IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 50 OF 2021

(Originating from Liwale District Court at Liwale in Criminal Case No.45 of 2020 before Hon. C. Mtui, RM)

SELEMAN JOHN ODILO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17/8/2022 & 03/10/2022

LALTAIKA, J.:

The appellant herein **SELEMAN JOHN ODILO** and three others not party to this appeal (Steven Steven Milanzi, Fadhili Haji Ngonyani and Michael Clemence) were arraigned in the District Court of Liwale (the trial court), where they were charged with three counts: 1. Unlawful cultivation of prohibited plant contrary to section 11 (1)(a) of the Drug Control and Enforcement Act [Cap.95 R.E. 2019]. 2. Unlawful Possession of Seeds in Production of Seeds contrary to section 11 (1)(b) of the Drug Control and Enforcement Act and 3. Unlawful Possession of Narcotic Drugs contrary to section 115A(1)(2)(c) of the Drug Control and Enforcement Act.

Upon his own plea of guilty, the trial court convicted the appellant and sentenced him to serve thirty (30) years in prison for the offence of

unlawful cultivation of a prohibited plant. Aggrieved, the appellant has filed a Petition of Appeal comprised of seven grounds. I take the liberty to reproduce them as follows: -

1. *That the event of taking into consideration the admitted fact was imperfect for this(sic) reasons the lower court erred in law in treating it as a plea of guilty.*
2. *That the trial magistrate erred in law and fact when he failed to read the charge all the essential ingredients of the offence and explained to the appellant in a language he understands.*
3. *That the trial court erred in both points of law and fact when it convicted the appellant in the absence of the said BHANG without warning itself that if the absent of seeds of bhang brought to the trial court was the reason of acquittal the appellant why the trial court failed to follow this(sic) steps in the first count in this case? Please hon. Judge see in page of the proceeding which stands also as ruling where the trial court trial was cited the case of JOHNSON ASHIRAFU V. REPUBLIC, Cr. APPL No. 523 of 2014(unreported).*
4. *That exhibit (PE1) was to be corroborated by the said bhang physically this means that the said document was failed (sic!) to be complied by the law.*
5. *That the prosecution side was failed (sic!) to bring a sample of the said plant, from the farm to prove the same for these reasons of lower court erred in law in convicting and sentencing the appellant.*
6. *That since the said claimed bhang was not been (sic!) sent to the in drugs for checked up and neither to the trial court to be an exhibit the charge against the appellant was not proved as per required standard of the law.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented while the respondent Republic had the services of Mr. Wilbroad Ndunguru learned Senior State Attorney.

The appellant prayed that the learned Senior State Attorney's presentation comes first so that he could respond specifically on the

relevant issues and arguments raised. Mr. Ndunguru had no objection to the prayer and with leave of this court, he took the stage.

The learned Senior State Attorney announced that he was not in support of the appeal. He went on to indicate that he wished to argue the grounds of appeal seriatim except the third and fourth grounds that he prayed to consolidate and do the same for the first and second grounds arguing that they were related.

It is Mr. Ndunguru's submission that on those two consolidated grounds, the appellant complains that his plea was equivocal. The learned Senior State Attorney went on and argued that from the way the charge was read over to him and how the appellant responded as seen on page three he reached thus "Ni Kweli" to both counts.

Mr. Ndunguru submitted that when brief material facts were read as reflected on page 5 and 6 the appellant responded, "All facts narrated by the prosecution I admit to being true and correct." The learned Senior State Attorney stressed that exhibits were also read over to him that is a certificate of seizure and a certificate used to destroy the farm. Therefore, Mr. Ndunguru reasoned, the complaint that the charge sheet was not read over and explained to him is not true.

To cement his argument, Mr. Ndunguru cited section 369(1) of the Criminal Procedure Code Cap. 20 RE 2019 and stressed that the appellant was supposed to appeal against the legality of the sentence only and not to challenge his plea. The learned Senior State Attorney submitted that since the proceedings are clear on how the plea was arrived at, it was his firm opinion that the plea was unequivocal. To that end, the learned Senior State Attorney prayed that the first and second grounds be dismissed.

Responding to the third and fourth grounds, the learned Senior State Attorney submitted that the appellant asserts that the exhibits (cannabis seeds) were not tendered in court and there was no corroborative evidence. Mr. Ndunguru submitted that as per section 228(2) of the CPA, it is stated that when an accused pleads guilty, the court will record the plea and proceed to sentence him except where there is another problem that has been noted by the court. The learned State Attorney insisted that the interpretation is that pleading guilty is revealing the truth of what happened. It is Mr. Ndunguru's submission that the plea can stand alone without the need for any other evidence. To buttress his argument, the learned Senior State Attorney referred this court to the case of **Joel Mwangambako v R. Crim Appeal No. 516 of 2017** CAT, Mbeya (unreported). The learned Senior State Attorney argued this court to dismiss these two grounds.

Before moving on to the sixth ground, Mr. Ndunguru averred that the fifth ground had been responded to while arguing the third and fourth grounds. He then proceeded to submit on the sixth ground that where the appellant complains that the exhibit was not taken to the Government Chemist for forensic analysis. The learned Senior State Attorney conceded. However, Mr. Ndunguru was quick to submit that as per the case of **Joel Mwangambako v R.** (supra) where a person pleads guilty, no additional evidence is needed. The learned Senior State Attorney insisted that this is especially applicable if the facts are detailed enough and understandable to both the accused and the court.

The learned Senior State Attorney went further and argued that there was no need to take the exhibit to the Government Chemist because the appellant knew the same to be bhangi. Moreover, the learned Senior

State Attorney averred, it is the legal position that a forensic report is merely persuasive, and it does not bind the court. The learned Senior State Attorney argued that the court has also found that on certain occasions even an individual can be considered an expert. In that regard, he prayed that the sixth ground is dismissed.

Still on equivocality of the plea, Mr. Ndunguru drew the attention of the court that, in his reasoned opinion, there is something unique in this case about the second count with which the accused was not convicted. Mr. Ndunguru argued that under section 228(2) of the CPA, when a person pleads guilty the court can go ahead and sentence the accused except where there is contravening circumstance to the contrary. To this end, the learned Senior State Attorney stressed that the learned trial Magistrate was supposed to enter a plea of not guilty. Mr. Ndunguru contended that that would have required the prosecution to produce extra evidence as the case would go for a full trial.

It is Mr. Ndunguru's submission that if facts were read over but the court could not appreciate them at the level required, acquitting is tantamount to deciding the case finally. The learned Senior State Attorney maintained that the best option was to change the plea to ensure justice for both sides. The learned Senior State Attorney invited this court to invoke section 372(1) of the CPA Cap 20 RE 2022 arguing that the procedure adopted on the second count resulted in an unfair trial not only for the appellant but also for the republic. However, the learned Senior State Attorney stressed, as far as the first count is concerned, the appeal had no merit and should be dismissed.

In a rejoinder the appellant submitted that it is true he was arrested on his farm at Ngumbu Village Kibutuka Ward, Liwale District by the police. The appellant argued that the police inspected his farm and could not find anything related to bhangi. However, the appellant contended, the police had come with a list of names, so they took him to the police station in Liwale because they were told that he was involved in the cultivation of bhangi. The appellant insisted that they interrogated him and then charged him with three counts namely possession of bhangi, cultivation of bhangi and third possession of seeds of bhangi.

More ever, the appellant stressed that the police took him to court without any exhibit. He insisted that there was no seed and pieces of bhangi anywhere during trial. The appellant further contended that the law requires that if someone is charged with stealing something such as a bike, the same must be produced in court to prove that he was found with it. The appellant submitted that the trial court did not want to listen to him, but it proceeded to sentence him and disregarded his evidence as incorrect. The appellant argued further that, regrettably, the only evidence used to convict him was information recorded by the police on the farm.

It was the appellant's submission further that they were four of them when they were arrested but wondered what happened to his former colleagues while they were all arraigned in court. The appellant submitted that the day he was sentenced his colleagues were taken back to remand. He argued that he was the first accused while the second and third accused were Steven Milanzi and Michael Clemence. He stressed that he too was innocent and pleaded this court to quash conviction and sentence meted upon him by the trial court citing unfairness.

Having carefully considered the rival arguments for and against the appeal, the grounds of appeal and the trial court records placed before me, I am inclined to determine the merits or demerits of the appeal. It is imperative at this juncture to address the issue raised by Mr. Ndunguru on the second count. The record shows that the appellant pleaded guilty to the first and second counts. However, upon findings of the learned Magistrate as evident on page 10 of the typed proceedings, the trial court was of the settled view that the facts did not constitute the offence pegged under the second count hence it acquitted the appellant.

Undoubtedly, that was wrong because as per the requirement of section 228 (2) of the Criminal Procedure Act the learned trial Magistrate was required to enter a plea of not guilty and proceed with the case to the next stage of the preliminary hearing and not to acquit as she did. I have had ample time to scrutinize the records to find out what exactly transpired. This was inspired by the second ground of appeal in which the appellant complains that the plea of guilty was not unequivocal.

It is a legal requirement that the accused person is barred from raising an appeal against his plea of guilty except on the extent or legality of the sentence. This position is found under section 360(1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] which provides as follows: -

> *"360. -(1) No appeal shall be allowed in the case of any accused A person who has pleaded guilty and has been convicted on a such plea by a subordinate court except as to the extent or legality of the sentence."*

Nevertheless, this court and the Court of Appeal have evolved principles which when tested positively the accused who has pleaded

guilty may lodge his appeal against his plea and the legality of the sentence. See **Laurent Mpinga vs Republic** [1983] TLR 166 and **Michael Adrian Chaki v. R**, Criminal Appeal No.399 of 2017(unreported)

There is no doubt that the charge read over to the appellant features the proper statement of the offence of "Unlawful Cultivation of Prohibited Plant, contrary to section 11(1)(a) of the Drug Control and Enforcement Act Cap. 95 R.E. 2019". It also contains the particulars of the offence which cover ingredients of the offence of Unlawful Cultivation of Prohibited Plant.

However, the drafter of the charge added a new ingredient which is strange to section 11(1)(a) of the Drug Control and Enforcement Act. This new creature is "without having a permit". In my observation, this is not correct since section 11(1)(a) of the Drug Control and Enforcement Act does not provide for a condition of having a permit for someone to cultivate the prohibited plant such as cannabis plant. The marginal note of the provision of the law is self-explanatory since it provides for the prohibition of cultivation of certain plants and substances. For clarity and ease of reference the provision of the law provides: -

> *"11. (1) Any person who-*
> *(a) Cultivates any prohibited plant; -*
> *Commits an offence and upon conviction shall be liable to imprisonment for a term of not less than thirty years."*

Based on the excerpt it is my firm view that the charge is invalid.

Moving on to the second issue on facts read and explained to the appellant no time is indicated as to the occurrence of the incident. Moreover, the particulars of the offence cover unlawful cultivation of cannabis plant, but the facts read over to the appellant show that the

appellant was arrested for cultivation of cannabis. The Drug Control and Enforcement Act has provided for the definitions of cannabis plant as well as cannabis as follows: Section 2 of the Drug Control and Enforcement Act: -

> *"2. "cannabis plant" means a plant of the genus cannabis by whatever name called and includes any part of that plant containing tetrahydro-cannabinol*
> *"cannabis" means any part of the plant of the genus cannabis, excluding the seeds, the mature stock, or fibre produce from cannabis plant or cannabis resin."*

Looking at the context of the offence, which is contained in the statement of the offence, I am of the settled position that the facts read over and explained to the appellant ought to have featured the phrase cannabis plant and not a cannabis. As far as the definition is concerned, cannabis plant reproduces cannabis. It follows logically therefore that cannabis cannot be cultivated but cannabis plant. Hence, the facts constituting the word cannabis instead of cannabis plant affected the quality of the plea of guilty of the appellant which the trial court regarded as unequivocal.

All said, I hold that the plea of guilty entered by the appellant is equivocal. To this end, I find that there is no need to proceed with the determination of other grounds of appeal as the first and second grounds are enough to dispose of the matter.

Given all the foregoing irregularities, the appeal is allowed. The conviction and sentence of the trial court are quashed and set aside. I hereby order the District Court of Liwale at Liwale to take the plea of the accused afresh. In case the exhibit in question has been destroyed by an order of the trial court, I direct that proper legal procedure be invoked to ensure that the rights of the appellant are unfairly prejudiced. Meanwhile,

the appellant shall remain in custody pending the taking of his plea which shall be within 30 days of this decision.

It is so ordered.

E.I. LALTAIKA

JUDGE

03.10.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 21st day of September 2022 in the presence of Mr. Wilbroad Ndunguru, the learned Senior State Attorney and appellant who has appeared unrepresented.

E. I. LALTAIKA

JUDGE

3.10.2022

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E. I. LALTAIKA

JUDGE

3.10.2022