

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 35 OF 2022

KULWA s/o SOYA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

7th & 25th August 2023

F. H. Mahimbali, J.

The issue for consideration before this Court is whether a conviction founded on a plea of guilty is legally appealable. There is a plethora of authorities that unequivocal plea of guilty is un appealable ((See **Frank s/o Mlyuka vs Republic** (Criminal Appeal 404 of 2018) [2020] TZCA 1738 (20 August 2020), **John Samwel @ Kabaka and Another Vs Republic**, Criminal Appeal No. 58 of 2005 (unreported), **Said Msiwaje @ Mwanalushu Vs Republic**, Criminal Appeal No. 464 of 2007 (unreported)).

In this current case, the appellant was convicted by the trial court and sentenced to 30 years' imprisonment on the offence of being in unlawful possession of Narcotic Drugs contrary to section 11(d) of the Drug Control and Enforcement Act, No. 5 of 2015. It was alleged by the prosecution that on 23rd day of September, 2017 at 11:00hrs at

Ukenyenge Village within Kishapu District in Shinyanga Region was found in possession of 600 grams of cannabis commonly known as "Bhangi".

In what appears as having pleaded guilty to the charge, the appellant was then convicted by the trial court and dully sentenced to 30 years' imprisonment. On his entry into prison life, the appellant registered his dissatisfaction thus, the genesis of this appeal founded on four grounds of appeal; namely:

1. That the learned trial magistrate erred in law and fact to convict and sentence the appellant relying on his own plea of guilty while the facts read over were contradictory.
2. That the cautioned statement was recorded contrary to the requirement of the law.
3. That there was no certificate tendered by the DPP to allow the trial court to entertain this matter.
4. That the learned trial magistrate erred in law and fact to convict the appellant on his plea of guilty while the same equivocal in its nature at police and before this court.

During the hearing of the appeal, the appellant who represented himself, had nothing material to argue his appeal on the grounds of appeal he submitted, but just prayed that they be considered as submission in

support of his appeal and finally, he added that his appeal be allowed and he be acquitted from the charges.

For the respondent, Mr. Saguya learned state attorney resisted the appeal. Making reference to section 360(1) of the CPA, Mr. Saguya submitted that since the appellant was convicted on his own plea of guilty, then this appeal is bankrupt of any merits in the eyes of law. He clarified that reading the trial court's proceedings, it is clear that the appellant freely admitted to the charge and facts of the case after his plea of guilty.

Regarding the issue of cautioned statement being recorded in contravention with the law, he reacted to it saying that it is the appellant's day dream since in this case there was not tendered any cautioned statement as alleged to establish his guilty.

Relying support in the case of **Frank Mlyuka vs. Republic**, criminal Appeal No. 404 of 2018 CAT at page 15, Mr Saguya submitted that it is trite law that conviction based on one's plea of guilty is not appealable save on legality of the sentence. Thus, in the context of this case, he prayed that the appeal be dismissed on its entirety for being bankrupt of any merit.

Having dispassionately scanned the trial court's records and thoroughly considered the submissions by both sides for and against the

appeal, the issue for determination by this court is whether this appeal is merited as argued and as per available records.

On the first ground of appeal that the learned trial magistrate erred in law and fact to convict and sentence the appellant relying on his own plea of guilty while the facts read over were contradictory, scanning the trial court record, it is clear that the trial magistrate just recorded what is alleged to be answers from the appellant on the read out facts of the case. However, traversing the court record, it has not been clear where the said facts of the case are. What then are alleged to be responses from the appellant, lack backup. The facts of the case, would enable the appellate court to determine whether on the charged offence, the ingredients forming the offence have been clearly established as per law. As that was not done as per trial court record, then there is a procedural fault by the trial magistrate which then vitiates the trial court's proceedings. Therefore, the basis of the said conviction, is legally, highly questionable.

On the second ground of appeal, it is the concern of the appellant that the cautioned statement was recorded contrary to the requirement of the law. He didn't elaborate on this. However, the respondent's attorney replied that in the said case, there was not tendered any cautioned statement as alleged, mocking him as having a day dream on the issue that didn't transpire in court. Yes, in my quick reading of the

trial court's record, there is nothing reflecting admission of the cautioned statement during his trial. Thus, this ground of appeal seems misplaced.

In the third ground of appeal, the appellant's grief is this that, there was no certificate tendered by the DPP to consent the prosecution or confer the trial court with the jurisdiction to entertain this matter. He could not elaborate on this, however the respondent's attorney could neither specifically respond on this. Thus, there is insufficient material from the respondent on this.

However, my reading of the provisions of Economic and Organized Crime Control Act, Cap 200, R.E 2019, on item 23 of the first Schedule to that law, economic offences are as provided under section 15, 16 or 23 of the Drugs Control and Enforcement Act, Cap 95 R.E 2019. Thus, their prosecutions are only lawful if strictly comply with the provisions of sections of 12 and 26 of the Economic and Organised Crime Control Act [CAP. 200 R.E. 2019].

His being an offence falling under section 11 of the Act include other offences (sections 7, 15A, 17, 18, 19, 20, 21. 22, 25, 34, 39, 42, 47, 51A, 54 and 65) which are not economic offences thus they are directly triable before the subordinate court. See section 2 of the DCEA which provides:

"court" means-

(a) in respect of an offence for contravention of section 7, 11, 15A, 17, 18, 19, 20, 21, 22, 25, 34, 39, 42, 47, 51A, 54 or 65 means subordinate court;

(b) in respect of an offence for contravention of section 15, 16 or 23, means the High Court;

That said, this ground of appeal is also bankrupt of any merit.

On the last ground of appeal which is central to the outcome of the appeal, the grief is, the learned trial magistrate erred in law and fact to convict the appellant on his plea of guilty while the same was equivocal in its nature at police and before this court.

Mr. Goodluck Saguya, learned state attorney resisted the appeal on this ground urging this court to disregard his contention as it is not backed up by proceeding at the trial court. As he freely admitted to the charge and facts of the case, he considered the appellant's concern as irrelevant. He was of the firm view that since the plea was clear and unequivocal, it was not appealable save on the legality of the sentence. On this stance, he relied support on section 360(1) of the CPA and the case of **Frank Mlyuka vs. Republic**, criminal Appeal No. 404 of 2018 CAT at page 15.

He thus prayed that this appeal be dismissed in its entirety for lack of merit.

Originally, according to the initial proceedings of the case at the trial court dated 26th September 2017 when the appellant was first arraigned, there seems to be no plea taken from him. However, on the subsequent proceeding dated 19th April 2018, is what culminated into the current appeal. In order to appreciate the outcome of this appeal, I have considered it important to traverse the whole trial court's record to display what transpired at the trial court.

Date: 19/04/2018

Coram: R.A. Oguda

PP. A/Insp Magunila

Accused: Present

PP: I pray for another date.

ACCUSED: *I pray to remind me the charge.*

COURT: *The accused has been reminded his charge and he pleads*

ACCUSED: *It is true that I was found in possession of 600 grams of cannabis.*

R.A. OGUDA
RESIDENT MAGISTRATE
19/4/2018

PP: *I pray to the case facts.*

FACTS AGREED BY ACCUSED

- 1. It is true of my case particulars.*
- 2. It is true fact I face the offence of unlawful possession of narcotic drug*
- 3. It is true that I was found to possess 6090 grams of cannabis*
- 4. It is true that I was arrested by police and taken to police station*
- 5. It is true fact I was brought on 26/9/2017 at this court.*
- 6. It is true fact I have pleaded guilty to both facts and charge read over to me.*

Accused: *Signed*

Prosecutor: *Signed*

Magistrate: *Signed*

PP: *I pray to tender 600 grams of cannabis known as bhanghi to form part of our evidence.*

Accused: *I have no objection.*

COURT: *the 600 grams of cannabis is hereby admitted as exhibit P1 and the Court proceeds to convict the accused on his own plea of guilty to the charge and facts read over to him.*

**R.A. OGUDA
RESIDENT MAGISTRATE
19/4/2018**

From this proceeding, the appellant was convicted and then sentenced to a custodial sentence of 30 years, thus the genesis of this appeal.

In view of the facts borne out from the proceedings as shown above, what I had to ask myself is whether under the circumstances, it could be safely said that there was no any ambiguity, vagueness or misapprehension in the plea entered by the appellant to the offence which he stood charged with.

My answer after having closely considered the record, is in the positive. I am positive that the plea by the appellant was clearly equivocal and that an appeal can be laid to this Court.

The circumstances which can entitle an accused person to challenge a conviction which was based on a plea of guilty, were stated in the decision of the High Court (Samatta, J.) in **Laurence Mpinga Vs Republic** [1983] TLR 166, and confirmed and adopted by the Court of Appeal in **Josephat James Vs Republic**, Criminal Appeal No. 316 of 2010 (unreported) that: -

*An accused person who has been convicted by any court
of 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."*

Save for the said reasons stated above, conviction based on a plea of guilty as a matter of law is un appealable (See **Frank s/o Mlyuka vs Republic** (Criminal Appeal 404 of 2018) [2020] TZCA 1738 (20 August 2020), **John Samwel @ Kabaka and Another Vs Republic**, Criminal appeal No. 58 of 2005 (unreported), **Said Msiwaje @ Mwanalushu Vs Republic**, Criminal Appeal No. 464 of 2007 (unreported).

The basis of plea of guilty to a charge is statutorily provided. It is not a mere wish. Therefore, it must clearly comply with the dictates of the law. The guiding law, is section 228(1) and (2) of the CPA, R.E 2019 which 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) 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.

In this case, a careful scan of the trial court record, is clear that the appellant's plea at the trial court, was imperfect in the sense that there were no accompanying material facts of the case to support the plea taken whether the facts of the case readout established the ingredients of the charged offence. In that absence, the plea of guilty is legally imperfect, ambiguous or unfinished and, and for that reason, the lower court erred in law in treating it as a perfect plea of guilty for being clear and unequivocal. It was a rush plea of guilty and thus not legal plea. In the

absence of material facts of the case establishing the ingredients of the charged offence, the plea was imperfect and unfinished in law. As that was not done, the plea of guilty cannot be justifiably accorded any legal weight and thus cannot stand.

That said, the appeal is allowed, conviction quashed and sentence set aside. In the circumstances of this case, I would have ordered retrial had there been such a grave charge. In consideration that this is a 2017 case and that the appellant has been in incarceration all that time, it is my considered view that for a charge of possession of 600gm of bhang, he might have sufficiently repented by that time spent in jail. He is thus set at liberty unless lawfully held by other causes.

DATED at SHINYANGA this 25th day of August, 2023.

F.H. MAHIMBALI
JUDGE

Judgment delivered today the 25th day of August, 2023 in the presence of Mr. Goodluck Saguya, learned state attorney, the appellant; and Ms Beatrice, RMA, present in Chamber Court.

Right of appeal explained.



F.H. MAHIMBALI
JUDGE