IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 15 OF 2020

JOSEPH CHARLES BUNDALA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kulita, J.)

dated the 21st day of November, 2019
in
DC Criminal Appeal No. 04 of 2019

.....

JUDGMENT OF THE COURT

29th October & 21st December, 2021

SEHEL, J.A.:

This is a second appeal by the appellant, Joseph Charles Bundala who was charged and convicted of an offence of unlawful possession of prohibited plants contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act, Cap. 95 R.E. 2002 (now R.E. 2019) (henceforth DCEA).

Essentially, it all started from a search mounted on 14th August, 2016 at the residence of the appellant, situated at Vikindu East area within Mkuranga District in Coast Region whereby 9.5 kilograms of cannabis sativa, commonly known as 'bhangi' was retrieved therefrom.

A day before the search, to be precise, on 13th August, 2016, Inspector Hassan (PW5), an investigative police officer working at the Anti-Drugs Unit (ADU), Kurasini Police Station, while at work, was assigned a job by his boss to investigate a report that there was a person named Charles Bundala who was dealing with drugs and he was informed further that the person was residing at Vikindu. Upon such assignment, PW5 assembled his team comprised of Assistant Inspector Anastazia, Detective Corporal Lewis and other police officers and on 14th August, 2016 at about 14:00 hours, they started their journey to Vikindu area. They arrived in Vikindu area at around 05:30 hours in the morning and they went straight to the house of the appellant. They did not report to the local area leader.

Upon arrival at the house of the appellant, PW5 knocked at the door but the wife of the appellant who was inside the house, having heard, the knock thought that the ones knocking were thieves. She raised an alarm for thieves. Neighbours including the ten-cell leader, Ndauka Mwalimu Nyengema (PW2) were awakened by that alarm and went straight to the house of the appellant. When they arrived there, they found PW5 and his colleagues. PW5 introduced himself and others to PW2 as police officers who have come to search the appellant's premises. PW2 then requested the appellant's wife to open the door, which she did. Thereafter, the search

begun. In the kitchen, they retrieved a green bucket of 20 litres that had plant/leaves in it wrapped in papers and put in a plastic bag.

According to the evidence of PW5, the appellant admitted to possess the said plants found in the kitchen and that it was him who confirmed to them that the plants were bhangi. He said, the appellant also volunteered to show them another consignment hidden in the unfinished house and that house was confirmed by the ten-cell leader to belong to the appellant. In there, they dug and retrieved three buckets, a green bucket with 51 pulls, black bucket with white lid, had 50 pulls and yellow bucket had 56 pulls. The pulls were first wrapped in the plastic bag then put inside the buckets. A seizure certificate (exhibit P3) was prepared and signed by PW5, the appellant, his wife and PW2.

The appellant together with the seized plants/leaves were first taken to Vikindu police post and later on to ADU offices on that same day. They arrived at ADU at around 09:00 hours. The exhibits were handed over to Assistant Superintendent of Police, Neema (PW6) for sealing. PW6 sealed the exhibit P1 in the presence of the appellant and Amos Mfinanga (PW4) as an independent witness. The appellant was also questioned by PW5 and admitted in his cautioned statement that the plants/leaves belonged to

him. The said cautioned statement was tendered and admitted in evidence as exhibit P4.

On the following day, that is, on 15th August, 2016, Elias Maloma (PW1), a chemist working at the office of the Chief Government Chemist received the exhibits from PW6 for examination. Upon inspection, he confirmed that they were narcotic drugs, cannabis sativa (bhangi) weighing 9.5 kilograms. He recorded his findings in a report which was tendered and admitted in evidence as exhibit P2.

Subsequently, the appellant was charged before the Resident Magistrate's Court of Coast Region at Kibaha of the above-mentioned offence.

In his defence, the appellant admitted that PW5 searched at his house but he denied to have been found with the said narcotic drugs. He said that after the search, nothing was retrieved therefrom. He said, while he was under arrest, some of the police officers went away and when they came, they returned with the four buckets full of cannabis sativa and that he was forced to sign exhibits P3 and P4.

At the end of the trial, the trial court was satisfied that the prosecution proved its case against the appellant beyond reasonable doubt.

It found credence on the evidence of PW5 that upon search at the appellant's house, the police officers found the appellant in possession of narcotic drugs and that the evidence was corroborated by that of PW1 and exhibit P2. He was therefore convicted as charged and sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed. Thus, he has brought this second appeal to the Court.

On 4th March, 2020 the appellant lodged a memorandum of appeal containing a total of six grounds of appeal. Later, he filed a supplementary memorandum of appeal adding two more grounds.

We propose to start with the first ground in the supplementary memorandum of appeal wherein the appellant complained that the High Court erred in law and fact by upholding the appellant's conviction without considering that the search and seizure of the cannabis sativa was improperly conducted since during trial, search warrant was not tendered, thus rendered a certificate of seizure a nullity. We opted to start with this ground because we find that it raises an important question of procedure adopted by the police officers while conducting search which led to the seizure of exhibit P1 and ultimately the appellant's conviction.

At the hearing of the appeal, the appellant appeared in person. He had no legal counsel to represent him. When he was invited by the Court to submit on his appeal, he first adopted his two sets of memoranda of appeal and urged us to consider the grounds raised therein with no more.

The respondent Republic had the services of Ms. Aurelia Makundi and Mr. Clemence Kato, both learned State Attorneys. It was Ms. Makundi who made a reply submission on behalf of the Republic. At the very outset, she conceded that the police officers who went to search the appellant had no search warrant hence it could not have been tendered in evidence. She also admitted that the search was not an emergency. In that respect, she argued that it was necessary for the police officers to obtain a search warrant as required by the provisions of section 38 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA).

That apart, she contended that given the nature of the evidence adduced before the trial court, that PW5 went at the appellant's house to search and upon search in the presence of the appellant, his wife and PW2, the cannabis sativa was seized therefrom and that the appellant signed a seizure certificate signifying that he accepted what was written therein, then there is no doubt that the drugs were seized from the appellant's

home. She further contended that the appellant admitted in his defence evidence in chief that his house was searched on that night by PW5. That, according to the evidence of PW5, it was the appellant who directed them to the place where the items were hidden. That, the evidence of PW5 was corroborated by the evidence of PW2 who told the trial court that he participated in the search.

Ms. Makundi added that after the search, the police took the seized drugs which were later on tendered and admitted in evidence as exhibit P1. She submitted that when PW1 appeared before the trial court to give his evidence he identified exhibit P1 as being the very exhibit brought to him on 15th August, 2016 by PW6 for testing. For that reason, she argued that the exhibit seized on 14th August, 2016 and analysed by PW1 on 15th August, 2016 was the one tendered before the trial court on 30th July, 2018. At the end, she urged us to dismiss the ground of appeal as it lacks merit.

In rejoinder, the appellant implored us to allow the appeal and set him free so that he could reunite with his family.

Having heard the submission of the learned State Attorney and revisited the ground of appeal, we find that the issue had been narrowed

down by the learned State Attorney because it is not disputed that there was no search warrant. It was also conceded that it was not an emergency search thus section 42 of the CPA is not applicable. She further admitted that PW5 did not comply with the provisions of section 38 of the CPA. Despite that concession, Ms. Makundi argued that the trial court perfectly acted on the illegally obtained exhibit P1 to find the conviction of the appellant. Therefore, the issue before us is, whether we can sustain the conviction of the appellant despite the fact that there is an illegally procured exhibit P1.

We wish to start with the position of the law that, in terms of section 169 (1) and (2) of the CPA the trial court has absolute discretion to admit and act on illegally obtained evidence upon complying with the conditions prescribed therein. That provision of the law provides:

> *"169-(1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the*

admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

(2) The matters that a court may have regard to in deciding whether, in the proceedings in repsect of any offence, it is satisfied as required by subsection (1) include-

> *(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or need to preserve evidence of the fact;*
>
> *(b) the nature and seriousness of the contravention or failure;*
>
> *(c) the extent to which the evidence that was obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained; and*
>
> *(d) all the circumstances of the offence, including the circumstances in which the evidence was obtained.*

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to

comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.

(4) The court shall, prior to exclusion of any evidence in accordance with subsection (1), be satisfied that the failure or breach was significant and substantial and that its exclusion is necessary for the fairness of the proceedings.

(5) Where the court excludes evidence on the basis of this provision it shall explain the reasons for such decision."

The above provision of the law was considered and interpreted by this Court in the case of **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 (unreported). In that appeal, the Court was faced with an issue regarding a cautioned statement which was admitted in evidence as exhibit P2 without any objection from the appellant. In considering whether the appellant had a right to challenge its admissibility under section 169 of the CPA it stated:

"It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in the absolute discretion of the trial court and that before admitting or rejecting such evidence, the parties must contest it, and the trial

court must show that it took into account all necessary matters into consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not duly prejudiced. In other words, there must be a delicate balancing of the interests of the public and those of the accused. It is not therefore correct to take that every apparent contravention of the provisions of the CPA automatically leads to the exclusion of the evidence in question. The decision of the trial court on such matters can only be faulted if it can be shown, that the admission or rejection of such evidence was objected to and that it did not properly exercise its judicial discretion, or at all, in rejecting or admitting it."

At the end, the Court held that since the appellant did not object to its admission when it was sought to be tendered, he had no right to complain about its admissibility at the appeal stage.

Conversely, in this appeal, the record of appeal shows that when the prosecution sought to tender in evidence the cannabis sativa, the appellant objected to its admission and he told the trial court that he was not agreeing with them. Despite such an objection, the trial court proceeded to admitting it in the following words:

"Since the accused person did not object them, this court will deliver them (sic.) and its admissibility will be discussed in the judgment and will be marked as PE1 collectively."

The above extract tells it all that the trial court went on to admit the cannabis sativa in evidence as exhibit P1 without complying with the dictates of section 169 of the CPA. The omission by the trial court to properly exercise its judicial discretion in admitting the cannabis sativa in evidence, disentitled it the right to act on such an illegally obtained evidence. Since Ms. Makundi admitted that the search conducted at the appellant's home was not on emergency basis, then PW5 ought to have complied with the provisions of section 38 of the CPA that generally empowers a police officer who is not in charge of a police station to enter into and search any building or dwelling house with a written authority, either of a police officer in charge of a police station (search order) or by a court (search warrant) – see: **Baven Hamis & 2 Others v. The Republic**, Criminal Appeal No. 99 of 2014 (unreported).

The importance of securing a search warrant before search is further resonated in the Police General Orders (P.G.O) issued by the Inspector General of Police pursuant to the authority granted to him under Section

7(2) of the Police Force and Auxiliary Services Act, Cap. 322 R.E. 2002. The purpose of the P.G.O is to provide directives to the police force personnel that will help and guide them in the proper conduct of their day-to-day duties and responsibilities as members of the police force and each member is expected to follow them, although it is understood that such directives cannot regulate the conduct in every situation that may arise in the course of policing. Of particular importance to our case is paragraph 2 (a) (b) (c) and (d) of P.G.O No. 226 which provides:

> *"2. (a) Whenever an O/C. Station (Officer In charge of the police station), O/C. C.I.D. (officer In charge of the Criminal Investigation Department), Unit or investigating officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.*
>
> *(b) If the search is to be made between the hours of sunset and sunrise, the Magistrate shall be asked to authorise the execution of the warrant at any*

hour of the day or night (Section 40 of the Criminal Procedure Act, Cap. 20 R.E. 2002).

(c) Where an officer referred to in (a) above receives information or has reasons to believe that a person wanted in connection with the commission of a criminal offence is in any building, he shall apply to the local Magistrate for a Warrant of Arrest.

(d) Where anything is seized in pursuance of search the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

In the case of the **Director of Public prosecutions v. Doreen John Mlemba**, Criminal Appeal No. 359 of 2019 (unreported), the Court articulated the reason behind such a requirement that:

"In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is

also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in peoples' private premises in fulfilling their undisclosed ill motives."

See also: **Badiru Musa Hanogi v. The Republic**, Criminal Appeal No. 118 of 2020 and **Shabani Said Kindamba v. The Republic**, Criminal Appeal No. 390 of 2019 (both unreported).

Without much repeating ourselves we wish to state that, as eloquently submitted by Ms. Makundi, PW5 searched the house of the appellant without a search order or warrant. Since the search was conducted contrary to the dictates of the provisions of section 38 of the CPA and P.G.O No. 226, we have no doubt that it was an illegal search and as the trial court did not comply with section 169 of the CPA, it had no right to act on it. Consequently, we proceed to expunge it from the record of appeal. Having done so, we failed to find any other evidence that connected the appellant with the charged offence. We thus find merit in the appellant's first ground in the supplementary memorandum of appeal.

As this ground of appeal suffices to dispose of the entire appeal in the appellant's favour, we find no reason to venture into determining the

remaining grounds of appeal. For that reason, we allow the appeal. Accordingly, we quash the appellant's conviction, set aside the sentence and make an order that **Joseph Charles Bundala** be released from prison forthwith unless he is held for any other lawful cause.

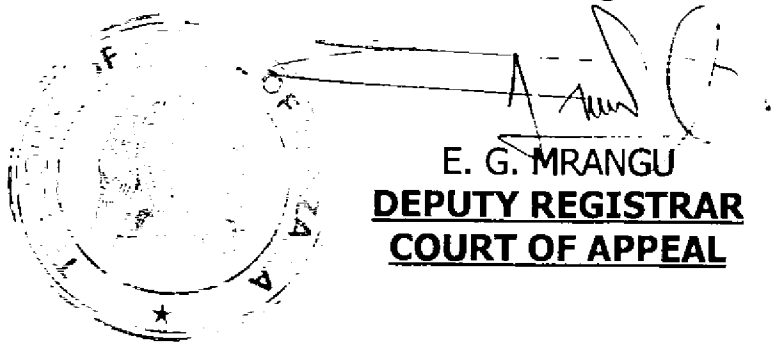
DATED at **DAR ES SALAAM** this 17th day of December, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The judgment delivered this 21st day of December, 2021 in the presence of the Appellant in person via video conference from Ukonga Prison and Ms. Easter Kyaro, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL