IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
HC.CRIMINAL APPEAL NO.47 OF 2020

(Arising from Judgment of the District Court of Bukombe in Criminal Case No. 70 of 2018)

KUSEKWA S/O MISINZO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last order: 23.04.2020

Judgment date: 29.04.2020

A.Z. MGEYEKWA, J

The appellant, KUSEKWA S/O MISINZO was convicted on his own plea of guilty in Criminal Case No. 70 of 2018 in the District Court of Bukombe. The prosecution alleged that on the 27th day of March, 2018 at about 15:30 hrs at Ituga Village within Bukombe District in Geita Region the appellant was found

cultivating prohibited plants to wit, 52 cannabis plant commonly known as bhangi..

The trial Magistrate was satisfied that the plea of the appellant was unequivocal and that the facts constitute the offence as charged. He was convicted on his own plea of guilty and was sentenced to serve 30 years imprisonment. Hence, the appellant has come to this Court on the first appeal.

The appeal was called for hearing, the hearing was done through audio Teleconference whereas the appellant was on air and Ms. Fyregete, learned Senior State Attorney was also on air representing the respondent.

The appellant has raised six grounds of appeal in his memorandum of appeal as stated hereunder:-

1. *That, the trial Magistrate grossly and incurably erred in law and facts for failure to give the Appellant a chance to plea on the facts elaborated by the prosecutor.*

2. *That, the trial Magistrate erred both in law and facts to convict the Appellant basing on equivocal plea of guilty which is not clear and full ambiguities to the Appellant.*

3. *That, the constituents of the charge as alleged by the trial Magistrate to be the key of plea of guilty to the Appellant*

were not explained and elaborated enough to the Appellant who was a layman in matters of law.

4. *That, the trial Magistrate wrongly convicted the appellant without elaborating to the Appellant all facts of the case and asks him whether is true or not.*

5. *That, the caution statement Exhibit PE 1 was wrongly introduced and illegally admitted in evidence to implicate Appellant in committing an offence.*

6. *That, the 52 plants which commonly known as bhangi alleged to be find by Appellant were not tendered in Court as Exhibit.*

7. *That, the facts of the case which the trial Court used as the plea of guilty by Appellant were doubtful, unreliable and inconsistent to implicate Appellant to be convicted on his plea of guilty.*

The appellant allowed this court to proceed *exparte*, he prays for this court to adopt his grounds of appeal and do justice.

The learned Senior State Attorney supported the appeal. She opted to combine and argue all grounds of appeal together since all grounds are based on a plea of the appellant. She stated that the appellant was convicted for his own plea of guilty in the offence of unlawful cultivation of prohibited plants c/s 11 (1) (a) which reads together with the First Schedule of the Drug Control and Enforcement Act No. 5 of 2015. Ms. Fyeregete submitted that the appellant's pleaded

"It is true" and the court entered a plea of guilty. She went on to submit that the facts were read over that the appellant planted 52 plants of bhangi then a cautioned statement was tendered and admitted as an exhibit.

Ms. Fyeregete further stated that based on what transpired before the trial court it is vivid that the plea was equivocal because the appellant's plea was not elaborative thus the facts of the case were required to narrate the content of the charge and even the 52 plants of bhangi were not tendered in court the same could support the facts of the case which were not well elaborated.

It was her further submission that the cautioned statement was not read over thus it was difficult to know if the appellant's understood the facts of the case. "it is true". She stated that

In conclusion, the learned Senior State Attorney urged this court to quash the proceedings and order retrial to allow parties to be heard on merit.

I find it appropriate to travel through the record and see what transpired in the District Court of Bukombe. On 29th August, 2018, and this what transpired:-

Prosecutor: Matter comes for substituting a charge to add the accused to the charge.

" it is true"

Court: *Plea of guilty is entered.*

Fact:

The name of the 2nd accused is per the sheet.

That on 27.03.2018 at 9:30 pm the accused was at Ituga Bukombe, Geita

On 27.03.2018 the same time, place unlawful was found with 52 plants which commonly known as bhangi.

On 25.08.2019 the accused was arrested to Bukombe Police.

On 25. 08.2019 at 7 pm, the accused was interviewed and his statement was recorded by E. 5179 DCPL Gozibert when the accused admits to committing the offence.

Thereafter the court entered the plea of guilty and the prosecution prayed to tendered the cautioned statement as an exhibit.

Accused: No objection.

Court: Cautioned statement of the accused Kusekwa Misonzo is admitted and marked as P1.

Accused: I admit the facts by the prosecution to be true to the best of my knowledge.

Then, the trial Magistrate proceeded to convict the appellant on its own plea of guilty and sentenced him for thirty years imprisonment and twelve strokes of canes for the offence of a gang armed robbery. In my view, the court went into error, for not asking the appellant if he admitted the cautioned statement, for not reading over the cautioned statement, the court had to read over to him to ascertain him with the content of the caution statement.

Following the court records it was not recorded if the appellant pleaded, it was supposed to be recorded as follows:-

Accused: " It is true" instead of recording mere words " It is true"

Moreover as pointed out by the learned Senior State Attorney the plea of the accused was incomplete because the accused statement was not recorded in the words he uses. Section 228 of the Criminal Procedure Act, Cap.16 provides that:-

" 288 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person ***admits the truth of the charge****, his admission shall be recorded as nearly as possible in the words he uses and the Magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary." [Emphasis added].*

Having closely examined the record, I have found that the expression, "It is true", used by the appellant after the charge was read to him was insufficient for the trial court to have been unambiguously informed the appellant's clear admission of the truth of its contents. Taking to account that the facts of the case did not reveal all the content of the charge and the cautioned statement was not read over. In the circumstances arising, it is doubtful whether that expression by itself, without any further elaboration by the appellant constituted a cogent admission of the truth of the charge.

It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged. Consequently, for a plea to be equivocal the accused must add to the plea of guilty a qualification which, if

true, may show that he is not guilty of the offence charged, as it was observed in the case of **Josephat James v R** Criminal Appeal No. 316 of 2010, which was delivered in 2012, the Court of Appeal of Tanzania observed that:-

> *" We entirely subscribe to that view.* ***I the instant case, the trial court was enjoined to seek an additional explanation from the appellant, not only what he considered was " correct" in the charge, but also what was it that he was admitted as the truth therein. With respect, the trial Court was not entitled by the answer given, " it is correct****", to distill that it amounted to an admission of the truth of all the facts constituting the offence charged." [Emphasis added].*

Similarly, in the case of Safari **Deemay's v R** Criminal Appeal No, 269 of 2011 (unreported) Court of Appeal of Tanzania held that:-

> *"Great care must be exercised, especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment.* ***We are also of the settled view that it would be more ideal for an appellant who has pleaded guilty to say more than just, "it is true". A trial court should ask an accused to elaborate, in his own words as to what he is saying " is true".*** *[Emphasis added].*

Guided by the above authorities, the mere words "It is true" were hardly sufficient to have conclusively assured the trial court of admission of the truth of the charge in terms of the requirement of section 228 (2) of the Criminal Procedure Act, Cap. 20 [R.E 2019]. Additionally, the recording of the plea of guilty was un-procedural and the facts of the case did not reflect the contents stated in the charge.

Now where the court is satisfied that the conviction was based on an equivocal plea, the court may order retrial as held in the case of **Baraka Lazaro v Republic** Criminal Appeal No. 24 of 2016 CAT Bukoba (unreported) and B.D Chipeta (as he then was) in his book Magistrate Manual stated at page 31 that:

> " *Where a magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon on appeal the conviction will almost certainly be quashed and in a proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction.*"

For those reasons, therefore, having found the original trial was defective since the accused plea was equivocal, I hereby allow the appeal. In the end, I nullify the whole proceedings with respect to Criminal Case No.47 of 2020, I quash the conviction on the purported plea of guilty, and set aside the

sentence. I order the case be remitted to the trial court for the appellant to plea afresh and the matter to proceed in accordance with the law. I direct, the hearing of this case to end within one year from the date of the decision of this court, and in the interest of justice, the period that the appellant has so far served in prison should be taken into account.

The appellant shall in the meantime, remain in custody to await his trial.

Order accordingly.

DATED at Mwanza this 29th April, 2020.

A.Z MGEYEKWA

JUDGE

29.04.2020

Judgment delivered in Court Chambers on 29th April, 2020 through audio teleconference and both parties were on air.

HIGH COURT OF TANZANIA MWANZA

A.Z MGEYEKWA

JUDGE

29.04.2020