IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 71 OF 2021

(Originating from Criminal Case No. 67 of 2021 of the District Court of Mwanga at Mwanga)

FATUMA ELIAS MZAVA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27/6/2022 & 27/7/2022

SIMFUKWE, J.

Before Mwanga District Court, the appellant, Fatuma Elias Mzava was charged with the offence of unlawful trafficking in narcotic drugs contrary to **section 15A (1) and (2)(c) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019.** She was convicted on her own plea of guilty and sentenced to serve thirty (30) years in prison. Dissatisfied, she preferred this appeal.

It was the prosecution's case at the trial that on 6/5/2021 at or about 16:20hrs at Old Mwanga Village within Mwanga District in Kilimanjaro Region, the appellant was found in unlawful possession of 20.50 kilograms of narcotic drugs "khat" commonly known as Mirungi.

During the hearing of this appeal, the appellant was unrepresented while the respondent/Republic was represented by Mr. Rweyemamu, learned

State Attorney. In her amended Memorandum of appeal, the appellant advanced five grounds of appeal as follows:

1. *That the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant basing on an equivocal plea of guilty by the appellant.*
2. *That the learned trial magistrate grossly erred both in law and fact when she failed to be a trustee in law especially when the accused (Now the appellant) is an unrepresented before the court of law. (sic)*
3. *That, the learned trial magistrate grossly erred both in law and fact when she failed to explain to the appellant the danger of pleading guilty to the capital charge.*
4. *That the learned trial magistrate grossly erred both in law and fact in failing to note that the plea of guilty will only be accepted when the accused (now the appellant) had no any defense on the charge facing her.*
5. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that the appellant was induced by Police officers to plea (sic) guilty as option of being acquitted.*

On the first ground of appeal that the trial magistrate grossly erred in law and in fact for convicting the appellant on equivocal plea of guilty, the appellant submitted that the charge against her was not explained to her thus, the magistrate should have not based her conviction on the plea of guilty which was entered mistakenly.

On the 2nd ground of appeal, the appellant faulted the trial magistrate for failure to assist her as required by the law by ensuring that she understood well the offence charged against her. She argued that even her plea would have been based on understanding of the charge against her having in mind the fact that she was unrepresented and lay person. In that regard, the appellant was of the view that the magistrate should have explained to her the impact of her plea of guilty which was not done by the trial magistrate and decided to convict and sentence her on mistaken plea of guilty.

She further submitted that, she was arrested on 6/5/2021 and stayed at the Police Station for six days and later was arraigned before the court on 11/5/2021. That, at the Police Station she was misled by police officers that when arraigned before the court she should plead guilty immediately and that she would be set free. Thus, when she was taken to court without knowing the nature of the offence of which she was charged and the fact that she had stayed at the police station for a long time she pleaded guilty equivocally after being convinced by police officers. That, the Police Officers also threatened her that if she would plead not guilty, they could take her back to the lockup where she could stay for a longer time. The appellant stated that since she is a mother with a family depending on her, she was convinced by the words of police officers and pleaded guilty to something which she did not understand. She alleged that she was not found trafficking narcotic drugs.

It was further submitted that the trial magistrate erred to convict her by believing that what was alleged to have been found under the possession of the appellant were narcotic drugs while the same were not substantiated by the Chief Government Chemist to be narcotic drugs. The

appellant disputed the same to be narcotic drugs. She referred the court to the case of **Omary Joachim vs Republic, Criminal Appeal No. 536 of 2016**, CAT at Arusha at page 9 and 10.

Finally, the appellant prayed the court to find that the trial court based the conviction on equivocal plea of guilty and quash the conviction and set aside the sentence against her and set her free.

In reply, Mr. Rweyemamu, the learned State Attorney partially supported the appeal. He submitted to the effect that this appeal emanates from a plea of guilty which is governed by **section 360 of the Criminal Procedure Act, Cap 20 R.E 2019**.

The learned State Attorney supported the conviction on the reason that the appellant's mind was sound when she pleaded guilty. He referred the court to page 1 of the handwritten proceedings and argued that when the charge was read over to the appellant, she replied that:

"It is true that I was found trafficking 20.50 kgs of narcotic drugs "khat" commonly known as "Mirungi".

Also, when the facts were read over to the appellant, she admitted the same to be true and correct. Then, the court found that the accused person had admitted all the facts read and explained to her in a language that she understood. Thus, the appellant understood what was going on before the trial court. It was on that basis that the learned State Attorney supported the conviction against the appellant.

On the other hand, Mr. Rweyemamu supported the appeal in respect of sentence. He submitted that the sentence of 30 years for a person who has pleaded guilty to the charge is manifestly excessive. That, **section**

15A (1) of the Drugs Control and Enforcement Act (supra) provides a maximum sentence of 30 years. According to the wording of that provision, the word **"shall"** has been explained in the Sentencing Manual to mean that the prescribed sentence is a maximum sentence. Thus, in this case the trial magistrate misdirected herself in respect of sentence.

Basing on the above submission, the learned State Attorney opposed and supported the appeal to the extent explained.

I have carefully considered the parties' submissions in relation to the trial court's records and grounds of appeal, having in mind the fact that the learned State Attorney supported the appeal in respect of the sentence imposed.

Section 360 (1) of the Criminal Procedure Act (supra) provides that, no appeal shall be allowed to the accused person who has pleaded guilty and has been convicted on such plea except as to the extent or legality of the sentence. There are also some exceptions when the accused can appeal against his own plea of guilty as established in a number of cases. In the case of **Josephat James vs Republic, Criminal Appeal 316 of 2010) [2012] TZCA 159 Tanziii,** the Court of Appeal at page 4 to 5 stated the circumstances where one can appeal against his own plea of guilty that:

1. *The 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. *An appellant pleaded guilty as a result of a mistake or misapprehension;*
3. *The charge levied against the appellant disclosed no offence known to the law, and*

4. *Upon the admitted facts, the appellant could not in law have been convicted of the offence charged. (See* ***Laurence Mpinga v. Republic, (1983) T.L.R. 166 (HC)*** *cited with approval in* ***Ramadhani Haima's case (Cr. Appeal No. 213 of2009, CAT, unreported).***

Having established the position of the law, I now turn to the grounds of the appeal. The appellant raised 5 grounds of appeal which all concern the issue as to whether the plea was equivocal or not. It was submitted by the appellant that the charge and the impact of the plea of guilty was not explained to her. The appellant also argued that she was convinced by police officers to plead guilty and that she was threatened that she could be taken back to the lockup if she would not plead guilty. Mr. Rweyemamu for the Republic supported the conviction on the ground that the appellant's mind was clear when she pleaded guilty and she understood what was going on before the trial court.

The procedures to be taken when an accused person pleads guilty are provided under **section 228 (2) of the Criminal Procedure Act (supra)** which provides that:

> *"(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."*

The trial court's records speak loudly from page 1-3 of the typed proceedings that, the trial magistrate adhered to the prescribed

procedures as enunciated under the above provision of the law. The appellant in her own words pleaded guilty to the charge. Also, she admitted the facts narrated by the prosecution in support of the charge; the facts which constituted the elements of the offence of unlawful trafficking in narcotic drugs. Even the name of the alleged drugs was translated to Swahili that, she was transporting khak commonly known as ***"Mirungi."*** This suggests that the elements of the offence were explained to her as the records reveal that the facts were explained to the appellant in Swahili.

This court is of considered opinion that the appellant's allegation that she was convinced to plead guilty by the Police Officers is an afterthought, since she did not raise such concern during the trial. In her mitigation she could have stated that fact.

Basing on the trend taken by the trial magistrate, it goes without saying that the appellant's conviction was prompted by her own plea of guilty to the charge against her.

The learned State Attorney supported the appeal in respect of sentence imposed on the appellant on the reason that the imposed sentence was excessive contrary to the prescribed guidelines in the sentencing Manual.

The record is very clear, the appellant was sentenced to 30 years imprisonment following her plea of guilty of which the learned State Attorney was of the view that it was excessive.

The Judiciary of Tanzania has introduced **Tanzania Sentencing Manual for Judicial Officers**. This manual has been established as a guideline to courts of all levels to adopt sentences which are consistent, proportionate, fair and just. The Court of Appeal has emphasized and

urged the courts to use the said Manual. In the case of **Nemes Myombe Ntalanda vs Republic (Criminal Appeal No. 1 of 2019) [2021] TZCA 513 [Tanzlii],** the Court of Appeal insisted and urged the lower courts to use Tanzania Sentencing Manual for Judicial Officers. In that case the appellant was convicted and sentenced to life imprisonment following his plea of guilty. He appealed against the sentence on the ground that it was excessive. The Court of Appeal reversed the sentence of life imprisonment and replaced it with 20 years' imprisonment.

The Tanzania Sentencing Manual for Judicial Officers at page 78 to 79, has specified the punishment in respect of trafficking in narcotic drugs under **section 15A (1) of Drugs Control and Enforcement Act** (supra). The Manual has also elaborated the factors to be considered before imposing sentence to the accused especially when he has pleaded guilty. That, when the accused pleads guilty, he has served the time as well as the costs of the court, he has secured an unmerited acquittal through a technical or procedural error, etc. ***See page 23 of the Manual.***

In the instant matter, despite the fact that the appellant pleaded guilty, the trial magistrate did not consider the mitigation nor did she consider that the appellant was the first offender who pleaded guilty thus saved the time and costs which could have been incurred in full trial as clearly elaborated in the Sentencing Manual. The trial magistrate did not apply the **Sentencing Manual** which clearly stipulates at page 78 that the person convicted for trafficking narcotic drugs below 30 kgs deserved the punishment of 1 to 3 years. In this case, the appellant was convicted for trafficking 20.50 kgs of narcotic drugs "khat" commonly known as *'Mirungi'* which were below 30 kgs stipulated in the Manual.

Had the trial magistrate consulted the Sentencing Manual, she could have not imposed the sentence of 30 years imprisonment based on the circumstances of this case. Guided by the decision of the superior Court of this land in the Case of **Nemes Myombe Ntalanda** (supra), I also urge magistrates to get acquainted with the said Manual so as to impose sentences which are consistent, proportionate, fair and just. This will avoid double standard in sentencing.

Since the trial magistrate did not consider the laid down principles in imposing sentence against the appellant, I am constrained to interfere with the sentence of 30 years imprisonment which was manifestly excessive.

In the event, I partly allow this appeal to the extent explained herein above. Accordingly, I hereby set aside the sentence of 30 years imprisonment imposed on the appellant and substitute it with a sentence of 2 years imprisonment which should be counted from 11/5/2021 when the appellant was convicted and sentenced.

It is so ordered.

Dated and delivered at Moshi this 27th day of July, 2022.

S. H. SIMFUKWE

JUDGE

27/7/2022