

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

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 466 OF 2019

ALDO KILASI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Matogolo, J.)

dated the 11th day of September, 2019

in

(DC) Criminal Appeal No. 80 of 2018

JUDGMENT OF THE COURT

20th & 28th September, 2021

MWAMPASHI, J.A.:

In the Resident Magistrate's Court of Njombe, the appellant, Aldo Kilasi was charged with and convicted of the offence of unlawful cultivation of prohibited plants, contrary to section 11 (1) (a) of the Drugs Control and Enforcement Act [No. 5 of 2015] (the Act). It was alleged that on 22.11.2017, at Sido Street village within the District and Region of Njombe, the appellant cultivated one plant of cannabis sativa (bhang) without a permit.

The appellant denied the charge and as a result, the case proceeded to a full trial. At the end of the trial, the appellant was found guilty.

Consequently, he was convicted and sentenced to thirty years imprisonment. Dissatisfied, he appealed to the High Court but his appeal was unsuccessful. The learned first appellate Judge agreed with the findings and decision of the learned trial Resident Magistrate and dismissed the appeal. Still aggrieved the appellant preferred this second appeal.

Before we proceed further, we find it apposite to give, *albeit* in brief, the background of the case.

The prosecution paraded a total of three witnesses whose evidence was as follows. PW1 was G 8028 D/C Advent of Njombe Police Station. This witness testified that following a report that at the house of one Edwin Kilasi there was someone dealing in bhang, he, with other three police officers and the Street Executive Officer of Sido, one Ms. Rehema Ngailo (PW2), got at the said house. After getting there they found Edwin Kilasi who told them that his son, the appellant, who by then was in his room, was the one who was dealing in bhang. They therefore entered in the appellant's room, searched the appellant and the room but found nothing illegal. However, when they got out of the room, they saw, on the roof, a bamboo made container in which a plant suspected to be of bhang had been planted. The appellant admitted that the plant in the container was of bhang and defended himself by telling them that he had

planted it for medicinal purposes. Thereafter, PW1 seized the plant and made the appellant and the witnesses present, sign on a search order. The plant and the search order were tendered in evidence by PW1 as exhibit P1 and P2 respectively.

The evidence from PW2 was to the effect that on 22.11.2017 at about 09.00 am the appellant's father one Mr. Edwin Kilasi, reported to her that the appellant who is his son and a drug addict, had planted bhang for his use at the house. PW2 reported the case to the police and she latter accompanied the police to the house of Edwin Kilasi where she witnessed the search that was conducted in the appellant's room. PW2's evidence on what transpired during the search supported the evidence given by PW1.

PW3 H.1913 D/C Peter, recorded the appellant's cautioned statement on 22.11.2017 in the presence of the appellant's father, Edwin Kilasi. The cautioned statement was tendered and received in evidence as exhibit P3. In the cautioned statement, it is shown that the appellant admitted that the plant was of bhang and that the same was planted by him for use as medicine because he is asthmatic.

In his sworn defence, the appellant did not deny that his room was searched by the police officers in the material morning. However, he stated that after failing to find anything illegal in his room, the police

officers got out and claimed to have found the bhang plant planted in a portable container on top of the roof of the house. He disassociated himself from the plant in question insisting that the plant might have been brought there by someone. He wondered how the police officers could not see the plant on the roof when getting in his room but they saw it after getting out and after finding nothing illegal in his room.

In its judgment, the trial court found the case against the appellant had been proved beyond reasonable doubt mainly because the appellant had admitted in the cautioned statement (Exhibit P3), that it was him who had planted the plant. It was also found by the trial court that the cautioned statement which was retracted by the appellant was supported by the evidence from PW1 and PW2 who saw the plant being found on top of the roof of the appellant's room. The High Court agreed with the findings of the trial court. It was found by the High Court that the trial court properly based the conviction on the cautioned statement which was corroborated by the evidence from PW1 and PW2.

In this second appeal against the decision of High Court, the appellant raised a total of twenty one grounds of appeal contained in two memoranda. We have examined the said twenty one grounds of appeal and observed that for purposes of the determination of this appeal, there are essentially two grounds that can be extracted from those grounds and

which need to be considered by the Court. The two grounds are **firstly**, that the plant on which the appellant was convicted of was not tested and proved to be of cannabis sativa (bhang), psychotropic substance or of any other prohibited plant and **secondly**, that the High Court erred in law in confirming the conviction by the trial court that was based on the cautioned statement.

At the hearing of the appeal, the appellant appeared in person unrepresented; whereas the respondent Republic was represented by Ms. Pienzia Nichombe, learned Senior State Attorney assisted by Ms. Veneranda Masai, also learned State Attorney.

When asked to argue his appeal, the appellant let the learned State Attorney begin by responding to his grounds of appeal first. He however reserved his right of rejoinder, if need would arise.

At the very outset, Ms. Nichombe made it clear that she was supporting the appeal. She argued that it is true that the plant which was found on the roof of the appellant's house was not proved to be of bhang. She referred the Court to pages 48 and 49 of the record of appeal where in the search order and the record of search, it is clearly stated that the plant was being suspected to be of bhang. She argued that according to regulation 21 of the Drug Control and Enforcement (General) Regulations, 2016 GN No. 173 of 2016 (the Regulations), the plant in question ought

to have been sent to the Chief Government Chemist's Laboratory for testing and proving that it really was of bhang. It was further submitted by Ms. Nichombe that the evidence from PW1 that from his experience and training the plant was of bhang was of no value because he was not a qualified expert witness on that field.

Lastly, Ms. Nichombe submitted on the cautioned statement (Exhibit P3), arguing that because the plant found in the possession of the appellant was not tested and confirmed to be of bhang, the appellant's admission in the cautioned statement that the plant was of bhang, was of no evidential value. She contended that the appellant was not qualified to know or prove that the plant was of bhang. She therefore argued that the trial court ought not to have based the conviction on the cautioned statement which was also retracted by the appellant. Ms. Nichombe concluded by urging the Court to allow the appeal because the case against the appellant was not proved.

The appeal having been not resisted, there was nothing the appellant could say in rejoinder rather than agreeing with the learned Senior State Attorney that the case against him was not proved to the hilt. He, thus prayed for the appeal to be allowed.

Having heard from the learned Senior State Attorney and the appellant and also having examined the record of appeal, it is plainly clear

that the plant that was allegedly planted by the appellant and which was being suspected to be of cannabis sativa (bhang), was not tested and proved to really be of bhang. It is imperative that for an accused to be held criminally responsible and guilty of an offence under the Act, there must be proof that the substance found in his possession is in fact a narcotic drug or psychotropic substance. The suspected substance must be tested and proved to be a narcotic drug by the Government Chemist's Laboratory Agency.

The requirement for any suspected narcotic drugs or psychotropic substance to be tested and proved as such, can be traced from section 67 (1) of the Act where the Minister is given powers to make regulations for carrying out the purposes of the Act and from subsection (2) of the said provision whereby it is provided that:

"Without prejudice to the generality of the provisions of subsection (1) the regulations may provide for the following matters:-

(a) N/A

(b) N/A

(c) N/A

(d) N/A

(e) N/A

(f) The drawing of samples and testing and analysis of such samples."

Under the powers given by section 67(1) and (2) of the Act cited above, the Minister has made the Regulations under which regulation 21 provides as follows:

"The officer in charge or the sampling officer shall dispatch samples of the seized drugs to the nearest recognized government forensic laboratory".

In **Mwinyi Bin Zaid Mnyagatwa v. Republic** [1960] EA 218, the defunct East African Court of Appeal underscored the need for narcotic drugs to be chemically analysed and proved by making the following observations:

"The prosecution in the offences related to narcotic drugs has a duty to submit expert analysis which is mandatory as its result is final, conclusive and it provides check and balances that warrant convicting".

Further, in **Charo Said Kimilu v. Republic**, Criminal Appeal No. 111 of 2015 (unreported), this Court insisted for substance suspected to be narcotic drugs to be submitted to the Government Chemist's Laboratory Agency for weighing and analysis before it is tendered in court as evidence. The Court held, among other things, that:

"Narcotic drugs or psychotropic substances should be submitted to the Government Chemist

*Laboratory Agency for weighing and analysis
before tendering it as evidence in court."*

In the case at hand, the plant suspected to be of bhang (Exhibit S3) was not submitted to the Government Chemist's Laboratory Agency for analysis. The failure to do so renders the prosecution evidence that exhibit P1 is noxious, invalid. PW1's evidence that from his experience the plant was of bhang was, under the circumstances of this case, valueless. The plant in question was therefore not proved to be of narcotic drugs or psychotropic substance which was an imperative element to be proved for the appellant to be held criminally responsible. For the above given reasons, the first ground has merits.

The second ground of appeal on the cautioned statement should not detain us. In the light of the findings on the first ground of appeal and as correctly argued by the learned Senior State Attorney, the purported admission by the appellant that the plant allegedly found in his possession was of bhang, is of no substance. The appellant who was not an expert in the relevant field, could not certainly know that the plant was of bhang. The trial court did therefore err in basing the conviction on the cautioned statement. We thus find this second ground of appeal to be meritorious too.

Since the appellant was convicted of cultivating a plant of bhang without permit whilst the said plant was not submitted to the Government Chemist Laboratory Agency for analysis and proof that it was really of bhang, the case against the appellant was not proved and the conviction can not stand. The appeal is therefore allowed, conviction entered by the trial court and confirmed by the High Court is quashed and the sentence of thirty years in prison is set aside. The appellant Aldo Kilasi is henceforth set at liberty unless otherwise lawfully held.


DATED at IRINGA this 28th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of September, 2021 in the presence of Mr. Aldo Kilasi, learned counsel for the Appellant and Ms. Pienzia Nichombe Senior State Attorney assisted by Ms. Veneranda Masari State Attorney of the Respondent, is hereby certified as a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL