

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 32 OF 2023

(Arising from Criminal Case No. 24 of 2023 District Court of Bukoba)

DEUS VICENT..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

25th July and 11th August, 2023

BANZI, J.:

On 31st March, 2023, the appellant was arraigned before Bukoba District Court ("the trial court") charged with the offence of trafficking in narcotic drugs contrary to section 15A (1) (2) (c) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2019] ("the Drugs Act") as amended by section 19 of the Written Law (Miscellaneous Amendment) (No. 5) Act of 2021. It is alleged in the particulars that, on 1st March, 2023 at Omukigusha area, within Bukoba Municipal in Kagera Region, the appellant was found in unlawful possession of 650 grams of narcotic drugs to wit cannabis sativa.

When the charge was read over to him, he replied by stating "*It is true I was found in possession of bhang of not more than 650 grams.*" Upon such reply, the trial court entered a plea of guilty and invited the prosecution to narrate the facts which in the main reveal that, the appellant was arrested

on 1st March, 2023 in possession of 650 grams of cannabis sativa. Thereafter, upon being asked to admit the fact, the appellant admitted the same to be true. Being satisfied that the plea was unequivocal, the trial court convicted and sentenced him to 30 years imprisonment. Dissatisfied with both, the conviction and sentence, the appellant filed this appeal with five grounds which can be summarized as; **one**, he didn't plead guilty as conviction and sentence were relied on unknown grams of the said bhang; **two**, the charge was defective for not disclosing the actual time of incident; **three**, there was no Government Chemist report to prove the allegations; **four**, he knew nothing about the offence charged due to lack of legal awareness; and **five**, the case against him was not proved.

At the hearing, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Yusuph Mapesa, learned State Attorney. The appeal was argued orally.

Submitting in support of the appeal, the appellant contended that, his plea was a result of threats from the investigator who threatened and tortured him while he was at police station, where he stayed for one month before arraigned to court. Since he didn't know the procedure of the court, he pleaded guilty out of threat. He further submitted that; he was not arraigned with the said cannabis sativa alleged to be found with him. Likewise, there was no any document produced from the Government

Chemist to establish that it was actually cannabis. Furthermore, he attacked the charge claiming that, it was defective for not disclosing the time of arrest. In that regard, he prayed for his appeal to be allowed.

In his reply, Mr. Mapesa argued that, the omission to indicate the time of incidence in the charge does not make it to be defective because, it is not the requirement of the law to indicate time in the charge. He supported his argument by citing the case of **Yustus Aidan v. Republic** (Criminal Appeal No. 454 of 2019) [2022] TZCA 622 TanzLII. He further contended that, in a plea of guilty proceedings, it is not mandatory to produce exhibit. What is important is for plea to be unequivocal. According to him, the exhibit is produced where the accused pleads not guilty and where there is an issue of proof. He cited the case of **Ramadhani Bakari @ Dodo v. Republic** (Criminal Appeal No. 552 of 2021) [2023] TZCA 224 TanzLII to support his submission.

On the other hand, Mr. Mapesa supported the appeal on the reason that, the appellant did not understand the nature of the charge against him thus, his plea was equivocal because when the charge was read over to him, his plea was not clear when he said to be found with "*about not more than 650 grams of bhangi.*" According to Mr. Mapesa, the appellant's plea was equivocal. He supported his position by citing the case of **Onesmo Alex Ngimba v. Republic** (Criminal Appeal No. 157 of 2019) [2022] TZCA 26

TanzLII. Apart from that, he attacked the facts in support of the charge by stating that, in the facts, the appellant was charged with the offence possession of narcotic drugs while the charge is about the offence of trafficking in narcotic drugs. Also, in convicting the appellant, the trial Magistrate did not mention the offence the appellant was convicted with. He urged the matter to be remitted to the trial court for plea to be taken afresh.

Generally, section 360 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] ("the CPA") restricts appeals where the accused person has been convicted on his own plea of guilty, save for the extent or legality of the sentence. However, under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. Reiterating the exceptional circumstances laid down in the case of **Rex v. Forde** [1923] 2KB 400, the Court of Appeal of Tanzania in the case of **Khalid Athumani v. Republic**, Criminal Appeal No. 103 of 2005 (unreported), stated that;

*"A plea of guilty having been recorded, this court only entertains an appeal against conviction if it appears (1) **that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it**, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged."*
(Emphasis added).

Also, in the case of **Laurence Mpinga v. Republic** [1988] TLR 166 this Court set exceptional circumstances to challenge the conviction on a plea of guilty whereby, among them is that, his plea was imperfect, ambiguous or unfinished. Reverting to the case at hand, there are two issues for determination; one, *whether the appellant's plea was equivocal* and two, *whether the charge was defective*.

The charge laid down against the appellant reads as follows:

"STATEMENT OF OFFENCE

TRAFFICKING OF NARCOTIC DRUGS contrary to section 15A (i) 2 (c) (sic) of the Drugs Control and Enforcement Act [Cap. 95 R.E 2019] as amended by section 19 of the Written Law (Miscellaneous amendment) (No. 5) No. 9 of 2021.

PARTICULARS OF OFFENCE

*DEUS VICENT on 1st day of March, 2023 at OMUKIGUSHA area within BUKOBA Municipal in KAGERA Region **was found in unlawful possession of 650 grams of Narcotic Drugs to with (sic) cannabis sativa.**"*

When the appellant was called upon to plead, he stated as hereunder:

*"It is true that I was found in possession of bhangi about **not more than 650 grams**" (Emphasis supplied).*

Taking into consideration of the wordings of the particulars of the charge and the response of the appellant, it is undisputed that they did not

conform with the requirement of the law. The expression "...***I was found in possession of bhanghi about not more than 650 grams***" is not clear and certain especially on the quantity he was alleged to traffic. Considering that, the offence of trafficking in narcotic drugs is triable by subordinate court subject to the quantity of drugs trafficked in, the accused's plea should be certain in order to eliminate the flaw that would be committed by the trial court to adjudicate the offence beyond its power. In addition, the way the accused replied on the charge is a clear indication that, he did not understand or appreciate the nature of offence. The fact that he did not admit the exact weight of narcotic drugs alleged to be trafficked, it cannot be concluded that, his plea was perfect. Thus, I agree with the submission of learned State Attorney that, the appellant's plea was equivocal.

Apart from that, the charge laid down against the appellant is defective as the particulars of the charge are in discordant with the statement of the offence. As quoted herein above, the appellant was charged with the offence of trafficking in narcotic drugs but the particulars indicate that, he was found in unlawful possession of narcotic drugs. Section 15A (1) of the Drugs Act provides that:

"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.

The above quoted section does not have the word possession which appeared in the particulars of the offence of the charge laid down against the appellant. As a matter of law, the particulars of the offence must disclose the ingredients of the offence and such ingredients are normally found in the charging section. Although the term trafficking is defined under section 2 of the Drugs Act to include possession, it does not mean that, the particulars should contain the words other than those mentioned in the charging section. This in itself makes the charge defective as the particulars of offence are in discordant with the statement of offence.

Furthermore, there is another flaw in the facts that were read over to the appellant concerning the offence laid down to the appellant. Part of the facts is hereby reproduced for ease of reference.

*"That accused face a single count of **being found in possession of narcotic drugs** C/S 15A (1) (2) (c) of the Drugs Control and Enforcement Act Cap 95 R.E 2019..."*
(Emphasis supplied).

The extract above indicates that, the appellant was charged with non-existence offence because, section 15A (1) provides for the offence of trafficking in narcotic drugs and not "*being found in possession of narcotic*

drugs." From the statement of offence, its particulars to the facts which were read over to the appellant, there is confusion on the type offence the appellant was facing. Moreover, this confusion did not end there, even the conviction of the appellant was not proper for want of the offence of which, and the section of the law under which, the accused person is convicted.

Basing on that, I am constrained to agree with the learned State Attorney that, the plea entered by the appellant was equivocal. Likewise, the charge was not only confusing but also defective as its particulars are in discordant with the statement of offence. On the prayer of re-trial by the learned State Attorney, it is my considered view that, since the charge which is the foundation of the case was defective, it is not proper to make an order of re-trial because such order presupposes a criminal charge to have been in order and in existence.

That being said, I invoke my revisional powers to nullify the whole proceedings, quash the conviction and set aside the sentence meted against the appellant. Consequently, I order the immediate release of the appellant from prison custody, unless otherwise lawfully held.



I. K. BANZI
JUDGE
11/08/2023

Delivered this 11th of August, 2023 in the presence of Mr. Amani Kilua, learned State Attorney for the Respondent and the appellant in person. Right of appeal fully explained.



A handwritten signature in blue ink, appearing to be "I. K. Banzi".

I. K. BANZI
JUDGE
11/08/2023