**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MWANZA**

**AT MWANZA**

**CRIMINAL APPEAL No. 57 2022**

**MAIMUNA RAMADHANI .....1ST APPELLANT**
**SONGOLO MATONGE .....2ND APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

(*Originating from Criminal Case No 69/2021 of the District Court of Geita at Geita)*

**JUDGMENT**

*17th & 21st Feb., 2022*

***Kahyoza, J.:***

**Maimuna Ramadhani** and **Songolo Matonge (**the appellants**)** were charged with the offence of illegal practicing contrary to section 45(1) (2) & (3) of the Traditional and Alternative Medicine Act, No. 23 of 2002 in the first court. And each appellant was charge in a separate count with the offence of unlawful possession of witchcraft instruments contrary to section 3(b) and 5(1) of the **Witchcraft Act**, [Cap. 18 R.E. 2002]. The appellants pleaded guilty. The trial court convicted them upon their own plea of guilty and sentenced them to pay a fine of Tzs. 100,000/= or serve one year imprisonment in the first count and to serve seven years imprisonment for the offence of unlawful possession of witchcraft instruments.

Aggrieved by both, the conviction and sentence, **Maimuna Ramadhani** and **Songolo Matonge** appealed to this Court. The appellants' grounds of appeal are paraphrased as follows:-

1) that trial court erred to convict the appellants on an unequivocal plea of guilty;
2) that the sentence of seven years was excessive;
3) in the alternative, that the court did not consider the general circumstances of the alleged offence, material fact and the period the appellants spent in custody.

The appellants, unpresented had nothing to add to the grounds of appeal.

The Republic was represented by Ms. Lilian, learned State Attorney, who supported the appeal. She submitted that on reading the facts on record in support of the charge, she was convinced that they did not disclose the ingredients of the offence. Thus, the plea was not unequivocal. She contended that the plea did not prove the ingredients of the offence of possession of witchcraft instruments as provided by section 3(b) of the **Witchcraft Act**, [Cap. 18 R.E. 2002] as there was no disclosure of witchcraft instruments the appellants were found in possession with. Not only that but also the charge sheet did not disclose the instruments, the appellant were alleged to be in possession. She concluded that the appellants were not properly convicted. To support her stance, she cited the case of **Josephat James V. R.**, Crim. Appeal No. 316/2010 CAT unreported.

The law, that is section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the **CPA**) is settled. It bars a person convicted on his own

plea of guilty to appeal against conviction. He can only appeal against the sentence. It states that

> ***"360****.-(1) 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."*

As a general rule, therefore, a person convicted upon his own plea of guilty can only appeal against the extent or legality of the sentence imposed by the subordinate court. However, this Court and the Court of Appeal have in a number of decisions expressed exceptions to that general rule. The two Courts have provided circumstances under which a person convicted upon his own plea of guilty may appeal against conviction. some of such cases are **Laurence Mpinga v. Republic [1983] T.L.R. 166** and **Josephat James v. Republic, Cr. Appeal No. 316 of 2010, CAT, Arusha Registry (unreported)**. In the latter case of **Josephat James v. Republic** the Court of Appeal stated that under certain circumstances an appeal arising a plea of guilty may be entertained by an appellate court where:

> *(i) 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;*
>
> *(ii) An appellant pleaded guilty as a result of a mistake or misapprehension;*
>
> *(iii) The charge levied against the appellant disclosed no offence known to law; and*

*(iv)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 of 2009, CAT, unreported).***

The Respondent's state attorney submitted that the appellants' conviction was equivocal, in other words the plea of guilty was imperfect, ambiguous, or unfinished. I totally I agree with the learned state attorney. For that reason, this Court is entitled to examine whether the trial court properly convicted the appellants.

It is true as submitted by the state attorney that the charge did not stipulate witchcraft instruments appellants possessed at the time of their arrest nor did the facts adduced disclose witchcraft instruments. Not only that but also the prosecution did not tender witchcraft instruments, which the appellants were in possession. I am in total agreement with the learned state attorney that the facts adduced were not sufficient to establish the offence of unlawful possession of witchcraft instruments.

To prove the charge of possession of witchcraft instruments, the prosecution was not only required to specify in the charge sheet particulars of witchcraft instruments found with the appellants but also to tender them as evidence. The appellants were arraigned under under section 3(b) read together with section 5(1) of the **Witchcraft Act**, which reads: -

*3. Any person who–*

*(a) by his statements or actions represents himself to have the power of witchcraft;*
*(b)* ***makes, uses, has in his possession or represents himself to possess any instruments of witchcraft****;*
*(c) ……(N/A);*
*(d) ……(N/A);or*
*(e) …..(N/A)*

*5.-(1) Any person who commits an offence under this Act* ***with intent to cause death, disease, injury, or misfortune to any community, class of persons, person, or animal, or to cause injury to any property*** *shall be liable to imprisonment not less than seven years.*
*(2) Any person who commits an offence under this Act without any intent such as is described in subsection (1) of this section shall be liable to a fine of not less than one hundred thousand shillings or imprisonment of not less than five years.*
*(3) The trial of a person for an offence punishable under subsection (2) shall not begin unless the consent of the Attorney-General or the Zonal State Attorney in-charge is obtained.*

I also noted that the appellants were charged with the offence of unlawful possession of witchcraft instrument under section 3(b) read together with section 5(1) of the **Witchcraft Act.** Section 3(b) of the **Witchcraft Act** does not create the offence of unlawful possession of witchcraft instrument. It creates the offence of possession of witchcraft instruments with intent stated under section 5 of the **Witchcraft Act.** The prosecution had a duty to prove that the appellants possessed witchcraft instruments, in this case, with intent to *cause death, disease, injury, or misfortune to any community, class of persons, person, or animal, or to cause injury to any property.*

Even if, there was evidence of possession of witchcraft instruments, I would still find that the prosecution did not prove the offence under section 3(b) read together with section 5(1) of the **Witchcraft Act.** The reason for so holding is none other than the fact that the charge under section 3(b) read together with section 5(1) of the **Witchcraft Act,** did neither disclose the appellants' intent to possess witchcraft instruments nor did the prosecution proved the appellants' intent to possess witchcraft instruments. The law requires the prosecution to prove the intent possessing witchcraft instruments. (*See section 5(1) of the* ***Witchcraft Act*****).**

I am of the firm view that the charge and the facts advanced by the prosecution did not establish all ingredients of the offence under section 3(b) of the **Witchcraft Act**. For that reason, I find the appellant's plea of guilty was *an unequivocal plea.*

I also examined the facts in relation to the first count of illegal practicing contrary to section 45(1) (2) & (3) of the Traditional and Alternative Medicine Act, No. 23 of 2002. The prosecution did not adduce facts explaining which practice did the appellants carry out in contravention of the law. I also find that the plea of guilty of relation to the charge in the first count was also unequivocal. I quash the conviction and set aside the sentence in relation to the first count of illegal practicing contrary to section 45(1) (2) & (3) of the Traditional and Alternative Medicine Act.

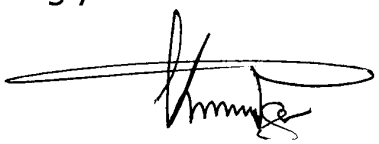
The state attorney prayed this Court to order the appellant to be tried *de novo*. The is no evidence on record to prove the offences the appellants stood charge, thus, to order a retrial will be to afford the prosecution an opportunity to fill in the gap. It is trite law that retrial will not be ordered to afford the prosecution an opportunity to fill the gap in its case. See the celebrated principle in **Fatehali Manji v Republic** [1966J 1 EA 343. In that case, the erstwhile **East African Court of Appeal** stated, at page 344, the principles for determining whether to order retrial or not, thus-

> *"in general a retrial will be ordered* ***only when the original trial was illegal or defective/ it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial****: even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame/ it does not necessarily follow that retrial should be ordered/ each case must depend on its particular facts and circumstances and an order for retrial should only be made where interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*

Eventually, I quash the conviction and set aside the sentence imposed against the appellants, for the offence in the first count in relation to both appellants, the second count in relation to the first

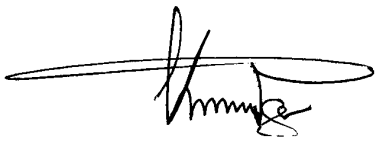
appellant and third count in relation to the second appellant. Given the circumstances of this case, I refrain from ordering a re-trial. The appellants shall be set at liberty unless otherwise held in prison for any other reason.

It is ordered accordingly.



**J. R. Kahyoza**
**JUDGE**
**21/2/2022**

**Court:** Judgment delivered in the presence of the appellants and Ms. Lilian Meli, State Attorney for the Republic. B/C Ms. Jackline (RMA) present.



**J. R. Kahyoza,**
**Judge**
**21/2/2022**