IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A.:)

CRIMINAL APPEAL NO. 389 OF 2020

AGNETHA SEBASTIAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Court of Resident Magistrate of Bukoba at Bukoba)

(Ndale, SRM - Ext, Jur.)

dated 27th day of May, 2020

in

Criminal Appeal No. 103 of 2020

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JUDGMENT OF THE COURT

4TH & 11th July, 2022

MWARIJA, J.A:

The appellant, Agnetha Sebastian was charged in the Resident Magistrate's Court of Bukoba with the offence of unlawful possession of prohibited plants contrary to s. 11 (1) (d) of the Drugs Control and Enforcement Act, No. 5 of 2015. It was alleged that on 17/2/2017 in the afternoon at Mumdongo Village within Missenyi District in Kagera Region, she was found in unlawful possession of narcotic drugs, to wit, cannabis sativa (also known as bhang) weighing 414 grams.

The appellant denied the charge. However, after a full trial at which, the prosecution relied on the evidence of three witnesses while the appellant was the only witness for the defence, the trial court found that the case had been proved against the appellant. She was, as a result, convicted and sentenced to thirty years' imprisonment. Aggrieved by the trial court's decision, the appellant appealed to the High Court. The appeal was transferred to the Resident Magistrate's Court of Bukoba for hearing before Ndale, SRM (Ext. Jur.) who dismissed it for want of merit. The appellant was further aggrieved hence this second appeal.

The facts of the case may be briefly stated as follows: The appellant was until the time of her arrest, residing in Mumdongo Village in Missenyi District within Kagera Region. Following information that she was involved in selling bhang, on 17/2/2017 police officers from Kyaka Police Station searched her house. The search was conducted by among others, WP 3294 D/SSgt Cecilia (PW1) and H 1012 PC Kusekwa (PW2). After the search, a certificate of search (exhibit P1) was prepared showing that the appellant was found with dry leaves thought to be bhang, weighing half a kilogram. The certificate was signed by the appellant and two other persons shown to have witnessed the search;

Mathias Petro and Magreth Mathias. The appellant was thereafter taken to police station and later on charged in court as shown above.

At the trial, the prosecution witnesses gave evidence to the effect that, when the appellant's house was searched, a parcel containing dry leaves believed to be bhang, was found. When the same was sent to Weights and Measures Agency's office, Bukoba for weighing, the same was found to be 414 grams. It was their evidence further that, some samples of the seized item were sent to Agriculture, Irrigation and Cooperative Department, Missenyi District for opinion of Agricultural Officer on the type of the plant and the Government Chemist for examination of chemical content. After that exercise, the police received reports from the two authorities that the leaves were from cannabis sativa plant and that the same contained narcotic drug of the type known as tetrahydrocannabiol. The reports were admitted in evidence as exhibits P3 and P4 respectively.

In his testimony, PW2 said that, after the suspected substance had been seized, the same was taken to Kyaka Police Station and on 13/3/2017, the samples from which the reports; exhibits P3 and P4 were obtained, were sent by him to the Agricultural Officer while Cpl. Bryton sent the other sample to the Chief Government Chemist. As for the

remaining quantity, it was PW2's evidence that the same was kept in the exhibits room at the police station and was later tendered in court as exhibit P5.

PW3 supported the evidence of PW2 that the appellant's house was searched and exhibit P5 was found wrapped in a sulphate bag. On her part, PW1 testified that, after she had received the information that the appellant was selling bhang, she arranged a team comprising of Cpl. Rashid, DC Majaliwa, the informer and a driver so that she could mount investigation. As they were going to the appellant's house, she said, they met the appellant on the way. She was taken to her house whereupon a search was conducted. PW1 testified further that the appellant admitted the allegation that she was engaged in illegal business of selling bhang. According to PW1's further evidence, the appellant said that she was doing so to earn money so as to support herself after being deserted by her husband.

In her defence, the appellant refuted the evidence tendered by the prosecution witnesses that exhibit P5 was found in her house. It was her testimony that, on the date of her arrest, she was at Bunazi centre where she had gone to buy medicine. She saw a police motor vehicle in which were the police officers who arrested her. She went on to state

that, after her arrest, she was taken to her house and because she did not have the key to the door, the police broke it and entered in the house. It was her evidence further that, although they did not have a search warrant, the police proceeded to search her house but did not find anything suspicious. As they were leaving however, the police officers who had remained in the motor vehicle, appeared carrying a plastic bag and told her that the same was found in her house. It was her further evidence that, she was thereafter taken to police station where she was forced to sign a document and later on, was charged in court after having being in the police lock up for seven days. She added that, she was charged after she had failed to get TZS. 500,000 which the said police officers allegedly demanded.

In his decision, the learned trial Resident Magistrate found that the prosecution had proved its case beyond reasonable doubt. He relied on the oral evidence of the three prosecution witnesses whom he found to be credible. He also relied on documentary evidence including the certificate of search (exhibit P1) which was signed by the appellant.

On her first appeal, the appellant challenged the finding of the trial court contending that the evidence was insufficient to prove the charge. She faulted the learned trial Resident Magistrate for having relied on the

certificate of seizure while, according to her, the search was not conducted in accordance with the law. Her main complaint was that the witnesses who signed that certificate were not called to testify.

As shown above however, her appeal was unsuccessful. The learned appellate Magistrate was of the view that the prosecution's failure to call the two persons who witnessed the search did not adversely affect its case. He relied on the High Court decision in the case of **Yamungu Kaburu Moshi v. Republic**, Criminal Appeal No. 56 of 2017 (unreported). He found further that the handling of exhibit P5 did not breach the requirement of proving that the chain of custody was unbroken. He was of the opinion that the chain of custody was established by oral evidence of PW2 who explained that the exhibit was kept in the exhibits room at the police station and from there, the samples taken to Agricultural Officer and the Chief Government Chemist were obtained. He cited the Court's decision in the case of **Chacha Jeremiah Murimi and Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported) to bolster his view that the chain of custody may be established by oral evidence.

As stated above, the appellant was further dissatisfied and has thus preferred this appeal. He initially filed a memorandum of appeal

consisting of five grounds. At the hearing of the appeal however, Mr. Anesius Stewart who, together with Mr. Ibrahim Mswadick, learned advocates appeared for the appellant, sought and obtained leave under Rule 4 (2) of the Tanzania Court of Appeal Rules, 2009 as amended, to file a supplementary memorandum of appeal which had been prepared by the appellant in person. The same consists of a total of thirteen grounds. Mr. Stewart decided however, to argue the 1st, 3rd, 8th, 10th and 12th grounds and thus abandoned the rest of the other grounds. He also abandoned all the grounds contained in the memorandum of appeal.

The grounds which were argued by the counsel for the appellant are hereby paraphrased as follows:

1. *That the learned appellate Magistrate erred in law and fact in relying on exhibit P5 to uphold the appellant's conviction while the same was obtained from a search which was conducted in breach of s. 38 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002] and s. 35 of the Police Force Act [Cap. 322 R.E. 2002].*
2. *That the learned appellate Magistrate erred in law and fact in failing to find that the appellant's conviction was wrongly based on exhibit P5 because its chain of custody was not established.*

3. *That the learned appellate Magistrate erred in law and fact in failing to find that, from the evidence of PW2, there was mishandling of exhibit P5.*
4. *That the learned appellate Magistrate erred in law and fact in upholding the appellant's conviction while the prosecution had failed to call the two persons who signed the certificate of search thus failing to prove its case beyond reasonable doubt.*
5. *That the learned appellate Magistrate erred in law and fact in disregarding the appellant's defence which raised reasonable doubt against the prosecution case."*

The grounds of appeal were argued by Mr. Stewart who, as pointed out above, was being assisted by Mr. Mswadick. On its part, the respondent was represented by Mr. Hezron Mwasimba, learned Senior State Attorney.

In determining the appeal, we intend, for reasons to be apparent herein, to start with the 2nd and 3rd grounds of appeal which the appellant's counsel had argued together. He submitted that, from the evidence on record, the chain of custody of exhibit P5 was not properly accounted for and for that reason, the learned appellate Magistrate erred in failing to find that the trial court erred in deciding that the case

was proved to the required standard. According to the learned counsel, there is gap in the evidence of the prosecution witnesses on how exhibit P5 was handled from the time of its seizure until the time when the samples sent to Agricultural Officer and the Chief Government Chemist were collected. Relying on the Court's decision in the case of **Ester Amani v. Republic**, Criminal Appeal No. 69 of 2019 (unreported), the learned counsel submitted that, such break of chain of custody raised reasonable doubt on the evidence that the samples were collected from the parcel which, according to the prosecution, was found in the appellant's house. He stressed that the learned appellate Magistrate should not have upheld the finding of the trial court.

Responding to the arguments made by the counsel for the appellant on the two grounds above, Mr. Mwasimba conceded that the evidence as regards the handling of exhibit P5, that is to say, the details on how the same was received and kept in safe custody at the police station, is wanting. It was his submission however, that from the evidence of the prosecution witnesses; particularly the testimony of PW2, the chain of custody was properly established from the time of taking the samples until the reports from the Agricultural Officer and the Chief Government Chemist were received. The learned Senior State

Attorney thus submitted that, the two grounds should be found to be lacking in merit.

From the submissions of he learned counsel for the parties on the above mentioned two grounds of appeal, it is undisputable that there is missing link in the prosecution evidence on how exhibit P5 was handled after the same was taken to Kyaka Police Station. It is an established principle that, when an item relating to crime is to be exhibited in court, its chain of custody must be properly established. The rationale behind this principle was aptly stated in the case of **Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 100 of 2007 (unreported). In that case, the Court observed as follows:

> *"The idea behind recording the chain of custody... is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone guilty.* ***The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."***
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> [Emphasis added]

In this case, it was Mr. Mwasimba's submission that, despite the missing link, the chain of custody of exhibit P5 was sufficiently established by the evidence of PW2. With respect, we are unable to agree with him. Although it is a correct position that the chain of custody may be proved not only by documentary evidence but also by oral evidence, in our considered view, the evidence of PW2 is lacking on that aspect.

In his evidence, PW2 merely stated that the said exhibit was kept in the exhibits rooms at the police station. He did not however, name the person who received and kept it in safe custody. Likewise, that person was not called to testify in court. His evidence was crucial in proving that the samples from which exhibits P3 and P4 were obtained were from the contents of the parcel which was alleged to have been seized from the appellant's house. In the case of **Zainabu D/O Nasoro @ Zena v. Republic,** Criminal Appeal No. 348 of 2015 (unreported) in which a situation akin to the one in the case at hand, the specimen of the item which was the subject of the charge, was stored in the strong room in the office of the Regional Crimes Officer (RCO). The RCO did not give evidence in that case. The Court observed as follows on the effect of the omission:

"Apart from merely stating that the specimen was stored in the strong room of the RCO, the RCO concerned neither testified on the integrity of the specimen whilst in his 'strong room' nor were any documents exhibited to prove integrity of documents as it moved from PW1 to the strong room. It is not clear if PW1 maintained control and the integrity of drugs even when it was stored in the strong room....

In the circumstances like the present one where the final determination (confirmation) of whether the substance concerned was narcotic drugs or not is done by another authority (**CGC**) *independent of police; it was not enough for PW1 without documenting the chain of custody, to perfunctorily state that the exhibits were safely locked in the strong room of the RCO."*

On the basis of the foregoing analysis, we are certain that had the learned appellant Magistrate properly evaluated the evidence, he would have found that the chain of custody of exhibit P5 was not established. We find therefore, that he misapprehended the evidence and thus erred in upholding the finding of the trial court that the prosecution had proved its case beyond reasonable doubt.

Since our finding on the 2nd and 3rd grounds of appeal suffices to dispose of the appeal, we do not find it necessary to consider the other

grounds. In the event, we allow the appeal. The decision of the appellate Magistrate is hereby reversed and the sentence meted out to the appellant is set aside. She should be released from prison forthwith unless she is held for any other lawful cause.

DATED at **BUKOBA** this 11th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2022 in the presence of Mr. Ibrahim Mswadick, counsel for the Appellant and Mr. Juma Mahona, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL