

TANZANIA / JUDGMENT

JUDGMENT ROBERT KISAWIA KWEKA VS REPUBLIC

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DECIDED
19 March 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO. 12269 OF 2024 (Arising from the decision of
District Court of Songwe at Mkwajuni in Criminal case No. 7880/2024) ROBERT S/O KISAWIA
KWEKA..... APPELLANT VERSUS THE
REPUBLIC.....1ST RESPONDENT ABDUL S/O OMARY
MKUNGU.....2ND RESPONDENT DOTTO S/O JOSEPH
ELIAS.....3RD RESPONDENT

JUDGMENT

Date of last Order: 29th July, 2024 Date of Judgment: 15th August, 2024 KAWISHE, J.: This is an appeal from the District Court of Songwe at Mkwajuni where, the appellant was charged with the offence unlawful possession of Narcotic drugs. It is on the records that, the appellant pleaded guilty on the offence he was charged with and was convicted on his own plea of guilty and sentenced to serve four years in jail. 1 It was alleged that on 19th day of March, 2024 at six fourteen at Saza Village within Songwe District in Songwe Region the appellant together with the 2nd and 3rd respondents were unlawfully found in possession of Narcotic drugs to wit 3.5 kilograms of Cannabis sativa commonly known as Bhangi, contrary to section 15A (1) and 2(c) of the Drugs Control and Enforcement Act No. 95 R.E 2019 as amended by section 19 of the Written Laws (Miscellaneous Amendments) Act No. 5 (No.9) of 2021. From the court’s records following the allegations drawn in the charge sheet, the appellant, the 2nd and 3rd respondents were arraigned in court on 22nd March 2024. The charge was read over to the accused persons in Kiswahili language that is understood to them and the appellant pleaded guilty to the offence he was charged with, that: “Ni kweli nilikutwa na bhangi hiyo tajwa huko Saza Kijijini eneo la six fourteen.” Literally translated, it is true that I was found with the cannabis at Saza Village, six fourteen area. The 2nd and 3rd respondents entered plea of not guilty. The facts were read and the appellant’s cautioned statement, seizure certificate and chain of custody records of the alleged drugs were tendered and admitted but not marked without 2 any objection from the appellant. The case against the 2nd and the 3rd respondents was withdrawn by the public prosecutor on 15th May, 2024. The appellant being aggrieved by the trial court’s decision, he preferred an appeal before this court with four grounds as reproduced hereunder.

1. That, the trial court erred both in law and fact to rely on equivocal plea of guilty.
 2. That, the trial court erred in law and fact for failure to read the admitted documents to the appellant.
 3. That, the trial court erred in law and fact for failure to adhere to the procedures of recording the proceedings.
 4. That, the trial court erred in law and fact that the case was not proved beyond reasonable doubt. The appellant appeared under the service of Ms. Grace Emmanuel, learned advocate and the respondents appeared under the service of the learned State Attorney Mr. James Mwenda. Following the agreement by the parties, the appeal was argued by a way of a written submission. Both parties complied to the schedule of submission. The appellant's counsel started with introduction, before arguing the grounds of appeal. That, the appellant being charged on his own plea of guilty is barred from appealing against the conviction. She added that, the appellant can only appeal against the extent or legality of the 3 sentence imposed. She cited section 360(1) of the Criminal Procedure Act, Cap 20 R.E 2019. That, there are circumstances where one may challenge the conviction on his own plea of guilty by way of an appeal. In enhancing her position, the learned counsel cited the case of Rex vs. Folder (1923)2 SKB400 which was followed in the decision of Laurent Mpinga vs. Republic [1983] TLR 166 and later was cited with approval in the case of Karlos Pundavas vs. Republic, Criminal Appeal No. 153 of 2005. On the procedures to be undertaken when plea of guilty entered, and that there cannot be an unequivocal plea on which a valid conviction may be founded unless the conditions mentioned in the cited case are followed, in the case of Michael Adrian Chaki vs. Republic (Criminal Appeal 399 of 2019) [2021] TZCA 454 (9 September 2021). After her introduction, the appellant's learned counsel embarked on the grounds of appeal. She decided to drop the second ground of appeal. The learned counsel argued the first and third ground of appeal collectively. She submitted that the facts of the case narrated by the prosecution did not establish the elements of an offence of unlawful possession of narcotic drugs, and the same were in variance with the charge the appellant charged with in terms of the weight of Bhangi. In the charge sheet the weight is 3.5 while in facts is 4.5 kilograms. 4 She went further to submit that the facts were neither itemized nor clearly illustrated to make the appellant understand the charge. She also added that, prior to entering conviction on plea of guilty before the trial court, every constituent of the charge should be explained to the accused, and should deny or admit every constituent. That, it should be recorded in the form that will satisfy the higher court that, he fully understood the charge and pleaded guilty to every element of it to make it unequivocal. In reinforcing her submission, she cited the case of Kato vs. Republic (1971) HCD 364 and Hando s/o Akunay vs. Republic
- (1951) 18 E.A.C.A 307. Thus, the words that 'facts of the case are true and the same I admit,' cannot reasonably be said to amount to the admission of every facts of the case. That, the admitted facts do not disclose all elements of the offence of unlawful possession of narcotic drugs. She averred that, the two elements have to be proved that the appellant was

found with narcotic drugs and he was found unlawfully. The appellant's learned counsel invited this court to refresh on the facts of the case at page 4 of the trial court's proceedings. She submitted that, the facts show that, the appellant was found with Bhangi in his premise, but the facts do not prove that he was found with 5 the said Bhangi unlawfully. She insisted that, the mere fact that, the appellant confessed to be found with the said Bhangi in his premise does not mean that the same was possessed by the appellant. She submitted further that the facts of the case do not reveal that the 3.5 kilograms of Bhangi were found in possession of the appellant unlawfully. The appellant's counsel furiously argued that, the absence of the facts to prove that the appellant was the one who possessed the said Bhangi unlawfully, it means the offence the appellant charged with was not proved. Thus, the trial court was not correct to convict the appellant basing on equivocal plea of guilty, and the facts read to him and explained to him were equivocal. In her view, the learned counsel argued that, the appellant admitted to what he did not understand. She prayed this court to allow this ground of appeal. Submitting on the fourth ground of appeal, the counsel argued that, the prosecution read the facts which did not relate to the charge sheet hence, the appellant's plea of guilty was taken out of mistake. She insisted that, the charge in the aspect of the weight of the Bhangi was not proved. That, in the charge sheet the weight is 3.5 kilograms while, in the facts read before the accused person is 4.5 kilograms. That, since 6 there was no amendment of the charge as per section 234(1) of the Criminal Procedure Act, Cap 20 R.E. 2019, the counsel argued that, the charge against the appellant was not proved. Therefore, he is entitled to an acquittal for the interest of justice. To bolster her submission, she cited the case of Hussein Mustafa vs. Republic, Criminal Appeal No. 650 of 2023, CAT at Morogoro. The appellant's counsel prayed that, the appeal be allowed, quash conviction and set aside the sentence imposed and the appellant set be free. In response, the respondent's learned State Attorney opposed the appeal. He argued that, the appellant when arraigned before the trial court, entered a plea of guilty on the offence which he was charged with. He referred to page 2 of the trial court's proceedings where, the appellant stated that: 'ni kweli nilikutwa na Bhangi hiyo tajwa huko Saza kijijini eneo la six fourteen'. He insisted that, from the statement of the appellant, it means the appellant understood the offence he was charged with. That, he knew the kind of the offence he was charged with as he stated the area where he was found in possession of the said drugs. The learned State Attorney argued that, the plea of guilty entered by the appellant is purely unequivocal as per section 360(1) of the CPA. 7 Consequently, he is barred to appeal against his own plea of guilty. The learned State Attorney further argued that, the case of REX (supra), Laurent Mpinga (supra), Karlos Pundavas (supra), Michael Adrian Chaki (supra), Akbar Ali Damji (supra), and the case of Thuway Akunay (supra) are distinguishable on the ground that, the plea of guilty entered by the appellant is unequivocal. The learned State Attorney replied on the assertion that, the appellant was mistreated at the police station as purely misconception, because the same was not raised when the matter was before trial court thus, it is an afterthought. To strengthen his submission, he cited the case of Yusufu Ismail Akandu vs. Republic, Criminal Appeal No. 263 of 2021. Reverting to the ground that, the facts of the case did not

