IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 91 OF 2019

(Appeal from the decision of the District Court of Mbarali at Rujewa in Criminal Case No. 135 of 2019)

ELIDA VALENTINO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order : 12/05/2020
Date of Judgement: 22/06/2020

MONGELLA, J.

Elina Valentino, was charged under section 15 (A) (1) (2) (c) of the Drugs Control and Enforcement Act, No. 15 of 2017 read together with regulation No. 3 (1) (a) of the Drugs Control and Enforcement (General) Regulations of 2016 providing for the offence of unlawful possession of cannabis sativa. The facts of the case are to the effect that on 14th June 2019 at 19:00 hours at Madandas area within the District of Mbarali, in Mbeya Region, Elina was arrested by DC Jamila while selling marijuana. Upon being searched she was found in possession of 74 rolls of cannabis sativa weighing 74 grams. She was arrested and taken to Rujewa Police Station for interview and later arraigned at Mbarali District court. She

pleaded guilty to the offence and was therefore convicted and sentenced to 30 years imprisonment. Disgruntled by this decision she has now appealed to this Court on the following grounds:

1. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant without explaining to the appellant the nature and ingredients of the offence during plea taking thus causing injustice to the appellant.*

2. *That trial Magistrate erred in law and fact by convicting and sentencing the appellant relying on the statement "It is true that I was found in possession of bhang, I was selling it to customers." Therefore the appellant's plea does not subject her into punishment.*

3. *That the trial Magistrate erred in law and fact by entertaining the matter in favour of the respondent while the prosecution side failed to prove the case beyond reasonable doubt.*

4. *That the trial court erred in law by entertaining the matter in favour of the respondent by relying on a defective charge.*

5. *That the trial court erred in law and fact by convicting and sentencing the appellant by relying on the statement adduced by the appellant who stated that "It is true that I was found in possession of bhang, I was selling it to customers." Without considering that the charge facing the accused stated that "the accused stands charged with the offence of unlawful possession of cannabis sativa c/s 15 (A) (1) (2) (C) of the Drugs Control and*

Enforcement Act No. 15 of 2017 read together with regulation No. 3 (1) (a) of the Drugs Control and Enforcement (General) Regulations of 2016.

6. *That the trial court erred in law by adjudicating the offence of unlawfully found in possession of cannabis sativa, 74 rolls weighing 74 grams while the court had no jurisdiction to entertain the matter.*

During the hearing which was conducted through virtual court, the appellant prayed for her grounds of appeal to be adopted as her submission. The respondent, who was represented by Mr. Shindai Michael, learned State Attorney, prayed to reply on the grounds of appeal by written submission. The appellant did not object to the prayer as she said she won't be having any submission in rejoinder.

In the written submission timely filed in this Court, the respondent vehemently opposed the appeal. He started by replying collectively on ground one and four. He argued that the charge read over to the appellant was valid and lawful. He said that the said charge was prepared under the provision of section 15A (1) (2) and (C) of the Drugs Control and Enforcement Act No. 15 of 2017 which creates the offence in which the appellant was charged. He contended that the charge was sufficient as it contained a specific statement of the specific offence and that the particulars gave enough information to the appellant as to the nature of the offence charged as directed under section 132 of the Criminal Procedure Act, Cap 20 R.E. 2002. He as well cited the case of ***Mussa Mwaikunda v. Republic*** [2006] TLR 387. He argued further that the

substance of the charge was also read and explained to the appellant as per section 228 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002. He contended that the appellant understood the nature of the charge facing her and entered plea of guilty when asked by the trial court to plead.

The respondent replied collectively to ground two and five. He argued that the plea entered by the appellant was clear and left no ambiguity. That it was unequivocal. He contended that the plea came from the appellant's understanding of the nature of the allegation she was facing. He said that following the plea of guilt the trail court had nothing to do than complying with the legal procedures under the provisions of section 228 (1) and (2) of the Criminal Procedure Act by proceeding to convict and sentence her. He argued further that if it appears to this Court that the plea was equivocal, the remedy available is remit the file to the trial court for the appellant to enter plea as provided in the case of ***Ngasa Madina v. Republic***, Criminal Appeal No. 151 of 2005 (CAT at Mwanza, unreported).

On the third ground, the appellant argued that the ground lacks merit as the appellant was convicted and sentenced on her own plea of guilty and the prosecution neither brought witnesses nor tendered exhibits in court to prove the charge. He argued that the case at hand does not fall under section 110 (1) and (2), 111, and 112 of the Law of Evidence Act, Cap 6 R.E. 2019 which require allegations against the accused person to be proved on each and every count he is charged with. He added that

the situation on this case falls under section 228 (2) of the Criminal Procedure Act.

On ground six, the respondent submitted that the offence charged under section 15A (1) (2) (C) of the Drugs Control and Enforcement Act No. 15 of 2017 falls within the jurisdiction of the trial court. He referred to section 2 (b) (i) of the same Act which provides that in case the narcotic drug or psychotropic substance stated in the charge is not more than two hundred grams the court for the purpose of hearing the case will be the subordinate court. He added that the amount of narcotic drugs involved in the case at hand is 74 grams thus falling within the jurisdiction of the trial court. With this submission, he prayed for the appeal to be dismissed.

I have considered the appellant's grounds of appeal and the respondent's submission in reply to the grounds of appeal. From the record, it is clear that the appellant was convicted on her own plea of guilty to the charge. Generally a person convicted on his own plea of guilty is not allowed to appeal unless the appeal is against the sentence imposed. This position is settled under section 360 (1) of the Criminal Procedure Act. It was also reiterated by the Court of Appeal (CAT) in the case of ***Said Mamboleo Sanda v. The Republic***, Criminal Appeal No. 25 of 2008 (CAT at Dodoma, unreported) to the effect that:

> *"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such a plea by a subordinate court except as to the extent or legality of the sentence."*

In the matter at hand, the appellant, though convicted on her own plea of guilty has appealed on grounds generally disputing the plea entered by her in the trial court. Basically under grounds one, two and five, the appellant claims that the plea entered by her is not related to the charged offence. She also claims that the ingredients of the offence were not explained to her to enable her enter plea. In other words it can be said that the appellant claims that the plea was equivocal. The issue regarding equivocal/unequivocal plea was underscored by the CAT in the case of ***Baraka Lazaro v. The Republic***, Criminal Appela No. 24 of 2016 (CAT at Bukoba, unreported) whereby it was held:

> *"Where a conviction proceeds in a plea of guilty, we have in mind what was stated in the case of* ***Yonasan Egalu & 3 Others v. Rex*** *(1942-1943) IX-X E.A.C.A. 65. It was held in that case as follows:-*
>
> > *"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 a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."*

From the above settled position, the trial court has to be certain that the accused understood the contents of the charge before it enters plea of

guilty. In the matter at hand, the records indicate that the charge was read over and explained to the appellant. She pleaded guilty to the charge as follows:

> *"It is true that I was found in possession of bhang, I was selling it to the customers."*

On the fifth ground of appeal, she claims that the plea was not related to the charged offence and on ground four she argued that the charge was defective. The statement and particulars of offence in the charge read as follows:

> *"**STATEMENT OF OFFENCE***
> *Unlawful possession of cannabis sativa c/s 15 (A) (1) (2) (C) of the Drugs Control and Enforcement Act No. 15 of 2017 read together with regulation 3 (1) (a) of the Drugs Control and Enforcement (general) Regulations of 2016.*
>
> ***PARTICULARS OF OFFENCE***
> *That ELIDA d/o Valentino charged in 14th day of June 2019 at about 19:00hrs at Madandasi within Mbarali District in Mbeya Region was found in unlawful possession of cannabis sativa weight 74 grams."*

From the above quotation, the appellant was charged with possession of 74 grams of cannabis sativa. She was charged under section15A (1) (2) (C) of the Drugs Control and Enforcement Act No. 15 of 2017 read together with regulation 3 (1) (a) of the Drugs Control and Enforcement (general) Regulations of 2016. I thus find it imperative to scrutinize the provisions under which the appellant was charged. Section 15A (1) (2) (C)

of the Drugs Control and Enforcement Act No. 15 of 2017 provides as follows:

> *"15A (1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects of substances used in the process of manufacturing drugs of the quantity specified under this section commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.*
>
> *(2) For purposes of this section a person commits an offence under subsection (1) if such person traffics in*
>
> *(c)Cannabis or Khat weighing not more than fifty kilogram."*

Regulation 3 (1) (a) of the Drugs Control and Enforcement (general) Regulations of 2016 provides:

> *"3 (1) Subject to section 17 (3) of the Act, the following quantity of narcotic drugs and psychotropic substances shall be treated as small quantity:*
>
> *(a) Cannabis that does not exceed 50 grams."*

Considering the above provisions, I agree with the appellant that the charge was defective. I say so taking into account the fact that the allegations in the particulars of offence in the charge mention the amount to be 74 grams. Section 15A (1) (2) (c) of the Drugs Control and Enforcement Act No. 15 of 2017 provides for cannabis weighing not more than 50 kilograms. On the other hand regulation 3 (1) (a) of the Drugs Control and Enforcement (General) Regulations of 2016 provides for small

quantity of cannabis weighing **not more than 50 grams**. In my settled opinion, these two provisions of the law that were used to formulate the charge provide for distinct offences. However, the charge indicates that the offence facing the appellant is established under these two provisions, thus defective. Under the circumstances, I find the appellant's contention under grounds two and five in the petition of appeal that her plea was not related to the charged offence having merit.

To this juncture, I find what I have deliberated on being sufficient to dispose of the whole appeal and thus shall not deal with the remaining grounds of appeal. After finding the charge being defective, I quash the proceedings and judgment of the trial court and order for immediate release of the appellant from prison custody unless held for some other lawful cause.

Appeal allowed.

Dated at Mbeya on this 22nd day of June 2020

L. M. MONGELLA
JUDGE

Court: Judgment delivered at Mbeya through virtual court on this 22nd day of June 2020 in the presence of the appellant, and Mr. Shindai Michael, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE