proceeding of the said preliminary hearing, quash the conviction, and set aside the sentence awarded by the trial court. I further order an expedited retrial before another Magistrate who should start from the Preliminary Hearing of this matter. In the circumstances, I order the immediate release of the appellant from

custody unless held by other lawful cause. Order accordingly. DATED and DELIVERED at MOSHI this 15th day of October, 2024. X JUDGE Signed by: A. P. KILIMI 10 Court: Judgment delivered today on 15th day of October, 2024 in the presence of Mr. John Mgave Learned State Attorney, also appellant present in person. Sgd; A. P. KILIMI JUDGE 15/10/2024 Court: Right of Appeal explained. Sgd; A. P. KILIMI JUDGE 15/10/2024 11

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