IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MANYARA
AT BABATI
CRIMINAL APPEAL NO. 1 OF 2022

(Originating from Criminal Case No. 144/2022 of the Babati District Court at Babati)

ZULFA SALUM.....1ST APPELLANT

REGINA PETER.....2ND APPELLANT
VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

15th May & 2nd June, 2023
Kahyoza, .J.:

Zulfa Salum and **Regina Peter** (the appellants) appeared before Babati District Court at Babati charged jointly with the offence prohibition trafficking of narcotic drugs. The appellants pleaded guilty to the charge. The trial court convicted them upon their plea of guilty and sentenced them to serve a custodial sentence of thirty years each.

Aggrieved by the sentence and conviction, **Zulfa Salum** and **Regina Peter** appealed, raising five grounds of appeal. They abandoned the fifth ground of appeal in their written submission. The appeal raised the following issues-

1) Was the appellants' plea unequivocal?
2) Did the appellants plead to the facts constituting an offence that they were charged with?

3) Was the charge defective?

4) Was the sentence excessive?

The background of this matter is that; police action on information obtained from their informers, on 25.08.2022 searched **Zulfa Salum's,** (the first appellant's) retail shop. They found the first appellant in possession of 65 pellets of *Cannabis sativa* commonly known as "bangi" in a plastic can commonly known as "sadolini". The first appellant told the police that the pellets belonged to **Regina Peter,** the second accused person and that it was **Regina Peter** who took the pellets to her shop. Upon arrest, **Regina Peter** admitted to take pellets to the first appellant.

The prosecution charged **Zulfa Salum** and **Regina Peter** with the offence of prohibition trafficking of narcotic drugs contrary to section 15A(1),(2) (C) of the Drug Control and Enforcement Act, [Cap.95 R.E. 2019 now 2022] (the **DCEA**). The prosecution alleged that **Zulfa Salum** and **Regina Peter** were on 25.8.2022 at Warangi "A" area Magugu Ward within Babati District and Manyara Region found trafficking in Narcotic drugs to wit; being in possession of 65 pellets of cannabis sativa commonly known as "bhangi". The appellants pleaded of guilty to the charge.

The prosecution read the facts to the appellants and the trial court called upon the appellants to plead to the facts and the appellants admitted the facts. The first appellant admitted that she was found with

"bhangi" and that she mentioned that "bhangi" belonged to the second appellant, who took them and kept them in her retail shop. The prosecution stated that the first appellant admitted to police to possess the pellets and that they were taken to her by the second appellant. The second appellant also admitted to police to take bhangi to the first accused person.

The prosecution further alleged that the Government Chemist examined the substance the found in possession of the first appellant and confirmed that it was "bhangi" weighed 244.90 grams. The prosecution tendered without objection the certificate of seizure, caution statements of the first and the second appellants, sample receipts, notification, Form DCEA 001 and Chain of Custody form, collectively as **exhibit PE**. The record does not show if the documents were read to the appellants.

The trial court called upon the appellants to plead to the facts. They admitted the facts advanced by the prosecution. After the trial court made a finding that the facts advanced by the prosecution established elements of the offence it convicted the appellants and sentence them to 30 years imprisonment.

It is against the above background, the appellants appealed to this Court. Hearing of the appeal was by way of written submissions, the appellants submitted a joint written submission in support of their appeal,

under the service of Mr. Humphrey Mwakajinga, Advocate, and Ms. Blandina Msawa, learned state Attorney who appeared for the Respondent, replied to the appellant's written submission. There was no rejoinder I will refer to the submissions while answering issues raised.

Was the appellant's plea unequivocal?

As the record bears testimony, the appellants were convicted upon their own plea of guilty. The law is settled, that is section 360 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the **CPA**) that no appeal for a person convicted on his own plea of guilty shall be allowed to appeal against conviction. He can only appeal against the sentence. Section 360 (1 the **CPA** states-

> *"**360**.-(1) 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."*

Having been convicted upon their own plea of guilty, the appellants have a right to appeal against the extent or legality of the sentence. I am alive of the fact that the Court of Appeal and this Court have in cases without number pronounced themselves that section 360 (1) the **CPA** is general rule. The Courts held that there may be exception circumstances under which a person convicted upon his own plea of guilty may appeal against conviction. A few cases to mention, which held that section 360 (1)

the **CPA**, provides a general rule, are **Laurence Mpinga v. Republic** [1983] T.L.R. 166**, Peter Kombe v D.P.P.** Cr. Appeal No. 12/ 2016 (CAT, Mbeya Registry (unreported) and **Josephat James v. Republic,** Cr. Appeal No. 316 **of 2010,** CAT, Arusha Registry (unreported). In **Josephat James v. Republic** the Court of Appeal stated that under certain circumstances an appellate court may entertain an appeal arising from a plea of guilty where:

> *(i) 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;*
>
> *(ii) An appellant pleaded guilty as a result of a mistake or misapprehension;*
>
> *(iii) The charge levied against the appellant disclosed no offence known to law; and*
>
> *(iv) Upon the admitted facts, the appellant could not in law have been convicted of the offence charged. (See **Laurence Mpinga v. Republic, (1983) T.L.R. 166 (HC)** cited with approval in **Ramadhani Haima's case** (Cr. Appeal No. 213 of 2009, CAT, unreported).*

There is one fundamental issue that is whether the appellants' appeal falls within the exception circumstances stated above. Mr. Humphrey, learned advocate expounded that the trial court erred to construe their pleas as being unequivocal. They submitted that the circumstances showed that their plea was not unequivocal, as they did not admit the facts

necessary to prove the offence of trafficking in narcotic drugs, rather they pleaded to the charge of being found in possession of narcotic drugs. Citing case(s) of **Adan vs. Republic** [1973] 1 EA 445, **Hamis Mohamed Mtou vs. Republic,** Criminal Appeal No. 228 of 2019 (Unreported) and **Musa Mwaikunda vs. Republic** [2006] TLR 387.

The respondent's state attorney replied, joining the first and the second grounds of appeal, that the appellants' plea was unequivocal, and that the trial court was in compliance to the procedure laid down in the case of **Ally Shabani @ Swalehe vs. Republic** (Criminal Appeal 351 of 2020) [2021] TZCA 406 (24 August 2021).

The proceedings reflected that after the trial court read charge to **Zulfa Salum** and **Regina Peter, Zulfa Salum** replied *"ni kweli nilikutwa na pellets 65 za bangi maeneo ya Warangi "Ä" Magugu tarehe 25/08/2022".* It further reflected that, **Regina Peter,** replied that *"ni kweli nilikutwa na hizo hizo pellets 65 za bangi maeneo ya Warani "Ä" Magugu tarehe 25/08/2022".* And the trial magistrate went on to record *"Court; entered that the 1st and 2nd accused person pleaded each to the offence charged".* Clearly, the record shows that the appellants pleaded guilty although the trial magistrate did not categorically state that the appellants' plea is that of "guilty". He simply stated that appellant pleaded. However, reading the whole record the magistrate construed the appellants' plea as a

plea of guilty. The omission is not fatal as the trial court after the facts were read to the appellants it made a finding that the appellants pleaded guilty to the charge, admitted the facts and convicted them.

I find that the trial court did not violate the procedure for plea of guilty. The Court of Appeal explained the procedure in **Peter Kombe v D.P.P.** (supra) where it reproduced the procedure from its earlier decision in Adan's case as follows-

> *"(i) The charge and all the ingredients of the offence should be explained to the accused in his language or in a language he understands.*
> *(ii)The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
> *(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.*
> *(iv) If the accused does not agree with the fact or raises any question of his guilt, his reply must be recorded and change of plea entered.*
> *(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.*

In addition, the appellants' advocate argued that, the appellants' plea reflected the elements of being found in possession of narcotics drugs and

not trafficking narcotic drugs. Consequently, they were denied to right to fair trial.

Ms. Msawa replied, that section 15A (1) (2) (c) was a proper section as it includes possession, by the import of section 2 of **the DCEA.**

After considering the rival arguments, I am of the considered opinion that trafficking includes possession as rightly pointed by Ms. Msawa, section(s) 2 and 15A(1) of the DCEA provides: -

> *"2.....*
>
> *"trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, **possession**, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer but shall not include-*
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> *(a) N/A". (Emphasis added)*

> *"**15**A.-(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."*

I scrutinized the charge and found that the prosecution stated in the particulars of the offence that the appellants were found trafficking in

narcotic drugs to wit; **being in possession of 65 pellets of cannabis sativa commonly known as "bhangi."** Possession was stated as the element of trafficking. The appellants admitted to have been in possession of narcotic drug. Thus, they admitted the fundamental element of the offence as they were charged with of prohibition trafficking of narcotic drugs. I find that they were properly charged.

The reply to the first issues answers the complaint in the second and third grounds of appeal whether the charge was defective. I wish to state that the case cited by the appellants' advocate supports the position that the appellants were properly charged. In **Hamis Mohamed Mtou v. R.**, Cr. Appeal No. 228 of 2019, (CAT unreported) the Court of Appeal observed that-

> *"Under this provision of the law [section16(1)(b)(i) of the DCEA], the modes in which trafficking in drugs can take place have been shown to include importation, exportation, manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person...*
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> *Looking at the particulars of the offence in comparison with the definition of trafficking, we have not found anything explaining on what the appellant is alleged to have done to be said that he was trafficking in narcotic drugs."*

Unlike in **Hamis Mohamed Mtou v. R.**, (supra), the charge sheet in the instant case explained that the appellants were trafficking, to wit by

possession of narcotic drugs. Possession was one of the modes of trafficking under section 15A of DCEA.

I find therefore, that the charge was not defective and the facts narrated constituted the offence the appellants were charged with. Consequently, I find no merit in the first, second and third grounds of appeal. Thus, the plea of guilty was unequivocal as the charge was not defective, the trial court read it to the appellants who pleaded guilty and also pleaded guilty to the facts read. The trial court convicted and sentenced them. There is nothing to vitiate the appellants' plea of guilty. They had no right to appeal against the conviction entered upon their own plea of guilty.

Was the sentence excessive?

The appellants were not amused with the sentence imposed. They complained that the sentence was too excessive and contravened the law. The appellants stated that the appellants ought to have been charged and therefore sentenced under section 11 (1)(d) of DCEA.

The state attorney for the respondent replied that section 11 of DCEA establishes an offence of prohibition of cultivation of certain plants and substances. She added that the cited subsection makes it an offence if a person possesses prohibited plants. To support her position, she cited the cases of **George Senga Mussa v.R.**, [2022] TZCA 12 as published on

www.tanzlii.org. where the Court of Appeal referred to section 2 of the DCEA which defines a prohibited plant to mean cannabis plant, khat plant, papaver somniferum or opium poppy and papaver setigerum. She also cited **Gabriel Aloyce Mbena v. R.,** [2022] TZHC 9613, where the term a plant *is a living thing that grows in the earth and has a stem, leaves and roots*". She concluded that the appellants were not found in possession of plant.

I said above that, the charges are proper so I will not dwell on whether the appellants were properly charged or not. I will consider the sentence. Section 15A(1) of DCEA which provides that a person found guilty shall be *shall be liable to imprisonment for a term of thirty years.* The issue here is whether the phrase *shall be liable to imprisonment for a term of thirty years* provides a minimum sentence or the maximum sentence. This Court in **Fahadi Joshua Akikabi Vs. R,** Criminal Appeal No 89 of 2017 and **Hassan Ismail vs R.,** (Criminal Appeal No. 38 of 2020) [2020] TZHC 2030 (3 June 2020) construed the phrase to mean that it gives courts discretion to impose sentence befitting the circumstances. In **Fahadi Joshua Akikabi Vs. R.**, the Court held-

> *"the word shall be liable to" without more, gives discretion to the court to impose a sentence which it deems appropriate according to the circumstances of the case."*

The Court of had an opportunity to consider the phrase *shall be liable to imprisonment for a term of thirty years* in **Jafari Juma vs Republic** (Criminal Appeal 252 of 2019) [2023] TZCA 216 (3 May 2023) where it held-

> *"Time and again we have emphasized that, the phrase "shall be liable to imprisonment for a term of thirty years"'* ***which we have emboldened above, does not impose the custodial term of thirty years as the mandatory penalty. It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating factors.*** *See,* ***Sokoine Mtahali @ Chimongwa v. Republic,*** *Criminal Appeal No. 459 of 2018 (unreported) in which we drew inspiration from the decision by the erstwhile Court of Appeal for East Africa in* ***Opoya v. Uganda*** *[1967] E.A. 752 on an appeal originating from Uganda in which the court interpreted the phrase "shall be liable to" as follows:*
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> > *"It seems to us beyond argument that the words "shall be liable to"* ***do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court.*** *In other words, they are not mandatory but provide a maximum sentence only and while the liability existed*

the court might not see fit to impose it "[Emphasis added]." (Emphasis added)

Given the fact that the trial court imposed a sentence of thirty years as if the sentence provided under section 15A (1) of the DCEA the minimum sentence, the sentence is clearly excessive. I uphold the fourth ground of appeal although on different ground. I quash and set aside the sentence of thirty years' imprisonment.

In end and having uphold the conviction of the appellants with the offence of prohibition trafficking of narcotic drugs contrary to section *15A(1)* of the DCEA, the appellants being first offenders, I sentence them to a term of **seven years** imprisonment running from the time they were convicted.

Dated at Babati, this 2nd day of June, 2023.

John R. Kahyoza
Judge.
02/06/2023

Court: Judgment delivered in the presence of the appellants and Ms. Blandina Msawa state attorney for the Respondent. B/C Ms Fatina present.

John R. Kahyoza
Judge.
02/06/2023