

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 33 OF 2022

(Arising from decision of the District Court of Tarime at Tarime in Criminal Case No. 77/2022)

BETWEEN

KATARINA MWITA..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

02/11/2022 & 03/02/ 2023

M. L. KOMBA, J.

The appellant, KATARINA MWITA, was convicted on her own plea of guilty of the offence 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 Drugs Control Act). She was accused of found trafficking 13.85 Kilograms of Narcotic Drugs commonly known as bangi (*scientific name is Cannabis Sativa*) on 14th Day of March, 2022 while at Obwere Street area within Rorya District in Mara Region. She purportedly pleaded guilty to the charge. Facts of the case were adduced by the prosecution. The trial court

was satisfied that the charge was proved. Consequently, she was sentenced to thirty years imprisonment. Being aggrieved by conviction and sentence she prefer this appeal with two grounds that;

- 1. That the trial court erred in law and in facts by convicting the appellant based on imperfect, ambiguous and unfinished plea and for that reason, the trial court erred in law in treating it as a plea of guilty.*
- 2. That the trial court erred in law and in facts by not taking into consideration the fact that even upon admitted facts the appellant could not in law have been convicted of the offence charged.*

When the matter was scheduled for hearing, the appellant was represented by Mr. Samson Samo an Advocate while Mr. Nimrod Byamungu learned State Attorney represent the respondent, Republic. Exercising his right to begin to amplify the grounds of appeal, Mr. Samo submitted that the District Court of Tarime erred to convict the appellant relying on imperfect, ambiguous and unfinished plea and the court consider to be plea of guilty and it erred for failure to consider admitted facts were not enough to convict the appellant. He submitted further that in order for a person to be found guilty in an offence there are some issues need to be proved which includes, that accused should be arraigned on a proper charge, the charge should explain offence and particulars properly framed,

the court must satisfy without doubt and must be clear in its mind that accused is aware of what is faced otherwise justice should not be met. Also, when accused called upon to plea to the charge, the charge is full explained before given a time to state whether she admit or denied each and every particular of offence as in section 228 (1) of CPA Cap 20.

According to him, another issue is that the fact adduced after recording the plea of guilty should disclose and establish all the elements of the offence charged, the accused must be asked to plea and actually must plead guilty to each and every ingredients of the offence charged, the same must be properly recorded and must be clear, the last ingredient before conviction on a plea of guilty the court must satisfy without any doubt that the facts adduced established all the elements of the offence charged.

Mr. Samo submitted further that when he read proceeding and judgment which convict the appellant, he discovered that prosecution failed to establish facts elements of plea of guilty. He said in the proceedings in the 1st and 2nd pages there are facts read out by the prosecution and in those facts there are nothing that show the appellant was caught with *Cannabis Sativa* as there is nothing which the republic show that they send those leaves to Government Chemist and the later prove the same to be

Cannabis Sativa by providing report as directed under section 48 (A) (1) of the Drugs Control Act. He insisted that the section compel the party to use the office of Government Chemist which was not done.

It was his submission that facts which were read in court did not establish the offence because the *Cannabis Sativa* was not proved and it was not tendered in court so that the court can satisfy itself. To buttress his position, he referred this court to Court of Appeal decision in Criminal Appeal No. 399 of 2019 between **Michael Adream Chaki vs. Republic** where the Court provides six ingredients and explain them that the court should establish all ingredients which constitute the offence. He insisted the fact was not established whether those leaves were *Cannabis Sativa*.

On the second ground it was his submission that because there is no fact that establish those leaves were *Cannabis Sativa* as there is no report, the court misdirected itself to convict the appellant while ingredient of the offence was missing from the Government Chemistry and therefore the plea of guilty shall not stand as facts were not established and he prayed for the appeal be allowed, quash the decision of the District Court of Tarime and set free the appellant.

In his part Mr. Byamungu expressed his firm position that respondent was opposing the appeal and he pray to argue both grounds collectively first by declaring six important ingredients as listed by the appellant were considered. He submitted that it is true the prosecution did not tender Government Chemistry Report neither tendered *Cannabis Sativa* as an exhibit because due to the circumstances of the case, the missing exhibits were not important because appellant pleaded guilty and, in the proceedings, there were non contentious because the appellant agreed to commit an offence.

He further submitted that the best evidence is one which accused plea guilty in court and referred this court to the case of **Joel Mwangambako vs. Republic**, Criminal Appeal No. 516 of 2017 CAT seated at Mbeya (un reported) that the court insisted in the circumstance of plea of guilty it is not important to tender exhibits, that is to say it is not legal requirement but it is desirable. In that case the court agree the sentence to be right after satisfying the state of mind. He prays the appeal to be dismissed as it lack merit.

In rejoinder Mr. Samo submitted that as the Respondent agree on the six ingredients then he insisted that one of the ingredients is missing which is

verification whether the leaves were *Cannabis Sativa* and the one to certify is the Government Chemist. Prosecutors did not tender the leaves nor the report, he referred the cited **case of Michael Chaki** where they said *Cannabis Sativa* were not tendered and the offence were not proved.

Having read pleadings and hear submission for and against the appeal, this court has the duty to determine whether the plea was equivocal or unequivocal in connection with the grounds of appeal and proceedings that lead to appellant conviction.

Generally, a person convicted of an offence on his own plea of guilty is barred from appealing against conviction. He can only appeal against the extent or legality of the sentence imposed. That is in terms of section 360(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). That provision states that:

"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence."

That strictness of the law notwithstanding, courts have taken cognizant of certain circumstances which may render a plea equivocal when a conviction on one's plea of guilty may successfully be challenged by way of an appeal.

Criteria or circumstances which may make a plea equivocal were identified by the High Court (Samatta, J. as he then was) in **Laurent Mpinga vs. Republic** [1983] TLR 166 and later cited with approval in **KarlosPunda vs. Republic**, Criminal Appeal No. 153 of 2005 (unreported). The four factors set were: -

- 1. That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;*
- 2. That the appellant pleaded guilty as a result of mistake or misapprehension;*
- 3. That the charge laid at the appellant's door disclosed no offence known to law; and*
- 4. That upon the admitted facts the appellant could not in law have been convicted of the offence charged.*

Looking at the grounds of complaint raised by the appeal, I note that the appellant attempting to fit his quest within the parameters of the principle stated in the above cited case. In order for a plea to be equivocal, the following factors must conjunctively met as agreed by both sides in this appeal which are:-

- 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.*

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.*

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. See also the case of **Michael Adrian Chaki vs. Republic** (supra).*

One of the complaint registered by Mr. Samo in his submission was that there was missing information about the leaves which was in possession of the appellant to be *Cannabis Sativa*. He said they were not tendered in court neither there was a report from the responsible Authority and for that accord, according to him, facts did not establish the offence. In reply Mr. Byamungu for Republic agreed that the leaves were not tendered in court

as exhibit and there was no report from the Government Chemist and explained to this court that due to the circumstance of this case the missing exhibits were not important because the appellant pleaded guilty and the best evidence is one of the accused to plead guilty. I agree with his explanation that it is the best evidence and he pleaded guilty.

I further agree with him that tendering and admission of an object or a document as an exhibit after an accused person has pleaded guilty to the charged offence is not a legal requirement though it is desirable to do so. See **Matia Barua vs. Republic**, Criminal Appeal No. 105 of 2015 (unreported) and **Joel Mwangambako vs. Republic**, (supra). In both cases admitted facts of the case disclosed all the elements of the charge offence and the plea was unequivocal. With regard to the case at hand, I had to go further and satisfy myself whether facts adduced after recording the plea constituted an offence charged.

Reading proceedings of the trial court at the very 1st page the appellant (accused person) replied as follows after the charge was read to him;

It is true your honor that I was found in possession (of) the said narcotic drugs.

Even when the facts were read to her she admitted all the facts. The question now is does the facts as read by prosecutor constitute an offence as charged?

The offence is rooted from Section 15 A of the Drugs Control Act reads:

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 specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.

(2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in-

(a) (b) and

(c) cannabis or khat weighing not more than fifty kilogram.

Among the factors to be established is that, the substance is prohibited under the act and the weight of it. Unlike in the present, in the case of **Joel Mwangambako vs. Republic**, (supra) before arresting the accused, Agriculture officer certified that the plants found in accused farm were *cannabis sativa* and the Agriculture officers' report was tendered in court, unlike in the present case, there was no certification of the substance

which was found in possession of the appellant while at Obwere street to be *cannabis sativa*, this is the point of departure. In the present case the report of the certification of the substance was important. Facts which read by prosecutor after the plea purporting to support the charge did not establish all the elements of the offence as laid down in charge. Substance was not certified to be *cannabis sativa* and it was not established who made the measurements and certify it was in that weight.

I subscribe to the findings in case of ***Michael Adrian Chaki vs. Republic*** (*supra*) that in the absence of those facts which were necessary for establishing the offence charged, the appellant's plea cannot be taken to have been a plea of guilty. The facts, as they are, did not disclose any offence in law. The appellant's plea of guilty cannot stand, the same is thereby impaired and is rendered nugatory because he cannot be taken to have pleaded guilty to a non-existent offence. The principle that "upon the admitted facts the appellant could not in law have been convicted of the offence charged" rightly applies here. That being so, the trial court erred in treating it as a plea of guilty. For that matter the first ground of appeal is found to be worth. The conviction cannot, therefore, stand. The same is hereby quashed and the sentence is set aside.

Having quashed the conviction and set aside the sentence, the other ground of appeal is superfluous and I shall not, delve to consider it. Mr. Samo prayed for release and set free of the appellant; I will not take that path. I am aware that the usual course taken by the Court where the appellant's plea is found to be equivocal that the case is remitted back to the trial court for it to proceed with the trial as if the appellant had denied the charge that is to say, he has pleaded not guilty to the charge. See ***Michael Adrian Chaki vs. Republic*** (*supra*). This does not amount to trial *de novo* neither re trial. I order full trial as if the accused pleaded not guilt.

All being said, I allow the appeal, quash the conviction and set aside the sentence. Record of the trial court be remitted back to trial court for it to deal with the appellant as if he had pleaded not guilty, that is to say, the trial court has to proceed with the case from where it had ended before the appellant purportedly pleaded guilty.

Bearing in mind the time the appellant has spent in prison, I direct the trial to be immediately commenced and, in the event, she is found guilty, the period of time she has spent in prison as a prisoner to be considered in the determination of the sentence.

DATED at **MUSOMA** this 30 Day of January, 2023.



NK
M. L. KOMBA
JUDGE

Judgement Delivered under the seal of the court 3rd February, 2023 in the presence of Mr. Isihaka Ibrahim, State Attorney and Mr. Samson Samo who was remotely connected.

NK
M. L. KOMBA
JUDGE

03 February, 2023