IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 48 OF 2022

(Originating from the District Court of Nanyumbu at Nanyumbu in Criminal Case No.86 of 2022 before Hon. C. J. David, RM)

SAIDI ISSA AZIZ..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

15/8/2022 & 12/10/2022

LALTAIKA, J.:

The appellant, **SAIDI ISSA AZIZ** appeared before the District Court of Nanyumbu at Nanyumbu where he was prosecuted on two 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] and 2. Unlawful possession of prohibited plant contrary to section 11(1)(d) of the Drugs Control and Enforcement Act (supra).

On the first count, it was alleged that on the 24th day of March 2022 at Matemwe Street in Mtalikachau village within Nanyumbu District and Region of Mtwara, the appellant was found cultivating Prohibited Plants named Cannabis Sativa commonly known as "bhangi" On the second count, it was alleged that on the 24th day of March 2022 at Matemwe Street in Mtalikachau village within Nanyumbu District and Region of

Mtwara, the appellant was found in possession of prohibited plants to wit: fifty-six (56) plants of Cannabis Sativa commonly known as "bhangi".

When the charge was read over to the appellant, he pleaded guilty to both counts. Thus, the trial court found the appellant guilty as charged and sentenced him to serve a thirty (30) years imprisonment term for both counts.

The appellant is dissatisfied and aggrieved by the conviction on his plea and sentence hence this appeal. The petition of appeal is comprised of five grounds as follows: -

1. *That the trial Magistrate erred in law by failing to comply with the requirements of section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] when composing the judgment. The was no conviction entered in the judgment. The accused was only found guilty but was not convicted.*
2. *That, the trial Magistrate erred in law and fact by convicting the appellant while the prosecution failed to prove beyond reasonable doubt that exhibit P1 was the prohibited plant. No document tendered before the court to prove that the exhibit P1 was scientifically (forensic) proved to be the alleged prohibited plant. Failure of the prosecution to prove their charge should benefit the appellant.*
3. *That, the trial Magistrate erred in law and fact for failure to consider that the appellant was a first offender and that the plea of guilty is an essential mitigating factor. See the decision of the Court in Bernadeta Paul vs Republic [1992] TLR 97 and Sylvester Lucas vs Republic, Criminal Appeal No.67 of 67 of 2014, CAT at Dodoma(unreported).*
4. *That, the trial Magistrate erred in law and facts for making the appellant's mere admission of the facts to be unequivocal (lucid) plea. See the stance of the Court in DPP vs Paul Reuben Makujaa [1992] TLR 2.*
5. *That the trial Magistrate erred in law by relying in the alleged search which was conducted in contravention with the requirement of the Criminal Procedure Act.*

   -Section 38(1) of the Criminal Procedure Act requires a search warrant to be issued when it is not an emergency search, as it was

in this case, according to the memorandum of facts. No justice of peace of the area participated in the search and the appellant was never issued with a search warrant or receipt acknowledging the seizure as per section 38(3) of the CPA. The Court of Appeal of Tanzania in the Criminal Appeal of Shabani Said Kindamba vs Republic, Criminal Appeal No.390 of 2019 at Mtwara(unreported), Re-emphasized the importance of issuing a search warrant and receipt of seizure.

Arguing against the appeal, Mr. Kigoryo narrated how the appellant was arraigned in the trial court on 30/3/2021 where the charge was read over to him, and he pleaded guilty. The learned State Counsel contended that on the next day (31/3/2022) the appellant was brought to court for a preliminary hearing. Mr. Kigoryo submitted that when the appellant was reminded of his offence and the charge explained to him, he pleaded guilty once again.

Having narrated the background of arraignment in court of the appellant, to the satisfaction and appreciation of this court, the learned State Attorney was quick to admit that the procedure taken by the learned trial Magistrate was not correct since once the accused pleads guilty there is no Preliminary Hearing.

It is Mr. Kigoryo's submission that such irregularity notwithstanding, given the uniqueness of the matter of the matter at hand, the order for Preliminary Hearing (PH) did not affect the proceedings.

Expounding on his argument, the learned State Attorney submitted that the appellant did not dispute the facts read over to him and, he argued, that meant he understood the charge. To buttress his argument, the learned State Attorney referred this court to the case of **Ndaiyai Petro vs Republic**, Criminal Appeal No.277 of 2012 CAT, Dar es Salaam(unreported) Again Mr. Kigoryo was quick to point out that the

cited case is different from the case at hand because in the former the facts read did not disclose the offence while in the present case facts read to the appellant clearly explained the offence that the appellant was charged with. Mr. Kigoryo firmly emphasized that such omission did not affect the proceedings.

Moving on to the second legal issue he chose to bring to the attention of this court, Mr. Kigoryo eloquently submitted that the appellant was not supposed to be charged and convicted with the second offence because the statement of the first count was to the effect that the appellant was found to have illegally cultivated the prohibited plant. The learned State Attorney insisted that it was obvious that cultivation covers possession. It is Mr. Kigoryo's submission that since there was no additional information that the appellant was found in possession of a separate item of bhangi, accusing him on both counts was duplicity of the charge.

Nevertheless, Mr. Kigoryo averred, the defect was curable. The learned State Attorney submitted that this court could strike out one count and remain with another. To fortify his argument, the learned State Attorney cited the case of **Juma Idrisa and Another vs Republic**, Crim. Appeal No.218 of 2017 CAT, Dar es Salaam (unreported) particularly on page 11 where the Court of Appeal interpreted duplicity of a charge. To this end, the learned State Attorney opined that such legal defects did not affect the charge.

Submitting on the first ground of appeal where the appellant asserts that the trial court did not prepare a proper judgment, Mr. Kigoryo partly agreed. The learned State Attorney submitted that indeed, the accused had pleaded guilty therefore there was no need for the court to compose

a judgment. The learned State Attorney stressed that finding someone guilty is the same as convicting him/her. To substantiate his argument, the learned State Attorney referred this court to the case of **Peter Kabi and Another vs Republic**, Criminal Appeal No. 5 of 2020, Dar (unreported). The learned State Attorney submitted that section 312 is read in tandem with section 235 which is in dispute now.

Mr. Kigoryo contended that the fact that the word conviction was not used should not be used to water down the case. To cement his argument, the learned State Attorney cited the case of **Imani Charles Chimango vs Republic**, Criminal Appeal 382 of 2016 CAT, Mtwara on page 11 whereby the Court of Appeal stated based on the wording of section 235 of the CPA thus "it suffices to say in the circumstances of this case that by all necessary implications, a conviction was entered". To this end, the learned State Attorney argued that the first ground should be dismissed.

On the second ground, Mr. Kigoryo argued that the appellant asserted that the case was not proven beyond a reasonable doubt. The learned State Attorney stressed that it should be noted that the appellant had pleaded guilty. Thus, averred Mr. Kigoryo, there was no need to bring about witnesses to prove the charge. Furthermore, the learned State Attorney submitted that lack of forensic exhibit is irrelevant because there is no more important evidence than the accused person's plea of guilty. Mr. Kigoryo contended further that if a farmer says this is bhangi, there is no need to call a forensic expert. To substantiate his argument, the learned State Attorney cited the case of Joel Mwangambo vs Republic, Criminal Appeal No.516 of 2017 CAT, Mbeya (unreported).

Mr. Kigoryo moved on to the third ground on mitigating factors. The learned State Attorney contended that the sentence meted is according to the law which is section 11 of the Cap. 95.

On the fourth ground, the learned State Attorney argued that the appellant is complaining that the admission of facts, the facts as an unequivocal plea. In that regard, the learned State Attorney stressed that as alluded to the statement of the first count as well as the facts reduced into writing were self-explanatory on the offence charged. To this end, Mr. Kigoryo contended that the fourth ground has no merit.

Submitting on the fifth ground on search, the learned State Attorney argued that the same contravened section 38 of the Criminal Procedure Act. Mr. Kigoryo stressed that the legality of the search is irrelevant because the appellant had pleaded guilty. Thus, the learned State Attorney argued that the fifth ground is also without merit.

Responding to the arguments advanced by Mr. Kigoryo, the appellant submitted that even when a person is raped, it is a doctor who proves it. The appellant contended that no one proved that he cultivated prohibited plants. The appellant further submitted that the police who arrested him were looking for prohibited liquor commonly referred to as "Gongo" or Moshi.

The appellant argued that three of them were women who said that the appellant should be brought to the police station. The appellant submitted that the police could not go with their car to Matemwe but could not go with their car, so they alighted and started walking at Mtalikachao to his village. The appellant submitted that they pointed to him a farm and wanted him to say that it belonged to him which was far from his farm.

Having dispassionately considered the lower court record and arguments of both parties, I am inclined to determine the merits of the appeal. I start with the assertion on duplicity of charge. In the case at hand, the charge read over and explained to the appellant features two distinct counts each having a separate statement of the offence and particulars of the offence. Therefore, I am of the settled position that there was no duplicity of the charge as per definition of the Court of Appeal as provided in the case of **Director of Public Prosecutions vs. Morgan Maliki and Another** (supra).

Notwithstanding the above finding, I maintain that the second count was misplaced since there are no facts read to the appellant that prove what is contained in the particulars of the offence of the second count. In addition, the statement of the offence features an offence which appears in the first count, but the particulars of the offence have a different offence. Consequently, I hold on the outset conviction on the second count is illegal.

This brings me to the second legal issue that has been eloquently presented by Mr. Kigoryo namely conducting Preliminary Hearing after an accused has pleaded guilty. It is a settled position of the law that a Magistrate is the manager of the court proceedings and not otherwise. In the instant case, the learned trial Magistrate after he took the plea of guilty of the appellant, he ought to have taken the floor to control his proceedings by proceeding with the proper next step of reading the facts and thereafter entering a proper conviction to each count. However, in this matter the learned Magistrate conceded with the prosecutor that the matter is adjourned and scheduled for a preliminary hearing.

Based on that confusion, I am of the settled view that the appellant did not enter a plea of guilty and if he did as it appears in the proceedings, it was either he pleaded on the facts which were ambiguous, imperfect or resulting from mistake or misapprehension. This view is backed by what the prosecutor had told the lower court and what the trial court ended up doing. When the matter went for the second time as scheduled, still the prosecutor reminded the learned trial Magistrate that the matter was coming for a preliminary hearing which entails that the appellant had denied the charge read and explained to him.

Based on the above finding, the appellant's plea of guilty did not pass the test of an unequivocal plea. In simple language, I hold that the plea of guilty of the appellant was an equivocal plea which entitled the trial court to enter a plea of not guilty and thereafter proceed with the procedure laid down under section 192 of the Criminal Procedure Act [Cap. 20 R.E. 2022].

Premised on the above, I have no other choice but to quash the proceedings and conviction, set aside the sentence imposed by the lower court as I hereby do. I hereby remit back the file to the trial court for a new trial be conducted by taking the appellant's plea afresh. During the period of awaiting retrial the appellant shall remain in custody.

It 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 the Mr. Wilbroad Ndunguru, learned Senior State Attorney and the appellant who has appeared 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