IN THE HIGH COURT OF ZANZIBAR

HELD AT TUNGUU

CRIMINAL APPEAL NO. 06 OF 2024
(From Criminal case No. 263 of 2019 the Regional Court Vuga Zanzibar)

MARCELO CURY DA SILVA ..... APPLICANT

VERSUS

DPP ..... RESPONDENT

JUDGMENT

19th September, 2024
Before Shamte J.

The Appellant was convicted before Hon. Hussein M. Makame at the Regional Court Vuga for the offence of drug trafficking of 960.554 gms contrary to section 15(1)(b) of the Drug and Prevention of Illicit Drug Act No. 9 of 2009 as amended under section 11(b) of Act No. 12 of 2011 and Act No. 1 of 2019 and sentenced to serve twenty-five years at Education Centre.

The particulars of the offence were that on 29th day of July 2019 at about 14.45 hours at Abeid Amani Karume International Airport found importing illicit drugs the total 4 rolls of wet white powder of narcotic drugs known as cocaine weight 960.554 grams, where each roll wrapped with aluminum foil, and he was from Brazil via Ethiopia through Ethiopian Airlines. The accused person was arrested while in possession of illicit drugs in his hand luggage following a search conducted by police officers. The illicit substances were subsequently submitted to the Chief Government Chemist as evidence for further analysis, and a certificate of analysis was issued on 31st July, 2019.

The Appellant agreed with all facts but asserted that he was not a drug dealer. The trial Magistrate was satisfied with that plea and convicted the Appellant to serve twenty-five (25) years in an Education Centre.

Dissatisfied with both conviction and sentence, the Appellant has lodged this appeal and in his petition of appeal he has raised four (4) grounds, namely:

(a) the trial Magistrate erred in law by convicting the Appellant based on an invalid charge sheet.
(b) the trial Magistrate erred in law by convicting the Appellant on a wrong or ambiguous plea (equivocal).
(c) the trial Magistrate erred in law for convicting the Appellant contrary to requirements provided under section 23 (a)(i) of Act No. 1 of 2019.
(d) the trial Magistrate erred in law by convicting the Appellant without affording him the right to understand the nature of the charge he was facing and the proceedings.

At the hearing of this appeal, the Appellant was represented by Counsel Hassan K. Kijogoo while the Respondent was represented by PSA Suleiman Yussuf Ali. At the outset, Counsel Kijogoo withdrew the third ground and submitted that the first, second and fourth grounds of appeal be argued jointly.

Starting with the first ground, which pertains to an invalid charge sheet, Counsel Kijogoo contended that the charge sheet lacks the signature and stamp of the Director of Public Prosecutions (DPP). He further asserted that the charge sheet is invalid, and consequently, the prosecution should be nullified. He prayed for the setting aside of the conviction, sentence, and judgment, and requested that the accused be released unless there are other grounds for detention.

Submitting the second ground, which pertains to conviction based on an incorrect or equivocal *plea*, Counsel Kijogoo referred to pages 1 and 3 of the court proceedings. He argued that on page 3, where the accused was presented with the facts, the accused testified:

> *"I agree with all facts (are correct) but I am not drug user, all bags mine".*

Based on the aforementioned statement, he maintained that the plea was equivocal, necessitating a retrial due to its implications. He prayed the court to order a retrial with a new Magistrate, as the fourth ground precludes the appeal.

Regarding the fourth ground, Counsel Kijogoo submitted that his client was not afforded the right to understand the nature of charges against him. As the client is Brazilian, as evidenced by the name and address of Marcelo Cury Da Silva, Brazilian, appearing in the charge sheet, he argued that the common language comprehensible to the Appellant is Portuguese and not English or Swahili. Furthermore, he contended that the charge sheet was framed in the English language, which is not a language the Appellant understood.

He further stated that the accused had the right to be provided with an interpreter, and at that time, the accused was representing himself before the trial court. The record indicates that there is no instance where the accused was inquired about the language he comprehends. Cementing his argument, Counsel Kijogoo contended that in criminal matters, the issue of understanding the charge is crucial and warrants consideration. He referenced the CA decision in **Nebo Emmanuel V. DPP**, Criminal Appeal No. 173 of 2019 at page 7, which imposes principles in this matter. Principle 2 stipulates that the court must satisfy itself beyond any doubt that an accused understands the charges against him. He concluded that in this case, the Magistrate was required to exercise caution on the matter, as Brazilians predominantly speak Portuguese. He prayed the court to set aside the decision read on 7thAugust, 2019, as well as the sentence and conviction.

Counsel Kijogoo concluded by stating that the accused was convicted to 25 years' imprisonment, a sentence not prescribed by law, and has thus served an illegal sentence for five years. He appealed for leniency for the Appellant due to the unlawful nature of the sentence served.

PSA Suleiman concurred with the submission regarding the equivocal plea and proposed that the appropriate remedy would be to order a

retrial. He acknowledged that the plea was improper and equivocal. PSA Suleiman cited the cases of **Haji Khatib Hassan V. DPP**, Appeal No. 34 of 2023 before Said J., and **Philipo S/o Faustine @ Chitembele V. Republic**, Criminal Appeal No. 666 of 2020, noting that in these instances, the remedy was a retrial.

In his brief rejoinder, Counsel Kijogoo maintained that a retrial was unnecessary and that the appropriate remedy would be to set aside the sentence, conviction, and judgment. He emphasised that the Appellant had served 5 years in an Education Centre without proper legal proceedings.

Having heard the arguments for and against the appeal, the issue for determination is whether the appeal is meritorious. The court finds it appropriate to refer the original and typed records and see what transpired in the Regional Court Vuga when the charge was read over and explained to the Appellant who was asked to plead thereto, the Appellant pleaded as follows

Court: *"The charge sheet is read over and well explained to accused person who asked and plea as follow thereto"*

Plea: *"I agree to import the illicit Drugs"*

Subsequently, the Public Prosecutor requested permission to present the facts of the case, and the prosecution sought to tender five exhibits and a certificate of analysis to substantiate the offence charged against the accused person. Prior to the trial court proceeding with the admission and marking of said documents, the accused responded to the facts and the contents of the exhibits as follows:

Accused: "I agree with all facts (are correct). But I am not drug user all bags are mine."

The trial court proceeded to admit and marked Exhibits PIA, PIIB, PIIIC, PIVD and PVE collectively.

Court: Admitted the following items (exhibits) marked as follow:

i. *Certificate of analysis as Exhibit Mark PIA.*
ii. *4 white powders rapped with aluminum foil as Exhibit P IIB.*
iii. *Two bags, one big bag travelling bag inside contain small bag (both black bags) as Exhibit PIIIC.*
iv. *One passport, Brazilian passport include travelling document (electronic ticket) No. FX-862742 Exhibit Mark PIVD.*
v. *One Mobile cell phone (red colour apple) as Exhibit Mark PVE.*

Thereafter, the court proceeded to convict and sentence the accused as follows:

> *"Therefore, I am the same views with the prosecution side that the accused person is deserved a stiff punishment according to the laws.....I hereby convict the accused person Mr. Marcelo Cury Dasilva and sentenced him to serve 25 years in prison (Education Centre)."*

The direct translation of the above is that the appellant pleaded "Not true" in respect of the first count. As for the facts of the case the appellant pleaded: "I agree with all facts (are correct). But I am not drug user all bags are mine"

In light of this response, the trial court entered a plea of "guilty" in respect of the count and a plea in accordance with the law. As previously noted, he was sentenced to 25 years imprisonment, and the specific section used to convict him was not provided. This leads to the Appellant's contention that he was convicted based on an equivocal plea.

To address this issue, it is undisputed that, in the case at hand, the Appellant was charged contrary to section 15(1)(b)(i) of the Drug and Prevention of Illicit Drug Act. The records do not clearly indicate that the respective charge was read over and explained to him, and that he subsequently entered a plea of not guilty to that count. The respective charges were not recorded by the court. Consequently, it remains in dispute whether the appellant was arraigned on a proper charge.

The case of **Adan V. Republic** [1973] E.A 445 establishes five fundamental guidelines for recording a plea of guilty from the accused. **Firstly**, the charge and all elements of the offence should be explicated to the accused in their native language or a language they understand; **Secondly**, the accused's own words should be recorded, and if it constitutes an admission, a plea of guilty should be entered; **Thirdly,** the prosecution should subsequently present the facts, and the accused should be afforded an opportunity to dispute, elucidate, or supplement these facts; **Fourthly**, if the accused contests the facts or raises any question regarding their guilt, their response must be recorded and a change of plea entered; **Fifthly**, in the absence of a change of plea, a conviction should be recorded along with a statement of facts pertinent to sentencing, accompanied by the accused's response.

The aforementioned considerations lead to the Appellant's contention that his conviction was predicated on an equivocal plea. The corresponding inquiry is whether the Appellant's plea in the trial court was sufficiently unequivocal to warrant conviction. In the prevailing circumstances, it is questionable whether that expression alone, without further elucidation by the Appellant, constituted a cogent admission of the veracity of the charge.

Regarding the issues on whether the Appellant's plea of guilty before the trial Court was equivocal, and whether the charge sheet was read over and adequately explained to the accused person, it is pertinent to elucidate the concept of an equivocal plea of guilty. An equivocal plea of guilty implies a degree of uncertainty or ambiguity in the admission of guilt. It is noteworthy that an accused may express guilt, *albeit* with reservations, conditions, or an element of doubt regarding their culpability. Upon thorough examination of the record, it has been ascertained that the expression, "I agree with all facts (are correct). But ....", utilised by the Appellant subsequent to the reading of the charge and statement of facts, was insufficient for the trial court to infer the Appellant's unequivocal admission of the truth of its contents.

It is established legal principle that a plea of guilty constitutes an admission by an accused person of all the necessary legal elements of the offence charged. Consequently, for a *plea* to be considered equivocal, the accused must append to the plea of guilty a qualification which, if true, may demonstrate that the person is not guilty of the offence charged. In such instances, the trial court was obligated to seek additional clarification from the Appellant. I refer the provisions of section 213 of the Criminal Procedure Act, 2018 provides that:

> *"213.(1) The substance of the charge or complaint 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 used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.*
> *(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*
> *(4) If the accused person refuses to plead, the court shall record a plea of "not guilty"".*

Guided by the aforementioned authorities, the mere words *"It is true but....."* were insufficient to have conclusively assured the trial court of admission of the truth of the charge in accordance with the requirements of section 213 of the Criminal Procedure Act. The Court in **Josephat James V. Republic,** Criminal Appeal No. 316 of 2010 [2012] TZCA 47, observed that:

> *"We entirely concur with that perspective. In the case at hand, the trial court was obligated to seek additional clarification from the appellant, not only regarding what he considered to be "correct" in the charge, but also concerning the specific elements he was admitting as truthful therein. With due respect, the trial Court was not justified in inferring from the response given, "it is correct", that it constituted an admission of the veracity of all the facts comprising the offence charged."* [Emphasis added}

Based on the preceding findings, it is appropriate to conclude that the trial court's conviction against the appellant was not proper and resulted in a failure of justice for the Appellant. It is established legal principle that when the court is satisfied that the conviction was based on an equivocal *plea*, the court may order a retrial, as held in the case of **Baraka Lazaro V. Republic** Criminal Appeal No. 24 of 2016 Court Bukoba (unreported) that:

> *"Where a Magistrate wrongly holds an ambiguous or equivocal plea or as it is sometimes called an imperfect or unfinished plea, to amount to a plea of guilty and so convict the accused thereon on appeal the conviction will almost certainly be quashed and in a proper case, a retrial will be ordered usually before another magistrate of competent jurisdiction."*

For the pleas of guilty to be valid for the purpose of convictions without trial under Section 213 CPA, they must meet the criteria for conviction as established in the case of **Michael Adrian Chaki V. Republic**, Criminal Appeal No. 399 of 2017 (Unreported). For an unequivocal plea of guilty to be valid, the following conditions must be met:

(a) *The Appellant must be arraigned on a proper charge. That is to say, the offence section and particulars thereof must be properly framed and must explicitly disclose the offence known to law.*
(b) *The court must satisfy itself without any doubt and must be clear in its determination that an accused fully comprehends the charges against them; otherwise, injustice may result.*
(c) *When an accused is called upon to plead to the charge, the charge is stated and fully explained to him before he is asked to state whether he admits or denies each and every particular ingredient of the offence. This is in accordance with Section 228(1) of the Criminal Procedure Act Cap 20 RE 2019.*
(d) *The facts adduced after recording a plea of guilty should disclose and establish all the elements of the offence charged,*

(e) The accused must be asked to plead and must actually plead guilty to each and every ingredient of the offence charged, and the same must be properly recorded and must be clear.

(f) Before a conviction on a plea of guilty is entered, the court must satisfy itself without any doubt that the facts adduced disclose or establish all the elements of the offence charged....."

In **Republic V. Tilu Petro** [1998] TLR No. 395, it was held that for a proper charge to which an accused has pleaded guilty, the prosecution must be called upon to adduce facts only in the presence of the accused, who is then required to admit them. The law does not permit the abduction of facts in the absence of the accused, and a plea of guilt cannot be implied but must be expressed.

The court observes that the Appellant was not cautioned on the outcome of the plea or the basic rights at every stage of the case. In law and practice, the duty of the court when a charge is before it is to ensure that the charge is correct in its form and content and discloses all the essential ingredients of the offence. Secondly, the court is duty-bound to read the charge and explain it to the accused, and to ask the accused whether they admit or deny the offence. Thirdly, the court must record the plea and require the prosecution to narrate facts, which are again read to the accused, who is asked if they admit them or not. (See the case of **Chamrungu V. SMZ** [1988] LRC (Crim) 26 at 29).

The records indicate that the charge sheet preferred against the appellant was filed on the 7th day of August, 2019. The alleged charge sheet contained one count:

Count: *Drug Trafficking*

PARTICULARS OF THE OFFENCE

"Marcelo Cury Da Silva, on 29th day of July, 2019 at or about 14.45 hours, at Abeid Amani Karume international Airport, Zanzibar, you imported from Brazil via Ethiopia (Addis Ababa) to Zanzibar, the total of 4 rolls of the white powder of Narcotic Drugs known as Cocaine

weight 960.554 gm in total, whereby each roll wrapped with aluminum foil."

The next question, and arguably the most critical one, is whether the set of facts read and explained by the prosecution after recording a plea of guilty was comprehensible to the accused. Regarding the understanding of the charge sheet as the requirement of an interpreter, ***Van der Vlis, E.-J. 2010. The right to interpretation and translation in criminal proceedings, The Journal of Specialised Translation*** at page 26 observed that it is established law that when an accused person does not understand the official language of the Court, an interpreter must be provided without any expense. The interpreter must accurately interpret to the accused person any statement made in the language he does not understand.

Upon examination of the documents from the trial court and the covering letters from the Embassy of the Federal Republic of Brazil, it is evident that they pertain to Marcelo Da Silva. He was a Brazilian national, and his nationality is stated as Brazil. He holds passport No. Fx862742; the charge sheet identified him as Brazilian from Brazil, and the references indicate that the Embassy of the Federal Republic of Brazil in Dar es Salaam was monitoring the case and sent various correspondences to the Registrar of the High Court Zanzibar regarding Marcelo's case.

The trial court has recorded that the charge sheet was read and thoroughly explained to the accused person, who was subsequently asked to enter a plea. However, it is not specified which language was used to communicate the charge to the accused individual. During the appeal, it was ascertained that the Appellant was fluent in Portuguese and possessed a limited vocabulary in Swahili, which he had acquired whilst in Education Centre (prison).

In the present appeal, it has been observed that the Appellant did not express himself adequately using the language with which he was most familiar, stating: *"I agree with all facts (are correct). But I am not a drug user all bags mine"*. Under these circumstances, it is the view of this court

that the Appellant did not possess a sufficient understanding of the language, as the Facts of the case do not contain any information regarding drug use or ownership of bags; rather, they present the facts and tender five exhibits. However, the Appellant responded to questions that were not directed towards him.

Furthermore, the trial Court records do not indicate an expression of doubt; that is to say, the accused pleaded guilty without lawful qualification, and his plea of guilty did not constitute the offence charged of being in possession of unlawful illicit drugs, specifically "*cocaine*". Consequently, it is my considered opinion that the Appellant's plea was equivocal and the conviction imposed upon him was not appropriate.

Understanding of language has been expressed under section *211(1) of the CPA. which provides:*

> *"211(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language he understands."*

Basically, the aforementioned provision mandates that an accused person, who appears to the court to be unable to comprehend facts presented in a language unfamiliar to them, shall be provided with an interpreter who will facilitate understanding. In the case of **Dastan Makwaya and Another V. Republic**, Criminal Appeal No. 179 of 2017 (unreported), the Court of Appeal, when referring to section 211(1) of the CPA, stated that:

> *"Whenever it appears an accused person does not understand the language spoken during the proceedings of the case, an accused person should be provided with an interpreter so as to enable him understand the proceedings of his case. The omission not to comply with the requirements of section 211(1) of the CPA renders the proceedings of the case null and void."*

Furthermore, the Court of Appeal in the case of **Joachim Ikwechukwu Ike V. Republic**, Criminal Appeal No. 272 of 2016 (unreported), while citing the case of **Mpemba Mponeja V. Republic**, Criminal Appeal No, 256 of 2009 (unreported), stated unequivocally that:

> *"We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's right to understand and follow up proceedings of the case against him. It was a fatal omission."*

Referring the case of The **DPP V. Hanna Pondo Kasambala**, Criminal Appeal No. 464 of 2017 (unreported). I am on the view that in the case at hand, the trial court erroneously assumed that the Appellant did not require an interpreter when he was called upon to plea to the charges and when the prosecution testified.

Mr. Kijogoo posited that, in circumstances where an interpreter was not involved, it constituted a procedural irregularity which invalidated the proceedings, as the Appellant was not afforded their right to a fair trial. This is particularly significant when considering the cardinal principle that an individual cannot be condemned without being afforded a fair hearing.

In conclusion, it is pertinent to cite the case of **Frank Miyuka V. Republic**, Criminal Appeal No. 404 of 2018, wherein the Court of Appeal of Tanzania adopted the decision rendered in the case of **Laurent Mpinga V. Republic** (1983) TR 166. The latter case stipulated that an accused person, having entered a plea of guilty, may appeal against conviction to a higher court on the following grounds: Firstly, that even upon consideration of the admitted facts, the plea was imperfect, ambiguous, or incomplete, and consequently, the lower court erred in law by treating it as a plea of guilty. *Secondly,* the guilty plea was entered as a result of a mistake or misapprehension. *Thirdly,* the charge sheet against the accused disclosed no offence known to law. Based on these circumstances, based on only the admitted facts, he could not, in law, have been convicted for the offence charged.

Upon application of the aforementioned authority and having determined that the original trial was deficient primarily due to the equivocal nature of the accused's plea and the absence of a translator to facilitate his comprehension of the charges against him, it is my considered opinion that the procedure was manifestly violated in the present case and that the Appellant's plea of guilty was indeed equivocal. I hereby make order as follows:

(a) The appeal is hereby allowed, and the entirety of the proceedings pertaining to Criminal Case No. 263 of 2019 are nullified.
(b) The conviction based on the alleged plea of guilty is quashed, and the sentence is set aside.
(c) It is ordered that the case be remitted to the trial court for the Appellant to plea afresh, and for the matter to proceed in accordance with the law.
(d) It is directed that the case scheduling for trial be accorded priority, with the hearing to conclude within six months from the present date. In the interest of justice, the period that the Appellant has so far served in Education Centre shall be taken into consideration.
(e) The Appellant shall, in the meantime, remain in custody pending the trial.

It is so ordered.

KHADIJA SHAMTE
JUDGE
19th September, 2024