

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

**(CORAM: MSOFFE, J.A., OTHMAN, J.A. And MJASIRI, J.A.)**

**CRIMINAL APPEAL NO. 229 OF 2008**

**(Appeal from the Judgment of the High Court of  
Zanzibar at Vuga**

**(Makungu, J.)**

**Dated the 6th day of November, 2007**

**In**

**HC Criminal Appeal No. 19 of 2006**

**.....**

**JUDGMENT OF THE COURT**

18 & 25 November, 2008

**MSOFFE, J.A.:**

In the Court of the Regional Magistrate at Vuga, Zanzibar, the appellant was charged with the offence of unlawful possession of bhang contrary to sections 17 (2) and 32 (3) of the Pharmaceutical and Dangerous Drugs Act No. 6 of 1986 as amended by the relevant provisions of the Written Laws (Miscellaneous amendments) Act No. 6 of 1991. He was convicted and sentenced to the statutory minimum term of fifteen years imprisonment. He unsuccessfully appealed to the High Court of Zanzibar (Makungu, J.) against the conviction. The High Court reduced the sentence to ten years on the ground that he was “**suffering from pain in his body for sometimes now**”. Still aggrieved, he preferred this second appeal.

At the hearing of the appeal the appellant appeared in person. The respondent Director of Public Prosecutions of the Revolutionary Government of Zanzibar was represented by Mr. Ali Hilal Vuai assisted by Mr. Ramadhani Ali Nassib and Mrs. Raya Msellem, learned State Attorneys.

The appellant preferred six grounds of appeal in the memorandum of appeal. He also filed a supplementary memorandum of appeal containing six grounds of appeal. It occurs to us that in both memoranda the following major grounds can be discerned there from:-

1. That the judgment of the High court lacks the essential requirements of a true judgment.
2. That the High Court erred in not analyzing the evidence properly.
3. That the case against the appellant was not established beyond reasonable doubt because there was a possibility of tampering with the exhibit the subject of the case.

4. That the evidence of the police witnesses, being that of members of the same “family”, was unreliable.

The appellant did not address us much on the above grounds. At best his submission was basically that there were doubts in the manner the police handled the exhibit in question. In his view, the doubts ought to have been resolved in his favour and thereby earn him an acquittal.

Mr. Ali Hilal Vuai argued the above grounds. Thereafter, Mr. Ramadhani Ali Nassib took over essentially for the purpose of emphasizing some of the points that were canvassed by Mr. Vuai.

In a nutshell, in arguing the first and second Mr. Vuai was of the general view that the judgment of the High court met the essential requirements of section 276 (91) of the Criminal Procedure Decree, Cap. 14. The judge identified the parties in the case; discussed the grounds of appeal; analysed the evidence; and gave reasons for his decision, he urged. Furthermore, he went on to say, composing a judgment is a matter of style as held by this Court in the case of **Amiri Mohamed v R** (1994) TLR 138. What matters is that the essential ingredients should be there, and these include an analysis of both the prosecution and the defence cases, he concluded.

The above point need not detain us. A look at the judgment in question will show that it is generally brief and does not appear to have stated in sufficient detail the evidence that was put before the trial court. Most of it is essentially a discussion of the grounds of appeal. notwithstanding, we are not prepared to dismiss it altogether as an untrue judgment. Although it is not as detailed as one would have wished or expected it to be, it substantially contains the essential requirements of a true judgment. We therefore, dismiss this ground of appeal.

This brings us to the third ground of appeal on the possibility of the exhibit being tampered with. It occurs to us that this is the core ground in the appeal. In arguing the ground Mr. Vuai carried us through the evidence on record. In the end, he was of the affirmative view that the evidence taken as a whole shows that there was no possibility of tampering with the exhibit as alleged by the appellant. In his view, the sequence of events gave no room for such tampering. According to him, PW3 E733 PC Ahmed Abdallah arrested and found the appellant with the Exhibit. Then he took him to the police station with the exhibit in issue. Thereafter, PWW5 £7456 PC Moh'd sealed the exhibit and sent it to PW1 Haji Ameir Bonde, a government chemist, while under seal. After his analysis PW1 re-sealed the exhibit and eventually identified it in evidence at the trial while still under seal.

At this juncture, we think, it is pertinent to state that generally a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court concurred with such a finding of fact. In their concurrent findings of fact both the court of the Regional magistrate and the High Court were satisfied that the evidence on record established the appellant's guilt beyond reasonable doubt. The question is whether or not there is basis for us to interfere with the findings of fact by the courts below.

As was said by Sir Kenneth O'Connor, President of the defunct Court of Appeal for East Africa in the case of **Peters v Sunday Post Limited** (1958) EA at page 429:-

"it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with **caution**: It is not enough that the appellate court might itself have come to a different conclusion."

In more or less similar vein, this Court in the case of **the director of Public prosecutions v Jaffari Mfaume**, (1981) TLR 149 held that in a second appeal the Court may interfere with the findings of fact by the courts below where there are misdirections or non-directions on the evidence.

This takes us back to the third ground of appeal. The sequence of events from the time the appellant was arrested by PW3, taken to the police station where the exhibit was kept, and eventually the exhibit taken to the chemist, and finally produced in evidence in Court, needs close scrutiny.

On 6/6/2004 at around 11.00 a.m. PW 3 was on patrol duty along Madagaanni area. Malindi, Zanzibar. He saw and suspected the appellant of possessing bhang. He accordingly arrested, searched and took him, together with the exhibit, to Malindi police station. On 29/7/2004 PW 5 sealed the exhibit and took it to PW1 for purposes of chemical analysis. Indeed, PW1 confirmed in his evidence that he received the exhibit from PW5 on 29/7/2004. According to PW1, after the analysis he handed over the exhibit and the certificate of analysis to PW5. In contrast, however, PW5 testified and stated that the exhibit was collected from PW1 BY pw4 E4840 PC Maulid

From the above evidence the following shortcomings come out quite clearly. **One**, PW3 did not state or mention the name of the person he gave the exhibit to at the police station. **Two**, PW5 did not give the name of the person who gave him the exhibit for taking to PW1. **Three**, UP TO 27/7/2004, the exhibit was in an open material and that was why pw5 had to seal it before taking it to PW1. **Four** although the exhibit was taken by PW3 to the police station on 6/6/2004 it was not until 27/7/2004, almost two months or so later, that it was eventually handed over to PW1. Thus, from 6.6./2004 to 27/7/2004, it is not known who had the custody of the exhibit. The prosecution failed to account for this period. **Five**, there was a contradiction in the evidence of PW1 and PW5 as to **who** exactly took the exhibit after the chemical analysis.

As was observed by this Court in **Moses Muhamagama Laurence v. The Government of Zanzibar**, Criminal Appeal No. 17 of 2002 (unreported):-

"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government of what was believed to have been found on the appellant."

We wish to add that it is important to ensure that exhibits are handled carefully. Needless to say, exhibits are vital evidence. So, their preservation, loss or tampering will depend on how they are handled. It is no wonder, therefore, that directive No. 31 of Police General orders No. 229 underscores this same point when it states:-

31 It is most important that a complete record of every person who handles an exhibit is maintained. This evidence may be required to prove in court that there has been no interference with the exhibit from the time it comes into the hands of the police until it is produced in evidence in court. This record shall be made on the Exhibit Label (PF.145). Each officer who takes over an exhibit shall also make a note in his note book of the date, time and place, and the person from whom he took it over. He shall obtain a receipt in his note book for the exhibit when he hands it over.

With respect, as shown in the evidence of PW3 and PW5, the requirements under the above directive were not followed to the letter. In the absence of such compliance, the possibility of tampering with the exhibit, particularly during the time when it was under police custody, was not ruled out by the prosecution evidence on record. If so, it cannot be safely said and concluded that the exhibit identified in evidence by PW1 at the trial was the same exhibit or material of what was seized from the appellant at the time of his arrest and search.

We are aware that in the course of their submissions before us Mr. Vuai and Mr. Nassib asserted quite strongly and affirmatively that Police General orders are mere guidelines which should not take precedence over other laws of the land. With respect, we agree that the Orders are guidelines. However, we are of the strong view that their importance should not be underestimated. They are important and vital guidelines in the smooth administration of justice. Hence forth, we allow the third ground of appeal.

The complaint in the final ground of appeal was dealt with by the trial Regional magistrate. He cited the provisions of section 118 of the *Evidence Decree, Cap 5* of the Laws of Zanzibar and asserted that the police witnesses were, just like any other person, competent in law to testify. We agree with the magistrate that much. Indeed, what matters really in is the weight to be attached to the evidence of the witnesses. The mere fact that a person is a member of the Police Force does not make him/her less competent in law to testify. With respect, we do not however, agree with the magistrate when he stated that as a matter of "*prudence*" the evidence of police witnesses needs corroboration. He did not cite any authority for the proposition. To our knowledge, there is no law or rule of practice to the effect that the evidence of a police witness needs corroboration. All in all, we find no merit in this ground of appeal.

Before we end this judgment we wish to make one comment in passing. As already observed, the judge on first appeal reduced the sentence of fifteen years imprisonment to ten years. He did not cite any authority giving him the power to do so. With respect, he erred. The fact that one is "**suffering from pain in his body for sometime now**" has never been a good reason for reducing a sentence. What is more serious however, is the fact that in doing so, the learned judge acted illegally. The appellant was charged with and convicted of an offence falling under section 17 (2) and 32 (3) of Act No. 6 of 1986 as amended by Act No. 6 of 1991. Under section 32 (4) of Act No. 6 of 1991 the offence carries a sentence of "**not less than fifteen years and not exceeding twenty five years**" imprisonment.

In view of the position we have taken on the third ground of appeal we hereby allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at ZANZIBAR this 24<sup>th</sup> day of November, 2008

J.H. MSOFFE  
JUSTICE OF APPEAL

M. C. OTHMAN  
JUSTICE OF APPEAL

S. MJASIRI  
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(P. B. KHADAY)  
DEPUTY REGISTRAR