IN THE COURT OF APPEAL OF TANZANIA

AT SUMBAWANGA

(CORAM: KOROSSO, J.A., MWAMPASHI, J.A., AND MASOUD, J.A.)

CRIMINAL APPEAL NO. 523 OF 2019

MINTANGA CHAMBUSO.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECTUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mashauri, J.)

dated the 20th day of November, 2019

in

Criminal Appeal No. 154 of 2018

.....

JUDGMENT OF THE COURT

13th & 18th March, 2024

MASOUD, J.A.:

The appellant was arrested at around 1.00 a.m on 15th July 2017 at Lua Village within Rukwa Region, carrying on his head a luggage kept in what is commonly known as a "*salphate bag*" suspected to contain nothing other than bhang. The appellant was on 5th September, 2018, after a lapse of about 14 months, charged with the offence of unlawful possession of prohibited plants contrary to section 11(1)(d) of the Drug Control and Enforcement Act, No. 5 of 2015. It is instructive that the particulars of the offence the appellant was charged with read thus:

"Mintanga s/o Chambuso on the 15th day of July, 2017 at Lua Village, within Sumbawanga Municipality, in Rukwa Region, was found by police officer G.2684 D/C Seif in unlawful possession of 4.10 kilograms cannabis bhang".

After a full trial, following the appellant pleading not guilty of the offence charged, the District Court of Sumbawanga at Sumbawanga convicted the appellant of the offence charged. As a result, he was sentenced to serve an imprisonment term of thirty (30) years on 29th October, 2018.

The evidence of the prosecution which saw the appellant convicted and sentenced as afore stated was from three police officers. They were, namely, G.2684 D/C Seif (PW1), G.2117 D/C Gerod (PW2), and H.5929 D/C Wycliffe (PW3).

The evidence from PW1 and PW3 was to the effect that on 15th July, 2017 at around 01:00 a.m, while in a car make Land Cruiser, along with other police officers, heading to Muze Village to attend a reported robbery incident, they met the appellant at Lua Village, carrying on his head a luggage (a "*furushi*") in a "*sulphate bag*". Being curious to find out what the appellant was carrying at such late midnight hours, they stopped and searched him. They discovered that what the appellant was

carrying on his head was nothing but bhang, although they said nothing about its weight. They said that they interrogated the appellant who orally admitted that he was trafficking the said bhang to town to sell it.

PW1 testified that he prepared a certificate of seizure at the crime scene which was signed by the appellant and PW3. PW1 tendered in evidence the certificate of seizure (exhibit P1) which quoted the weight of the seized luggage as 4.10 kg. PW1 testified further that, having arrested the appellant and seized the luggage, they proceeded to the robbery incident with the appellant and the seized luggage in the vehicle before the appellant was later taken to central police station. Neither PW1 nor PW3 testified as to the control and handling of the seized luggage containing nothing other than bhang after seizing it from the appellant at the crime scene, although they both stated that the appellant was subsequently taken to the central police.

PW2's testimony was to the effect that on 15th July, 2017, during morning hours he was assigned the appellant's case file to investigate, whereby PW1 was the complainant. As to the appellant, PW2 testified, he was already in police custody. As to the seized luggage in the *sulphate bag* containing nothing other than bhang which was ultimately admitted as exhibit P2, PW2 testified that it was handed over to him

weighing 4.00 kg, although he neither named the person who handed it over to him, nor did he testify on the condition of the seized luggage, where and how it was kept and by whom. He testified to have interrogated the appellant who confessed to have been dealing with the business of selling bhang and that he was found in possession of bhang at Lua village. However, it was not clear why PW2 did not record such a confession if the appellant had confessed when he interrogated him.

In his further testimony, PW2 had it that on 20th March, 2018, notably after a lapse of 8 months after the alleged seizure, he took the exhibit P2 to the Government Chemist Laboratory Agency (hereinafter the GCLA) for examination and analysis, having unpacked it into a box and sealed it. He went on testifying that as a result of GCLA analysis, the exhibit was confirmed by one, Yohana N. Goshashy, a government chemist officer who did not testify at the trial, to be bhang (*Cannabis Sativa*). He tendered in evidence the GCLA report (exhibit P3), which was given to him, proving that the exhibit weighing 4.11 kg was confirmed to be bhang. PW2 did not tender the *sulphate bag* in which the seized luggage was allegedly kept by the appellant, although he said that he was the one who re-packed the said exhibit P2 into a box and sealed it immediately after taking the samples. Notably, it was the

sulphate bag removed by PW2 which enabled the appellant to carry the seized luggage (a "*furushi*") on his head if we go by the testimony of PW1 and PW3 above.

In his defence, the appellant distanced himself from the allegations by the prosecution. He testified that he was arrested at night when he was on his way to see his sick mother, having been informed that she was seriously sick. He was, however, arrested immediately after arriving at Sumbawanga town. He denied having any parcel when he was arrested.

In its decision which convicted the appellant as charged and sentenced him as alluded to herein above, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. The trial court found that the exhibit P2, which was confirmed by the exhibit P3 to be bhang was found in the possession of the appellant as alleged by the prosecution side. The trial court relied also on the evidence of the certificate of seizure (exhibit P1). The trial court was equally of the view that PW1, PW2 and PW3 were credible witnesses and their evidence was therefore reliable. Citing the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 363, the trial court was settled that there was no good and

cogent reason for not believing the said witnesses. In this respect, at page 25 of the record of appeal, the trial court said:

> *"This court has thoroughly gone through the evidence of the prosecution witnesses, and found their evidence not contradictory, probable, and plausible one. The witnesses were amongst police officers who were on the way to execute their duties and in due course they saw the accused person walking during late night hours. They reasonably suspected. They had not known him before which connotes that there was no any ill will or grudges between them.....This court sees no reasons not to believe in the prosecution witnesses.....This court is forced to believe that it is true that the accused was really found in actual possession of the seized 4.11 kg of bhang".*

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His main complaint which arose from the seven grounds of appeal he raised at the first appellate court was on the failure of the prosecution to prove the charge laid against him beyond reasonable doubt. The High Court (Mashauri, J.) upheld the decision of the trial court. The learned first appellate Judge was likewise of the view that there was no good and cogent reasons for not believing the

evidence of the prosecution witnesses. He also relied on the case of **Yohana Paulo v. Republic,** Criminal Appeal No. 284 of 2012 (unreported) to dismiss the complaint that the box containing bhang (exhibit P2) and the government chemist report (exhibit P3), were illegally admitted in evidence.

As the appellant was further aggrieved by the decision of the High Court, he preferred the instant appeal to this Court urging us to interfere with the concurrent findings of facts of the two lower courts that found him guilty as charged. In his memorandum of appeal filed on 11th February, 2022, he raised five grounds which could be paraphrased thus: **One**, that the prosecution case was not proved beyond reasonable doubt; **two**, that the prosecution evidence was from police officers; **three**, that the prosecution witnesses were contradictory to one another and therefore not reliable; **four**, that the exhibits were illegally admitted whilst there was also a failure by the prosecution witnesses to establish the sanctity of the chain of custody of the seized luggage kept in a *sulphate bag* allegedly containing bhang; and **five**, the defence evidence was not considered.

At the hearing of the appeal, while the respondent was represented by Mr. Deusdedit Rwegira, learned Senior State Attorney

and Mr. Kizito John Kitandala, learned State Attorney; the appellant, who was present in person was not represented. Thus, when the appellant was called on to argue his grounds of appeal, he opted to adopt them and let the respondent submit in reply to his grounds whilst reserving his right to rejoin if need be.

Mr. Rwegira addressed the Court that the appeal would be argued by his colleague Mr. Kitandala, who consequently started his brief but focused submission by stating that the respondent supports the appeal as the charge was not proved beyond reasonable doubt. He assigned two reasons. The first was on the weakness of the prosecution evidence to establish the sanctity of the chain of custody of the seized luggage kept in a *sulphate bag* containing nothing other than bhang. And the second was on the failure of the prosecution to call GCLA officer who conducted laboratory analysis of the seized substance to ascertain that it was bhang as per exhibit P3. The two reasons, according to Mr. Kitandala, fall within the purview of the first and fourth grounds of appeal paraphrased herein above.

According to Mr. Kitandala, the chain of custody of the seized luggage kept in a *sulphate bag* containing nothing else other than bhang was broken as there was glaringly lack of evidence from PW1, PW2 and

PW3 regarding storage, sealing, handling, change of hands, and sampling for laboratory analysis of the seized luggage from the moment it was seized up to the time when it was tendered in evidence at the trial court. He relied on the case of **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 110 of 2007.

To amplify his argument, Mr. Kitandala said that, when the appellant was arrested and exhibit P2 was seized from him at Lua Village, within Sumbawanga Municipality at around 1:00 a.m on 15th July, 2017, there was no evidence as to where the same was kept until when it was produced in court on 10th October, 2018 by PW1. The learned State Attorney agreed with the appellant in his fourth ground of appeal that the chain of custody of the exhibit P2 (the seized substance) which was tendered in the trial court, was not observed, thus raising reasonable doubt as to whether the exhibit tendered in court during the trial was really the same that was found in the possession of the appellant. It was his submission that the evidence does not show on whose control and custody the exhibit P2 was, between the date of its seizure and the time when it was tendered in the trial court.

Mr. Kitandala argued that, in the circumstances, the prosecution evidence leaves doubt as regards the place where the exhibit was kept

and stored the whole period right from 15th July, 2017 at 1:00 a.m, up to 10/10 2018, when it was tendered in evidence before the trial court. He added that the absence of the evidence pertaining to the chain of custody of the seized luggage raises another doubt as to whether the exhibit which was taken for laboratory analysis was the same one that the appellant was allegedly found to be in possession and in that regard, it can hardly be said that the appellant was really found in the possession of bhang as charged.

The appellant welcomed the stance taken by the learned State Attorney of supporting his appeal. He did not, therefore, have any arguments to add in rejoinder. He prayed to be released from prison.

As we embark in determining the complaint on the chain of custody of the seized luggage in relation to the first and fourth grounds paraphrased herein above, we wondered as to whether there was indeed no evidence led by the prosecution on the chain of custody of the seized luggage as contended by the appellant and the learned State Attorney. And if the answer is in the affirmative, the next issue will be whether the charge was in view of such failure proved beyond reasonable doubt, and whether this Court can, in the circumstances,

interfere with the concurrent findings of the two lower courts that found the appellant guilty as charged.

It was contended that the chain of custody was broken from the time the exhibit was allegedly seized from the appellant on 15th July, 2017 at 1:00 a.m up to 20th March, 2018 when PW2 took the same to the GCLA for laboratory analysis and when it was tendered as exhibit P2 on 10th October, 2018. In this respect, we carefully examined the record of evidence from page 11 of the record of appeal when the prosecution commenced with PW1's testimony up to page 15 when the prosecution closed its case, consisting of three witnesses (PW1, PW2, and PW3) and three exhibits, namely, certificate of seizure (exhibit P1), a box containing bhang (exhibit P2), and GCLA report (exhibit P3).

It is on the record, based on the evidence of PW1, PW2 and PW3, that the seized luggage, allegedly, containing nothing other than bhang was seized from the appellant as he was walking carrying it on his head on 15th July 2018 at Lua village within Sumbawanga at around 1:00 a.m. The certificate of seizure completed by PW1 at the crime scene and signed by PW1, PW2 and the appellant, according to PW1, attests to that fact, whilst also it indicated that the weight of the seized luggage which the appellant carried on his head was just 4.10 kg.

We gather from the testimony of PW1 and PW3 that the appellant and the seized luggage were carried in the vehicle as the police officer were heading in the same vehicle to the reported robbery incident elsewhere. Thus, the seized luggage was carried all the way to the place where there was the robbery incident. While we learn from PW1 and PW3 that the appellant was subsequently taken by the same vehicle to the Central Police and kept in a lockup, there is no similar testimony with regard to movement, control and custody the seized luggage in the *sulphate bag* containing nothing other than bhang. It means that there is no evidence as to whether the seized luggage in the *sulphate bag* was correspondingly handed over to whoever responsible with keeping exhibits at the central police, and whether appropriate records as to condition, movement and handling of the seized luggage in the *sulphate bag* were kept.

We further gather from the testimony of PW2 that in the morning of 15th July, 2017 after the arrest and seizure on 15th July, 2017 at 1:00 a.m, the seized luggage was handed over to him to investigate on the case, when he also interrogated the appellant who was already in the police lockup. However, there is no evidence from any of the prosecution witnesses as to who received the seized luggage kept in the *sulphate*

bag at the central police from PW1 if at all, who kept it under his control, and who handed it over to PW2 in the morning on 15th July, 2017 after the seizure had taken place at 1:00 a.m of the same day.

Worse still, while the seized luggage kept in the *sulphate bag* was handed over to PW2 in the morning of 15th July, 2017 as per PW2 testimony, it is in his testimony that he took the seized luggage to the GCLA on 20th March, 2018, notably after a lapse of more than eight months. Regrettably, there is no evidence adduced by the prosecution as to where and under whose control and custody the seized luggage in the *sulphate bag* containing nothing other than bhang was kept between 15th July, 2017 and 20th March, 2018 as it was not in PW2's evidence that he handed it over to whoever handed it to him in the first place.

Likewise, there is no evidence as to where and who kept the seized luggage under his control and custody until it was brought and tendered in evidence at the trial court on 10th October, 2018. Apart from the above shortcomings, there was a conspicuous failure by the prosecution witnesses to produce any documentation or paper trail corresponding with the handling of the seized luggage, such as occurrence book, handover reports, labelling of the seized luggage for identification, the letter to the GCLA, and a record about sealing and/or

resealing of the same to avert interference and possibility of tempering in the course of its movement.

Of interest is that, the weight of the seized luggage kept on dramatically changing without there being any plausible explanation from any of the prosecution witnesses accounting for such changes. Thus, the seized luggage containing nothing other than bhang changed in its weight from a luggage *("furushi")* kept in a *sulphate bag* which had to be carried by the appellant on his head in the late mid-night hours of 15th July, 2017 to the following: Firstly, a seized luggage weighing 4.10 kg as quoted in the certificate of seizure (exhibit P1); secondly, a seized luggage weighing 4.00 kg when it was handed over to PW2 by undisclosed person and from undisclosed place in the morning of 15th July, 2017 as testified by PW2; thirdly, a seized luggage weighing 4.11 kg when it was returned from GCLA as is evident in exhibit P3; and fourthly, a seized luggage weighing over 4 kg when it was admitted in evidence by the trial court on 10th October, 2018.

In view of the above findings, we are in agreement with Mr. Kitandala that the chain of custody of the seized luggage was so broken that the exhibits concerning the seized luggage ought not to have been admitted in evidence to prove the charge. It would, therefore, follow

that there was in this case no proof by the prosecution that the luggage that was seized from the appellant was the same one that was handed over to PW2 and was again the same one that was handed over to the GCLA for Laboratory analysis which was ultimately confirmed to be bhang. In the end, there is also no proof that exhibit P3 (GCLA report) was in relation to the substance contained in the luggage allegedly seized from the appellant.

In the case of **Paulo Maduka** (supra), this Court insisted that chain of custody of an exhibit must be proven by producing the chronological documentation and/or paper trail showing the seizure, custody, control, transfer, analysis and disposition of that exhibit. In the case of **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported), this Court relaxed the application of the principle restated in the case of **Paulo Maduka** to cater for situations involving substances that cannot change hands easily and therefore not easy to temper with. See also, **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015; and **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017 (both unreported).

In the light of the above position of the law, we think the substance involved in the instant case could not fall within the purview

of those which cannot change hands easily and therefore not easy to temper with, if we go by the evidence on the record. We have in mind, in this respect, the evidence regarding the condition of the seized luggage kept in the *sulphate bag* and later on in a box allegedly containing nothing other than bhang, the associated weight variations over time of the said luggage, and the lapse of time between 15th July, 2017 when the seizure took place at 1:00 a.m and 10th October 2018 when it was tendered in evidence.

Even if we assume that the substance at stake falls within the category of those substances which cannot change hands easily and therefore not easy to temper with; we think the relaxed principle, restated in the case of **Kadiria Said Kimaro** (supra) and in our recent decision in the case of **Moses Mwakasindile** (supra), would not apply in the instant case as there was a complete absence of evidence concerning the chain of custody of seized luggage contained in the *sulphate bag* from its seizure up to the point when it was tendered in evidence in the trial court which means that its chain of custody is not only broken but it is completely missing from the prosecution witnesses. We are again fortified in our view by the absence of the evidence of persons, such as exhibit keeper, that in one way or the other handled

the seized luggage at different stages from its seizure to its exhibition at the trial court as alluded to herein above.

In the absence of such evidence, it is not easy for the prosecution to prove that what was seized from the appellant during the material night of arrest on 15th July, 2017 was the same substance which was tendered as exhibit P2 during the trial. Again, the absence of the evidence as to chain of custody meant that there was no linkage between the followings: the substance allegedly seized from the appellant, the substance that was handed over to PW2, and the substance that was sent to the GCLA office for Laboratory analysis, after about eight months, which according to PW2 weighed 4 kgs, whilst the GCLA report revealed it was 4.11kg when it was being returned to PW2. It is equally worthwhile to note that the substance that was eventually tendered and admitted in evidence as exhibit P2, as per the record of proceeding weighed over 4kgs. Without such linkage in the prosecution evidence, the entire prosecution case was in our considered opinion bound to collapse.

Having regard to what we discussed above, we find that, had the learned first appellate Judge properly re-evaluated the evidence, he would have found that the same did not prove the case against the

appellant beyond reasonable doubt due to the weaknesses in the chain of custody of the seized luggage which address the first and fourth grounds of appeal. We are thus of the considered view that both lower courts misapprehended the evidence, thereby arriving at an erroneous conclusion that the charge laid against the appellant was proved beyond reasonable doubt, notwithstanding that the chain of custody of the seized substance in the prosecution case was conspicuously broken.

Our findings from the foregoing favourably take care of the fourth ground of appeal as to the complaint on the chain of custody and the first ground as to whether the charge was proved on the standard required by the law. Because of the misapprehension of the evidence in relation to the chain of custody by the two lower courts, we are entitled as a matter of rules of practice to interfere with the concurrent findings of the two lower courts as we hereby do so. See for instance, **D.P.P v. Jaffari Mfaume Kawawa** [1981] T.L.R 149 and **Musa Mwaikunda v. Republic** [2006] T.L.R 387. Since the findings suffice to dispose of the appeal, there is no pressing need to consider the other grounds of appeal.

In the light of the foregoing, therefore, we allow the appeal. The appellant's conviction is quashed and the sentence meted out to him is

set aside. We, henceforth, order the immediate release of the appellant from prison if he is not otherwise retained for some other lawful cause.

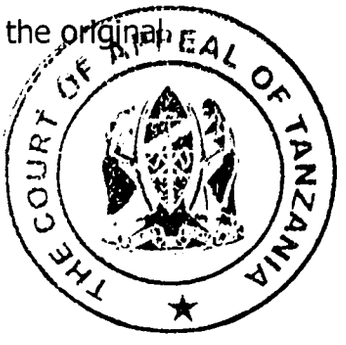
DATED at **SUMBAWANGA** this 18th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgement delivered this 18th day of March, 2024 in the presence of the appellant in person/unrepresented and Mr. David Mwakibolwa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL