**IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX (CRIMINAL DIVISION "2") HELD IN ACCRA ON MONDAY, 24TH DAY OF JANUARY, 2024 BEFORE HER LADYSHIP JUSTICE MARIE-LOUISE SIMMONS (MRS.), JUSTICE OF THE HIGH COURT**

**SUIT NO.: CR/0474/2022**

**MAHAMADU MUMUNI @ OSAMAN**

**VRS.**

**THE REPUBLIC**

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# JUDGMENT

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This is a judgment hinging on a Petition of Appeal filed on the 9th May 2022 on behalf of the above named Appellant who was the 1st Accused person at the trial Court. The appeal was filed pursuant to leave granted to file appeal out of time by the High Court on the 29th March 2022.

The Appeal was against the sentences on two (2) counts of C**onspiracy to commit crime, namely Robbery a**nd **Robbery.** The Appellant was sentenced on the 21st July 2014 by the Circuit Court "1", Accra then presided over by His Honour Francis Obiri Esq. (as he then was) to fifteen (15) years IHL on count one (1) and twenty (20) years IHL on count two (2), both counts to run concurrently.

**THE GROUNDS OF APPEAL**

The grounds of appeal were stated as follows:

The original ground of appeal was:

1. That the sentence imposed on the Appellant is harsh and excessive considering the conditions of detention within the prison confines, hence his plea for mitigation.

The further grounds of appeal filed were the following:

2.That the Appellant has regretted his actions and has really learnt his actions over the period of time served in incarceration under the harsh and severe conditions of detention and vowed never to engage in any criminal activity.

3. That the Appellant is a first time offender who was unrepresented, illiterate and unskilled in law, his potential to lead a meaningful defense either by way of countering a conviction and a sentence is limited. He therefore pleads with your Lordship to kindly consider the negative and psychological effects of long incarceration and commute his sentence.

4. That the Appellant's prolonged stay in prison may not achieve the reformative effect but rather may produce a hardened criminal instead. Therefore as a reformed person, it would be beneficial for him to contribute to society. Hence his plea for reduction in his sentence.

5. That it is therefore these reasons that he is praying the Honourable Court to look at the sentence of the Appellant again considering the young age of the Appellant as a first time offender will be given an opportunity to come out of prison reformed and become a useful law abiding citizen, hence his plea for reduction in his sentence.

**THE RESPONSE**

The Republic/Respondent herein afterwards referred to as the Respondent filed its response through a learned Assistant State Attorney, Selasi Kuwornu on the 24th October 2023. In her response the learned attorney in analyzing the sentences of the Appellant especially on count one, observed, acknowledged and submitted that the conviction of the Appellant on the 1st count of conspiracy to commit crime was wrong in law as he pleaded not guilty but was yet convicted. On the 2nd count of Robbery, where the Appellant pleaded guilty with explanation, she submitted that the sentence of 20 years IHL meted out to the Appellant on the 2nd count was appropriate and must be maintained.

**THE DELAY IN THE HEARING OF THE APPEAL**

I have noticed and need to comment that though the appeal was filed in February 2022, it has taken these couple of years for this appeal to be heard due to the difficulty in procuring the proceedings of the trial Court from its Registry. The proceedings of this Court in this appeal then presided over by my sister, Justice Elfreda Amy Dankyi indicate that this Court made an Order on the 6th June 2022 for the Registry of the trial Circuit Court to transmit the Records of Appeal. Then on the 13th October 2022, the Order was repeated by the Court and yet no records were transmitted.

Upon assumption of office and takeover of this court in April 2023, I also made another Order on the 28th April 2023 for the Registry of the Circuit Court, Accra to transmit the records. By the 25th July 2023 when this case was called, the three (3) earlier Orders had not been complied with by the trial Circuit Court's Registry and no information had been given to this Court as to the failure to produce same.

The Court was informed by the State Attorney for the Respondent that, the Appellant through the services of the prison teacher had filed a Mandamus Application before the Court which was placed before the Criminal Court "1" for the compelling of the Registry of the trial Court to transmit same. Information provided to this Court by the Respondent's counsel which I verily believe same to be true, states that the application was granted by the Court and the Registry was directed to comply.

These delays obviously affected the hearing of the appeal and the proceedings of the Court confirms same. The Deputy Registrar of the Circuit Court, Accra eventually appeared in person and informed the Court about efforts to locate the records. The appeal was then adjourned to after the legal vacation on 2023 and the records were received by this Court by the 10th October 2023. The Court ensured that the Appellant was served a copy of the proceedings and the written submissions of the Respondent before hearing this appeal.

Back in 1975, the revered and bold spirited Taylor J as he then was, had the cause to complain in a similar fashion of the existence of these kind of unfair and non chalant attitudes and behaviors of judicial officers that leads to grave injustice.

In the case of **FORSON VS. THE REPUBLIC** decided on the 24th November 1975 and reported in Judy law as 1975 JELR 66385 HC. I quote Taylor J extensively when he stated thus:

> *"I must preface this judgment with an expression of a deep concern which has built up gradually in our Courts to dispense justice to our people particularly the poor class. I have had Criminal Appeals in which the Record of Proceedings is bulky running into hundreds of pages, but the record has nevertheless been prepared and certified within a month or a few weeks after judgement.*

*In the cases before me, the Appellant was convicted on 12th August 1974, his Record of Appeal in one of the cases is about 11 pages… in the second case the actual Record of Proceedings is less than five pages. There is in my view no reason or possible excuse why such a record should not be available a week or so after 6th September 1974, the date the Appellant appealed and yet the case came before me for summary hearing for the first time on 12th November 1974, more than one year after the trial and even the record was not complete….*

*There can be no doubt that the machinery of justice devised by the legislature to protect this Appellant has worked havoc in his case and has been operated so as to produce an injustice. This must be looked into by the authorities to avoid such future situations. In this respect, it seems to me that it is of utmost importance for the efficient and fair administration of criminal justice in this country, that our Registries should be properly supervised and their work undertaken by men dedicated with a sense of responsibility, men who must appreciate the demoralizing effect and the suffering which their careless and non chalant attitude to work could cause to persons allegedly involved in crime, particularly as often happens when such person are found innocent and are discharged. By their irresponsible conduct they could cause such persons to serve unlawful sentences."'*

It is sad to know that these sentiments expressed in 1974 by this judge seem to be the same sentiments expressed today in this case about delays in obtain proceedings. It is commendable that an application for Mandamus was filed on behalf of the Appellant and the Court acted upon it which eventually led to the transmission of the records. I must also commend the State Attorney who constantly highlighted the said situation in Court and even went ahead to contact the Trial Registry for the records to be transmitted.

**THE FACTS OF THE CASE AND TRIAL OF THE APPELLANT**

The facts at page 4 of the Record of Appeal indicates that, the Appellant then 1st Accused person together with three (3) others (two of whom were later arrested and prosecuted) , entered the house of the Complainant, a caterer, armed with a pistol and machete on the 1st July 2014 at about 1:30am whilst the Complainant was baking in his kitchen. They forcibly entered the kitchen and the Appellant allegedly pulled the pistol on the Complainant who out of fear left his phones and tablet in the kitchen and run into his bedroom. The Appellant and his accomplices then obviously took the phone and tablet away, together with some cash amounting to GHC800.00. The Police states that as the Appellant and his accomplices left the house, they brandished the machetes on the walls of the house threatening anyone who dared to approach them. The complainant subsequently reported the matter to the police and the Appellant was first arrested on the 1st July 2014 and charged for the offences aforementioned. The charge was later amended to include the 2nd Accused, Ali Mohammed @ Ali Kosei who was subsequently charged together with the Appellant

From the Record of Appeal, it is not clear when charges were preferred against the 3rd Accused person, however, the records show that on the 21st July 2014 when the Appellant and the 2nd Accused person were sentenced, a 3rd Accused person was present in Court, his plea was taken and he was remanded to reappear. On the 11th May 2014, 3rd Accused person changed his plea of not guilty on count 2 to guilty simplicita and was later sentenced on the next adjourned date of 18th August 2014 to 15 years on count one (1)and 22 years on count two (2).

**APPEAL BY WAY OF REHEARING**

It is a settled principle of law, that an Appeal is a creature of statute and as such the right to appeal at any stage of a trial, whether criminal or civil , and to which Court

and through what means or procedure is all governed by law. Under the **Criminal Procedure Act, 1960 (Act 30),** the right to appeal to the High Court in a criminal case from a lower Court is provided for by **Section 324** as well as under **Section 44 (2) of the Courts (Amendment) Act, 2002 (Act 620).** An appeal is also said to be by way of rehearing. This means that the Appellate Court or body is to examine the entire proceedings or decision that is the subject of the appeal to determine whether the decision can be supported in law or in fact or both. Numerous case law support this principle that is relevant to both civil and criminal appeals.

See cases such as **DEXTER JOHNSON VS. THE REPUBLIC (2011) SCGLR 601, NAGODE VS. THE REPUBLIC (2011) SCGLR 975, AMANKWAH VS. THE REPUBLIC (J3/04/2019) (2021) GHASC 27 DATED 21ST JULY 2021**.

In **AMANKWAH** supra, The Supreme Court through Dotse JSC explained the concept as pertains to criminal trials as follows:

> *"… applying the above principle in a Criminal Appeal might result in the Court embarking upon the following, to analyze the entire Record of Appeal and this must include the charge sheet, the Bill of Indictment (where applicable), the witness statements of all witnesses, all documents and exhibits tendered and relied on during the trial, as well as the evidence during testimony and cross examination. To satisfy itself that the Prosecution has succeeded in establishing the key ingredients of the offence charged against the Appellant beyond reasonable doubt. And that the entire trial conformed to settled procedures under the* ***Criminal and Other Offences Procedure Act, (Act 30)*** *and that the acceptable rules of evidence under the Evidence Act (NRCD 323) have been complied with including the Practice Directions issued following the decision in the* ***REPUBLIC VS. BAFFFOE–BONNIE AND 4 OTHERS (2017-2020) 1 SCGLR 327*** *case"*

**APPEAL ALLOWED ONLY ON SUBSTANTIAL MISCARRIAGE OF JUSTICE**

By way of statutes, the **Courts Act (NRCD 323)** regulates the conduct of criminal appeals by **its Section 31** when it states:

> *"(1) subject to subsection (2) of this section, an Appellate Court in hearing any appeal before it in a criminal case, shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case, shall dismiss the appeal.*
>
> *(2) The Court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or the point raised in the appeal consists of a technicality or procedural error or a defect in the charge sheet or indictment but there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the caused could have been convicted upon that charge or indictment"*

I greatly commend the learned Attorney for the Republic/Respondent for her erudite submission much of which have been of relevance to me.

**THE APPEAL AGAINST SENTENCE**

I have given consideration to the facts and circumstances of this case, especially the fact that the Appellant was not represented at the trial and is not still represented by a lawyer for his appeal. As stated, he filed the appeal with the help of the "Prison Teacher" and the appeal is only against sentence.

It has been decided severally that an appeal against sentence only means that the Appellant does accept, that he was rightly convicted, which means that when an Accused pleads guilty, no further proof of the case is necessary.

This principle is enunciated in cases including the ones below:

**FIIFI KOFI ADU VS. THE REPUBLIC (2015) JELR 63662 CA, FORSON VS. THE REPUBLIC (1975) JELR 66385 HC, TAYLOR J., DARKRUGU VS. THE REPUBLIC (1989-1999) 1 GLR 308, ATTA BONSU AND ANOTHER VS. THE REPUBLIC (2018) JELR 66461, CA**

However, it is also the principle that an Appellate Court can interfere with a conviction which it deems wrong in law or not borne out of the facts and set it aside notwithstanding the fact that the appeal was not against conviction. It was stated in **FORSON VS. THE REPUBLIC** (Supra), Taylor J (as he then was) thus:

> *"It is my opinion that an appeal against sentence where the conviction is not being challenged as in this case necessarily implies that the conviction is prima facie in order. However, if the conviction is not in fact in order it cannot support a sentence and in such a case, the sentence is set aside as it ought to be, then, with it goes the conviction"*

**THE ANALYSIS OF THE CHARGES AND PLEA**

Per the Record of Appeal, there are two (2) charge sheets that were filed involving the Appellant at the trial. It seems to me, upon reading the records that there was a substitution of charges which was done to include the other Accused persons who were later arrested. The charge sheets all had the same case number, **D2/53/14** and all had the Appellant who was the A1, **charged with Conspiracy to Commit Crime, and Robbery, contrary to Sections 23 (1) and 149 of Act 29 as amended as well as Robbery contrary to Section 149 of Act 29.**

As found in the proceedings of the 18th July 2014 being the 2nd day of the appearance of the Appellant in Court, he pleaded NOT GUILTY to the 1st count of CONSPIRACY and GUILTY WITH EXPLANATION to the 2nd count of ROBBERY.

It can be gleaned from the record that the trial judge unfortunately convicted him on the 1st count on that very day and deferred the sentence for another day. As aptly submitted by the Respondent's counsel, the said conviction on **a plea of not guilty** clearly sinned against both the Constitutional provision of **Article 19 (2) (c)** and the Statutory provision of **Section 172** of **the Criminal and Other Offences Act, 1960 (Act 30).**

**Article 19 (2) (c)** states:

> *"A person charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty"*

**Section 172 of Act 30** also states:

> *"Where the Accused does not plead guilty to the charge, the Court shall proceed to hear the evidence as the prosecutor adduces in support of the charge."*

In this particular case, the certified records indicate nothing more than the day's proceedings of the said date, **18th July 2014 when the pleas were taken** and the Appellant convicted. The subsequent date of the **21st July was when the Appellant and his co-accused, the 2nd Accused person were both sentenced.** It is obvious that no evidence was taken to prove the guilt of the Appellant neither did he change his plea to guilty on count one (1).

**Having noticed that the conviction and sentence of the Appellant on count one (1) was clearly wrong and sinned against the aforementioned constitutional and statutory provisions, and with the power of rehearing, and having noticed an error of law and a substantial miscarriage of justice in this regard, I will have both the**

**conviction and sentence on ground one, on the offence of Conspiracy to Commit Crime, namely Robbery, set aside and acquit the Appellant on that count.**

On count two (2) on a charge of Robbery, the Appellant pleaded guilty with explanation and the explanation was:

> *"I was with A2, he entered the complainant's house. I was outside and he stole the items. I did not report him."*

The taking of the plea of an Accused in a summary trial is regulated by **Section 171 of the Criminal and Other Offences Act, 1960, (Act 30)** and **Section 199** in a trial on indictment. **Section 171 (3)** states:

> *"a plea of guilty shall be recorded as nearly as possible in the words used, or if by letter under **Section 70 (1)** the letter shall be placed on the record and the Court shall convict the Accused and pass sentence or make an order against the Accused, unless there appears to it sufficient cause to the contrary."*

I must state that in reference to Act 30 and decided cases, **in Summary Trials** there is no provision made for a guilty plea with explanation or with any words after the plea that indicate that the Accused may have a defense. However, under **Section 199** dealing with the taking of the plea in **a trial on indictment**, though there is also no express provision for a plea of guilty with explanation, it is stated as follows:

> *"199 (1) where the Accused pleads guilty to a charge, the Court before accepting the plea, shall if the Accused is not represented by counsel, explain to the Accused the nature of the charge and the procedure which follows the acceptance of a plea of guilty.*
>
> *(2) the Accused may then withdraw the plea and plead not guilty.*
>
> ***(4) Where the Accused pleads guilty but adds words indicating that the Accused may have a defense or so indicates in answer to the Court, the Court***

***shall enter a plea of not guilty and record it as having been entered by Order of the Court."***

Notwithstanding this difference, the Courts have long held **even in cases conducted summarily** that when an Accused pleads guilty with explanation, it is incumbent on the trial Court to ensure that the explanation is recorded and analyzed to determine if it constitutes a defense or if the Accused really meant to plead guilty. That if the explanation is inconsistent with a plea of guilty, the Court must enter a plea of not guilty and proceed to take evidence.

See the cases of **NOKWE VS. THE REPUBLIC (1999-2000) GLR 49, CA and ATTA BONSU & ANOTHER VS. THE REPUBLIC (2018) CA** supra

In **ATTA BONSU**, on appeal to the CA, it was held *inter alia:*

*"It is trite learning that when an Accused pleads 'guilty with explanation' whether represented or not, even though there is no such plea in our laws, it is incumbent on the trial judge to listen and record his explanations and from that the trial judge then decides whether to enter a plea of guilty for him or not guilty so as to let prosecution establish his guilt"*

In this particular case, the Appellant and his co-accused were tried summarily and the trial Court rightly recorded his plea and explanation. The Court was of the opinion that the explanation amounted to a guilty plea and accordingly convicted and sentenced him subsequently.

As the Appellate Court, with the right of rehearing, I am enjoined to consider the entire Record of Appeal including the said explanation provided by the Appellant against the 2nd charge of robbery proffered against him.

For clarity, I have reproduced the explanation here:

> ***"I was with A2, he entered the complainant's house. I was outside and he stole the items. I did not report him."***

A careful scrutiny of his explanation indicates that the Appellant made no admission that he entered the house. In fact, he stated that he was outside, he made no admission that he was involved in the stealing, neither did his explanation indicate any admission of having used force, harm, or threat of criminal assault to steal from the complainant as required for a charge of Robbery**. The only admission made in his explanation was that he was with A2. That could have made a difference if the charge under consideration was the conspiracy charge**. However, this 2nd charge which he pleaded guilty with explanation to, is the substantive offence of Robbery not the Conspiracy. The explanation ended with the statement, ''**I did not report him",** a statement, which indicates that the Appellant rather implicates the A2, but he claims he failed to report the said A2 as he was reasonably expected to.

This explanation may be said to implicate the Appellant to the extent that he went with the A2 to the vicinity of the complainant's house, as he said that he was outside the house when the complainant entered the house to steal. Assuming that he was at the scene of crime with the A2, that alone cannot constitute an offence, as it has been held that *"mere presence at the scene of crime, even presence at the scene of crime with flight after the commission of a crime, is not enough to constitute abetment, conspiracy or involvement in a criminal act, unless there is a legal duty to act".*

See cases like **OBENG VS. THE REPUBLIC (1971) 2 GLR 107, CA, AZU CRABBE.**

It has also been held that even if the explanation provided after a guilty plea is consistent with, and capable of **both a guilty and innocent interpretation**, then it must be noted that the explanation cannot support a conviction and therefore the plea must be changed to not guilty and evidence taken.

See cases such as **GUNDAA VS. THE REPUBLIC (1989-1990) 2 GLR 50**,

My analysis, therefore of the explanation of the Appellant to the plea of guilty to the 2nd charge of Robbery does not indicate one of guilt, or at least it could yield to either a guilty or not guilty explanation. It is my considered opinion that the trial Court should have recorded a not guilty plea and made the prosecution to prove their case beyond reasonable doubt as required under Section 11 (2) of the **Evidence Act, (NRCD 323)**.

Even with the knowledge that the appeal was only against sentence and not conviction, as an Appellate Court with the power of rehearing, I am yet duty bound to ensure that the Appellant, especially not defended by counsel does not suffer substantial miscarriage of justice.

Having come to the conclusion that the explanation does not connote a guilty plea that should have warranted a conviction, I will set aside the conviction and sentence of twenty (20) years against the Appellant on the 2nd charge of Robbery and acquit and discharge him, notwithstanding the fact that he did not appeal against his conviction. Of course, the decision to acquit and discharge in this instance, does not in any way confirm the innocence of the Appellant, it only supports the constitutional principle of the presumption of innocence until proven or pleaded guilty (without any equivocation).

In the case of **RAHIM IBRAHIM AND ORS VS. THE REPUBLIC (2017) JELR 107062 CA**, Dennis Adjei JA, in his concurring judgment stated *inter alia*:

> *"an appeal against a decision rendered in Criminal Appeal succeeds only when it is proved or found that there was a miscarriage of justice against the Accused. Section 31 of the Courts Act sums up the grounds upon which criminal appeals may succeed…"*

***He further stated:***

> *"as a Court of law, even though the 4th Accused did not appeal against conviction but was apparent that he ought to have been acquitted and discharged by the trial Court but was convicted, I am duty bound to ensure that a party whose case is before me does not suffer substantial miscarriage of justice and having come to that conclusion, I am duty bound to acquit and discharge the 4th Accused. An Appellate Court is duty bound to set aside a wrong decision of law or void decision irrespective of how it comes to its notice and in what form or shape"*

I have noticed that the Appellant have spent about 9years in custody and therefore it will be extremely unfair and unjust to order a retrial for the case to be heard on its merits. In the circumstance, the conviction and sentence of 20years IHL to run concurrently on both counts is hereby set aside, accordingly the Appellant is acquitted and discharged on both counts.

**(SGD)**

**JUSTICE MARIE-LOUISE SIMMONS (MRS)**
**(JUSTICE OF THE HIGH COURT)**

**COUNSEL:**

**NO LEGAL REPRESENTATION FOR THE APPELLANT.**

**SELASI KUWORNU (ASSISTANT STATE ATTORNEY) FOR THE REPUBLIC/RESPONDENT.**