

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT MBEYA**

CRIMINAL APPEAL NO 154 OF 2023

**(Originating from the District Court of Rungwe at Tukuyu in Criminal
Case No. 74 of 2023)**

CLEDENCE SIMON @ MWAKAJE.....1st APPELLANT

DENNIS MWATIMBA @ ANDALWISYE.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 30 October 2023 & 3 November 2023

SINDA, J.:

The appellants Cledence Simon @Mwakaje and Dennis Mwatimba @Andalwisye were charged with and convicted of the offence of Trafficking in Narcotic Drugs contrary to section 15 A (1) (2) (c) of the Drugs Control and Enforcement Act, Cap. 95 R.E 2019 as amended by section 19 of the Written Laws (Miscellaneous Amendments Act) (No. 5) of 2021 (the **Act**). The District Court of Rungwe at Tukuyu (the **District Court**) convicted the appellants and sentenced them to thirty (30) years imprisonment each.

The particulars of the offence are that on 8 June 2023 at Ndembela Village within Rungwe District in Mbeya Region, the appellants were found in possession of narcotic drugs, namely cannabis sativa, commonly known as 'bhang' weighing 2.1 kilograms.

The appellants challenge their conviction and the corresponding sentence on two grounds as follows:

1. That - the trial magistrate erred in law and fact when convicting the appellants without regarding that all the ingredients of the offence were not explained well to the appellants as required by law; and
2. That - the trial Magistrate erred in law and fact when it believed that the plea of both appellants was unequivocal while the plea was not unequivocal.

At the hearing of the appeal on 30 October 2023, the appellants appeared in person, unrepresented. The respondent was represented by Ms. Upendo Lyimo, learned State Attorney.

The appellants requested the Court to consider their grounds in the petition of appeal as presented in the Court. The appellants opted for Ms. Lyimo to reply to them first so they could rejoin in case such need arose.

Ms. Lyimo opposed the appeal and stated that section 360 (1) of the Criminal Procedure Act, Cap 20 R.E 2022 (the **CPA**) restricts an appeal against conviction on a plea of guilt except as to the extent or legality of the sentence.

Ms. Lyimo submitted that conviction could be challenged under certain circumstances as an exception to the general rule as was stated by this Court in the case of **Jumanne Juma vs The Republic**, Criminal Appeal No. 32 of 2023 (HC at Mbeya, unreported). In that case this Court referred to the decision of **Laurent Mpinga vs Republic** (1983) TLR 166 where the Court laid four grounds upon which a conviction on a plea of guilty could be appealed against.

Ms. Lyimo further submitted that the appellants' conviction was appropriate and in accordance with the provisions of section 228 of the CPA. She argued that in terms of section 228 (2) of the CPA where the accused pleads guilty, his plea shall be recorded, and the magistrate shall convict him.

Ms. Lyimo argued that this Court stated in **Jumanne Juma Vs. Republic** (supra) at page six (6) that in law for a plea of guilty to be valid for purposes of conviction without trial under section 228 (2) of the CPA it must meet the six conditions as laid down in the case of **Michael Adrian Chaki vs Republic** (2021) TZCA 454 TANZLII. She stated that the plea of guilty was in accordance with the condition laid down in that case.

Ms. Lyimo further argued that the appellants appeal is against the conviction and sentence for the offence of trafficking in narcotic drugs contrary to section 15 A (1) (2) (c) of the Act. She stated that under section 2 of the Act, the modes in which trafficking in drugs can take place include the importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or

distribution by any person of narcotic drug. She contended that possession of 'bhang' falls under the offence of trafficking in narcotic drugs.

Ms. Lyimo further contended that the District Court entered a plea of guilty after the charge was read out and explained to the appellants, and the appellants admitted to the offence of trafficking in narcotic drugs. She added that the prosecuting attorney narrated the facts of the case to the appellants, and the appellants admitted to the facts of the case as narrated by the prosecution.

Ms. Lyimo stated that the appellants each pleaded guilty when the charge was re-read out and explained to the appellants. The first appellant replied that *"it is true, I was caught trafficking bhangji of 2.1 kilogram"*. The second appellant also replied again that *"it is true, I was caught while trafficking bhangji of 2.1 kilograms"*. Then, immediately, the appellants admitted the facts of the case unreservedly, as narrated by the prosecuting attorney.

Ms. Lyimo further explained that the admitted facts disclosed all the ingredients of the offence of trafficking in narcotic drugs and that the procedure used to record the plea of guilty by the District Court was correct, as provided under section 228 of the CPA. She stated that the appellants' pleas were correct and complete. The learned State Attorney added that the District Court did everything for the appellants to understand all the ingredients of the offence charged and convicted them after proving that the pleas were unequivocal. Ms. Lyimo urged this Court

to find the first and second grounds of appeal devoid of merit and dismiss the appeal.

In a brief rejoinder, the appellants had nothing useful to add.

I have considered the District Court's records and the parties' arguments. I agree with Ms. Lyimo that, as a general rule, section 360 (1) of the CPA restricts an appeal against a conviction based on a plea of guilty except to the extent or legality of the sentence imposed. However, Ms. Lyimo stated that section 360 (1) of the CPA restricts an appeal and said there are exceptions to the general rule, but she did not state if this case meets the exceptions as laid down in the case of ***Laurent Mpinga vs Republic***, supra.

Section 360 (1) of the CPA 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".

Notwithstanding the above provision, an appeal against a conviction on a plea of guilty may be entertained under certain circumstances. In ***Laurent Mpinga vs Republic*** (supra) the Court held that:

"An accused person who has been convicted by any court of an offence on his own plea of guilty may appeal against the conviction to a higher court on any of the following grounds:

- 1. That, even taking into consideration the admitted facts, his 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 he pleaded guilty as a result of mistake or misapprehension;*
- 3. That the charge laid at his door disclosed no offence known to law;
and*
- 4. That upon the admitted facts he could not in law have been convicted of the offence charged."*

The question is whether the appeal at hand meets the exception provided in the case of ***Laurent Mpinga vs Republic*** (supra). In my view, the grounds of appeal before this Court fall under item one listed above. The Court, therefore, has to see whether the appellant's plea was equivocal as complained or otherwise.

It was argued by the appellants that the District Court convicted them without explaining all ingredients of the offence to the appellants as required by law and that their pleas were equivocal.

Ms. Lyimo submitted that the District Court entered a plea of guilty after the charge was read out and explained to the appellants, and the appellants admitted to the offence of trafficking in narcotic drugs. She further argued that the prosecuting attorney narrated the facts of the case to the appellants, and the appellants admitted to the facts of the case as narrated by the prosecutor.

To properly determine the issues in this appeal, I must reproduce the charge and the appellant's plea of guilty as recorded by the District Court on 24 & 25 August 2023.

The statement of the offence provided that **"TRAFFICKING IN NARCOTIC DRUGS; Contrary to section 15A (1) (2) (c) of the Drugs Control and Enforcement Act, Cap. 95 R.E 2019 as amended"**.

The particulars of the offence stated that the appellants *"on 8 day of June 2023 at Ndembela Village within Rungwe District in Mbeya Region were found in possession of narcotic drugs namely cannabis sativa commonly known as bhang weighing at 2.1 kilograms"*.

When the charge was read out and explained to the appellants before the District Court on 24 August 2023, the first appellant readily pleaded, *"It is true, I was caught trafficking bhang 2.1 kgs"*, after that the presiding Senior Resident Magistrate recorded the response as a plea of guilty. The second respondent similarly readily pleaded, *"It is true, I was trafficking bhang 2.1 kgs"*, after that, the presiding Senior Resident Magistrate recorded the response as a plea of guilty.

Forthwith, the prosecuting attorney prayed for the case to be adjourned to 25 August 2023 for the prosecution to submit the exhibits and brief facts. The District Court granted the prayer, and the case was set to proceed on 25 August 2023.

