IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 52 OF 2022

(Originating from the District Court of Lindi at Lindi in Criminal Case No.13 of 2022 before Hon. M.B. Magara, RM)

GEORGE MATAKA FRANK..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

22/8/2022 & 12/10/2022

LALTAIKA, J.:

GEORGE MATAKA FRANK "the appellant" was arraigned in the District Court of Lindi at Lindi charged with the offence of Trafficking in Narcotic Drugs contrary to Section 15A (1) and (2 (c) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019] as amended by the Written Laws (Miscellaneous Amendments) (No.5), 2021. It was alleged that on 11th March,2022 at Matopeni - Wailes area within the Municipality and Region of Lindi, the appellant was found in possession of 80 grams of cannabis sativa commonly known as "Bhangi".

When the charge was read over to the appellant, he pleaded guilty. Consequently, the lower court convicted him as charged and sentenced him to serve thirty (30) years imprisonment term. Dissatisfied and

aggrieved by both conviction and sentence, the appellant has lodged a Petition of Appeal comprised of two grounds as follows: -

1. *That, the trial court erred in law and fact in convicting and sentencing the appellant even taking into consideration the admitted fact, the plea was imperfect, ambiguous or unfinished, the appellant pleaded guilty as result of mistake or misapprehension and for that reason, the lower court erred in law treating it as plea of guilty.*
2. *That, the trial court grossly erred in law and in fact convicting and sentencing the appellant while the appeal was equivocal on ground that he was forced to admit the offence.*

When this appeal was called on for hearing on 22/8/2022, the appellant appeared in person, unrepresented while the respondent Republic enjoyed the services of Mr. Enosh Kigoryo, learned State Attorney. On his part, the appellant told this court that since he was not learned in law, it was his desire that counsel for the respondent submits first, and he would be able to address the court later specific issues raised by the learned counsel.

At the outset, Mr. Kigoryo resisted the appeal and submitted that after going through the proceedings, he realized that the appellant was convicted and sentenced to thirty (30) years in prison on his own plea of guilty. The learned State Attorney submitted that the appellant was charged with Trafficking in Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drug Control and Enforcement Act [Cap. 95 R.E. 2019]. The learned State Attorney argued that at page 1 of the typed proceedings the appellant admitted that he was found with bhangi weighing 80 grams. The learned State Attorney stressed that thereafter brief facts were read over to the appellant, and he admitted that the facts were true.

Mr. Kigoryo contended further that a seizure certificate was tendered along with 36 pieces of bhangi and the same were admitted without any

objection. However, the learned State Attorney reasoned, in his mitigation factors, the appellant appeared remorseful and promised never to sell bhangi again. Furthermore, the learned State Attorney submitted that it is obvious that section 360(1) of the CPA Cap. 20 does not allow appeal against plea of guilty. The learned State Attorney stressed that it only allows appeal based on sentence.

To buttress his argument the learned State Attorney referred this court to the case of **Laurence Mpinga v. R** [1983] TLR 166 whereby the Court allows appeal if the facts read to the appellant are ambiguous or unfinished and therefore makes the plea equivocal. The learned State Attorney submitted further that in the instant matter indicates that, at page 2 of the typed proceedings the facts were elaborate enough.

It is Mr. Kigoryo's submission that even though the exhibit was not tested by the government chemist, the appellant's own plea of guilty was enough. The learned State Attorney went on and argued that the government chemist report was not necessary. To support his argument, Mr. Kigoryo referred this court to the case of **Joel Mwangambako v. R.**, Crim App 516 of 2017 CAT, Mbeya (unreported). To that end, the learned State Attorney prayed that the appeal be dismissed.

In response, the appellant prayed this court to have mercy on him since he was a person with disability (PWD) and demonstrated that was partly paralyzed. He explained that about ten years ago, he was just seating and suddenly something cold passed through his body that would later result into disability. He stressed that he was using bhangi on his own and not for sale.

It is the appellant's submission that he was told that if he used bhangi, he would be able to drive out evil spirits. He thus used to cover up himself "kujifukiza" with the smoke of bangi as medicine. He explained that he would put it in the coconut shell "kifuu" and wrap up himself in order to scare away the devil. However, the appellant insisted that he never saw the devil but believed that the smoke would drive away evil spirits. As recounted by the learned Senior State Attorney, the appellant appears remorseful and deeply regrets having ever involved himself in bhangi related offences. It is in his wish list that if he ever goes back to Lindi, he will beseech his brothers to open a small business for him.

Having dispassionately considered the lower court's records and arguments of both parties, inspired by the case of **Laurence Mpinga v. R** (supra) discussed by the learned State Attorney, I am going to confine my discussion to the sentence of 30 years meted by the lower court. Before doing so, I have the following preambular account to make.

Like other illicit drugs, bhangi has ruined the lives of many people; young and old. Talented youths have dropped out of school and others have abandoned their carrier including in the entertainment industry such as hip-hop artists "Bongo Fleva" upon being introduced to *bhangi.* Some villages are haven to unruly youths who smoke the prohibited plant making lives of those who don't very difficult indeed.

Some of those unruly youths have gone as far as trying to convince innocent secondary school students that smoking the weed is a cool thing to do thus endangering the future of our country by harming the future generation of scientists, doctors, engineers, lawyers and more importantly future parents. At the level of family, gender-based violence is aggravated by use of illicit drugs.

It is in this context that we must all fight relentlessly against Narcotic Drugs of any kind.

The appellant who is a person with disability has raised a point that has captured my attention. It is on ignorance. He has averred that since he is partly paralyzed and no reason has been established for the life changing calamity that befall him, he needed to smoke the prohibited weed to drive out demons. It is not uncommon for accused persons to raise such arguments.

Coming back to my deliberation on sentence, in the present case the appellant was charged with the offence of Trafficking in Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019]. I have read very carefully the provision under which the appellant was charged and convicted, and it is my finding that the same does not provide for the minimum sentence. It has only provided for maximum sentence of thirty (30) years imprisonment term. The section provides as follows: -

15A (1)

> *"Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years."*

The issue is whether the trial court or this court may impose a sentence which is lower than that provided by the provision of the law as it appears in the quoted section. The answer is affirmative. The phrase "shall be liable to imprisonment for a term of thirty years" does not create a minimum sentence. It is my considered view that the section gives the

trial court the discretion to pass a sentence which is appropriate in each situation.

In the case of **Nyamhanga Magesa vs Republic** (Criminal Appeal 470 of 2015) [2017] TZCA 233 or [2017] T.L.R. 455(CA) in which the Apex Court had borrowed a leaf from the Ugandan case of **Opoya v. Uganda** (1967) E.A. 752, the Court stated that: -

> *"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it "*

I entertain no doubt in my mind that the trial court was obliged to observe several factors when it passed the sentence of 30 years imprisonment term to the appellant. The Sentencing Manual for Judicial Officers (61-63) provides guidance on factors to be considered when there is no minimum sentence provided. The factors are as follows: -

(1) Seriousness of the offence and appropriate starting point and sentencing range for such offence (be high, medium or low). Here the assessment shall be based on the following criteria:
(i) The nature and quantity of the substance
(ii) The seriousness of the offender's role in the offence.

(2) Consider the relevant aggravating and mitigating factors which may increase or decrease the sentence within the range.

(3) Consider the accused's personal circumstances and other individual factors relevant to sentence including totality principle, co-accused sentence, any co-operation with the authorities, the views of the victim- e.g. age, health, any physical or mental disability previous conviction or any breach of court's order etc.

I have considered the above factors. The appellant has, all along, appeared remorseful. He regrets deeply having committed the offence. His physical disability is also a factor that comes to my consideration. The amount of bhangi he found with falls within the bracket of a small amount. All these reasons point to the fact that the sentence of thirty years imprisonment is excessive given the unique circumstances I have narrated.

I am therefore inclined to reduce the sentence of 30 years to 2 years. In counting the sentence of 2 years, the time already spent in jail must be considered.

It is so ordered

E. I. LALTAIKA

JUDGE
12.10.2022

Court:

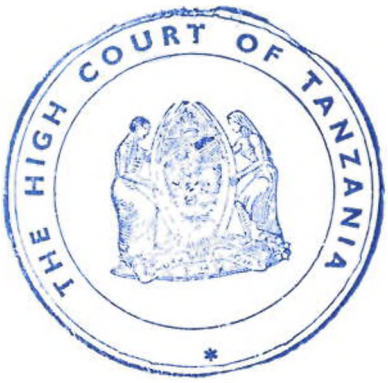
This Judgment is delivered under my hand and the seal of this Court on this 12th day of October,2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney and the appellant who has appeared in person and unrepresented.

E. I. LALTAIKA

JUDGE
12.10.2022

Court

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



E. I. LALTAIKA

JUDGE

12.10.2022