

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MUSSA, J.A., MKUYE, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 536 OF 2016

OMARY JOACHIM APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Dr. Opiyo, J.)

dated 26th day of August, 2016

in

(Criminal Appeal No. 73 of 2016)

JUDGMENT OF THE COURT

28th November, & 10th December, 2019

MUSSA, J.A.:

In the District Court of Longido, the appellant was arraigned for transportation of prohibited plants contrary to section 11 (1) (d) of the Drug Control and Enforcement Act, No. 5 of 2015 (hereinafter called "the Act").

The particulars of the offence alleged that on the 5th day of March 2016, at Engikareti Village, within the District of Loliondo, the appellant involved himself in the transportation of narcotic drugs, to wit, 6 kilograms

of *khat*, alias, *mirungi*, as the plants are locally known, valued at Tshs.1,200,000/= . It was further alleged that the narcotic drugs were being transported by way of motorcycle registration No. MC 920 AEU from Namanga in Longido District to Babati in Manyara Region. As to what transpired at the commencement of the trial on the 7th March, 2016 we will let the record of proceedings speak for itself:-

"The charge read over and explained to the accused persons who is asked to plea there to.

***A.E.Temu-SRM
07/03/2016***

Accused: *It is true*

Court: *Entered as plea of guilty.*

***A.E.Temu-SRM
07/03/2016***

Prosecutor: *Investigation Is complete. I pray for short adjournment to prepare the facts of the case.*

Court: *Short adjournment.*

***A.E.Temu-SRM
07/03/2016***

*At 14:26 HRS THE COURT RESUMED WITH THE SAME
CORAM*

***A.E.Temu-SRM
07/03/2016***

Prosecutor: *I am ready to read the facts of the case.*

FACTS OF THE CASE

- 1. That, the names, address and the personal particulars of the accused person is shown in the charge sheet.*
- 2. That, the accused person stands charged with the offence of transporting prohibited plant as shown in the charge sheet.*
- 3. That, on the 5th day of March, 2016 at about 11:00hrs at Engikaret Village the accused person was found transporting 6kg of Mirungi.*
- 4. That, the accused person was transporting the said Catha edulus from Namanga Longido Arusha to Babati Manyara using the Motor Cycle No. MC 920 AEU makes Star.*
- 5. That, the said Mirungi was kept in the greenish plastic bucket carried on the said Motor Cycle.*
- 6. That, the accused person was arrested and brought to police station Longido for investigation.*
- 7. That, the accused person in interrogation admitted to commit the said offence and made his cautioned statement.*
- 8. That, on 07/03/2016 the accused person was brought before the court to stand his respective charge.*

9. That, we would like to produce three exhibits, a bucket, 6kg of Mirungi and Motor Cycle No. MC 920 AEU make Star which is kept under Police Station Longido custody and couldn't move due to its Mechanical problem. I therefore request this court to move to police station Longido to enable the Republic to tender the said Exhibit.

Court: *prayer granted.*

A.E.Temu-SRM
07/03/2016

Court: *At police Station Longido the Coram is as it was before.*

Prosecutor: *This is the right Motor Cycle I was referring to its bears Registration No. MC 920 AEU. I pray to tender it as exhibit in this case.*

Accused: *I have no objection your honour.*

Court: *A green bucket, with 6 kg of Mirungi and Motor Cyle with Registration No. MC 920 AEU collectively admitted as Exhibit P1 in this case.*

A.E.Temu-SRM
07/03/2016

Court: *(to accused person)*

You have heard the facts of the case read to you by the prosecution along with the exhibits admitted in this case. It's your time now to respond.

***A.E.Temu-SRM
07/03/2016***

Accused: *I admit the facts read to me by the prosecution and the exhibits its true your honour.*

Sgd. Accused Omary Joachim

Prosecutor: A/Insp. S.S. Kaina

***A.E.Temu-SRM
07/03/2016***

Court: *The facts the accused person admitted do constitutes the offence with which he stands charged. I therefore find him guilty of the offence and duly convict him forthwith.*

***A.E.Temu-SRM
07/03/2016"***

Upon conviction, the appellant was handed down the mandatory minimum sentence of thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Opiyo, J.), hence this second appeal which is upon a memorandum of appeal which was lodged on the

7th November, 2017 and a supplementary memorandum which was filed on the 22nd November, 2019. The complaints in the two memoranda may conveniently be paraphrased as follows:-

- 1. That the appellant's plea of guilty resulted from a mistake or misapprehension;*
- 2. That even taking into consideration the admitted facts, the appellant's plea was imperfect and unfinished;*
- 3. That the 1st appellate court failed to scrutinize the admitted facts and as a result she arrived at an erroneous decision and;*
- 4. That the entire proceedings were marred by procedural irregularities.*

To buttress the foregoing memoranda of appeal, the appellant sought to rely on the unreported Criminal Appeal No. 272 of 2011 – **Juma Mohamed v. The Republic** which he appended in his list of authorities.