On 25 August 2023, the prosecuting attorney prayed to amend the charge. The District Court granted the prayer. The charge was re-read and explained to the appellants. The first appellant readily pleaded, *"It is true, I was caught trafficking bhang 2.1 kgs"*, after that the presiding Senior Resident Magistrate recorded the response as a plea of guilty.

The second respondent similarly readily pleaded, *"It is true, I was trafficking bhang 2.1kgs"*, after that the presiding Senior Resident Magistrate recorded the response as a plea of guilty. Immediately, the prosecuting attorney narrated the facts of the case to the appellants, which the appellants admitted.

I have gone through the charge and the appellant's pleas of guilty. It is clear that after the charge was read to the appellants, they pleaded guilty.

The statement of offence provided that the appellants were charged with the offence of Trafficking in Narcotic Drugs contrary to section 15 A (1) (2) (c) of the Act, which states that:

*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 not less than of thirty years.

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

(a) N/A

(b) N/A

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

The catch word in this offence is traffics in narcotic drugs or psychotropic substances. The term trafficking has been defined under section 2 of the Act as follows:

*"trafficking" means the importation, exportation, buying, sale, giving, supplying, storing, **possession**, production, manufacturing, conveyance, delivery or distribution by any person of narcotic drug.*

Looking at the particulars of the offence in comparison with the definition of trafficking, it is said that the appellants were found in possession of 'bhang'. There is mention of possession as a category of trafficking in narcotic drugs to constitute the offence charged. The prosecution indicated in the particulars of the offence what the appellant was doing with the narcotic drugs to constitute the offence charged for the appellants to understand the allegations against them for plea-taking.

In ***Hamis Mohamed Mtou vs The Republic***, Criminal Appeal No. 228 of 2019 (Court of Appeal of Tanzania (**CAT**) at Dar es Salaam, unreported), the CAT took inspiration from the Republic of Kenya in the case of ***Madeline Akoth Barasa & Another vs. Republic***, (2007) eKLR where the court stated thus:

"...It is evident from the definition of "trafficking" that the word is used as a term of art embracing various dealings with narcotics drugs or psychotropic substance. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking..."

In addition, The CAT in ***Richard s/o Lionga @ Simageni vs The Republic***, Criminal Appeal No. 14 of 2020 (CAT at Dar es Salaam, unreported) dealt with the conditions for a plea of guilty to be unequivocal and valid. In that case the CAT held that for a plea of guilty to be unequivocal and therefore valid, it must pass the test the CAT set in the case of ***Michael Adrian Chaki vs The Republic (supra)*** where it stated that:

"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 particulars thereof must be properly framed and 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 apprehends what he is actually faced with, otherwise injustice may result;*
- 3. When the accused is called upon to plea 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; and*
- 6. Before or conviction on a plea of guilty is entered, the court must satisfy itself without any doubt trial the facts adduced disclose or establish all the elements of the offence charged."*

The above conditions reveal that there are two crucial stages in the proceedings for accepting an unequivocal plea of guilty:

1. The accused must plead guilty to the charge as indicated by conditions 1, 2 and 3; and

2. The accused must plead guilty to the facts constituting the offence charged as provided under conditions 4 and 6.

The issue now is whether the narrated facts, which the appellants admitted to without qualifications, satisfied conditions 4 and 6 in the case above. It was narrated that *"The first accused Cledence Simon Mwakaje is a peasant and also a motorcycle (bodaboda), the second accused is a peasant of Busekelo village. They are friends. The first accused used to ride a motorcycle with registration No. MC.911 CQF, Make Kinglion. On 8 June 2023, the first accused carried the second accused onto a motorcycle riding from Mwambegele to Mwakaleli. The second accused had a bag containing bhangji. The first accused had notice of such bhangji into the bag which was transported. The accused persons were stopped and interrogated by the police officers on duty at Ndembela village. The accused persons during interrogation, they tried to diverge, but the police officers managed to arrest them. The search was conducted and it was found that the bag had bhangji. The search warrant was executed. The accused persons, the arresting officer and an independent witness all signed the search warrant. The accused persons together with the exhibits were sent to Tukuyu police station for further steps. where cautioned statements were taken. That all the accused persons before the police station, through their voluntary cautioned statements, they admitted to have been caught with bhangji. That the exhibit (bhangji) was sent to the Drugs Enforcement Unit for investigation. The report revealed that the dry leaves found in such bag was bhangji weighing 2.1 kilograms. That the charge was prepared, and the accused persons were brought to this court to answer the charge."*

The appellants response to the narrated facts is reflected at page seven (7) of the typed proceeding of the District Court.

*"**First Accused:** It is true as narrated by the prosecutor that is what happened."*

*"**Second Accused:** It is true, the facts narrated are true as the things happened."*

After the appellants responded to the narrated facts, the prosecutor produced to the District Court four (4) exhibits along with details thereof. These were one, a motorcycle with registration number MC 911 CQF Make Kinglion (**Exhibit P1'**). Two, a report from the Government chemist (**Exhibit P2'**). Three, a search warrant (**Exhibit P3'**). Four, a bag containing bhanghi (**Exhibit P4'**). Finally, the presiding Senior Resident Magistrate convicted the appellants on their own plea of guilty.

In ***Richard s/o Lionga @ Simageni vs The Republic***, (supra) the CAT made the following observation:

"Where the accused pleads guilty to the charge, before conviction, the law is that the prosecution must narrate the facts establishing the offence. That is, the prosecution must explain clearly and adequately the circumstances in which and how the offence was committed in specific and intelligible terms. The prosecution must detail the substance of the evidence and where applicable tender

documentary and other exhibits, all meant to ensure that the accused clearly understand without any doubt, what is that he is alleged to have done wrong”.

See also: ***Michael Adrian Chaki v The Republic***, (*supra*) and ***Adnan vs. The Republic (1973) EA 445***

I agree with the above statement. It is evident in this appeal that the charge and the facts of the case were read out and explained to the appellants. Also when narrating facts, the prosecution detailed the evidence's substance and tendered exhibits in the District Court.

In my opinion, the facts narrated by the prosecution amplified the particulars of the offence in the charge as such, fulfilling all the conditions in ***Michael Adrian Chaki v The Republic*** (*supra*). Moreover, the appellants admitted to the narrated facts without any qualifications.

As such, I believe that the charge and the facts disclosed the essential ingredients of the offence. The appellants were found in possession of bhangji, which constitutes trafficking.

I am satisfied that the appellants' response left no doubt that the ingredients of the offence were explained to the appellants, and they understood both the particulars of the offence and the facts of the case.

Finally, section 228 (2) of the CPA requires the District Court to record the admission of the accused who pleads guilty as nearly as possible in the words he uses. Section 228 (1) and (2) of the CPA provides:

"228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary".

In this appeal, the first appellant readily pleaded, *"It is true, I was caught trafficking bhangji 2.1 kgs"*. The second respondent similarly readily pleaded *"It is true, I was trafficking bhangji 2.1 kgs"*. In my view, these words are sufficient to have conclusively assured the District Court of an admission of the truth of the charge in terms of the requirements of section 228 (2) of the CPA. The District Court recorded the admission by the appellants in the words they used.

In the result, I find that the appellants pleaded guilty and admitted to the facts produced by the prosecution which constitute the offence. Thus, the appellants' pleas were unequivocal. No grounds are given to convince this Court that the appellants did not fully understand the nature of the offence when they pleaded guilty to the charge.

The appeal is without merit and is hereby dismissed in its entirety.

The right of appeal was explained.

DATED at MBEYA on this 3rd day of November 2023.

A. A. Sinda
A. A. SINDA
JUDGE

The Judgment is delivered on this 3rd day of November 2023 in the presence of the appellants, who appeared in person, and Ms. Lyimo, counsel for the respondent.



A. A. Sinda
A. A. SINDA
JUDGE