

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

CRIMINAL APPEAL NO. 90 OF 2023

*(Originating from the decision of the District Court of Babati at Babati in Criminal Case
No. 137 of 2023)*

SADAM HUSSEIN @ BENDERA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

7th November, 2023 & 24th January, 2024

Kahyoza, J.:

Sadam Hussein @ Bendera (the appellant) was charged with the offence of Prohibition on Trafficking Narcotic Drugs contrary to section 15A (1) and (2)(c) of **the Drugs Control and Enforcement Act**, Cap 95 R.E 2019 - before the District Court of Babati. The appellant pleaded guilty and, in the aftermath, the trial court convicted and imposed a sentence of thirty (30) years imprisonment. Aggrieved on both conviction and sentence, the appellant marshalled three grounds of complaint, namely: -

1. That, the District Court erred in law and fact for its failure to exercise its legal duty under the circumstances before convicting the appellant basing on the purported plea of guilty.
2. That, the District Court erred in law and fact by committing serious irregularity in its proceedings occasioning the defeat of justice.
3. That, the District Court erred in law and fact for convicting the appellant hereof basing on imperfect plea of guilty.

During the hearing of the appeal Mr. Festo Jackson, Advocate, appeared for the appellant, and Ms. Malima, learned state attorney, appeared for the Republic, the respondent.

Arguing in support of the appeal, Mr. Festo amplified that the trial court did not explain sufficiently to the accused person on the nature of the offence that he was facing-basing on the reply of the accused upon the reading of the charge, making reference to page 2 of the typed proceedings.

He submitted further, even after the brief facts were read (referring to page (s) 5 through to 7 of the typed proceedings), nothing features the accused person's reply. Citing section 210(1)(a) and (b) **of the Criminal Procedure Act**, [Cap 20 R.E 2022] (the CPA), the accused reply was

recorded in a reported speech, instead of narrative form. Also, citing a rule in **Juma Bakari vrs. The Republic**, Criminal No. 362B of 2009, cited in approval the case of **Fredy Sichembe vrs. The Republic**, Criminal Appeal No. 148 of 2018, CAT at Mbeya (unreported).

On procedures for plea of guilty, he cited the case of **Chamurungu vrs. ZMZ** [1988] LRC, arguing that once an accused person changes his plea or gave a statement which amounts to change of plea, then the court has to enter a plea of not guilty. To buttress his submission, he referred and supplied the case of **Mandisela Kunguru vrs. The Republic**, Criminal Appeal No. 462 of 2017, CAT at Mbeya (unreported) which emphasizes the duty to explain the ingredients of the offence, and the accused must be afforded with an opportunity to plead thereto. The facts were not explained to the accused, thus improper conduct of the plea of guilty and prayed for quashing of the plea of guilty and a retrial be ordered.

Ms. Malima, submitted in reply, that an appeal cannot emanate from a plea of guilty as provided under section 360(1) of the CPA, save for exceptions as articulated in the case of **Ally Shaban @ Swalehe vrs. The Republic**, (Criminal Appeal 351 of 2020) [2021] TZCA 406 (24 August 2021). She went on to submit that the trial records are clear that, the charge

against the appellant was fully explained to the accused person, who replied and his own words were recorded, and he signed thereto, facts were read and he admitted all the facts read to him and signed, hence the plea was unequivocal. On top of that, the accused signed the seizure certificate, that connotes that he admitted to have been found with prohibited narcotic drugs, citing the rule in **Waziri Shaban vrs. The Republic**, [2023] TZCA 17344 citing in approval the rule in **Song Lei vrs. The DPP**, Criminal Appeal No. 16A OF 2016. Further that the accused never wished to add or omit anything from the facts read to him. As to the applicability of section 210(1)(a) and (b) of the CPA is that the section provides on reported speech and not recorded narrative, the court recorded what was stated by the appellant. She argued this appeal be dismissed.

In rejoinder, Mr. Festo, insisted that requirements on plea of guilty taking were not complied with, and that appellant's mitigation does not justify the procedure on plea of guilty.

Since the appellant has raised specific grounds of appeal, I will fuse the three grounds of complaint into one, that is whether the plea was unequivocal.

Was the appellant's plea unequivocal?

As the record bears testimony, the appellant was convicted upon their own plea of guilty. It is settled, that is section 360 (1) of 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 his own plea of guilty, the appellant has a right to appeal against the extent or legality of the sentence. I am aware 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).

It is incumbent upon this court to determine as to whether this appeal falls within the category of exceptions to the general rule. It has been submitted by Mr. Festo that the purported plea of guilty was imperfect one as it was marred with irregularities. The same was opposed by Ms. Malima that plea was perfect and justified.

I had a cursory review of record, for the sake clarity I quote relevant part of proceedings as follows:-

"Date; 23/08/2023

.....

The charge is read over and explained to the accused person who is asked to plea thereto

Accused plea

Accused – "Ni kweli nimekamatwa na bangi misokoto 150 maeneo ya mswakini ilikuwa 20/04/2024 nikiwa natumia usafiri wa basi"

Accused Sgd:

Court; Entered the accused person plead guilty to the charge with.

Sgd; J. M Mwambago – SRM

23/08/2023

Emmanuel PP – I pray to read facts of the case.

Court; Read facts of the case under accused.

Sgd; J. M Mwambago – SRM

23/08/2023

FACTS OF THE CASE

1. That the accused is.....

2.

3.

.....

RESPONSE OF AN ACCUSED PERSON TO THE FACT OF THE CASE

1. *That the accused person admitted his name.....*
2. *That the accused admitted he pleaded guilty to the offence of Prohibition on trafficking of narcotic drugs charged with.*
3. *.....*
.....

Accused; Sgd

Sgd; J. M Mwambago – SRM

23/08/2023

FINDINGS

The accused person pleaded to the charge charged with. Also the accused person admitted all facts that are true by his own words of mouth. Therefore accused pleaded guilty. The accused person is hereby convicted for an offence of Prohibition on Trafficking of Narcotic Drugs Contrary to section 15A (1) of drugs Control and Enforcement Act, Cap 95 R.E 2019 as amended by section 19 of written laws(Miscellaneous Amendments)(No.5) Act, 2021.

Sgd; J. M Mwambago – SRM

23/08/2023"

From the cited extract of proceedings, the following are evident: -

1. The appellant plea did not feature as to whether he admitted to be responsible to what he was found with, in other words his

words does not establish the knowledge factor on possession (actual possession/constructive possession).

2. That the appellant was not afforded with an opportunity to respond with his own words on whether he admits the narrated facts or otherwise.
3. That the trial magistrate failed to make findings on whether the alleged admitted facts tally with the ingredients of the offence preferred against the appellant.

Section 228 of the CPA and a litany of decisions of the Court of Appeal have stipulated in no uncertain terms on the procedure to be observed by the trial court before it convicts an accused person on a guilty plea. Section 228 (2) of the CPA states that the trial court can convict an accused person if that accused person admits the truth of the charge. It states that after the accused admits the charge, the court must record his admission in the words he uses. It provides that-

*"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."*

The Court of Appeal's recent decision in **Emmanuel Ambrous V. R.**, Court of Appeal Criminal Appeal No. 555 Of 2017 CAT Unreported. held that

"an accused can only be convicted on his own plea of guilty if the court is satisfied that his plea is unequivocal." The defunct East African Court of Appeal stipulated the procedure which must be followed before a person is convicted upon his own plea of guilty, in **Aidan v. R.** [1973], E.A. 443. The procedure is 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.** (Emphasis added)*

The records bear testimony that the trial magistrate did not specify which language that the accused was conversant with, in the circumstances,

one cannot state with certainty that the ingredients of the offence were explained to the appellant. It is also truism, that after the narration of brief facts of the case, it was incumbent upon the trial magistrate to invite the appellant to respond, an opportunity to dispute or explain the facts or to add any relevant fact: unfortunately, the same was not done. Rather, the trial magistrate reported what was purported to be the response of the appellant, contrary to the requirement that the response must be "accused's own words". There was no statement of fact nor was the accused's reply recorded. Thus, this appeal qualifies to fall in the purview of exceptions to the general rule.

In the circumstances, it is clear that 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. The plea was utterly equivocal. It follows that, all the proceedings, conviction and sentence so meted are a nullity. I quash the conviction, set aside the sentence.

As to the recourse, Mr. Festo invited this court to order for retrial upon findings that the plea was equivocal, Ms. Malima suggested nothing on this. Since the appellant has not been tried the decision in **Fatehali Manji v. R** [1966] I EA 343 is inapplicable. In the circumstances of this case, where

there was no trial, I agree with Mr. Festo, and I order a retrial before another magistrate, so as to meet the ends of justice. In an event the appellant is convicted, time he has been in custody awaiting trial or in prison serving the sentence shall be considered when imposing the sentence.

It is ordered accordingly.

Dated at Babati this **24th** day of **January**, 2024.



A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line.

J. R. Kahyoza

JUDGE

Court: Judgment delivered in the presence of the appellant, Mr. Festo advocate and Ms. Malima, State Attorney for the Republic. B/C Mrs/Ms. Fatina Haymale (RMA) present.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line.

J. R. Kahyoza,

Judge

24/01/2024