IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWARIJA, J.A., KENTE, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 372 OF 2020

ADAM ABDALLAH RAMADHANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mutungi, J.)

dated the 23rd day of July, 2020

in

DC. Criminal Appeal No. 76 of 2019

.....

JUDGMENT OF THE COURT

12th & 19th March, 2024

KENTE, J.A.:

There is one important question to be resolved in this appeal and that is whether or not, the High Court, (Mutungi J, as she then was), sitting at Moshi, erred in law and in fact in allowing the appellant's conviction and sentence by the Hai District Court (the trial court) to stand just because of the appellant's own plea of guilty to the charge of trafficking narcotic drugs with which he stood charged.

The facts giving rise to this appeal may briefly be stated as follows: the appellant appeared before the trial court where he was charged with

and subsequently convicted on one count of trafficking in narcotic drugs contrary to section 15 (A) (1) and (2) (c) of the Drugs Control and Enforcement Act (No. 5 of 2015) as amended by section 9 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017. The facts alleged by the prosecution and accepted as true by the appellant were that, on 17th September, 2019 at Kikavu Bridge within the District of Hai in Kilimanjaro Region, the appellant was found trafficking 1.2 kg of cannabis sativa or "bhang" as it is commonly called.

After the charge was read over and explained to the appellant, he admitted them and the trial court accordingly recorded his reply as follows:

> *"It is true that I was found trafficking drugs that is cannabis sativa"*

With regard to what transpired thereafter, we will let the record of the trial court speak by itself, thus:

> *"Court: entered as a plea of guilty.*
> *Sgd: D. J. Msoffe – RM*
> *20/9/2019*
> *Pros: I pray to proceed with the facts.*
> *Court: Agree.*
>
> *Sgd: D. J. Msoffe – RM*
> *20/9/2019*

FACTS

1. *That Personal Particulars of the accused are as stated in the charge sheet.*
2. *That he stands charged with one count as the charge shows.*
3. *That on 17/9/2019 accused was at Kikavu bridge here at Hai District.*
4. *That on 17/9/2019, one Ass. Insp Komba was on patrol with other police officers at Kikavu; he found accused riding a motorcycle with no MC243CFQ make Sinorai.*
5. *That they doubted on him and on inspecting him as he got an accident, they found him with 288 rolls of bhang.*
6. *That today he is before this court on what he did.*

COURT: *The agreed facts*

Accused – I agree with all facts.

That it is true.

Accused: x....

P.P.x .....

COURT: *Section 288 (1) of the CPA C/W*

COURT: *From the plea of guilty entered, I find accused guilty of the offence and I convict him basing on the offence that he stands charged with.*

Sgd: D. J. Msoffe – RM
20/9/2019

As demonstrated above, the trial court found that the appellant had pleaded guilty to the charge and proceeded to convict him accordingly. As a consequence, it sentenced him to the mandatory custodial sentence of thirty years imprisonment.

However, in defiance of his plea of guilty to the charge, the appellant still believed in his innocence. He therefore appealed to the High Court complaining among other things that, the trial court erred both in law and in fact in convicting him without proof of the true nature of the substance which he was allegedly found trafficking.

Upon what we can call a careful examination and analysis of the trial court's record, the learned Judge of the first appellate court was satisfied in the first place that, as opposed to his complaints, the appellant's plea admitted of no doubt or ambiguity.

With regard to the complaint that it was not proved beyond doubt that the contraband substance which the appellant was found trafficking was narcotic and nothing else, the learned Judge of the first appellate court accepted the argument by the learned State Attorney for the respondent that, since the appellant had himself admitted the fact that he was found trafficking bhang, proof of the nature of the said substance would be simply an exercise in superfluity.

Based on the foregoing, the learned Judge found as a fact that indeed on the fateful day, the appellant was arrested while trafficking 1.2 kg of bhang and that, after the charge was read over to him, he readily and unequivocally pleaded guilty to it. The learned Judge therefore concluded that, there was no ambiguity in the particulars of the offence and that the appellant's acceptance of their correctness as narrated by the prosecution was a perfect plea of guilty.

Before us, the appellant appeared in person without any legal representation while Ms. Jenipher Massue, learned Principal State Attorney assisted by Ms. Veronica Moshi, learned State Attorney appeared to resist the appeal on behalf of the respondent Republic.

As would be expected, the appellant adopted the material contents of his memorandum of appeal and chose to hear the learned State Attorney in reply to his grounds of appeal after which he made a very short rejoinder.

Responding to the appellant's grounds of appeal, Ms. Moshi who addressed the Court on behalf of the respondent was very brief. She contended generally that, the plea by the appellant was unequivocal and therefore the conviction and sentence that proceeded therefrom were respectively proper under the law. We were accordingly reminded of the

well known provisions of section 360 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA) which stipulates that:

> *"No appeal shall be allowed in the case of any accused 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"*

With regard to the complaint that it was not established by the prosecution that the items which the appellant was allegedly found trafficking were narcotic drugs, the learned State Attorney maintained as did the first appellate Judge that, after the appellant had himself admitted the correctness of the facts narrated by the prosecution side, there was no need for proof that the impugned substance was indeed narcotic. It was the stance of the learned State Attorney that, the very acceptance of the particulars of the offence by the appellant was by itself, proof that the items which he was found trafficking were narcotic substances.

In his short rejoinder and, relying on our decision in the case of **Omary Joachim v. Republic**, Criminal Appeal No. 536 of 2016 (unreported), the appellant stood firm that, despite his plea of guilty, it was still incumbent upon the prosecution side to prove that the substance which he was allegedly arrested while trafficking constituted, narcotic materials or were of the nature of narcotics. Otherwise, a conviction upon

a plea of guilty, was, in the circumstances of this case, wrongful; so argued the appellant.

The appellant also criticized the first appellate Judge for accepting the argument by the respondent that, after he had pleaded guilty to the charge and accepted as true the facts of the case as narrated by the prosecution side, the prosecution was relieved of their duty to prove that the impugned substance was narcotic. In this connection, we were strongly urged by the appellant to remember that, he was himself not a Government chemist and therefore not a qualified expert in the field of analysis and identification of narcotic or psychotropic substances. The appellant thus argued that, his acceptance of the facts narrated by the prosecuting State Attorney was not sufficient proof of the true nature of the impugned substance. In these circumstances we were further implored by the appellant to sustain the appeal, quash his conviction and set aside the custodial sentence which was meted out on him.

We wish to begin our discussion by acknowledging at the outset the principle embodied in section 360 (1) of the CPA which we have already reproduced. To recapitulate, the above – cited law bars appeals in the case of any accused person who has unequivocally pleaded guilty to the charge and subsequently been convicted and sentenced on such plea except as to the extent and legality of the sentence.

However, it must be noted that, pursuant to the High Court decision in the case of **Laurence Mpinga v. Republic** [1983] T.L.R 166 which has been approved and adopted by this Court in several decisions, there are circumstances which allow an appellate court to delve into the propriety or otherwise of the conviction irrespective of the plea of guilty by the appellant.

It follows therefore that section 360 (1) of the CPA to which were ably referred by Ms. Moshi, does not lay down a general rule without exceptions. The said exceptional circumstances which were reproduced by this Court in the case of **Omary Joachim** (supra) are:

> *"1. That even taking into consideration the admitted facts, the appellant's (accused's) 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 a 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."*

Faced with a similar situation and after putting aside other complaints raised by the appellant in the memorandum of appeal in the case of **Omary Joachim** (supra) in which, just as in the instant case, the appellant had pleaded guilty to a somewhat similar charge and subsequently been convicted and sentenced accordingly, the Court went on to pose the question thus: "was there proof, to the standard required in criminal cases, that the impugned substances found in the possession of the appellant were actually prohibited plants?" The above-posed question stemmed from the Court's concern as to whether, upon the admitted facts, the appellant in that case could, in law, have been convicted of the offence charged.

Having observed that, in terms of section 28 (1) of the Drugs Control and Enforcement Act, the burden of proving that the narcotic or psychotropic substance was possessed, dealt in, trafficked, sold, cultivated, purchased, used or financed pursuant to the terms of a licence, permit or authority lies on the person charged, the Court went on emphasizing that, proof of permissible or authorised possession or transportation is different from proof that the impugned material constitutes, a narcotic or psychotropic material. As to the latter instance, the Court was categorical that, the burden of proof throughout remains on the shoulders of the prosecution.

Reverting to the specifics of the case which was then before the Court the facts of which were not materially different from the case now under review, the Court then held that:

> *"Thus, it was in the best interest as, indeed, it was incumbent upon the prosecution to seek and adduce into evidence a report of a Government analyst with respect to the nature of the plants which were seized. As that was not done, the true nature of the seized plants which were the subject of the trial is a matter for conjecture. To say the least, the case for the prosecution fell short, much as, upon the admitted facts the offence of transporting prohibited plants, was not established."*

Going by the above position of the Court, it must be plain that, in order for a conviction on a plea of guilty to a charge of trafficking narcotic drugs to be sustained, in addition to proving that the plea was unequivocal, it must also be established that, the substance which the accused was trafficking was indeed narcotic or psychotropic. The inescapable conclusion from the foregoing observation is that, a mere admission by the accused person that he was trafficking narcotic or psychotropic substance without a report of a Government analyst

regarding the nature of the said substance, is not sufficient to ground a conviction upon one's plea of guilty.

In saying so, we wish to remind the legal fraternity of the position underscored by the now defunct East African Court of Appeal way back in 1960 in the case of **Mwinyi Bin Zaid Mnyangatwa v. Republic** [1960] EA 218 in which the said Court insisted that, the prosecution in the offences related to narcotic drugs has a duty to submit expert analysis evidence which is mandatory as its result is final, conclusive and it provides checks and balances that warrant convicting. We should as well insist that, at any rate, the above stated position of the law cannot be said to be as outdated as a manual typewriter as one might be tempted to think. Even after all these many years, the requirement for forensic analysis of the impugned substance still holds true and continues to be a good law. (See also **Charo Said Kimilu v. Republic**, Criminal Appeal No. 111 of 2015 and **Aldo Kilasi v. Republic**, Criminal Appeal No. 466 of 2019 (both unreported).

It is because of the foregoing analysis that we have in sum, come to the conclusion that, despite the appellant's plea of guilty and admission of the facts narrated by the prosecution in the present case, the offence of trafficking narcotic drugs was not established beyond reasonable doubt as the true nature of the impugned substance was not established. We

thus find merit in ground three of the appeal which we accordingly allow. Moreover, since the alleged bhang was central to the prosecution case, we find it unnecessary to consider the other grounds of appeal.

We allow the appeal, quash the appellant's conviction and set aside the sentence meted out on him by the trial court and subsequently sustained by the first appellate court. We order for the appellant's immediate release from prison if he is not otherwise detained for some other lawful cause. Order accordingly.

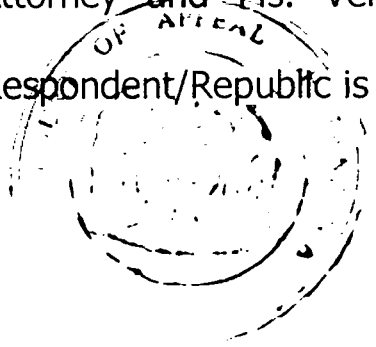
DATED at **MOSHI** this 19th day of March, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of March, 2024 in the presence of the Appellant in person, Ms. Jenipher Massue, learned Principal State Attorney and Ms. Veronica Moshi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL