

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

HC. CRIMINAL APPEAL NO. 38 OF 2023

*(Original from District Court of Ukerewe at Nansio Criminal Case No. 17 of 2023, HC Criminal Reference
No. 02 of 2023)*

EMMANUEL S/O MAENDELEO @ BEI 1st APPELLANT
ALPHAXARD BENEDICTO @ MAMBO 2nd APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

JUDGMENT

26th June & 4th July 2023

ITEMBA, J

In the District Court of Ukerewe at Nansio, Emmanuel Maendeleo Bei and Alphaxard Benedicto Mambo were charged with the offence of being in possession of Narcotic Drugs contrary to section 15(2) of the Drugs Control and Enforcement (amendment) Act, Cap 95 R.E 2019 herein, the Act. When the charge was read before the appellants for the first time, they entered a plea of guilty and on the same day, they were immediately convicted and sentenced to life imprisonment. Obviously, the appellants were pained with the outcomes and filed this appeal armed with seven grounds as follows:

- 1. That, the appellants' plea of guilty was/were not unequivocal which the court should order this matter to be retried denovo.*
- 2. That, the tried court erred in law for failure to note that the appellants were convicted and sentenced unfairly and their right to be heard was violated.*
- 3. That, the trial court erred in law to convict and sentence the appellants without finding out whether the appellants admitted to have committed the alleged offence knowingly and voluntarily with any reservation.*
- 4. That, even taking into consideration the admitted facts, the appellants plea was/were imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as the plea of guilty.*
- 5. That, the lower court didn't explain vividly the facts of the case and the ingredients of the offence to the appellants which renders the appellants' pleaded guilty was the result of mistake or misapprehension.*

6. That, the magistrate's fundamental duty to know whether the appellants know the meaning of the plea of guilty and the effect of doing so to the appellants was not elaborated by the trial court before entered the conviction and sentence which was excessive.

7. That, the appellants were not informed of their right to be represented by an advocate during the trial so they did not have a fair hearing.

As per the charge sheet, it was alleged that on 19th of February 2023 at about 12:30hrs at Lugezi Port within Ukerewe District in Mwanza region, the appellants were found by a police officer namely Insp. Aidan in unlawfully possession of two bags of narcotic drugs commonly known as *bhangi*.

When the appeal was scheduled for hearing the appellants fended for themselves while the respondent Republic was represented by learned state attorneys namely; Ghati Mathayo, Evans Kaiza and Ibrahim Salim. The appellants were given an opportunity to argue their appeal but they asked for the respondents to be the ones to roll the ball.

Mr. Kaiza told the court that they support the appeal for the reason that the chargesheet was defective. He expounded that the chargesheet mentions that the appellant violated section 15(2) of the Act but the offence of being found in possession of *bhanghi* is under section 15(1)(a) of the same Act. He argued that under the circumstances, the appellant's plea was not properly entered, hence equivocal. The learned state attorney added that in charging person with such kind of offence the weight of the said narcotic drug have to be mentioned because this will determine the court's jurisdiction and whether the accused is eligible to bail or not. He cited the case of **Michael A. Chaki v R** Criminal Appeal No 399/2019 Court of Appeal Dar es salaam which laid down the principles for an unequivocal plea and one of them is that the particulars of the charge have to be clear. And that based on a wrong section of the law, the plea was equivocal. He prayed for the court to quash the trial court's proceedings and set aside the judgement thereof. He further prayed for a retrial so that the case will be heard on merit after the prosecution has amended the charge and by that, the appellants rights won't be prejudiced.

In the other side, Emmanuel Maendeleo as expectedly, agreed with the learned state attorney that they were not properly charged. He

however insisted that when arrested, he did not carry any drugs and even the said two bags were not produced before the court. The second appellant, Alphaxard Benedicto Mambo was of the same prayer that he should be set free. He also added that he was not involved at all in the offence because he is a motorcycle driver commonly known as *bodaboda* and the owner of the bags, the first appellant was just his passenger.

This being the summary of what transpired at the trial court and submissions from both sides, the issue is whether the appeal has merit. To start with, the accused were charged with **section 15(2)** of the Act which states that:

*'(2) Any person who produces, possesses, transports, exports, imports into the United Republic, sales, purchases or does any act or omits anything in respect of **drugs or substances not specified in the Schedule** to this Act but have proved to have drug related effects, or substances used in the process of manufacturing of drugs commits an offence, and upon conviction shall be sentenced to life imprisonment.'*

As rightly stated by the learned state attorney, if at all the appellants were found with *bhanghi* the proper section would have been **section 15(1)(a)** of the Act which states:

'15. -(1) Any person who-

(a) trafficks in **narcotic drug or psychotropic substance**; commits an offence and upon conviction shall be sentenced to life imprisonment.'

For a plea of guilty to be unequivocal and therefore valid, it must pass the test that this Court set in the case of **Michael Adrian Chaki** (supra). In that case the Court stated:

"... there cannot be an unequivocal plea on which a valid conviction may be founded unless these conditions are conjunctively met:

- 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 dear 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. This is in terms of section 228(1) of the CPA.*
- 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 (see Akbarali Damji vs R. 2 TLR137 cited by the Court in Thuway Akoonay vs Republic [1987] T.L.R. 92);

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"
[Emphasis added]

It also in records, at page 7 out of 9 of the typed proceedings that before sentencing, when the appellants were given an opportunity for mitigation they stated:

'ACCUSED PERSON'S MITIGATION

1st ACCUSED PERSON

The bag was not mine. I was called by a person at Musoma Zero and gave me the bags to take at Mwanza (sic). He promised me if I will take them at Mwanza safely, he will pay me 30,000/=. He further told me that I have to pass through Ukerewe he will communicate with one boba boda to take me. He gave me the number and boda took me to Rugezi port. Also, your honor my one kidney is not functioning.....I pray for bail consideration.

2nd ACCUSED PERSON

Your honor my duties are boda boda..... I was phoned and received a passenger (sic). I received the 1st bag and I was arrested by the police officer. I pray for leniency.'

Based on these kinds of statements, it appears that the appellants disowned the said bags which they are alleged to have been found with. The trial court should have noted that the appellants are not actually admitting to have committed the offence charged.

Therefore, the charge was clearly defective because the facts of the case were referring to narcotic drugs namely *Bhangi* but the section was relating to drugs or substances not specified in the Schedule to the Act. Thus, what was alleged by prosecution is not supported and does not feature in the charge.

In **Rajabu Khamis @ Namtweta vs. Republic**, Criminal Appeal No. 578 of 2019 (unreported), the Court said the following with regard to defective charges: -

"We need not emphasize here that particulars of offence are more informative to accused persons (most of them being laypersons) than the statement of offence. In our view, it is simple and easy for an accused person to understand what is elaborated in the particulars of offence and prepare his

defence than in the statement of offence which is somehow technical having been made of provisions of laws."

Relying on the cited case of **Michael Adrian Chaki** the respondent moved the court to order a retrial for the case to be heard on merit. I will not agree with this prayer for the following reasons. For a defective charge to be eligible to amendment, the said amendment should not be caused without injustice. Due to the nature of the charge in this particular case the intended amendment will touch the core part of the case on what exactly the appellants are alleged to have been found with, was it the narcotic drug or psychotropic substance or the drugs or substances not specified in the Schedule to the Act? I find that this amendment cannot be done without causing injustice in terms of section 234(3) of the Criminal Procedure Act. I am of the firm view that this is a type of defect which is incurable.

I would have ended here considering that the charge which is the foundation of criminal case is declared defective. However, I will go an extra mile to consider if the charge was not defective was the case against the appellants proved? I would say the answer is in the negative because during the trial of this case, all that could have gone wrong, went wrong.

Apart from the fact that the charge was defective for citing a wrong section, it was not established in the chargesheet if the said products which were seized from the appellants were actually narcotic drugs and of which type, if so, what was the quantity? This would have also determined if the trial court has jurisdiction to proceed with such case among others. In **Mwinyi Bin Zaid Mnyagatwa v. Republic** [1960] EA 218, the then East African Court of Appeal underscored the need for narcotic drugs to be chemically analysed and proved by making the following observations:

"The prosecution in the offences related to narcotic drugs has a duty to submit expert analysis which is mandatory as its result is final\conclusive and it provides check and balances that warrant convicting"

See also: **Charo Said Kimilu v. Republic**, Criminal Appeal No.111 of 2015 (unreported) and **Aldo Kilasi v R** Criminal Appeal No. 466 Of 2019, CAT Iringa.

Further, it is said that the arresting officer was one Inspector Aidan and the appellants mentioned that he is the one who took them to the court. This is also supported by the proceedings that the prosecutor was inspector Aidan. I believe this trend is against the principles of criminal

justice and the spirit of civilianization where for the interest of justice, the arresting officer is not to be the same as prosecuting officer.

To conclude, I find merit in the appeal for the reasons discussed. Although the admissions were made on a defective charge, which would have sufficed to dispose of the appeal, the case against the appellants was not proved to the required standard. I therefore quash the conviction, set aside the sentence and order the appellants' immediate release, unless they are otherwise held for a lawful cause.

It is so ordered.

Right of appeal explained.

DATED at **MWANZA** this 4th day of July, 2023.



L.J. ITEMBA
JUDGE