

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

CRIMINAL APPEAL NO. 37 OF 2021

(Original Criminal Case No. 13 of 2021 of the District Court of Ilemela District at Mwanza)

EMMANUEL SWEETBERTAPPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last order: 04/08/2021

Date of Judgement: 13/08/2021

F. K. MANYANDA, J.

The Appellant was charged with two counts of offences under the Drugs Control and Enforcement Act. In the first count he was charged with Illicit Trafficking of Nacortic Drug contrary to section 15A and (2)(C) of the Drugs, Control and Enforcement Act, [Cap. 95 R. E. 2019].

In the second count he was charged together with Gamaliel Hans Mkwaro with the offence of unlawful consumption of nacortic drug, Contrary to section 18(a) of the Drug Control and Enforcement Act, [Cap. 95 R. E. 2019].

The particular of offence in the first count state that Emmanuel Sweetbert on 11/01/2021 at Nyasaka-Msumbiji area within Ilemela District in the City and Region of Mwanza was found in unlawful possession of 1362.53 grams of Nacortic Drugs, commonly known as "Bhangi"

The particulars of offence in the second count state that Emmanuel Sweetbert and Gomaliel Hans Mkaro on the same 11/01/2021 at Nyansaka-Msumbiji area within Ilemela District in the City and Region of Mwanza unlawful consumed Nacortic Drugs commonly known as "Bhang."

When the charge was read over and explained to him he is recorded to have pleaded in respect of the first count.

"Ni kweli nilikutwa na "bangi" literally means it is true I was found in possession of bhang.

He was recorded in respect of the second count as follows:-

Ni kweli nilikutwa natumia "bangi." Literally means it is true that I was found consuming bhang. The second accused who was charged with only the second count pleaded not guilty and has not appealed.

The trial Court entered a plea of guilty against the Appellant in both counts. When the facts were outlined to him, he agreed all were true. The trial court went on convicting him on his own plea of guilty. It sentenced him to a term of 30 years imprisonment in respect of the first count and 3 years imprisonment in respect of the second count or pay fine of Tsh 1,000,000/=. He could not pay the fine, therefore he was put behind the bars.

When in prison upon and reflection, he chose to try his lucky by appealing to this Court.

He lodged his appeal with four (4) grounds, namely:-

- 1. That, as the facts do not support the charge of unlawful trafficking of narcotic drug, equally, the conviction and sentence of thirty (30) years in jail has no legal stand, but the trial Court overlooked this fact.*

2. *That, the so called admitted facts were wrong and improcedural (sic) taken/recorded as cumulatively rather than in a separate manner as each fact thus renders the alleged plea of guilt resulted from misapprehension/mistaken of facts;*
3. *That, the conviction was wrongly on plea of guilt which is purely equival (sic) resulted from par functority process (sic) writer (sic) taken during trial.*
4. *That, there is misdescription between the commitment warrant and the concurrent finding/order upon the first and second counts which resulting (sic) difficulties in execution of sentence i. e consecutive sentence executing as a substitute to the concurrent order.*

At the hearing of the appeal he was represented by Ms. Kundi Erica Nyeje, learned Advocate and the Respondent (Republic) was represented by Maryasintha Lazaro, learned Senior State Attorney.

Ms. Kundi argued grounds one and three only, she abandoned grounds two and four. Submitting in support of ground one, Ms. Kundi argued that

the facts narrated by the prosecution do not reveal the first count of offence of illicit trafficking in narcotic drugs. The facts narrated according to the Counsel, were in variance with the charge in the first count. The reason she gave is that while the facts showed possession of bhang, the offence of illicit trafficking in narcotic drugs entail conveying the drugs from point A to B. It was her views that in absence of facts showing that the Appellant conveyed the bhang from one place to another, then the offence in the first count was not established and proved but rather it was the offence in the second count.

In support of ground three of appeal the Counsel submitted that the trial Court was not correct to convict the Appellant on a plea of guilty which was equivocal. She submitted further that the reply by the Appellant when the facts were read and explained to him were equivocal in that the words he used were more than the required. It was her views that the words to be recorded were supposed to be not more than " Ni kweli" true or "sio kweli" it is not true. In this matter the reply recorded were as explained above that "Ni kweli nilikutwa na bangi it is true I was found in possession of bhang; and " Ni kweli nilikutwa natumia bangi." Meaning it is true I was found in possession of bhang. The Counsel argued that these words were not to be

recorded wholesomely, it was required either “ni kweli,” it is true or “si kweli” it is not true.

She cited the case of **Laurent Mkunga vs Republic** [1983] TLR 166 which held *inter alia* that an appeal in plea of guilty conviction is tenable in equivocality of the plea. The learned Counsel also cited the case of **Adam Abdallah Jumanne vs Republic**, Criminal Appeal No. 311 of 2017 (unreported) where it was held *inter alia* that the Court can quash a conviction found on plea of guilty where it is found to be equivocal. She invited this Court to allow the appeal.

On the other hand the Senior State Attorney respondent against ground one of appeal arguing that it is not a position of the law that in order to prove illicit trafficking it must be proved that there was movement of the drug from one place to another.

The Senior State Attorney contended that following amendment of section 2 of the Drug Control and Enforcement Act, now illicit trafficking includes possession of the drug.

Moreover, the Counsel argued that there is no requirement of proving beyond all reasonable doubt, no calling of witnesses or tendering of documents in plea of guilty convictions.

It was her views that the plea was unequivocal she added that section 228(2) of the CPA required the words used by the accused in reply to be recorded as near as possible in wording he uses. There is no limitation to Yes or No of it is true or it is not true for that matter. According to the Counsel, the plea was correctly recorded and the conviction is sound in law. She prayed for dismissal of the appeal.

In rejoinder, the Counsel for the Appellant reiterated her submissions in chief. Those were the submissions of the Counsel from both sides, I recommend for their well researched works which has eased my duty of determining this appeal. The main issue in this appeal is whether it has merit.

As a general rule provided under section 360(1) of the Criminal Procedure Act, (CAP), [Cap. 20 R.E 2019], no appeal is 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. This position of the law was echoed in many cases including the recent case of **Amos Masari vs Republic**, Crim. App No. 280 of 2019 (unreported) in which the Court of Appeal of Tanzania, stated as follows: -

"since the record shows that the appellant was convicted on his own plea of guilty to the charge of armed robbery, in terms of section 360(1) of the CPA, [Cap. 20 R. E. 2019], an appeal only lies to the extent and legality of sentence but not against conviction."

However, there are exceptions to this general rule to which an appeal against the conviction may be tenable, save that such appeal is not as of right, it has to certify some conditions. In the case of **Mohamed Clavery vs Republic**, Criminal Appeal No. 470 of 2017 it was stated that: -

"No appeal against conviction is allowed on an accused's person own plea of guilty as of right."

The exceptions were well spelt in the case of **Emmanuel Ambroas vs Republic**, Criminal Appeal No. 555 of 2017 where the Court of Appeal of Tanzania stated as follows: -

*"An appeal against conviction on a plea of guilty may be entertained under certain circumstances an exception to the general rule. In **Kalos Punda vs Republic**, Criminal App. No. 153 of 2005, the Court cited with approval a decision of the High Court (Samatta, J, as he then was) in **Lawrence Mpinga vs Republic** (1983) TLR 166 where it said:-*

"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/or 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, upon the admitted facts he could not in law have been convicted of the offence charged.

See also the case of **Mtumwa Silima Bonge** vs Republic, Crim. Appeal No. 11 of 2019 and **Charles Samwel Mbise vs Republic**. Crim. Appeal No. 355 of 2019.

The next question is whether the appeal at hand meets the exceptions in the case of **Emmanuel Ambrous (supra)**.

It was argued in support of ground one by Ms. Kundi for the Appellant that the charge in the first count of illicit trafficking in drug that the facts do not establish, that offence because they revealed that the Appellant was found in possession of the drugs commonly known as bhang. The facts do not tell that he was conveying an act which would have amounted to "trafficking"

Ms Maryasintha for the Republic argued that following amendments to section 2 of the Drug Control and Enforcement Act, in 2017, the word "possession" now includes trafficking of drugs.

I have visited the definitions under section 2 of the Drug Control and Enforcement Act, [Cap. 95 R.E 2019] and found the word "trafficking" is defined as follows:-

*"2. trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, **possession**, production, manufacturing, **conveyance**, delivery or distribution by any person of narcotic drug or psychotropic substance or any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer...."*

The definition was visited by this Court in case of **Martin Ike vs Republic**, Miscellaneous Criminal Application No. 58 of 2020 [2020] TZHC 3512 (unreported). Interpreting section 2 of the Drug Control and Enforcement Act as amended by Act No. 15 of 2017 that the word “trafficking” includes “possession” the Court referred to the case of **Haji Mwalami Mkumba and Another vs Republic**, Miscellaneous Criminal Appeal No. 104 of 2020 (unreported) stated as follows:-

"The catch word in the above amendment is the inclusion of the word "possession" in the offence of trafficking, meaning under the new amendment the offence of being found in possession of narcotic drug fall under the definition of trafficking under the law."

The Court went on saying that: -

"For the foregoing reasons I shoulder up with Mr. Msemo's submission that possession is not an independent offence and proceed to dismiss the applicant's contention that the act of possession constitutes an independent offence and it does not mean trafficking."

From the above authorities it is obvious that the word possession is included in our laws dealing with narcotic drug and psychotropic substance

control as one of the categories of trafficking. In other words, the terms "possession" and "conveying" mean one and something both connoting "trafficking."

I have navigated through the facts which were read out and explained to the Appellant, I am satisfied that they established the offence of illicit trafficking of narcotic drug against the Appellant. The facts reveal that on the fateful day 11/10/2021 at 18.00 Hours the Appellant was found in his rented room, consuming bhang. Upon being searched he was found with two pockets with leaves. The said leaves were proved by the Chief Government Chemist to be narcotic drug commonly known as the urine of the Appellant showed that the bhang and the consumed the same.

The facts were wholesomely admitted by the Appellant without any qualifications. The reply by the Appellant was so exhaustive. He stated that:-

"Ni kweli mheshimiwa haya maelezo ni sahihi."

Literally means that it is true your honour these facts are true.

The Counsel for the Appellant in the third ground of appeal attacks this reply as been equivocal because it was supposed to be recorded either “yes” or “no.” to bolster her position, she relied on the case of **Abdallah Jumanne Kambangwa vs Republic**, Criminal Appeal No. 321 of 2017. In that case, Hon. Mruke, J. held the words “Ni kweli nimemchoma mtoto wangu huyo mikono yake” as been equivocal.

In that case the accused responded using those words but it was said that such words were equivocal. Reliance was put on the case of Musas Nuya vs Republic (1962) EACR 643 and the book of B.D Chipeta, Magistrate’s Manual, 3rd Edition, 2010 at page 30 which reads:-

"An equivocal plea simply means an ambiguous or vague plea, that is a plea in which it is not clear whether the accused denies or admits the truth of the charge. Pleas in such term are such as "I admit," "nilikosa" or "that is correct", and the like. Though prima facie, appear to be pleas of guilty, may not necessarily be so. In fact, invariably such pleas are equivocal. It is for this reason that where an accused person replies to the charge in such or similar terms, facts must be given and accused asked to deny or admits them. Only by doing so can a magistrate be certain that the accused's plea is one of "not guilty" or "unequivocal plea of guilty."

It is trite law that each case is determined on its own circumstances. In **Abdallah Jumanne Kambangwa's case (supra)** the record were silent whether facts were narrated by the prosecutor after the trial Magistrate entering a plea of guilty. Hence, the Hon. Mruke, J, reliance on the excerpt from B. D. Chipeta's book which basically insists on narration of facts in order for the trial Magistrate to satisfy himself or herself whether the plea is unequivocal.

The circumstances obtaining in the current appeal are different from **Abadallah Jumanne Kambangwa's case (supra)** because in this appeal the facts were given. The Appellant accepted them as true without any qualification.

This Court has already explained above that the facts discloses the offences the Appellant was charged with. The plea is unequivocal.

Moreover, section 228(2) of the CPA require the trial Magistrate to record the admission of the accused who pleads guilty as nearly as possible in the words he uses.

In this appeal, the trial Magistrate recorded the admission by the Appellant in the words used.

This Court fails to fault the trial Court, it rightly found that the plea of guilty was unequivocal and rightly convicted the Appellant. The sentence given is in accordance with the law and no complaint against it was lodged.

In the upshot, on reasons stated above, I find this appeal lacking merit, Consequently, I do hereby dismiss this appeal in its entirety. Order accordingly.




F. K. MANYANDA

JUDGE

13/08/2021