IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A)

CRIMINAL APPEAL NO. 108 OF 2018

GEORGE S/O SENGA MUSSA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 29th day of January, 2018
in

Criminal Appeal No. 66 of 2017

JUDGMENT OF THE COURT

9th & 14th Feb, 2022

SEHEL, J.A.:

This is a second appeal. It emanates from the Criminal Case No. 40 of 2017 of the District Court of Babati at Babati (the trial court) in which the appellant, George s/o Senga Mussa was convicted as charged on his own plea of guilty to the two offences, namely, unlwaful cultivation of prohibited plants contray to section 11 (1) (a) and unlawful posession of prohibited plants contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act, No. 5 of 2015 (now Cap. 95 R.E. 2019) (henceforth DCEA). To each count, he was sentenced to thirty-five (35) years

imprisonment. It is noteworthy to state here that the trial court did not specify as to whether the sentences would run concurrently or consecutively. Suffices to state that he was aggrieved with the sentences and he successfully appealed to the High Court (the first appellate court). Thus, the sentences were reduced to thirty years imprisonment. He was therefore, sentenced, to each count, to thirty years imprisonment, to run concurrently. Still aggrieved, he has now appealed to this Court on both conviction and sentence.

The brief facts of the case as it was alleged by the prosecution are that on 22nd March, 2017 at about 10:00 hours at Pori kwa Pori namba mbili area in Kimana village within Kiteto District in Manyara Region, the appellant was found in unlawful cultivation of prohibited plants and posession of 16 kilograms of prohibited plants namely *cannabis sativa* commonly known as "*bhangi.*" When the charge was read over and explained to him, he pleaded to the first count as follows:

> *"It is true I cultivated bhangi in my farm and they find me in my farm. It was bhangi which I also used to smoke and (sic.) my fellow they were about 40 plants"*

Thus, the trial court entered a plea of guilty to the first count.

For the second count, he pleaded as follows:

> *"It is true they found those bhangi plants with me which I planted in my farm and I use to smoke them. It is bhangi."*

The trial court also entered a plea of guilty to the second count.

Thereafter, the Public Prosecutor (the Prosecutor) was invited by the trial court to read the facts of the case to the accused person. The Prosecutor read the facts and tendered in evidence; a certificate of seizure and the 16 kilograms of *bhangi*. The appellant did not object to any of the tendered exhibits. Accordingly, they were admitted as Exhibits P1 and P2 respectively. Subsequent to the reading of the facts, the appellant was asked as to whether he admits or had any reservation to the facts. He replied as follows:

> *"The facts provided is true and correct. I admit them nothing was added."*

As alluded earlier, having pleaded guilty to the charge and the facts, the trial court convicted and sentenced the appellant on his own plea of guilty. His appeal on sentences to the first appellate court was successful as the sentences were reduced to thirty years imprisonment, for each count, to run concurrently.

Still aggrieved, he has come to this Court with five grounds of appeal. **One**, the offence was not proved to the required standard. **Two**, the admitted facts did not establish the charged offences, thus the appellant's plea was equivocal. **Three and Four**, the charge was fatally defective for citing a plant which is not a prohibited plant as "*cannibas sativa*" is not among the prohibited plants under the DCEA. **Five**, the plants were not taken to the Chief Government Chemistry (CGC) for scientific analysis so as to be proven as prohibited plants.

At the hearing, the appellant appeared in person, he had no legal representation whereas Ms. Riziki Mahanyu, learned Senior State Attorney assisted by Mr. Charles Kagirwa and Ms. Grace Madikenya, both learned State Attorneys, appeared to represent the respondent /Republic.

In his brief submission, the appellant argued that he did not plead guilty to the offences. He, therefore, urged the Court to allow his appeal on the basis of his grounds of appeal and set him free.

Ms. Mahanyu made a reply submission for the respondent/ Republic. In the first place, she declared the respondent's stand that it supported the convictions and sentences on account of unequivocal plea of guilty.

Thereafter, the learned Senior State Attorney submitted that the first and fifth grounds of appeal were new having not been dealt with by the lower courts and they do not raise legal issues. She thus, urged the Court not to consider them.

On the remaining three grounds of appeal, Ms. Mahanyu argued the third and fourth grounds together and the second ground was argued separately.

Submitting on the third and fourth grounds of appeal that the plant, namely, *cannabis sativa* was not among the prohibited plants under the DCEA, Ms. Mahanyu argued that the law is very clear as to what is a prohibited plant. She referred us to section 2 and the third schedule to the DCEA where *cannabis* is categorized as a prohibited plant. She contended that with such clear position of the law, the grounds of appeal are baseless. She thus, urged the Court to dismiss them.

On the second complaint that the admitted facts did not constitute the charged offences thus, the plea was equivocal, the learned Senior State Attorney submitted that the facts read over to the appellant which appear at pages 3 – 4 of the record of appeal disclosed the two charged offences.

She added that the facts were read over to the appellant following his own plea of guilty to the charge and that he was given a chance to respond to each and every fact which he did, and had anything to add. He admitted all the facts without any qualification. Ms. Mahanyu further argued that due to the appellant's own admission of the facts constituting the charged offences, the trial court correctly convicted him on his own unequivocal plea of guilty. She therefore, prayed to the Court to dismiss the appeal for want of merit.

The appellant in his rejoinder insisted that his plea was unequivocal as no witness was called to support the prosecution case.

From the facts and submissions, three issues arise for the Court's determination. **First**, whether the appellant raised new factual grounds in this second appeal. **Secondly**, whether *cannabis sativa* is a prohibited plant. **Thirdly**, whether the appellant's plea was unequivocal.

On the first issue, we entirely agree with the learned Senior State Attorney that the first and fifth grounds of appeal are new and they do not raise a point of law. We have stated herein that the appeal by the appellant before the High Court was against sentences only. This is gathered from page 8 of the record of appeal where there is the appellant's

petition of appeal. In that petition, the appellant advanced two grounds of appeal faulting sentences of thirty-five (35) years imprisonment. Looking at the first and second grounds of appeal, none of them were raised in the High Court. Besides, they all raise factual issues as they are not on point of law.

This Court has, in numerous occasions held that it has no jurisdiction to deal with an issue raised for the first time that was not raised nor decided by lowers courts unless that issue raises a point of law; the jurisdiction of the Court is confined to matters which came up in the lower court and were decided – see the cases of **Jafari Mohamed v. The Republic**, Criminal Appeal No. 112 of 2006 and **Hassan Bundala @ Swaga v. The Republic**, Criminal Appeal No. 386 of 2015 (both unreported). We thus refrain from considering the new grounds.

We now turn to the third and fourth grounds of appeal that *cannabis sativa* was not a prohibited plant. The issue poses no difficulty as section 2 of the DCEA defines a prohibited plant to mean **cannabis plant**, khat plant, coca plant, papaver somniferum or opium poppy and papaver setigerum. Further, the third schedule to the Act has listed cannabis as one of the prohibited plants. Therefore, according to the clear position of the

law, *cannabis sativa* is a prohibited plant. Therefore, the grounds of appeal are baseless. We dismiss them.

Regarding the second ground of appeal that the facts did not constitute the charged offences, we wish to start with the provision of section 228 of the Criminal Procedure Act, Cap. 20 (the CPA) that guides the procedure of plea taking at the subordinate courts. It 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) If 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 procedure to be adopted in taking the plea of the accused person is explained in detail in the case of **Aden v. R** [1973] EA 445 cited in **Eliko Sikujua and Another v. The Republic,** Criminal Appeal No. 367 of 2015 (unreported) that:

"When a person is charged, ***the charge and the particulars should be read out to him****, so far as possible in his own language, but if that is not possible, then the language which he can speak and understand. The magistrate should then explain to the accused person all the ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused said, as nearly possible in his own words, and then formally enter a plea of guilty.* ***The magistrate should next ask the prosecution to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant fact.*** *If the accused does not agree with the statement of facts or asserts addition facts which, if true, might raise a question as to his guilt the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and*

the accused reply must, of course be recorded."
(Emphasis is added).

(See also **Khalid Athuman v. The Republic,** Criminal Appeal No. 103 of 2005 and **Waziri Saidi v. The Republic,** Criminal Appeal No. 39 of 2012 (both unreported)).

Furthermore, it is was emphasized by the Court in numerous decisions that the facts to be adduced in support of the charge must disclose the ingredients of the charged offence – see the cases of **Saidi Omari Kombo v. The Republic** [2000] T.L.R. 315 and **Ngasa Madina v. The Republic,** Criminal Appeal No. 151 of 2005 (unreported).

In the present appeal, we have indicated herein that the charge was read out and explained to the appellant who pleaded guilty thereto and a plea of guilty to the charge was entered. Thereafter, the Prosecutor was invited by the trial court to read the facts to the appellant. Pages 3 - 4 of the record of appeal contains the facts read over to the appellant which are:

"1. The name and personal particulars of the accused is as provided in the charge sheet.

2. That on 22/8/2017 at about 10:00hrs the accused was found cultivating in his farm more than 40 plants of prohibited plants commonly known as bhangi.

3. He was interviewed and admitted that the farm in which the plants were found and being cultivated is his farm and he was the one who cultivated it and belonged to him.

4. That, the accused was arrested with those plants of bhangi and the plants were uprooted from his farm and collected. The certificate of seizure was filled ... "

The Prosecutor tendered in evidence the seizure certificate (Exh. P1) and 16 kilograms of bhangi which were in the sulphate bag (EXh. P2). The exhibits were admitted without any objection from the appellant. After reading of the facts, the appellant was given an opportunity either to dispute or add anything to the facts. He admitted to all the facts without any reservation. Going by the record, we are satisfied that the facts read out to the appellant disclosed the ingredients of the charged offences. Therefore, we are settled that, since the appellant pleaded guilty to the offences and admitted to all the facts without reservation, there was no need for the prosecution to call witnesses to prove the allegation. Thus,

the appellant was properly convicted as charged and sentenced accordingly.

In the end, we find the appeal lacks merit and we do hereby dismiss it.

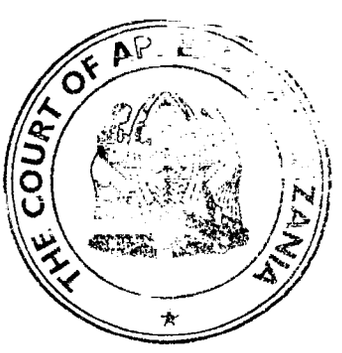
DATED at **ARUSHA** this 14th day of February, 2022.

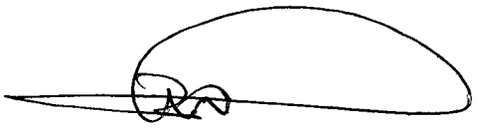
S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2022 in the presence of the appellant in person and Mr. Charles Kagirwa learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL