IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 113 OF 2021

(Arising from a decision of District Court of Ilala in Criminal Case No. 586 of 2020 dated 30th November,2020 Hon. Luvinga - RM)

RAHIM HUSSEIN ATHUMAN.....1ST APPELLANT

FRANK MWENDWA.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th March, 2022 & 1st April, 2022

E.E KAKOLAKI, J.

Before the District Court of Ilala in Criminal Case No.586 of 2020, the appellants herein Rahim Hussein Athuman and Frank Mwendwa were charged, convicted and sentenced to custodial sentence of 30 years basing on their own pleas of guilty. They both stood charged with Unlawful Possession of Prohibited Plant; Contrary to section 11(1)(d) of the Drugs Control and Enforcement Act [Cap 95 R.E 2019] herein referred to as DCEA. Aggrieved with both conviction and sentence the appellants preferred this appeal armed with four grounds of appeal going thus:

1. That the learned trial magistrate erred in both law and facts by convicting the appellants based on their own plea of guilty which was not unequivocal.
2. That the learned trial magistrate erred in both law and fact by treating that the admitted fact and their plea as plea of guilty.
3. That the learned trial Magistrate erred in both law and fact by convicting the appellants based on a case that was poorly prosecuted.
4. That the learned trial magistrate erred in both law and fact as a trustee of the court he would have informed the appellants the consequence of plea of guilty they were about to plea.

When the appeal came for hearing both appellants who appeared in person unrepresented prayed the court to proceed with hearing by way of written submissions, the prayer which was supported by Mr. Adolf Kisima, learned State Attorney representing the Respondent. The submissions filing schedule orders were complied with by both parties.

In this judgment I am intending to consider and determine all grounds of appeal if needy be and in chronological orders as argued. To start with the first ground of appeal, it is the appellants' contention that, the trial magistrate erred in both law and fact by convicting them based on their own

plea of guilty which was not unequivocal. They submit that, they were convicted on own plea of guilty which if viewed in legal eyes is an equivocal plea of guilty that cannot stand to sustain conviction. They referred the court to section 228(1) and (2) of the Criminal Procedure Act, [Cap 20 R.E 2019] which provides for the plea taking procedure arguing that, the procedure taken by the trial court during plea taking infracted the provision of section 228(2) of the Criminal Procedure Act, Cap 20 R.E 2019 as the recorded plea "it is true" does not support the fact that, the charge sheet was read to them in swahili language and in their fluent language. They said, the trial court ought to have recorded the words in the language used by accused during their admission of the charge and not English words "It is true" hence a submission that, the substance of the charge was not explained to them before their pleas could be taken as per the requirement of the law. According to them, the said pleas of guilty amounted to equivocal pleas of guilty hence a prayer that, their conviction be quashed for being premised on equivocal pleas. The appellants invited this court to be guided with the decision of this Court in the case of **R Vs.Tarasha** (1970) HCD No.252 where it was held that, the words "it is true" cannot be an unequivocal plea of guilty by itself. Basing on that position of the law it was their submission that, in

this case when the accused replied "it is true" the trial magistrate ought not to have formed an opinion that, they had entered a plea of guilty rather should have gone further to ask them to qualify their pleas so as to satisfy himself that the same were true.

In opposition to the first ground of appeal Mr. Kisima for the Respondent argued that, the ground is without merit, thus the same should be dismissed. He said, it is trite law that, once accused person is convicted on his own plea of guilty the law bars him from appealing against the conviction except as to the extent or legality of the sentence as provided under section 360(1) of the Criminal Procedure Act, [Cap 20 R.E 2019]. On the appellants submission that their pleas of guilty were an equivocal pleas and the allegation that, the trial court did not follow the procedure laid down by section 228(1) and (2) of the CPA to admit them, the learned counsel responded, it is conspicuously indicated in the proceedings that, each appellant pleaded to the charge and said *"it is true"* before the trial court entered a plea of guilty to the extent of their admission. To him the words "it is true" were used for record purposes as required by law under section 13(2)(a) of the Magistrates Court Act, [Cap 11 R.E 2019] which provides that, in courts of Resident Magistrates and District courts the language shall be either English or Swahili or such other

language as determined by the court, but all records and judgments shall be in English. According to him, the charge was read over to the appellants in Swahili language which they understood and used to plead to the charge, and then their pleas recorded by the court in English as required by law.

The respondent counsel submitted further that, even when the matter was adjourned to another date where both appellants were reminded of their charge and asked to plead thereto, still each entered the same plea to the charge and said *"it is true"*. He said, after recording their pleas the trial court went on to ask the prosecution to narrate facts of the case to them one paragraph after another in which all facts were admitted them to be true. It is from that admission the court was satisfied and recorded their pleas as true pleas of guilty and proceeded to convict and sentence them accordingly. He therefore urged the court to dismiss the ground.

Appellants in their brief rejoinder resisted respondent's contention that, since their conviction is premised on their own pleas of guilty then were barred from appealing against it. They impressed upon the court that, that is a general rule which is not free from exceptions, basing on the circumstances of each case as listed in the case of **Laurence Mpinga Vs. R** [1983] TLR 166 which is also referred in the case of **Safari Deemay Vs. R**, Criminal

Appeal No. 269 of 2011 (CAT-unreported). They argued, since the essential ingredients of the offence were not explained to them by the trial court before recording their pleas as per the requirement of section 128 of the CPA, their recorded pleas in the words ”it is true” cannot be considered to be unequivocal as submitted by the respondent. They were therefore insistent that, the ground has merit and this court is bound to so find and proceed to allow the appeal on the strength of their submission.

I have taken time to peruse the trial court's record as well as consider the rival submissions from both parties on the merit or otherwise of this ground of appeal. Before proceeding into determination of its merit, I wish to state from the outset that, I fully subscribe to Mr. Kisima’s proposition that, generally section 360 (1) of the CPA bars appeals on convictions premised on party’s own plea of guilty except as to the extent or legality of the sentence imposed. For easy of reference, I find it useful to reproduce the content of section 360 (1) as hereunder do:

> *“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”.*

In similar vein I am not feeling wary to subscribe to the Appellant's submission that, restriction of appeal on conviction premised on plea of guilty under the provision of section 360 (1) of the Act is the general rule not free from exceptions particularly after taking into consideration the circumstances of each case under which the alleged plea of guilty, conviction and sentence were obtained. In the case of **Kalos Punda Vs. Republic,** Criminal Appeal No. 153 of 2005 (CAT-unreported), the Court cited with approval the decision of **Lawrence Mpinga Vs. Republic** (1980) TLR 166 where Samatta, J. (as he then was) that described the circumstances under which an appeal whose conviction resulted from a plea of guilty can be entertained. The Court referred them as follows:

> *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."

In light of the above position of the law which I subscribe to, it is in the opinion of this court that, section 360(1) of CPA which stands as an estoppel to the appellant challenging the conviction resulted from his own plea of guilty, can only apply when it is established that the plea was unequivocal, meaning the same was unambiguous or finished and not otherwise. And further that, where there is compliance of the provisions of section 128(1) and (2) of the CPA to the letters.

Now turning to the merit or otherwise of the appeal at hand, it is uncontroverted fact that, the charge in which the appellants' conviction and sentence is premised is none than the offence of Unlawful Possession of Prohibited Plant. For better understanding and appreciation of the parties' arguments, I find it worthy to quote part of the said charge as well as the provision of the law involved as I hereby do:

The statement of offence and particulars of offence read that:

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF PROHIBITED PLANT*; Contrary to section 11(1)(2) of the Drug Control and Enforcement Act, [Cap. 95 R.E 2019]*

PARTICULARS OF OFFENCE

Rahim Hussein Athuman *and* ***Frank Mwenda****, on 17th day of October, 2020 at Kariakoo Sokoni area within Ilala District in Dar es salaam Region, was* ***found in possession of prohibited plants of Narcotic drugs namely Cannabis Sativa*** *commonly known as* ***"Bhangi" weighing 78.67 grams****.*

Dated at Dar es Salaam this 27th day of November 2020

Sgd:

STATE ATTORNEY

And section 11(1)(d) of the DCEA as cited in the charge provides that:

> *11.- (1) Any person who-*
> *(a) N/A.*
> *(b) N/A.*
> *(c) N/A.*
> *(d) produces,* ***possesses****, sells, purchases, transports, imports into Mainland Tanzania, exports, use or does any act or omits to do anything in respect of* ***prohibited plants*** *which act or omission amounting to contravention of the provisions of this Act,*

commits an offence and upon conviction shall be liable to imprisonment for a term of not less than thirty years.

It is further undisputed fact that, when the charge was read over to the appellants on 27/11/2020 both of them entered a plea of guilty to the offence charged with before the procedure for facts reading to them and conviction was adjourned to proceed on the 30/11/2020 on the ground that, on that date of plea taking the prosecution had no exhibits to tender in court to finalise the process. I so view as the record shows at page 3 of the trial court proceedings that, the procedure of plea taking was redone on the 30/11/2020 when the two were reminded of their charges and pleaded thereto. For easy of reference, I reproduce the excerpt from the trial court proceedings of 30/11/2020 as painted at page 3.

30/11/2020

Coram: Hon ***F.E LUVINGA-RM***

PP: Aziza Mhina

CC: Emmy

Accused:1. Present

2. present

Court: Accused persons have been reminded on the charge against them and asked to plead thereto.

Accused plea:

1st Accused: It is true

2nd Accused :It is true

Court; The accused person entered plea of guilty.

Sgd: F.E. Luvinga – RM

30/11/2020″

Again it is undisputed fact that, several exhibits were tendered in court by the prosecution to support the facts which were read over to the appellants and not objected to their admission. These included appellants' cautioned statements, sample submission form DCEA No. 001, Government Laboratory Analyst Report DCEA Form No. 009, seizure certificate Form No. DCEA 003. All these exhibits aimed at proving that, both appellants were found in possession of narcotic substances known as **cannabis Sativa** commonly known as ″bhangi″ weighing 78.67 grams. As per DCEA Form No. 001 and No. 009 what was found in possession of the appellants, submitted to and received by Chief Government Laboratory Authority for test, were dried leaves which after test were confirmed to be narcotic drugs namely cannabis

sativa commonly known as Bhangi with Tetahydrocannabinol (THC) chemical.

The appellants in this matter are faulting the trial court to convict them submitting that, it contravened the provision of section 228(1) and (2) CPA when failed to explain to them the ingredients of the offence before they were called to enter their pleas hence equivocal pleas, the submission which is resisted by the respondent's counsel arguing that, the procedure was complied with to the letter. This court having revisited the said provision of the law, finds it prudent to reproduce the same for the purposes of clarity. Section 228 provides that:

> *228.-(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) Where 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.*

My interpretation of the provision of section 228(1) of CPA is that, before the accused person is called to enter his plea to any criminal charge, the trial

court is duty bound to state or explain to him the substance of the charge in detail so as to elicit the true and unequivocal plea from him when pleading to the said charge. The above stance finds refuge from the Court of Appeal decision in **John Faya Vs. R**, Criminal Appeal No. 198 of 2007 (CAT-unreported), that quoted with approval the case of **Rex Vs. Yonasani Egalu and Others** (1942) EACA 65 at Page 67, which laid down the procedure to be followed by the court of law in case the plea of guilty is entered by the accused person. It was observed by the Court that:

> *"In any case in which a conviction is likely to proceed on a plea of guilty, 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 appellate court that he fully understood the charge and pleaded guilty to every element of it unequivocally."*

In this case as alluded to above appellants were accused of being in unlawful possession of **''prohibited plant''**. The term **''prohibited plant''** is defined under section 2 of the DCEA to mean and include among others plants, **cannabis plant**, khat plant or coca plant. The definition provides:

> *"**prohibited plant**" means **cannabis plant**, khat plant, coca plant, papaver somniferum or opium poppy and papaver setigerum;*

Section 2 of DCEA further defines the term **cannabis plant** as follows:

> *"**cannabis plant**" means **a plant of the genus cannabis** by whatever name called and includes **any part of that plant containing tetrahydro-cannabinol**;*

And the term "**cannabis**" is also defined under section 2 of DCEA as follows:

> *"cannabis" means **any part of the plant of the genus cannabis**, excluding the seeds, the mature stock, or fibre produce from the cannabis plant or cannabis resin; (emphasis added)*

As per the **Collins Dictionary and Thesaurus**, found in www.collinsdisctionary.com the term **plant** is defined to read:

> *"A **plant** is a **living thing** that **grows in the earth** and has a **stem, leaves, and roots**."*

What is gathered from the above definitions is that the term cannabis plant refers to the whole **plant** of **cannabis genus** (class). It is from that understanding and for the purposes of this appeal, I am of the firm views that the term **"prohibited plant"** as referred in the charge facing the appellants referred to nothing other than **cannabis plant or living**

organism/thing that grows in earth, together with its parts such as stem, leaves and roots containing Tetrahydro-cannabinol chemical (THC) and not part of it only such as dried cannabis leaves which is subject of dispute in this matter. In other words the said prohibited plant must be a fresh or living one growing on earth with its stem, leaves and roots. Now with the above definition and finding, the only issue for determination by this court is whether the appellants' pleas to the offence of Unlawful Possession of Prohibited Plant was unequivocal. It is undisputed fact that, as per the exhibits tendered in court jointly as exh. P1 (Chief Government Laboratory Authority Report DCEA Form No. 009, seizure certificate Form No. DCEA 003) as cited above, both appellants were found in possession of cannabis sativa (dried leaves) commonly known as "Bhangi" weighing 78.67 grams. The said cannabis sativa or "bhangi" in my humble opinion is not prohibited plant within the meaning of section 11(1)(d) of DCEA as discussed and found above since were dried cannabis leaves and not fresh/living plant or growing plant with its parts. In other words I would say, the provisions of section 11(1)(d) of DCEA meant to prohibit possession, production, selling, purchasing, transportation, importation and exportation or any act of cultivation of fresh/living or growing plants and not dried parts of plants. I

find that stance to be fully supported by margin notes of the provision of the said section 11(1)(d) of DCEA which provides for prohibition of cultivation of certain plants and substances. That being the position of the law, it was imperative for the trial court to make sure that, the substance of the charge or ingredients of the offence together with the facts are well read and stated or explained to the appellants in conformity with section 128(1) of the CPA, so as to inform them of the nature of the case facing them before were called to plead to the charge. For example the fact that, the prohibited plant in which appellants in this appeal were alleged to have been found in possession of was a fresh/living or growing plant of the genus (class) of cannabis sativa with Tetrahydro-cannabinol chemical (THC) before they were called to enter their pleas, failure of which renders their pleas equivocal. My perusal of the court proceedings has failed to support Mr. Kisima's submission that, the trial court properly discharged this mandatory duty of explaining to the appellants the charge and facts thereto before registering their pleas and proceed to convict them, failure of which rendered the said pleas imperfect for not carrying the essential elements of the offence. Had the trial court explained properly to the appellants the substance of the charge and it every constituent as stated in the case of

John Faya (supra), that, they were accused of being found in possession of prohibited plants and not cannabis sativa (dried cannabis leaves) or Bhangi as the evidence in exhibit P1 collectively provides, I am of the firm view that, the appellants would not have entered the pleas of guilty which is alleged they did. As the pleas entered were rendered incomplete and imperfect for want of explanation of substance of the charge in its every constituent, this court is entitled to entertain their appeal as it has so rightly done since their first ground of appeal falls under the circumstances where the court can entertain the appeal arising from conviction on plea of guilty as stated in the case of **Kalos Punda** (supra) and **Lawrence Mpinga** (supra).

In totality of the foregoing, I agree with the appellants' proposition that, their pleas were ambiguous, incomplete and therefore equivocal due to infraction of the provision of section 128(1) of the CPA and the trial court wrongly convicted them basing on unequivocal pleas. Thus the issue is answered in negative. The first ground of appeal in my opinion suffices to dispose of this appeal, henceforth there is no gain in wasting court's precious time to dwell into discussion of the rest of the grounds as that will is tantamount to academic exercise, which I am not prepared to labour on.

Having been satisfied that the appellants' conviction emanated from equivocal pleas, I allow the appeal and proceed to order that appellants' conviction obtained from the equivocal pleas is hereby quashed and the sentence meted on them set aside.

The last question to be answered is what remedy are the appellants entitled to after quashing their conviction and sentence? The Court of Appeal in the case of **Baraka Lazaro Vs. R**, Criminal Appeal No.24 of 2016 (CAT-unreported), in a situation similar to the presented one quashed conviction and ordered retrial of the appellant's case before another competent magistrate after the trial magistrate had wrongly found him guilty and convicted him basing on an ambiguous or equivocal plea of the charge.

As the circumstances in the above cited case are similar to the present matter, I borrow therefrom the wisdom of the higher Court and proceed to order that, the case against both appellants be remitted to the trial court for them to take a fresh plea and matter to proceed before another competent magistrate in accordance with the law. It is further ordered that, if the new trial leads to conviction, the time spent by the appellants in prison serving the current sentence should be taken into account when passing the sentence. Considering the nature of the case, I direct that the appellants, be

remanded in custody until when taken to the trial court where their right to bail will be considered. Order accordingly.

DATED at Dar es salaam this 01th day of April, 2022.

E. E. KAKOLAKI

JUDGE

01/04/2022.

The Judgment has been delivered at Dar es Salaam today on 01th day of April, 2022 in the presence of both appellants in person, Ms. Beatha Kitau, learned Senior State Attorney for the Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
01/04/2022