IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 516 OF 2017

JOEL MWANGAMBAKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court of Mbeya at Mbeya)

(Herbert, SRM – Ext. Jur.)

dated the 31st day of October, 2017
in
(DC) Criminal Appeal No. 41 of 2017

.....

JUDGMENT OF THE COURT

25th & 27th November, 2020

NDIKA, J.A.:

The appellant, Joel Mwangambako, appeared before the District Court of Mbozi at Vwawa on 27th February, 2017 for arraignment on a charge of cultivation of *cannabis sativa* plants contrary to section 11 (1) (a) and (c) of the Drug Control and Enforcement Act, Act No. 5 of 2015 (now Cap. 95 R.E. 2019) ("the Act"). It was alleged that on 22nd February, 2017 at 18:00 hours at Masoko Village within Mbozi District and Songwe Region he was found cultivating in his farm the aforesaid plant commonly known as *bhang*, the estimated value of which being TZS. 5,000,000.00. He

pleaded guilty and was, accordingly, convicted of the offence and sentenced to the mandatory thirty years imprisonment. His first appeal bore no fruit, hence this second and final appeal.

It is essential, at the outset, to look at what transpired during his arraignment on 27th February, 2017. At the beginning, the record shows that after the charge was read over and explained to him, he readily pleaded guilty, saying:

> *"It is true I was found cultivating cannabis sativa plants."*

Then, the presiding Resident Magistrate duly recorded the reply as a plea of guilty, after which the Public Prosecutor narrated what he conceived to be the facts of the case. We wish to let the record speak for itself:

> *"**PP**: I pray to give facts of the case.*
>
> ***FACTS OF THE CASE***
>
> *The accused is Joel Mwangambako, a resident of Masoko. The accused has two farms which he inherited from his father .... On 22/02/2017 around 5:00 P.M., the accused was arrested by police officers who were on the operation which was led by D.S. Mkama, Insp. who got information that the accused has cultivated cannabis sativa in his maize farm. The accused led the police, WEO, Security Officer and Agricultural Officer Petro*

Ndundu who is a specialist in agriculture and plants, to his farms. After inspection, it was detected that in his farm there were maize and cannabis sativa plants cultivated together. After the Agricultural Officer certified that the plants were cannabis sativa the Inspector of Police together with other police officers and citizens who were there extracted the cannabis sativa and the map of that farm was drawn and several pictures were taken. The seizure note was filed and was signed by the accused and witnesses .... The accused was taken to Mlowo Police Station. And on interrogation with Police Officer No. E.8287 D/Cpl Tadeus, which was made on the same date, the accused admitted to cultivate that plant as a business crop. Also, other witnesses [recorded] their statements including the Agricultural Officer who gave his report in writing and today the accused person is brought to this court to face his charge who pleaded guilty.

Also I pray to tender cannabis sativa plants valued TZS. 5,000,000.00, cautioned statement of the accused, sketch map, seizure note and picture which was taken at the scene of crime as exhibits."

After the facts were narrated and six exhibits tendered for admission by the Public Prosecutor, the presiding Resident Magistrate went ahead and admitted the exhibits without having them cleared for admission. Nor did he cause the contents of four documentary exhibits to be read out. This is reflected at page 4 of the record of appeal thus:

*"**Court**: cautioned statement of Joel Mwangambako, sketch map of the scene of the crime, report from the Agriculture Officer, Seizure Note, Cannabis Sativa plants and photograph taken of the scene of the crime are hereby admitted as exhibits P.1, P.2, P.3, P.4, P.5 and P.6 respectively. Exhibit P.5 handed over to the Police Officer.*

***Order:** Cannabis sativa to be distorted (sic) under supervision of Police Officer.*

***Sgd**. N.L. Chami"*

The appellant was, thereafter, asked whether he admitted the facts of the case or not. His response was:

*"**Accused's reply**: I have heard the facts of the case as given by the PP. That statement is truth."*

The above reply was followed up by the appellant being convicted of the charged offence on his own plea of guilty and sentenced:

*"**Court**: The accused has pleaded guilty and has admitted the facts of the case as given by the PP to be true. So, I hereby convict the accused person for (sic) the offence of cultivation of cannabis sativa plants c/s 11 (1) and (c) of the Drug Control and Enforcement Act No. 5 of 2015 for (sic) his own plea of guilty.*

***Previous conduct**: No [record of] previous conduct but I pray for a heavy sentence against the accused since the prevalence*

of the offence is high nowadays. Also, I pray for his farm to be seized.

***Mitigation**: I pray for a lenient sentence since I have six children depending on me.*

***Sentence**: I have considered that the accused person is the first offender and that the prevalence of offence is higher so I hereby sentence the accused person to serve 30 years imprisonment to be a lesson to others ....*"

As hinted earlier, the appellant appealed to the High Court of Tanzania to challenge both conviction and sentence. By the order of that court dated 29th May, 2017 made under section 45 (2) of the Magistrates' Courts Act, Cap. 11 R.E. 2002 (now R.E. 2019), the appeal was transferred to the Resident Magistrate's Court of Mbeya at Mbeya for hearing and determination before Hon. Herbert, Senior Resident Magistrate with Extended Jurisdiction. That court upheld the conviction and sentence, holding that the charge was unblemished and the appellant's plea of guilty explicit and unequivocal.

This appeal is predicated on a Memorandum of Appeal containing seven grounds of appeal. In effect, the Memorandum raises five complaints as follows: **one**, that the charge was defective for failure to disclose any offence. **Two**, that the appellant did not understand the charge as it was

read over and explained in a language he did not understand as he was only fluent in Kinyakyusa. **Three**, that his plea of guilty was not unequivocal. **Four**, that the admission of the cautioned statement containing a purported confessional statement was improper. **Finally**, that the charged offence was not established.

At the hearing of the appeal, the appellant appeared in person via a virtual link from Songea Prison to prosecute his appeal while Mr. Ofmedy Mtenga, learned Senior State Attorney, represented the Republic.

The appellant adopted his grounds of appeal and urged us to allow his appeal and set him at liberty. He, then, opted to let the Republic address his appeal subject to his right to rejoin should need arise.

On his part, Mr. Mtenga firmly opposed the appeal, contending that the appellant, having been convicted on his own plea of guilty, had no right of appeal against the conviction as stipulated by section 360 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) (the "CPA"). To buttress his proposition, he relied on the recent decision of the Court in **Robert N. Mbwilo v. Republic**, Criminal Appeal No. 154 of 2017 (unreported).

Addressing the complaint in the first ground above, he argued that both the statement and the particulars of the charged offence were flawless and that the appellant was sufficiently notified of the offence he faced. As regards the complaint that the charge was read over in a language the appellant did not understand, he countered that, as shown at page 2 of the record of appeal nothing of the sort was raised during arraignment or when the facts of the case were read out.

As regards the grievance that the appellant's plea of guilty was not unequivocal, the learned Senior State Attorney took us through pages 3 and 4 of the record and contended that the facts of the case as narrated by the Public Prosecutor following the appellant's plea of guilty, which the appellant admitted unreservedly, sufficiently established the ingredients of the charged offence. To underline this point, he argued that the appellant admitted to have led police officers, an agriculture officer and a Ward Executive Officer to his farm where he had cultivated the aforesaid prohibited plant.

Addressing us on the impugned cautioned statement attributed to the appellant (Exhibit P.1), Mr. Mtenga conceded that it was wrongly admitted without the appellant being asked to say if he had any objection to its admission and that even after being improperly admitted its contents were

not read out. He urged us to expunge the exhibit from the record. When probed on the validity of the rest of the documents and objects admitted along with Exhibit P.1, Mr. Mtenga acknowledged that Exhibits P.2 – P.6 were liable to be expunged on account of the same infraction. However, he contended that the expungement of the exhibits would not be fatal to the appellant's conviction as it was founded upon his unequivocal plea of guilty. Finally, on the contention that the charged offence was not established, Mr. Mtenga submitted that as the appellant was convicted upon his own unequivocal plea of guilty, there was no need of proof. Concluding, Mr. Mtenga urged us to dismiss the appeal.

The appellant had little to say in rejoinder except that he reiterated his plea that his appeal be allowed and that he be released from prison.

Having heard the submissions from both sides, we wish to observe, at the outset, that we agree with Mr. Mtenga that the general rule made under section 360 (1) of the CPA bars allowance of an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence. That provision states that:

> *"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, we are keenly aware that an appeal against conviction may be entertained notwithstanding the plea of guilty as stated by the High Court (Samatta, J. as he then was) in **Laurence Mpinga v. Republic** [1983] TLR 166, a decision which has been cited by the Court with approval on many occasions. In that case, at page 168 of the report, it was held that:

"Such an accused person may challenge the conviction on any of the following grounds:

1. that, even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty;

2. that he pleaded guilty as a result of mistake or misapprehension;

3. that the charge laid at his door disclosed no offence known to law; and,

4. that upon the admitted facts he could not in law have been convicted of the offence charged."

Looking at the grounds of complaint raised by the appeal, we note that the appellant attempted to fit his quest within the parameters of the

principle stated in the above case. However, we would hasten to say that the second ground of appeal as we enumerated earlier is a new ground and, therefore, cannot be entertained by the Court. It is settled that the Court will generally not look at issues or matters that were neither raised nor decided either by the trial or the High Court on appeal unless they were pure matters of law – see **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015; **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 and **Abeid Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (all unreported).

For the sake of argument, we would add that apart from that complaint being plainly an afterthought as the appellant had obviously no good cause to raise the matter so belatedly, it flies in the face of the record of appeal, which leaves no doubt that the appellant understood not just the charge that was read over and explained to him but the proceedings that followed.

The foregoing leads us to deal with the first complaint that the charge was defective for failure to disclose any offence. On this grievance, we are inclined to agree with Mr. Mtenga that the statement and the particulars of the offence charged were essentially faultless and that the appellant was sufficiently notified that he faced the offence of cultivating a

prohibited plant, namely, *cannabis sativa*. In compliance with the requirement of section 135 of the CPA on the mode of charging, the charge was laid under section 11 (1) (a) and (c) of the Act and that it was stated, with sufficient particularity, that the appellant was found cultivating the prohibited plant in his farm at Masoko village. Admittedly, the charging provisions appear to have been erroneously stated as "section 11 (1) & (a) C" of the Act but we think this was an innocuous typographical error that did not occasion any failure of justice, hence curable under the provisions of section 388 (1) of the CPA – see, for instance, **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported). Looking at the appellant's plea to the charge, the narrated facts of the case and his admission of the truthfulness of the said facts, we take the view that the appellant appreciated the charged offence and its seriousness. The first ground of appeal fails.

Next, we deal with the contention that the appellant's plea of guilty was equivocal. As we indicated earlier, the appellant pleaded to the charge after it was read over and explained to him that "*It is true I was found cultivating cannabis sativa plants.*" Also, we showed earlier that his response as to whether the narrated facts of the case were true or not was, "*I have heard the facts of the case as given by the PP. That*

statement is truth." Having scrutinized the facts of the case, we entertain no doubt that the said narrative sufficiently disclosed the essence of the charged offence, that the appellant was found cultivating *cannabis sativa* plant in his farm at Masoko village, the said plant being a prohibited plant. Bearing that in mind and that the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said narrative, we find without demur that he was rightly convicted as his plea was unequivocal and unmistakable. The ground of appeal at hand is bereft of merit. It fails.

As conceded by Mr. Mtenga to the complaint in the fourth ground of appeal, rightly so in our view, the cautioned statement (Exhibit P.1) was improperly admitted just as was the case with the other five exhibits (Exhibits P.2 – P.6), rendering all of them liable to be expunged. That was so because none of them was cleared before admission and that the contents of the documentary exhibits were not read out, leaving the appellant oblivious of the substance thereof. The pertinent question then is the effect of the expungement of the exhibits on the appellant's conviction.

It was Mr. Mtenga's submission that expungement would not be fatal. We agree. The absence of the said documents and the objects including the *cannabis sativa* that was extracted from the appellant's farm

(Exhibit P.5) has no effect on the unequivocality of the appellant's plea. That is so because, as we held in **Matia Barua v. Republic**, Criminal Appeal No. 105 of 2015 (unreported) that the tendering and admission of an object or a document as an exhibit after an accused person has pleaded guilty to the charged offence is not a legal requirement though it is desirable to do so. See also **Frank s/o Mlyuka v. Republic**, Criminal Appeal No. 404 of 2018 (unreported) in which **Matia Barua** (*supra*) was referred to. As long as the appellant pleaded guilty and then admitted the facts of the case that disclosed all the elements of the charged offence, his plea would be considered unequivocal. Inevitably, we find the fourth ground of appeal without merit. It stands dismissed.

The contention in the final ground of appeal that the charged offence was not proven is evidently beside the point. We accept Mr. Mtenga's submission that there was no need of proof as the appellant's conviction was soundly based upon his own unequivocal plea of guilty. Indeed, the applicable procedure when an accused person pleads guilty to a charged offence, as stated in numerous decisions of the Court, involves no production of proof of the charge but a procedure for ascertaining if the appellant's plea is unequivocal – see the leading case of **Adan v. Republic** [1973] EA 445 decided by the Court of Appeal for East Africa. See also this

Court's decisions in **John Faya v. Republic**, Criminal Appeal No. 198 of 2007; and **Constantine Deus @ Ndinjai v. Republic**, Criminal Appeal No. 54 of 2010 (both unreported). The fifth ground of appeal is unmerited. It falls by the wayside.

The above said, we find the appeal without a semblance of merit. We dismiss it in its entirety.

DATED at **MBEYA** this 27th day of November, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgement delivered this 27th day of November, 2020 in the presence of the appellants in person through Video facility and Ms. Sara Rumanywa, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL