

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 228 OF 2021

***(Appeal from the Decision of the District Court of Bagamoyo at
Msoga in Criminal Case No. 235 of 2021)***

MAHIJA ATHUMANAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

26th September & 03rd October, 2022

BWEGOGGE, J.

The appellant above named was convicted on her own plea of guilty in the District of Bagamoyo at Msoga on the charge of trafficking in narcotic drugs c/s 15A (1) and 2(c) of the Drugs Control and Enforcement Act [Cap.95 R:E 2019]. The trial Court had sentenced the appellant to suffer thirty (30) years in prison. The appellant being aggrieved, has appealed against both conviction and sentence imposed by the trial Court on four

(4) grounds which in totality boil to one main ground that her plea of guilty was not unequivocal in a strict legal sense, as it was ambiguous and unclear.

The appellant had appeared in person and fended for herself. The respondent Republic was represented by Mr. Emmanuel Maleko, the Senior State Attorney. When the appellant was allowed to refresh her memory and asked to substantiate the grounds of appeal she had advanced to defeat the conviction and sentence entered by the trial Court, she stated that she has nothing to submit. She prayed this Court to consider the grounds of appeal as filed in this Court.

On the other hand. Mr. Emmanuel Maleko, counsel for the respondent Republic had informed this Court that he supports the conviction and sentence entered by the trial Court. And he had stated that his grounds for supporting the conviction and sentence entered by the trial Court are mainly two as hereunder reproduced.

First, the appellant herein on her 1st ground of appeal, alleges that her plea was equivocal. The charge and particulars of the offence, clearly indicate that the appellant was alleged to have been found with 4 kg of Khat. And her plea was clearly stated... "*Ni kweli nilikuwa nampelekea mtu.....*" Further, the counsel submitted that the narrated the facts

constituting offence and the appellant admitted all facts by stating that:
"Maelezo hayo ni ya kweli".

Second, the appellant on her 2nd ground of appeal had alleged that no exhibits were tendered in Court to prove that she was found with drugs, however, plea of guilty entered, had discharged the prosecution's burden of proof by tendering exhibits related to chemist finding on the nature of substance found into possession of the appellant.

In cementing his position, the Counsel submitted that he has noted that the appellant, in her last ground of appeal, has alleged to have denied her right to be heard as she was not given the opportunity to defend herself. He opined that since there was no full trial following the appellant's plea of guilty, there was no room for the appellant to make defence. However, she was given room to mitigate the sentence and her mitigation is in the record of the trial Court whereas she was heard to have pleaded for the leniency of the Court on grounds of being the first offender and with children depending on her.

On the above premises, the counsel for Respondent republic prayed this court to dismiss the appeal herein and uphold the conviction and sentence of the trial court.

The issue for determination by this court is whether the ground of appeal advanced by the appellant is meritorious.

From the outset, this court shall explore the requisite procedure to be adhered to in respect of the proceeding in which the accused pleads guilty to the charge expounded by the erstwhile East Africa Court of Appeal in the case of ***Adan vs. Republic*** [1973] EA 446 cited by the Apex Court in the case of ***Yeremia s/o Jonas @ Tehani vs. The Republic***, Criminal Appeal No. 100 of 2017, at pg.12 as follows:

"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused doesn't agree with the statements of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to " not guilty", and proceed to hold a trial..... The statement of facts and the accused's reply must, of course, be recorded. The statement

of facts serves two purposes: It enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused had no defence and it gives the magistrate the basic material on which to assess the sentence....."

Basing on the above principle, it is apparent that when the accused person is arraigned in court, having the charge and particulars read out to him in a language he understands, the trial magistrate is obliged; **First**, to explain to the accused person all the essential ingredients of the offence charged. Upon the accused admitting all those essential elements, the magistrate is obliged to record what the accused has said (as nearly as possible in his own words) and then formally enter a plea of guilty. **Second**, the magistrate to ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts.

In the same vein, the superior court in the case of in **Richard Lionga @Simageni vs. Republic**, Criminal Appeal No. 14 of 2020 [2021] TZCA 671 had this to say:

*"For a plea of guilty to be unequivocal and therefore valid, it must pass the test that this Court set in the case of **Michael Adrian***

Chaki vs. R. Cr. Appeal No. 339 of 2019 (unreported). In that case, the Court stated:

"...there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met: -

- 1. The Appellant must be arraigned on a proper charge. That is to say, the offence section and the particulars thereof must be properly framed and must explicitly disclose the offence known to law;*
- 2. The Court must satisfy itself without any doubt and must be clear in its mind, that an accused fully comprehends what he is actually faced with, otherwise injustice may result.*
- 3. When the accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in terms of section 228(1) of the Criminal Procedure Act.*

4. *The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.*
5. *The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged and the same must be properly recorded and must be clear (see Akbarali Damji vs R. 2 TLR 137 cited by the Court in Thuway Akoonay vs Republic [1987] T.L.R. 92);*
6. *Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged”.*

Having revisited the principles guiding this court, now this court shall revert to the proceedings of the trial court to find out whether they pass the test. The charge placed at the door of the accused person is reproduced as under:

Offence Section and Law: *Trafficking in narcotic drugs c/s 15A(1) and 2(c) of the Drug Control and Enforcement Act, (Cap. 95 RE: 2019).*

Particulars of Offence: That MAHIJA D/O ATHUMAN on 10th day of July, 2021 at Chalinze Bus Stand area, within Bagamoyo District in Coast Region, unlawfully possessed 4 kilograms of catha edulith (Khat) commonly known as Mirungi.

Then, the proceedings are as follows:

"Date: 13/07/2021

Coram: Hon. V. P. Mwaria, RM

PP: Kawawa

CC: Neema

Accused: Present

Charge read over and explained to the accused person who is required to plead thereto: -

Sgd: V. P. Mwaria

RM

13/07/2021

Accused plea: *Ni kweli nilikuwa namplekea mtu na baadae nikampigia simu akawa hapokei.*

Court: EPG.

Sgd: V. P. Mwaria

RM

13/07/2021

PP: *I pray to read facts*

Court: *Prayer to read facts is hereby granted.*

FACTS

Accused name Mahija d/o Athumani on 10/07/2021, you were arrested at Chalinze bus stand and found in possession of four (4) Kg of Catha Edulis (Khat) commonly known as Mirungi and when you were interrogated by police you admitted the Khat to be yours.

Sgd: V. P. Mwaria

RM

13/07/2021

Accused: Maelezo hayo ni ya Kweli.

PP: That is all.

Sgd: V. P. Mwaria

RM

13/07/2021

Court: *Accused has pleaded guilty to the charge and she has also admitted the facts narrated by the prosecution side to be true. I have gone through the facts and satisfied that it constitutes the elements of the offence charged. Therefore, I find the accused guilty as pleaded and I convict him accordingly.*

Sgd: V. P. Mwaria

RM

13/07/2021

Upon scrutiny of the proceedings above, it is obvious that the charge was ready to the appellant herein whereas the same had pleaded guilty. However, the requirement set in ***Adan vs. Republic (supra)***, obliging the magistrate to ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, give the accused an opportunity to dispute or explain the facts or to add any relevant facts was not met. In the same vein, it is obvious that the proceedings produced above do not pass the criteria 4, and 6 set in the case of **Richard Lionga @Simageni vs. Republic (supra)**.

The import of the narration of the statement of facts constituting offence after the accused person has pleaded guilty to the charge, is well stated in the case of **Richard Lionga @Simageni vs. Republic (supra)** cited above as thus:

"A careful scrutiny of the above criteria shows that an unequivocal plea of guilty is constituted of two crucial stages of pleading. That is, first, the accused must plead guilty to the charge as indicated at criterial 1, 2, 3 and 5 and, secondly, he must plead guilty to the facts constituting the offence charged as per criteria 4 and 6.

"..... Where an accused pleads guilty to the charge, before conviction, the law is that, the prosecution is duty bound and it must audibly and understandably narrate facts establishing the offence as alleged in the statement and particulars of offence. That is, the prosecution must explain clearly and adequately the circumstances in

which and how the offence was committed in specific and intelligible terms. "

Further, the Apex Court observed:

"We subscribe to the above position and hasten to observe that conversely, in this case, instead of disclosing the ingredients of the offence and substance of the evidence in amplifying the particulars of offence in the charge, the prosecution when narrating facts, did nothing but restated the particulars of offence in the charge sheet. Notably, although the charge was read over to the accused and explained to him as recorded in the proceedings, thereby satisfying conditions 1, 2, 3, and 5, with respect, the rest of the criteria, that is conditions 4 and 6 were not fulfilled. In our view, that was unlawful, and the plea of guilty entered cannot be held to have been unequivocal upon which to ground a valid conviction. "

It is apparent on the face of the record that the purported facts narrated to the appellant are nothing but a *replica* of the particulars of the offence. Likewise, the purported admission by the appellant herein, as she put it, was "ambiguous and unclear." This court finds substance in the appellant's ground of appeal in that the plea entered by the trial court was equivocal; hence, incapable to ground conviction in the eyes of the law.

In fine, for the foregoing reasons, this court finds the appeal herein against conviction based on the appellant's own plea of guilty meritorious. This court hereby nullifies the disputed plea and the proceedings in the

trial court. The conviction entered by the trial court is hereby quashed and the sentence imposed on the appellant is hereby set aside. The record in Criminal Case No. 235 of 2021 be remitted to the District Court of Bagamoyo for retrial before a different resident magistrate. Meantime, the appellant shall remain detained in prison pending her trial.

Appeal allowed.

Order, accordingly.


DATED at **DAR ES SALAAM** this 03rd of October, 2022.





O. F. BWEGOGGE
JUDGE

The judgment has been delivered this 03rd October, 2022 in the presence of Ms. Fidesta Uiso, State Attorney for the respondent Republic and the appellant who is present and unrepresented.

Right of appeal explained.




O. F. BWEGOGGE
JUDGE