IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)
AT MWANZA
CRIMINAL APPEAL NO. 219 OF 2020

(Arising from the Criminal Case No.249 of 2020 of the District Court of Bukombe)

JAPHAR S/O JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 22.02.2021

Date of Judgment: 24.02.2021

A.Z. MGEYEKWA, J

This is the first appeal. The appellants were arraigned before the District Court of Bukombe charged with Unlawful possession of Narcotic Drugs contrary to section 17 (b) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by Act No. 9 of 2017. It was alleged that on 25th September,2020 at Masumbwe Police Station

within Mbogwe District in Geita Region unlawfully did found in possession of one stick cannabis sativa commonly known as bhang.

The appellants pleaded guilty to the charge. The trial Magistrate was satisfied that the plea of the appellant was unequivocal and that the facts constitute the offence as charged. Thereafter the trial Magistrate proceeded to conduct Preliminary Hearing and mitigation factors. The appellant was convicted to serve 3 years of imprisonment. The appellant was dissatisfied with the conviction and sentence, hence this appeal.

When the matter was called for hearing the appellants appeared in person unrepresented while Ms. Gisela Alex, learned State Attorney represented the respondent Republic.

The appellant has raised four grounds of appeal which can be summarized as follows:-

1. *That, the trial court erred in law and fact founding its conviction on unsubstantiated and uncorroborated evidence. And that sentenced excessive sentence or in default a fine of TZS. 500,000/= which is too much to pay as I am poor.*

2. *That, the trial Magistrate fatally erred in law and fact in deliberately not recording some important evidence of the appellant.*
3. *That, the trial court misdirected itself in convicting and sentencing the appellant on unproved charge and evidence below the required standard.* ***Thus no any expert Witness who proved in the trial court that what obtained with the appellant was Bang.***
4. *That, it was an unequivocal plea of guilty because the Appellant's mental status was not well for being beaten by Police Officers.*
5. *That, the Appellant do wishes to be present on hearing this appeal*

When the appellant was called on to say something in connection with the grounds, he had not much to say, he lamented that he was drunk and found himself arrested. He urged this court to set him free.

Responding, Ms. Gisela expressed her stance at the very outset of his submissions that she supported the conviction and sentence. On the first ground of appeal, Ms. Gisela stated that the appellant was convicted for an offence of unlawful possession of anorectic drugs and he was convicted on his own plea of guilty. She argued that this ground

is baseless because on 05th November, 2020 the prosecution read over the charge and the appellant plead guilty. She added that then the prosecution read over the facts of the case, the appellant did not object, thus, the court proceeded to convict the appellant.

It was Ms. Gisela further submission that the trial court examined the mitigation factor in accordance with section 7 (b) of the Drugs Act whereby the appellant was convicted to serve 3 years imprisonment of pay Tshs. 500,000/=. She added that the imposed fine of Tshs. 500,000/= was proper. She urged this court to disregard this ground of appeal.

Submitting on the second ground, Ms. Gisela stated that this ground is baseless for the reason that the appellant was convicted on his own plea of guilty therefore the court proceeded to enter conviction and sentence without proceedings with calling the witnesses to prove the case.

As to the third ground, the learned State Attorney went straight to the point that this ground is demerit because the appellant plead guilty therefore the trial court entered a conviction and the case ended there.

Submitting on the 4th ground of appeal, Ms. Gisela argued that the appellant complained that he had a mental problem but the trial court proceedings are silent. She added that the charge was read over and the appellant plead guilty, the court could decide otherwise if the appellant could have pleaded not guilty. Ms. Gisela referred this court to the case of **Hyasint Nchimbi v R**, Criminal Appeal No. 109 of 2017, the Court decided that in certain circumstances the plea can be equivocal; where the charge sheet does not disclose the offence, the plea was ambiguous or unfinished.

It was her further submission that section 17 (b) of the Penal Code Cap. 16 [R.E 2019] was required to read section 17 (1) (b) of the Penal Code Cap. 16 [R.E 2019]. She added that the same is curable by the facts of the case which were read over to the appellant and he plead guilty. She went on to state that in a situation where the accused was aware and understood the chargers, his plea is treated as an unequivocal plea. To fortify her position she referred this court to the case of **Festo Domician v R**, Criminal Appeal No. 109 of 2016.

On the strength of the above submission, Ms. Gisela beckoned upon this court to uphold the conviction and sentence and in case this court

will find that the plea was equivocal then this court can remit back the file to the trial court to determine the matter afresh.

In his brief rejoinder, the appellant reiterated his submission in chief and stressed that he was arrested for the reason that he was drunk.

Having heard the arguments for and against the appeal, the issue for determination is *whether the appeal is meritorious*. I find it appropriate to travel through the original and typed records and see what transpired in the District Court of Misungwi. On 05th November, 2020 when the charge was read over and explained to the appellant who was asked to plead thereto the appellant pleaded as follows:-

Accused: *It is true … sign*

Court: *Entered a plea of guilty … sign*

Thereafter, the Public Prosecutor prayed to read the facts of the case and the prosecution prayed to tender one stick of bhang @ cannabis sativa, a caution statement of the accused, and a certificate of seizure. The trial court proceeded to admit and the same were marked as Exh.PE1 collectively. Thereafter the court asked the accused as follows:

Court: the accused person is asked if he objects

Accused: I do not object

Then, the Public Prosecutor read over the exhibits and the court asked the accused to respond to the facts and the exhibit content. The appellant state that

Accused: I was found in possession of one stick of cannabis sativa illegally.

The court proceeded by virtue of section 288 of the Criminal Procedure Act, Cap.20 [R.E 2019] to convict the accused as charged.

Thereafter, the trial court proceeded with the preliminary hearing stages of recording previous records and mitigation. The trial court pronounces the sentence whereas he sentenced all accused person to serve 3 years imprisonment or to pay a fine in a tune of Tshs. 500,000/=.

Having closely examined the record, I have found that the expression, "It is true", used by the appellants after the charge was read to him was insufficient for the trial court to have been unambiguously informed the appellant's clear admission of the truth of its contents. In the

circumstances arising, it is doubtful whether that expression by itself, without any further elaboration by the appellants constituted a cogent admission of the truth of the charge. Section 228 of the Criminal Procedure Act, Cap.16 [R.E 2019] provides that:-

> *" 288 (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." [Emphasis added].*

It is trite law that a plea of guilty involves an admission by an accused person of all the necessary legal ingredients of the offence charged. Consequently, for a plea to be equivocal the accused must add to the plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged, as it was observed in the case of **Foster (Haulage) Ltd v Roberts** [1978] 2 All ER 751. Also, in the case of

Josephat James v R Criminal Appeal No. 316 of 2010, which was delivered in 2012 the Court of Appeal observed that:

> *" We entirely subscribe to that view. In the instant case, the trial court was enjoined to seek an additional explanation from the appellant, not only what he considered was "correct" in the charge, but also what was it that he was admitted as the truth therein.* ***With respect, the trial Court was not entitled by the answer given, " it is correct****", to distill that it amounted to an admission of the truth of all the facts constituting the offence charged." [Emphasis added].*

Guided by the above authorities, the mere words "It is true" were hardly sufficient to have conclusively assured the trial court of admission of the truth of the charge in terms of the requirement of section 228 (2) of the Criminal Procedure Act, Cap. 20. [R.E 2019].

In my respective opinion, the procedure was evidently floated in the present appeal negating any assurance that the appellant's plea of guilty was unequivocal.

Based on the above findings, it suffices to hold that the trial court's conviction against the appellant was not proper and occasioned to failure of justice on the part of the appellant. The first ground of appeal,

suffice to dispose of this appeal. In the premises, I refrain from determining the remaining three grounds of appeal, the same will not safe useful purpose now.

It is trite law that where the court is satisfied that the conviction was based on an equivocal plea, the court may order retrial as held in the case of **Baraka Lazaro v Republic** Criminal Appeal No. 24 of 2016 Court Bukoba (unreported) and B.D Chipeta (as he then was) in his book Magistrate Manual stated at page 31 that:-

> *" Where a Magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon on appeal the conviction will almost certainly be quashed and in a proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction."*

Applying the above authority and having found the original trial was defective for the main reason that the accused plea was equivocal, I hereby allow the appeal. In the end, I nullify the whole proceedings in respect to Criminal Case 185 of 2020, I quash the conviction on the purported plea of guilty, and set aside the sentence. I order that the

case be remitted to the trial court for the appellant to plea afresh and the matter to proceed in accordance with the law. I direct, the case scheduling for trial be given priority, hearing to end within six months from today, and in the interest of justice, the period that the appellant has so far served in prison should be taken into account.

The appellant shall in the meantime, remain in custody to await the trial.

Order accordingly.

DATED at Mwanza this 24th February, 2021.

THE HIGH COURT OF TANZANIA
UHURU NA UMOJA
MWANZA

A.Z.MGEYEKWA

JUDGE

24.02.2021

Judgment delivered on this 24th February, 2021 in the presence of both parties.

A.Z.MGEYEKWA

JUDGE

24.02.2021