

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO
CRIMINAL APPEAL NO.87 OF 2022

(From the Original Criminal Case No. 58 of 2022 in the District Court of Morogoro)

DIRECTOR OF PUBLIC PROSECUTIONSAPPELLANT

VERSUS

HAMIS MUSTAPHA MWINYIMVUA.....1ST RESPONDENT

ANTIPAS RICHARD MKOBA.....2ND RESPONDENT

JUDGEMENT

Hearing on: 31/10/2022

Judgement on: 03/11/2022

NGWEMBE, J:

This is an appeal against the judgement of the trial court which court had no advantage to hear the case on merits, but rather ended up convicting and passing sentence against the respondents according to the plea bargaining entered between the Republic and the Respondents. Following the agreed plea bargaining being filed in court, the trial court passed sentence of one (1) year imprisonment. The Director of Public Prosecutions (DPP) was aggrieved with that sentence, hence immediately

filed petition of appeal under certificate of urgency comprising one ground that the Trial Court erred in fact and in law in imposing a sentence contrary to the terms agreed in the plea agreement.

For convenient purposes, the genesis of this appeal traces back to 21st March, 2022, at Geti la Madamu area, Mkuyuni ward within Morogoro District in Morogoro region, where the respondents were found trafficking in Narcotic Drugs, to wit; 46:13 kilograms of Cannabis Sativa commonly known as "Bhang" contrary to section 15A (1), (2)(c) of the Drugs Control and Enforcement Act, [CAP 95 R.E 2019].

Upon being arraigned in court and properly charged, the appellant and respondents entered into plea bargaining whereby on 4th October, 2022 both parties agreed and executed a plea agreement. One of the conditions in that agreement was the respondents freely pleading guilty to the charges, voluntarily and without any threat or force or coercion of any kind or promise or benefit of any form other than contained in their agreement. That they consented to be imprisoned for a period of two and a half years (2 ½). Such plea agreement being filed in court, on 4th October, 2022 the respondents stood in court and proceeded to plead guilty to the charge as per the agreement, consequently the trial court proceeded to convict them and passed sentence to serve one year imprisonment. Such sentence was contrary to the plea-bargaining agreement executed between the respondents and the Republic. Being aggrieved with that sentence, the DPP appealed to this court as aforementioned.

On the hearing date, the appellant was represented by Ms. Neema Haule Senior State Attorney, while the respondents appeared in their personal capacity. In arguing this appeal, the learned Senior State Attorney insisted that the trial court's judgement comprised a sentence which was contrary to the bargaining executed by both parties.

Further submitted that, plea bargaining was to the effect that the accused shall serve two and a half years (2 ½) for the offence they were charged with, hence the trial court erred in law by passing sentence contrary to the parties' agreement. Referred this court to **section 194 D (6) of the Criminal Procedure Act (CPA)** as amended on March this year in Misc. Amendments Act No. 1 of 2022.

Moreover, she submitted that the respective law provide sentence of 20 – 30 years for the offence charged, but due to the plea bargaining the respondents agreed to serve only two and a half years, hence the trial court went wrong to pass sentence contrary to the agreed terms.

Rule 21 (2) of the plea bargaining retained discretionary powers of the trial court in sentencing the accused person. However, those rules were of year 2021, while the principal legislation was amended this year of 2022. Usually when there is a conflict between the principal legislation and subsidiary legislation, section 36 (1) of the Interpretation Laws Act Cap 1 R.E. 2019, provide an answer that the principal legislation shall prevail. Substantiated her argument by referring this court to the case of **Virtel Tanzania PLC Vs. R, Criminal Appeal No. 55 of 2021** where the court ordered compensation contrary to the plea bargaining, on appeal the agreed compensation in plea bargaining prevailed.

The learned Senior State Attorney insisted that, the issue of sentence is no longer under court's discretion, rather the trial court has discretionary powers to reject the plea bargaining, but once accepted and admitted in court, same cannot pass sentence contrary to what was agreed. She also cited a South African case of **Denise Cindy- Lee Jansen & Another Vs. The State**, where the Supreme Court held that, the High court decided contrary to the agreement in plea bargaining and ordered that the court has no right to sentence different from what was agreed in the plea bargaining.

Lastly, she prayed this court to set aside the sentence of the trial court and pass an appropriate sentence according to the agreement under section 336 (1) (b).

In turn the respondents being unrepresented and possibly without proper knowledge on plea bargaining rules, had no useful response. 1st admitted that they agreed on the sentence of 2 ½ years imprisonment as per the plea agreement, but the trial court was equally right to sentence them for only one year which they are serving it by performing community services.

The 2nd respondent equally conceded to what the learned senior State Attorney submitted and agreed to the terms of plea agreement, but repeated that the trial court was equally right to sentence them for one year as they are laymen and the trial court is run by competent magistrates who are qualified lawyers.

With deep considerations of the rival arguments on this appeal, I think the issue before this court raised by the Republic is straight forward. The amendments of Criminal **Procedure Act [CAP. 20 R.E. 2022] (CPA)** provides for the correct position as far as plea bargaining is concerned. To begin with the term "Plea bargaining" or "plea agreement" is defined under section 3 of CPA to mean an *"agreement entered into between the prosecution and the accused in a criminal trial in accordance with sections 194A, 194B and 194C"*

Likewise, the term "plea bargaining" is defined in the same section to mean *a negotiation in a criminal case between a prosecutor and the accused whereby the accused agrees to plead guilty to a particular offence or a lesser offence or to a particular count or counts in a charge....in return for concession from the prosecutor leading to a lenient sentence or withdrawal of other counts"*

Further section 194 (1) empowers the Public Prosecutor at any time before judgement to enter into plea bargaining arrangement with the accused (s). For clarity the section is quoted: -

194A.-(1) "A public prosecutor, after consultation with the victim or investigator where the circumstances so permit, may at any time before the judgment, enter a plea-bargaining arrangement with the accused person and his advocate if represented or, if not represented, a relative, friend or any other person legally competent to represent the accused person"

The also requires the plea agreement, among many other requirements should be in writing, witnessed by advocate of the accused or if not represented, a relative, friend or any other person legally competent to represent the accused, prior to the written consent of the DPP. Other requirements are provided for in section 194C which is quoted: -

194C.-(1) "A plea agreement shall be in writing witnessed by advocate of the accused or, if not represented, a relative, friend or any other person legally competent to represent the accused, and shall-

(a) state fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person;

(b) be read and explained to the accused person in a language that he understands;

(c) accepted by the accused person; and

(d) be signed by the prosecutor, the accused person and his advocate, if represented or, if not represented, a relative, friend or any other person legally competent to represent the accused.

(2) Where an accused person has negotiated with a prosecutor through an interpreter, the interpreter shall certify that he is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement.



(3) Without prejudice to the requirements set out under subsections (1) and (2), a plea agreement shall not be entered between a prosecutor and accused person, without prior written consent of the Director of Public Prosecutions or any other officer authorised by him in writing"

Further section 194 D (1) (2) (5) requires that, the plea agreement shall be registered by the court, after satisfying itself that the agreement was voluntarily obtained and proceed to convict the accused.

Section 194(D) (6) of the CPA as amended, specifically provide that where the plea agreement is entered accordingly, the court shall proceed to sentence the accused in accordance with the plea agreement. In essence this subsection forms the basis of this appeal. For easy of reference the section is quoted: -

194D (6) *"Where conviction is entered in accordance with subsection (5), **the court shall proceed to sentence the accused person in accordance with the plea agreement notwithstanding the sentence specified by the provisions of the applicable law.**"*

With direct interpretation of laws, the above sections speak what they mean and mean what they say. Therefore, I agree with the learned Senior State Attorney that Rule 21 (2) of the Plea-bargaining Rules of 2021 conflicts with amendments of the CPA of 2022. Hence the principal Act that is, CPA as amended must prevail. The amendments of CPA have ousted the discretionary powers of the trial court in sentencing the accused as far as

plea agreement is concerned. As of now, the trial court once accept the executed plea agreement in court to end up the trial, it has no choice to sentence the accused otherwise, but must pass sentence as per the terms and conditions provided for in the executed and filed plea agreement.

In this appeal, the records are clear like a brightest day light that, parties herein executed voluntarily a plea agreement entered on 4th October, 2022, same was filed in court. In clause 3 of that agreement, the respondents herein agreed to serve two and a half years (2 ½) imprisonment. As per the sections referred above, the trial court lacked discretionary powers to depart from what the parties agreed. Unfortunately, the trial court misdirected itself in considering that it had discretionary powers to pass sentence contrary to the agreed terms and conditions in the plea bargaining. Obvious I view that, had the trial magistrate directed his mind on the new amendments of the CPA, would not have passed sentence of one year imprisonment contrary to what was agreed by the parties. This has reminded me on the sanctity of parties' agreement. When the law so provides, and parties who are all matured capable of understanding the terms and conditions of their agreement, voluntarily enters into an agreement, and such agreement is reduced in writing, which terms and conditions are in line with applicable law, the duties of the court is concluded. The court has to pass its judgement, conviction and sentence according to the agreement.

Sarkar on Evidence, 15th Edition at page 1269 discussed in depth on the sanctity of agreement as follows: -

"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as substitute for such instrument, or to contradict or alter them".

Applying this principle, the Court of Appeal in the case of **Univeler Tanzania Ltd Vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** proceeded to emphasize that: -

"Strictly speaking under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute"

Those principles may apply mostly on civil and commercial matters as opposed to criminal trials. However, the principles of law stand firm even on criminal trial under plea bargaining. In fact, plea agreement or plea bargain as rightly defined in section 3 of CPA, is purely a contract voluntary entered between the Republic and the accused. Those terms and conditions are reduced in writing. As such the agreement binds the parties immediately when it is admitted and accepted by a trial court to terminate



that trial in terms of that plea agreement. Thus, the trial court has to pass judgement in accordance to the terms and conditions of the parties' agreement. The discretionary powers of the court is ousted by that agreement of the parties.

Having so said, and for the reasons so stated, this appeal is meritorious same is granted. I proceed to set aside the sentence passed by the trial court, and substitute therein by sentencing the respondents to serve two and a half years (2 ½) imprisonment as they rightly agreed in the plea agreement. It is noted that, the respondents are already performing Community Services, therefore, this court orders that, they have to perform that duties for the period of 2½ years commencing from the date of previous conviction and sentence.

Order accordingly.

DATED at Morogoro in Chambers this 3rd day of November, 2022.



P.J. NGWEMBE

JUDGE

03/11/2022

Court: Judgement delivered at Morogoro in Chambers on this 3rd November, 2022 in the presence of Ms. Neema Haule Senior State Attorney and for the Appellant and in the presence of both Respondents.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

03/11/2022