

TANZANIA / JUDGMENT

Mwakipesile FINAL

COURT
TANZLII

DECIDED
19 August 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB -
REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO. 25251 OF 2024 CASE REF
202409032000025251 Originating Criminal Case No.23442 of 2024 In the District court of
Mkuranga at Mkuranga Hon. H. Mwailolo PRM dated 19 August, 2024 KELVIN HENRY
MWAKIPESILE..... 1ST APPELLANT ADAM HUSSEIN
SHOMVI 2ND APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGEMENT

28th Nov 2024 & 17th Feb 2025 KIREKIANO J The appellants herein were charged before the
District Court of Mkuranga at Mkuranga with an offence of Trafficking in Narcotic Drugs c/s 15A
(1),

- (2) (C) of the Drugs Control and Enforcement Act cap 95 [Re 2019]. According to the trial court
record, on 19.8.2024, when the charge was read to the appellant, they purportedly admitted
to the truth the charge; the prosecution thus went on to read the facts of the case and tender
the exhibits (sic). 1 The trial court was satisfied with the accused admission of the charge
and the exhibits tendered; it went on to convict the appellants on their plea of guilt and
sentenced them to serve an imprisonment term of thirty (30) in jail each. The appellants
have logged this appeal, protesting their innocence. During the hearing the appellants
paraphrased their grounds of appeal into one major complaint thus; That the learned trial
magistrate grossly erred in both law and fact by convicting the appellants based on a plea of
guilty that was equivocal plea”. It is noted here that the procedure for finding the appellant
plea is the centre of this appeal; I thus find it necessary to let the record explain what
transpired when the charge was read to the appellants. 1ST ACCUSED-Ni kweli mhe
tumekutwa na kilo nane za bhang court-Entered plea of not guilty 2ND ACCUSED-Ni kweli
mhe tumekutwa na kilo nane za bhang Court-Entered plea of not guilty PP- Your honor, the
investigation is complete, I pray to read

facts:

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FACTS

That the accused person is Adamu Hussein Shonvi and the 2nd accused is Kelvin Henry Mwakipesile who stands charged with the offence of trafficking in narcotic drugs contrary to section 15 A (1), (2) (c) of drugs. That the accused were seen by the police officers who were in the motor cycle with Reg MC 501EEM make TVS with one big bag of the leaves which were suspected as bhang. They were suspected and stopped. They asked them to open it for search. They looked for the independent witnesses and they opened it. They found dry leaves which were suspected as bhang hence they seized them and prepared the Certificate of seizure which was signed by both accused persons. the accused were arrested and brought at Kimanzichana police station. The exhibits were kept by the exhibit's keeper. On 28/6/2024 the said leaves were brought to the GCLA for analysis. The same was weighed and found with 8.19 kilogram. the samples were taken for analysis and it was found that the said dry leaves were bhang. the report was given by the GCLA officer today the accused are before this Hon court, and they have plead guilty. 1st ACCUSED PERSONS-Ni kweli mhe maelekezo haya yako sahihi 2nd Accused-Your honor its true. Ni Kweli maelezo yote PP- Your honor I pray to tender DCEA 003 as an exhibit 3 1st Accused- No objection 2nd accused- No objection COURT- admitted and marked as exhibit P1. let it be read loudly. signed, 19/8/2024 PP- Your honor we pray to tender form no DCEA009 as an exhibit 1st accused- No objection 2nd accused -no objection Court-Admitted and marked as exhibit p2. Let it be read loudly. signed, 19/8/2024 pp-Your honor we pray to tender the motorcycle with Reg no MC 501 EEM make TVs as an exhibit 1st accused-no objection 2nd accused-no objection court- admitted and marked as exhibit p3. signed, 19/8/2024 PP-Your honor we pray to tender the bag of dry leaves of bhang sealed by GCLA seals (8.19kilograms) 1st accused-no objection 2nd accused-no objection 4 Court -admitted and marked as exhibit p4 PP-that's all Court-The accused persons are hereby convicted on their own plea against the offence of trafficking in narcotic drugs as charged. signed, 19/8/2024 Mr Ashraf Muhidin represented the appellants while the respondent had the service of Miss Agness Ndanzi, learned state attorney. The appeal was heard by way of written submissions. I wish to indicate at this stage that is reading from the parties' submissions; it is common ground that, generally, under section 360 (1) of the Criminal Procedure Act Cap 20 [RE 2022], an appeal does not lie against a conviction founded on the plea of guilty. However, there is an exception as elucidated in several decisions, including Laurence Mpinga vs Republic (1983) TLR 166 Emmanuel Ambrous vs Republic. Criminal appeal no. 555 of 2017, CAT, and Revocatus Mugisha vs Republic (Criminal Appeal No. 656 of 2022)

[2024] TZCA 573 (16 July 2024). In the latter case of Revocatus Mugisha at page 13 the court of appeal held thus; We are keenly aware that notwithstanding a conviction resulting from a plea of guilty, under certain circumstances, an appeal arising thereof may be entertained by an appellate court for both conviction and sentence. These would include situations where the plea was imperfect, ambiguous, or unfinished or where the appellant pleaded guilty as a result of a mistake or misapprehension or where the charge levelled against the appellant disclosed no offence known to law, and upon the admitted facts, the appellant could not in law have been convicted of the offence charged. The parties' point of departure is whether the appellant's plea was equivocal, as indicated in the ground of

appeal. The appellant's counsel was of the view that, the trial magistrate opted not to accept or take their plea as a plea of guilt instead, she recorded them as plea of not guilt. The appellant's counsel also relied on the decision in Khalid Athumani Vs Republic, Criminal appeal no 103 of 2005, to the effect that the procedure requires the magistrate should explain to the accused person all the 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. He said the appellants were arraigned with Trafficking in Narcotic Drugs; hence, in their plea, they ought to have elaborated further on where 6 they had found the said bhang, the weight and other vital facts. The appellant's counsel was of the stance that since the magistrate recorded a plea of not guilty in the first place, she was not satisfied with the plea. As such, he said, while they purportedly admitted the possession of eight (8) kgs of bhang, what was tendered in court was 8.19 kgs of bhang; hence, their plea was equivocal. On her part, Miss Ndanzi was of the opinion that the plea was unequivocal since the appellant knew what they pleaded for. She made reference to the record, arguing that the words 'ni kweli mheshimiwa maelezo yote yako sahihi speak volumes about their intention to plead guilty and, in fact, they admitted to all the facts narrated to them. She also argued that the record of the trial magistrate that it was a plea of not guilty was a misdirection. Hence, the prosecution should not succumb to this, nor should criminals go unpunished for omissions made by the Court. In his rejoinder, the appellant's counsel argued that the appellant's contention that the trial magistrate recorded the appellant's plea as a plea of not guilty was not a slip of a pen, as argued by the respondent's counsel since she indicated in both appellants' plea. He said the weight of the said bhang was a crucial component of the charge. Thus, the variance in weight 7 in the charge and the exhibit tendered was eight (08) kg to 8.19 kgs made the plea unequivocal. He also rejoined that under sections 228 (1) and (2) of the CPA, the prosecutor's duty is to prove their case by narrating the case to the appellants and making them answer one after the other properly, sufficiently, and does not disappear. On my part, before responding to the rival arguments of the parties on whether the pleas were unequivocal, I wish to refer to the insightful decision on the area by Lord Duffus P, sitting in the Court of Appeal for East Africa, In the case of David K. Gatihi Vs. R, Criminal Appeal No. 118 of 1972 thus; "The courts are concerned not to convict an accused person on his own plea unless it is certain that, the accused understands the charge, intended to plead guilty and that he has no defence to the charge" As such, I wish, in the first place to clarify the procedure for plea of guilty as was elucidated by CAT in Adan V. R, (1973) EA 445 Hyansit Nchimbi v. Republic (Criminal Appeal No.109 of 2017) [2019] TZCA 251 (21 August 2019,) TANZLII. It goes thus:

1. "When a person is charged, the charge and the particulars should be read out to him so far as possible in 8 his own language, but if that is not possible, then in a language which he can speak and understand.

2. The magistrate should then explain to the accused person all the 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 formerly enter a plea of guilty
3. 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 explain the facts or to add any relevant facts.
4. If the accused does not agree with the statement of the facts or asserts additional 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.
5. 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 fact and the accused's reply must, of course, be recorded." (Emphasis supplied)
Guided by the above authority, the crucial issue for my determination is whether the appellant's plea of guilty was unequivocal enough to warrant a conviction on a plea of guilty and whether the trial court can be faulted on this. Going by the record, the pertinent issue that arises is whether the trial court made a finding on a plea of guilty in the first place. From the record, the trial court recorded the plea of "not guilty" but again went on to have the facts narrated and found a conviction on the plea of guilty; the counsel for the appellant is of the view that the record that the appellant pleaded not guilty is a manifestation of the trial court's dissatisfaction with its admission. As such, I have considered the argument by both parties on this; Miss Ndanzi apparently admitted that there was a problem with the record of the trial court. She beseeched me to find that the fact that the Magistrate noted as a plea of "not guilty" was a misdirection; hence, neither prosecution should be punished for omissions made by the Court. Based on what appears in the record, the trial magistrate did not record a guilty plea but went on with other procedures as if there had been such a plea. Having given this thought, I consider this fatal. As such, going by Miss Ndanzi's argument that this was a slip of the pen, I have given this thought and in the process, considered the provision of section 388 CPA Cap 20 and whether the same can be cured. This section 10 states that an order shall not be reversed on appeal or revision based on error in the order or sentence. The issue of whether the appellants entered a guilty plea or otherwise is the centre of this appeal. Hence, even assuming that there was a slip of the pen, I do not find it safe to overlook this and assume that there was a slip of the pen. The trial court could not proceed with other stages to convict on a plea of guilt without keeping the record of a plea of guilty clear. Based on the foregoing, the conviction and sentence passed were null and void; this court exercises its revisional powers and quashes the same under section 29 (b) of The Magistrates' Courts Act [CAP. 11 R.E. 2019] Now, on the way forward, plenty of decisions guide this, including *Fatehali Manji v. The Republic* (1966) EA 343 and *Shaban Abdallah v. Republic* Criminal Appeal No. 255 of 2013, which held that it is not the rule of thumb that a retrial will always be ordered when the original trial is illegal or defective. A retrial should only be

made where the interests of justice require it. In this case, I have considered that the defect in the proceedings was occasioned by the trial court not touching the substance of the prosecution evidence. In those circumstances, this court orders a retrial of the case, starting with taking the plea afresh and proceeding as the 11 case may be. In the meantime, the appellants shall remain in custody, awaiting their appearance in the trial court. Dated at Dar es Salaam this 17th February 2025 A. J. KIREKIANO. JUDGE 12

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Prepared on 14 October 2026 · Esheria