When the appeal was placed for hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic, had the services of Ms. Agnes Hyera, learned Senior State

Attorney, who was being assisted by Mr. Tusaje Samwel, learned State Attorney.

As it were, the appellant fully adopted the memoranda of appeal which we have paraphrased as well as the sole authority which he sought to rely. In elaboration, the appellant insistently contended that, at the trial, the prosecution only sought to adduce into evidence the Motor Cycle and, it was erroneous, therefore, for the trial court to admit the other items, namely, the bucket and the six (6) kilogrammes of *mirungi*. Unfortunately, if we may express at once, paragraph 9 of the admitted statement of facts which were outlined by the prosecution does not bare the appellant's contention. It was clearly stated therein that the prosecution desired "*to produce three exhibits, a bucket, 6 Kg of Mirungi and Motorcycle No. MC 920 AEU . . .*"

In response to the appellant's submissions, Ms. Hyera resisted the appeal by contending that the plea was unequivocal and, in the result, the conviction and sentence were, respectively, properly entered and meted out against the appellant. On account of the plea being unequivocal, the learned Senior State Attorney reminded us of the provisions of section 360 (1) of the Criminal Procedure Act, Chapter 20 of the Laws (hereinafter abbreviated "the CPA") which goes thus:-

"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."

As regards the sentence, Ms. Hyera submitted that the complaint against sentence is just as well devoid of merit, more particularly, since the sentence imposed is the minimum provided by the law.

When we, however, enquired, in a short dialogue, as to whether there was proof that the impugned plants were indeed *khat* or *mirungi*, the learned Senior State Attorney was seemingly withdrawn but, she was, nevertheless, quick to rejoin that proof that the seized plants were narcotic or psychotropic substances avails from the appellant's plea of guilty and his acceptance of the outlined facts.

In his brief rejoinder, the appellant reiterated his adoption of the memoranda as well as the unreported case of **Juma Mohamed** (supra).

Having heard the submissions from either side, we should observe, for a start, that we are keenly aware of the general rule predicated under the extracted section 360 (1) of the CPA which bars the allowance of appeals originating from a plea of guilty except to the extent or legality of

the sentence. Nevertheless, under certain circumstances, an appeal may be entertained notwithstanding a plea of guilty. The leading case on this proposition is the High Court decision in **Laurence Mpinga v. The Republic** [1983] TLR 166 which has been referred and adopted by the Court times without number. The circumstances which were enumerated in that case are:-

- "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 a 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."*

Aside from the points raised in the appellant's memoranda, our concern is with respect to circumstance No. 4 hereinabove and the

question which looms large is this: Was there proof, to the standard required in criminal cases, that the impugned substances found in the possession of the appellant were actually prohibited plants?

In this regard, we are well aware that in terms of section 28 (1) of the Act, the burden of proving that the narcotic or psychotropic substance was possessed, dealt in, trafficked, sold, cultivated, purchased, used or financed pursuant to the terms of a licence, permit or authority lies on the person charged. It is, however, our well considered view that proof of permissible or authorized possession or transportation is different from proof that the impugned material constitutes a narcotic or psychotropic material. We take the position that the latter instance, certainly, the burden of proof throughout remains on the shoulders of the prosecution.

Thus, it was in the best interest as, indeed, it was incumbent upon the prosecution to seek and adduce into evidence a report of a Government analyst with respect to the nature of the plants which were seized. As that was not done, the true nature of the seized plants which were the subject of the trial is a matter for conjecture. To say the least, the case for the prosecution fell short, much as, upon the admitted facts the offence of transporting prohibited plants was not established.

When all is said and done, we find merits in the appeal which is allowed. In the result, the appellant's conviction and sentence are, respectively, quashed and set aside. In the final event, we order that the appellant be released from prison custody forthwith unless if he is detained for some other lawful cause. Order accordingly.

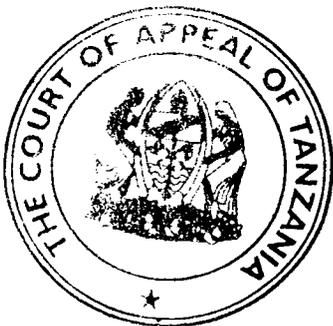
DATED at ARUSHA this 6th day of December, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of Mr. Omary Joachim, the Appellant in person and Ms. Tusaje Samuel, State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.




G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL