IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 129 OF 2022

(From the decision of the Resident Magistrates' Court of Mbeya at Mbeya (Hon. R. W. Chaungu, SRM) in Criminal Case No. 154 of 2018)

UPE S/O NTUTA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 20/09/2022
Date of Judgement: 24/10/2022

MONGELLA, J.

The appellant was arraigned in the RM's court for Mbeya at Mbeya in Criminal Case No. 154 of 2018 on two counts being: One, Being found in possession of narcotic drugs contrary to **section 17 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015**; and two, cultivation of prohibited plants contrary to **section 11 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015**.

On the 1st count the offence was alleged to be committed on 16.02.2017 at Jojo village Santilya ward, within the city and region of Mbeya. He was alleged to have been unlawfully found in possession of cannabis sativa (bhang) weighing 17 kilograms and 29 rolls of processed cannabis sativa

weighing 362 grams all valued at T.shs. 60,000/-. On the 2nd count he was alleged to have cultivated 2000 plants of narcotic drugs known as cannabis sativa (bhang). The offence was alleged to have been committed on 16.02.2017 at Jojo village Santilya ward within the city and region of Mbeya.

The appellant was convicted on both counts out of his own plea of guilty. He was sentenced to serve 5 years imprisonment for the 1st count and to serve 30 years imprisonment for the 2nd count. The sentence was to run concurrently. Aggrieved by the decision he filed the appeal at hand on four grounds being:

1. *That the finding of the trial court was unfounded hence unfair to the effect that previously I was released on bail with a condition to report to the police station once per week the latter being told me to stay at my home till when called. In fact I was called through mobile phone after one year and ten months, unbelievable on reaching the police station I found the court order that I was already convicted and sentenced to imprisonment for 35 years in absentia surprisingly the recorded shows that I was pleaded guilty to all substances of the charge.* (sic)

2. *That the trial court erred both in law and fact when relied on fictitious and fabricated evidence by the prosecution, which cannot be refuted.*

3. *That the trial court erred both in law and fact for not comprehending that the alleged plea of guilty was an equivocal plea and even if we assume that I was present in court during hearing as the offence against me was a serious and technical one still I could have simply pleaded guilty as shown in the record of the trial court.* (sic)

4. *That the trial court erred both in law and fact for not understanding that the substance of the charge stated to me does not correspond with or resembles to the admission alleged to have been admitted uses my own words in both courts.* (sic)

During trial the appellant fended for himself. He had nothing to submit than to pray for his grounds of appeal to be adopted as his submission and to hear first from the respondent/republic. The respondent on the other hand was represented by Mr. Rwegira, learned state attorney. He opposed the appeal.

Mr. Rwegira first made a general remark on the whole case. With regard to the 1st count, he submitted that the appellant replied to the charge read out to him that "*It's true I was found in unlawful possession of Bhangi 17.362 Kgs. valued at 60,000/-*" and on the 2nd count he replied that "*It's true I was found in unlawful cultivation of 2000 plants of Bhangi.*" He argued that concerning the two pleas, the issue becomes whether on both counts the plea was unequivocal.

He found the plea on the 1st count improper on the ground that the particulars of the offence did not tally with what the appellant pleaded as being true. He said that the particulars of the offence, among other things, state that he was found with Bhang weighing 17 kgs. and 29 rolls of processed cannabis sativa worth T.shs. 60,000/- weighing 362 grams. Considering the variance between the particulars of the offence and the appellant's plea, he argued that it would have been wise for the Hon. Magistrate to record plea of not guilty. In support of his argument he referred the case of ***Halid Athumani vs. Republic*** [2006] TLR 83.

Regarding the 2nd count, Mr. Rwegira contend that the appellant's plea thereof was unequivocal. The bases of his argument was that: **one**, the offence was unlawful cultivation of prohibited plant; **two**, the offence was disclosed on the particulars of the offence; **three**, the facts read out disclosed the elements of the offence; and **four**, the appellant admitted the facts and the exhibits, to wit the cautioned statement, which was also read out in court. He found the plea being perfect.

As to the grounds of appeal, he addressed the 1st ground whereby he disputed the appellant's claim that he was sentenced in absentia. Referring to the typed proceedings, he argued that the proceedings show clearly that the appellant was present in court. Remarking on the sanctity of the court record, he contended that it is trite law that court records/documents are considered to be serious documents and do not lie.

On the 2nd ground, he argued that the charge is not evidence, but the prosecution furnished exhibits. He disputed the exhibits being fictitious as contended by the appellant, on the ground that the appellant admitted the exhibits with no objection. He found the ground an afterthought.

Addressing the 3rd ground, he maintained his arguments on the general address whereby he conceded that the plea on the 1st count was equivocal, but the plea on the 2nd count was unequivocal. He had the same position regarding the 4th ground. In the premises he contended that the remedy available is for the court to uphold the conviction and sentence on the 2nd ground, and to order a retrial with respect to the 1st count.

In rejoinder the appellant changed the story saying that he was present in court, but did not understand what transpired and what he pleaded guilty to.

After considering the grounds of appeal, the arguments by the parties and gone through the trial court record, I wish to state that considering the appellant's rejoinder, the 1st ground stands baseless and an afterthought. Besides, as argued by Mr. Rwegira, the law is settled to the effect that court records are taken to be sacrosanct. They are believed to reflect what exactly transpired in court relevant to the case and thus cannot be easily impeached. This was decided by the Court of Appeal in the case of ***Alex Ndendya v. The Republic***, Criminal Appeal No. 207 of 2018, (CAT at Iringa, unreported) whereby the Court held:

"It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."

The Court further revisited its previous decisions in ***Halfani Sudi v. Abieza Chichili*** [1998] TLR 527 and ***Shabir F. A. Jessa v. Rajkumar Deogra***, Civil Reference No. 12 of 1994 (unreported) in which it held that "***A court record is a serious document; it should not be lightly impeached.***"

I as well find the 2nd ground baseless and shall not let it take much of my time. The conviction and sentence was based on the appellant's own plea of guilty. In the premises, no evidence was led by the prosecution apart from the exhibits tendered which included the appellant's cautioned statement. The same, as argued by Mr. Rwegira, was admitted with no objection on his part.

On the 3rd and 4th grounds, the appellant claims that the plea he entered on both counts was equivocal. The conditions under which a plea of guilty can be valid for purposes of conviction without trial have been settled in a number of cases. See: ***Nebo Emmanuel vs. The Republic***, Criminal Appeal No. 173 of 2019 (CAT at Mbeya, reported at Tanzlii); and ***Michael Adrian Chaki vs. The Republic***, Criminal Appeal No. 399 of 2019 (CAT at DSM, unreported) in which the Court stated the conditions to be that:

(a) 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;

(b) 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.

(c) 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 CPA.

(d) The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged.

(e) 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.

(f) 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."

See also: ***Onesmo Alex Ngimba vs. The Republic***, Criminal Appeal No. 157 of 2019 (CAT at Mbeya, reported at Tanzlii); and ***Philipo s/o Faustine @ Chitembele vs. The Republic***, Criminal Appeal No. 666 of 2020 (CAT at Mbeya, reported at Tanzlii).

In the matter at hand, as stated earlier, two counts were laid against the appellant. The first being, found in possession of narcotic drugs and the second, cultivation of prohibited plants, to wit 2000 plants of bhangi. As

argued by Mr. Rwegira to which I subscribe, the plea on the 1st count was equivocal as the appellant entered plea on something not presented in the particulars of the offence. While the particulars on the 1st count referred to 17 kilograms of cannabis sativa (bhang) and 29 rolls of processed cannabis sativa; the appellant's plea referred to 17.362 kg of bhang, which is different. The plea as well does not include the 29 rolls of processed cannabis sativa. The plea in this count therefore does not meet the threshold provided in the above cited authorities.

With regard to the 2nd count, Mr. Rwegira had the stance that the plea was unequivocal thus proper. He had the argument that the plea met the criteria settled under the law on the ground that the offence was disclosed on the particulars of the offence; the facts read out disclosed the elements of the offence; and that the appellant admitted the facts and the exhibits, to wit the cautioned statement, which was also read out in court. In my view however, the accused is as well supposed to admit the facts read out by the prosecution in clear terms.

In the proceedings it shows that, after the facts were read the appellant replied "*All the facts as related to me are correct. I so admit.*" In the case of ***John Charles vs. Republic***, Criminal Appeal no. 554 of 2017 (CAT at Arusha, found at Tanzlii) the Court held that the accused must admit to the narrated facts unequivocally by stating that he/he admits to all facts as stated by the prosecution. The Court further held that failure to admit the facts unequivocally, the plea thereof cannot be taken to have been a plea of guilty. In my considered view, I find the statement that "*all the facts as related to me are correct*..." not depicting admission to the facts

read out by the prosecution in clear terms. It was therefore incorrect for the trial court to consider the same as plea of guilty and to convict the appellant as such.

Considering the flaws by the trial court as observed hereinabove, I quash the conviction and sentence by the trial court and order the matter to be retried in the district court before another magistrate. The prosecution is hereby employed to see to it that the process of initiating retrial is expedited. In the event the appellant is found guilty of the offences, the time already spent in serving the sentences should be taken into consideration and deducted accordingly. Meanwhile, the appellant shall remain in custody.

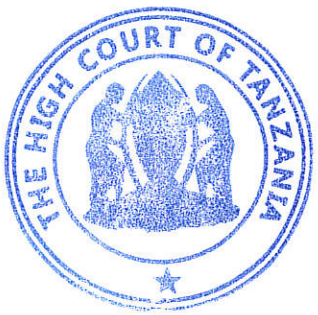
It is so ordered.

Dated at Mbeya on this 24th day of October 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in Chambers on this 24th day of October 2022 in the presence of the appellant appearing in person and Ms. Hannarose Kasambala, learned state attorney for the respondent.



L. M. MONGELLA

JUDGE