establish the offence of unlawful possession of narcotic drugs he claimed that it has no legal basis. The learned State Attorney invited this court to refer to page 3, 4 and 5 of the trial court's proceedings which reflect the facts establishing the offence of unlawful possession of the drugs. On the ground that, there is variance on the charge sheet and facts on the issue of weight, the learned State Attorney argued that, it is a mere slip of the pen on the trial magistrate's side. He added that, the seizure 8 certificate was tendered and admitted as exhibit to prove the weight of the said drugs. He further stated that, even if the same was not a mistake, the sentence to be imposed to the appellant could have been the same as established under the provision the appellant charged with. The appellant failed to establish how he has been prejudiced by the said variance. He insisted that, it has to be noted that, the appellant never raised any objection on the said variance at the trial court therefore, he cannot raise the same at this stage. He cemented his position by citing the case of Yusufu Ismail Akandu (supra). Ravaging the issue that the facts were not itemized, the learned State Attorney argued that, it is not necessary for the facts to be itemized for the accused person to understand and respond to. He maintained that, the issue is whether the said facts were well understood by the accused person. The learned State Attorney claimed that, in this case the facts were very clear and straight forward for the accused person to understand and respond accordingly. He faulted the case of Kato (supra) and Hando Akunay (supra) by stating that they are distinguishable. That, the word; 'facts of the case are true and the same I admit', do establish that the appellant understood the offence charged with and this means that, the element was well established for 9 him to understand. He referred to page 3, 4, 5 and 6 of the trial court's proceedings. He concretised his argument by citing the case of Joel Mwangambako vs. The Republic, Criminal Appeal No. 516 of 2017. The learned State Attorney further submitted that, since the plea of guilty entered is unequivocal there is no need to raise an issue that the prosecution side did not prove the offence to the hilt. The learned State Attorney argued that, the provision which establish the offence which the appellant was charged with, provides for the punishment to serve 30 years but based on the facts that the appellant was the first offender and he saved the court's precious time he was punished to serve four years in prison. He prayed this court to be guided by the provisions of the law and sentence the appellant to serve 30 years. He prayed this court to dismiss this appeal. In rejoinder the appellant's counsel was against what was submitted by the learned State Attorney. She reiterated what she submitted in chief. She added that, the words used by the appellant when plea of guilty entered cannot reasonably amount to unequivocal plea. Commenting on the issue of being mistreated by the police, the appellant's learned counsel argued that, the same was not raised in their 10 grounds of appeal. Banking on the variation of the charge and the facts that it is a mere slip of the pen and that the seizure certificate was tendered and admitted in court, the learned counsel stated that, they disagree with that argument as the seizure certificate was not tendered before and admitted as an exhibit by the trial court. On the ground that, the appellant did not establish how he was prejudiced by the said variance, the counsel argued that, the same was so clear on submission in chief. That it was stated that the variance caused the failure

of justice to the appellant as the charge on the aspect of the weight of the Bhangi was not proved. She submitted that, the State Attorney admitted that there is variance, and nothing was replied in the case of Hussein Mustafa (supra). The counsel further argued that, the authorities cited by the attorney are not applicable in the circumstances of this appeal. She prayed the appeal to be allowed. Having summarised the submission made by both parties, and having a thorough perusal of the lower court's record, there are two issues to be determined, first whether the plea of guilty entered by the appellant was properly taken, second if the answer in the first issue is in affirmative thus, whether the prosecution has the duty to prove the case beyond reasonable doubt. Starting with the first issue as to whether the plea of guilty entered by the appellant was properly taken. The general rule governing plea of guilty is well established by the law under section 360(1) of the Criminal Procedure Act R.E 2019 which provides that: "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". The law is very clear that the conviction based on plea of guilty is non-appealable. An appeal from such conviction ought to be on the sentence only. However, in certain cases an appeal on conviction may be entertained even if there is a plea of guilty as stated in the case of Laurence Mpinga vs. Republic [1983] TLR 166 that: "Such an accused person may challenge the conviction 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." Considering the excerpt from Laurence Mpinga (supra) and the allegation by the appellant's counsel that the appellant's plea of guilty was equivocal, the first principle in the case cited leads me in determining the authenticity of the plea. 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. Therefore, did the trial court err in law as alleged? To disentangle this knot, I could not hold myself from revisiting page 2 of the trial court's proceedings where the appellant stated that 'Ni kweli nilikutwa na Bhangi hiyo tajwa huko Saza kijijini eneo la six fourteen'. This statement shows clearly that, he responded to a question concerning bhangi. According to the charge sheet and the facts thereto, the appellant was charged with the unlawful possession of narcotic drugs commonly known as bhangi. To be specific the charge sheet reads:
CHARGE STATEMENT OF OFFENCE 13 UNLAWFUL POSSESSION OF NARCOTIC DRUGS contrary to section 15A (1), 2(c) of the Drugs Control and Enforcement Act CAP 95 [R.E 2019] as amended by section 19 of the Written Laws in (Miscellaneous Amendments) (No. 5 No. 9 of 2021. PARTICULARS OF OFFENCE ROBERT S/O KISAWIA KWEKA, ABDUL S/O OMARY

MKUNGU and DOTTO S/O JOSEPH ELIAS on 19th day of March, 2024 at six Fourteen Saza Village within Songwe District in Songwe Region were unlawfully found in possession of Narcotic Drugs to wit; 3.5 Kilograms of cannabis sativa, commonly known as Bhangi. In line with the appellant's plea of guilty, section 228 of the Criminal Procedure Act, Cap 20 R.E 2019 provides for the procedure for plea. It reads as follows: "(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 mine]. The provisions of the law were well illustrated in the case of Safari Deemany vs. Republic, CAT Criminal Appeal No. 269 of 2001 (unreported). The Court stated that: "Great care must be exercised especially where an accused is faced with a grave offence like the one at hand which attracted life imprisonment. We are also of the settled view that it would be more ideal for an appellant who has 14 pleaded guilty to say more than just, it is true. A trial court should ask an accused to elaborate in his own words as to what he is saying is true." Testing the appeal at hand against the position established by the Court in Safari Deemany (supra), it is evident from the trial court's proceedings that, the appellant plea was very elaborate. The appellant did not state 'it is true' and became dumb. He elaborated on what he stated to be true, that it is true that he was found in possession of the narcotic drugs. This is self-explanatory at page 2 of the trial court's proceedings. I find it prudent to reproduce a part thereof: Court: Charge is read over to the accused persons in Kiswahili language that understand (sic) to them who then asked to plead thereof. Accused plea: 1st accused: "Ni kweli nilikutwa na bhangi hiyo tajwa huko Saza kijijini eneo la six fourteen". Therefore, the plea was properly taken by the trial magistrate as the words used 'Ni kweli nilikutwa na Bhangi hiyo tajwa huko Saza kijijini eneo la six fourteen', by the appellant and recorded by the trial magistrate. Later on, the facts of the case the appellant charged with was read before the trial court by the prosecutor. The facts were read, when asked whether they were true and correct, he admits them. Part of the proceedings is reproduced hereunder: 15 Court: Asked the 1st accused if he admits facts of the case narrated by prosecutor are true and correct. Accused: Facts of the case are true and the same I admit. Given the procedure undertaken by the trial magistrate, I feel it compelling to borrow wisdom from the case of Republic vs. Tarasha
- (1970) HCD No. 252 where it was held: "There is no shortcut to a trial and in every case where there is a plea of guilty the prosecution must give facts. It often happens that the facts given do not establish the offence and the plea of guilty cannot be accepted. This is a case in point assuming that the facts are stated in the complaint. Moreover, it is true cannot be unequivocal plea of guilty by itself." In view of the quotation above, this appeal at hand before the trial court, the facts of the offence were read before the appellant/accused person, the documents to prove the offence that is caution statement, seizure certificate and chain of custody records of the alleged drugs were admitted without any objection by

the appellant. After having read the facts to the accused person he admitted by stating that, 'facts of the case are true and the same I admit'. It is common that the process of taking and recording plea has to comply with section 228(1) and (2) of the CPA, which guide on the procedure that should be taken by the trial court. That, the facts which include the ingredients of the offence should be read before the accused person and the accused person in his plea of 16 guilty must admit all ingredients of the offence. Contrary to that, it is against the law and it occasions injustice to the accused person. Therefore, in this case the procedures were followed and the appellant admitted the facts which establish the offence. All the elements of the offence were reflected in the facts read by the prosecutor before trial court. That, the appellant was unlawfully found in possession of narcotic drugs (Bhangi), in his premises at Saza Village in the area commonly known as six fourteen. The complaint that the appellant being found with Bhangi in his premise did not mean that the same was possessed by him. In my view, this complaint has no merit, the same cannot be raised at this stage it is an afterthought. Thus, the plea entered is unequivocal, and the same form the basis of his conviction. In such circumstances the conviction entered by the trial court and sentences passed was just before the law. The appellant's complaint on the ground that the charge sheet did not reflect what are stated in the facts of the case, that the said variance in the weight of the Bhangi is fatal and caused injustice to the appellant. As responded to by the learned State Attorney that, it did not occasion injustice, I am convinced as the variance is not fatal. In my considered view, the same did not go to the root of the case. The 17 appellant admitted that it is true that he was found in possession of the said Bhangi, he did not deny on the weight of the said Bhangi. Even if the weight is 4.5 or 3.5 kilograms the same cannot change the sentence imposed to the appellant and the same did not affect the jurisdiction of the court. I concede with the State Attorney's submission that, the appellant did not state how he has been prejudiced with the said variance on the weight of Bhangi. Also, the same was not raised during trial in the district court thus, raising it at this stage is an afterthought, as stated in the case of Yusufu Ismail Akandu (supra). consequently, the complaint has no merit. Pondering on the allegation that the facts of the case were not itemized nor clearly illustrated to make the appellant understand the charge he was facing; the appellant's counsel cited the case of Kato vs. Republic (supra) and Hando Akunay (supra). She stated that, every constituent of the charge should be explained to the accused and accused should be required to admit or deny every constituent and the same should be recorded. I am inclined to the State Attorney's submission that the facts of the case were very clear and straight forward for the accused to understand and respond accordingly. The words used by the appellant show that, he understood the facts of the 18 case, which disclosed all the elements of the offence of unlawful possession of narcotic drugs. From this point of view, the cases cited by the appellant's counsel are distinguishable from this case at hand. The words used by the appellant when he admitted the facts show that, the appellant understood the facts of the case. In the case of Joel Mwangambako (supra) it was stated: "Bearing in mind and the appellant, having pleaded guilty to the charged offence, unreservedly admitted the truthfulness of the said narrative, we find without demur that he was rightly convicted as

his plea was unequivocal and unmistakable”. Basing on discussion endeavoured, the first issue is answered in the affirmative. Thus, as a result, the 1st and 3rd grounds of appeal have no merit. The fourth ground of appeal, was that the prosecution did not prove its case beyond reasonable doubt. The appellant stated that there was variation between the charge and facts of the case on weight of the Bhangi found in his possession. The appellant’s learned counsel cited the case of Hussein Mustafa (supra) in support of his submission. Considering the plea of guilty entered by the appellant, I concur with the State Attorney’s submission that, once there is unequivocal plea of 19 guilty, the prosecution has no duty to prove the case beyond reasonable doubt. The foundation of the State Attorney’s argument is anchored int the position developed in the case of Joel Mwangambako (supra), where it was held that: “There was no need of proof as the appellant conviction was soundly based upon his own plea of guilty”. That being the position definitely, the second issue is answered in the negative, meaning that, the 4th ground has no merit. Having discussed the grounds of appeal, I am of the view that, the appellant’s plea of guilty was unequivocal. The appellant understood the offence he was charged with and pleaded accordingly on facts which he comprehended. The accused/appellant having pleaded guilty, the prosecution was not duty bound to prove the case beyond reasonable doubt. The accused/appellant pleaded guilty to the offence and admitted that, the facts read were true and correct, what else the prosecution could submit to prove accepted facts. Therefore, the trial magistrate did not err in law and facts as alleged by the appellant. In the upshot, the appeal is dismissed in its entirety. The conviction and sentence imposed by the trial court are hereby confirmed and upheld. 20 It is so ordered. Dated and Delivered at MBEYA this 15th day of August, 2024. Right of appeal explained to any aggrieved party. E. L. KAWISHE JUDGE 15/8/2024 Court: Judgment delivered virtually before the parties. E. L. KAWISHE JUDGE 21

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Prepared on 14 October 2026 · Esheria