IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 11 OF 2023

(Appeal from the decision of the District Court of Kiteto at Kibaya in Criminal Case No. 48 of 2021 dated 7th January 2022)

PETRO BAHE PAULO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date: 22/5/2023 & 12/6/2023

BARTHY, J.

The above-named appellant was arraigned before Kiteto District Court sitting at Kibaya (hereinafter referred to as the trial court), charged with two counts. On the first count the appellant was charged with the offence of unlawful cultivation of prohibited plant contrary to Section 11 (1) (a) of the Drugs Control and Enforcement Act No. 5 of 2015 (hereinafter referred to as the Act).

It was alleged before the trial court that on 27th February, 2021 at Nabiligunya area, Kimana village within Kiteto District in Manyara Region,

the appellant was found in unlawful cultivating prohibited plants known as cannabis sativa commonly known as bhang.

On the second court the appellant was charged with the offence of unlawful possession of prohibited plants contrary to Section 11 (1) (d) of the Act. It was alleged before the trial court that on 27th February, 2021 at Nabiligunya area, Kimana village within Kiteto District in Manyara Region, the appellant was found in unlawful possession of three seedling of narcotic drugs namely cannabis sativa commonly known as bhang.

It is on record that when the charge was read over and explained to the appellant, he pleaded not guilty. However, before the hearing had commenced the charge was reminded over to the appellant and he pleaded guilty to both offences. Hence, he was convicted and sentenced to 30 years imprisonment.

Aggrieved with the conviction and sentence meted against him, the appellant preferred the instant appeal with three grounds of appeal as follows;

i. *The court erred in law and in fact by upholding the appellant plea of guilty without considering that the trial*

court never explained every ingredient of the alleged offence to the appellant.

ii. *That the appellant pleaded guilty as a result of misapprehension, and even taking into account the purported admitted facts, his plea was equivocal and full of ambiguities. For that reason, the lower court erred in taking (sic) as a plea of guilty.*

iii. *That the appellant was convicted based on a defective charge.*

During the hearing of this appeal, the appellant fended for himself while the respondent was represented by Mr. Leons Bizimana learned state attorney.

The appellant when he was called to expound his grounds of appeal, he adopted them to form part of his submission. He had nothing further to explain.

On the respondent's side, Mr. Bizimana supported the appeal. He made his submission on the second ground of appeal, as its determination will sufficiently dispose the entire appeal.

He argued that, the plea of guilty of the appellant was not properly made as it was an equivocal. He submitted further that, going by the record of the trial court, it is reveals that on 7/1/2022 when the case was fixed for hearing, upon the charge being reminded to the appellant he pleaded "it is true".

Then the statements of facts were adduced which again the appellant agreed to those facts. He added that, basing on the plea of the appellant, the trial court went ahead and convicted the appellant and sentenced him to 30 years imprisonment.

Mr. Bizimana went on arguing that, the plea was equivocal and it was not in compliance with the law. To buttress his argument, he referred to the the case of **Lawrence Mpinga v. Republic** [1983] TLR 66 where the court held that, an appeal on a plea of guilty can be preferred if the plea is equivocal one.

He further stated that, a mere statement that "it is true" or "I admit the fact" do not amount to a proper admission as he ought to specify which facts were admitted.

In the same premises, the learned state attorney invited the court to quash the conviction of the appellant and set him free or order a retrial by taking a proper plea. To argument this position he referred to the case of **Samson Daniel Mwang'ombe v. Republic** Criminal Appeal No. 106 of 2014 Court of Appeal of Tanzania at Mbeya (unreported).

He therefore prayed for the matter be remitted to the trial court for proper plea taking in accordance to the law.

The appellant had nothing of substance to say on his rejoinder submission, which now leaves to this court to determine this appeal.

Having gone through the rival submission of the parties, the issue for determination is whether the appeal has merits.

In this case it is with no doubt that the appellant was convicted on his own plea of guilt and sentenced to 30 years imprisonment. Ordinarily an appeal against conviction resulted from plea of guilty is barred under Section 360(1) of the Criminal Procedure Act [CAP 20 R.E 2022], (the CPA) except for the legality of sentence. The said provision reads;

> *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. [Emphasis added].

From the referred provision of the law, as a general rule, any appeal against conviction on plea of guilty is not allowed. However, in the case of **Laurence Mpinga v. Republic** (supra) this court expounded instances in which appeal against conviction on plea of guilty can be preferred. It was held thus;

An accused person who has been convicted by any court for 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.

In determining the merits or otherwise of this appeal the court will consider as to whether or not the appeal has the merit. The trial court's record reveals what transpired on 7/1/2022;

Date: 7/1/2022

Coram: B. A. Lihamwike-SRM

Prosecutor: Joseph -A/Insp.

C/Clerk: F. Haymale

Accd: present.

Court: file is re-assigned to Hon. Lihamwike RM

Sgd

7/1/2022

PP: For hearing. I have one surety (sic). I pray to remind him with the charge.

Accused plea:

1st count: true

2nd count: true

AEPG to the charge.

Sgd

7/1/2022

Thereafter the facts were read to the appellant and he responded thus;

I agree with facts read.

Going through the records above clearly show that, after the appellant/ the accused person had made his plea stating "true" the trial court did not ask him to elaborate on his own words or give further explanation as to what was true in relation to charge. This emphasis was made by the Court of Appeal in the case of **Safari Deemay v. Republic**, Criminal Appeal No. 269 of 2011

Looking on the record, the appellant's plea was equivocal, unfinished and imperfect, as he only stated "true" without any further explanation. I am of the settled mind that, looking at the appellant's plea it cannot be said with certainty that the appellant was admitting that he committed the alleged offences. The same was held in the case of **Republic v. Tilu Petro** [1998] TLR 395 the court stated; plea of guilty cannot be implied, but must be express.

In the case of **The Director of Public Prosecutions v. Salum Madito,** Criminal Appeal No. 108 of 2019 (unreported) the Court of Appeal quoted the decision in **Adan v. Republic** (1973) E.A 445 where it was stated that:

> *"When a person is charged, the charge and particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said as nearly as possible in his own words, and then formally enter a plea of guilty.* ***The magistrate*** *should next ask the prosecutor to state the facts of the alleged offence and* ***when the statement is complete, should give the accused an opportunity to dispute or to explain the facts or to add any relevant facts.*** *If the accused does not agree with the statement of facts or asserts additional facts which if true,*

might raise a question as to his guilty, the magistrate should record the change of plea to "not guilty" and proceed to hold a trial. If the accused person does not deny the alleged facts in any material aspect the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. Statement of facts and the accused's reply must, of course, be recorded." [Emphasis added].

Having determined that the appellant's plea was an equivocal one, this court has to consider if it could be remedied with the facts narrated to establish the offence and admitted by the appellant.

The record reveals that the appellant was not given a chance dispute or explain facts or add any relevant facts. The appellant in few words just said it was correct. In the case of **Adan v. Republic** (supra) where it was held that, an equivocal plea can be remedied by fully statement of all the facts need to constitute the offence and an admission by an accused person that those facts are true.

I have also keenly gone through facts narrated by the prosecution, as stated before the appellant stood charged with two counts of unlawful

cultivation and possession of prohibited plant. But looking at the facts it was stated, the appellant was found on 27/2/2021 cultivating 3 seedlings of cannabis sativa.

There are no facts in relation to possession of cannabis sativa. I am of the settled mind that, the facts of the case never described the two offences sufficiently and conviction could not be sustained.

Having found that the appellant's plea was equivocal the next pertinent question now come, as what is the remedy? Mr. Bizimana urged the court to remit the matter to the trial court for proper plea taking.

I subscribe to the prayer by the learned state attorney. Hence, the conviction and sentence meted against the appellant are accordingly quashed and set aside and the matter is remitted to the trial court for proper plea taking. Considering the appellant has been in prison, the case to be expedited before the trial.

Taking into account the appellant has already served a term in his 30 years jail sentence meted against him, I direct that should there be conviction the time spent by the appellant in prison be deducted.

It is so ordered.

Dated at **Babati** on 12th June, 2023

G. N. BARTHY

JUDGE

Delivered in the presence of Mr. Leons Bizimana the learned state attorney and the appellant in person.