IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 373 OF 2018

(Appeal from Criminal Case No 369 of 2017 at the District court of Kinondoni)

MPANDA MLOLOGA.....1ST APPELLANT

SHOMARI RAJABU .....2ND APPELLANT

YAHAYA MOHAMMEDI.....3RD APPELLANT

GUSTAV WILBERT DIMOSO@ BANZI.....4TH APPELLANT

ULAYA MICHAEL.....5TH APPELLANT

HAMISI RAMADHANI.....6TH APPELLANT

SHUKURU SALIM.....7TH APPELLANT

TWALIBU FAKHI.....8TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

MASABO J.:-

The appellants are appealing against the decision of the district court of Kinondoni which on 15th August, 2018convicted them of the offence of unlawful possession of narcotic drugs contrary to section 11 (1)(d) of the Drugs Control and Enforcement Act No.5 of 2015 and subsequently sentenced each of them for 30 years imprisonment. It was alleged that the appellants were found in possession of narcotic drugs namely cannabis sativa on the 6th February, 2016 at Ubungo Dar es salaam Region. Their appeal is based on 6 grounds that:

1. the trial magistrate erred in holding to Exh.PE.1 where PW.1 and PW.3 were not led to identify by displaying what they alleged to have tested and seized respectively before the court.
2. That the trial magistrate failed to realize contradiction between PW.2 and PW.3
3. That the trial magistrate erred in holding to search warrant Exh.PE.2 where PW.2 the independent witness and signatory to the same was not led to identify it before court for verification
4. that the learned trial magistrate erred in holding Exh.PE.3 where movements and storage chain of custody was not established
5. the learned trial magistrate erred in conviction all the appellants based on unjustified corroborated prosecution evidence, and
6. That the learned trial magistrate grossly erred in holding that the prosecution proved its case against all the appellants beyond reasonable doubts.

At the hearing the appellants appeared whereas the Respondent Republic was represented by Ms. Christine Joas leaned state Attorney. The appellants adopted their six grounds and pray this court to allow the appeal. On the Respondents side Ms. Joas started by supporting the 4th ground appeal. She then proceeded to submit that the chain of custody was not established and cited **Twalib Omary Juma @Shida V R** Criminal 262 of 2014 in support. She reasoned that the witness who tendered the Exhibit PE.3 did not state where he took the exhibit to. She also submitted that PW1, the Chemist who examined the drug tendered a report but was not led to identify it nor was

the report read over to the appellants at the stage of admission. In conclusion she submitted that because of these irregularities the Respondent is in support of the Appeal.

Having gone through both submissions, I find it pertinent to consolidate the first and third ground of appeal as they both relate to identification of Exhibit PE2 by PW1, PW2, and PW3. The records reveal that PW1 the government chemist tendered exhibits PE 1 containing a examination report of the drugs allegedly found under the possession of the appellant. Apart from tendering the report, PW1 was not led to identify the drugs he alleged to have tested. It is therefore uncertain whether the dugs tendered as Exhibit PE 3 are the same drugs allegedly examined by PW1. It is equally clear that PW3, an independent witness who was present at the time when the appellants were searched and arrested, was not led to identify the drugs. In his testimony in page 25 of the proceedings he told the court that while searching the house they found some leaves stored in granted and it was looking ..bhangi. He also told the court that they found two candles, razors and some ketes but he was never led to identify these items.

The question to be determined is whether failure to lead the witness to identify the exhibit constituted a fatal irregularity or put otherwise, saw it necessary for the witnesses to be led to identify the exhibits to ascertain whether they are the ones found in possession of the appellants? In **Emmanuel Saguda and Sahili Wambura v R,** Criminal Appeal No. 422 "B" of 2013, at Tabora is to the effect that:

> where witnesses are required to testify on a document or object which would subsequently be tendered as Exhibit that the procedure is not simply to refer to it theoretically as was the case here, but to have it physically produced and referred to by the witness before the court either by display or describing it and then have it admitted as an exhibit.

In the instant case, considering that both PW1 and PW2 testified they were on time in passion or they saw the drugs, the same ought to have been produced so as to give them an opportunity to prove the court that the drugs referred in their testimonies is indeed the one tendered in court as Exhibit PE3 were indeed the drugs with which the appellants were found to be in possession of.

The court of Appeal of Tanzania, dealt with similar issue in **Oscar Nzelani V Republic** Cr. Appeal, No. 48 of 2013 Rutakangwa J.A. where PW6, the government chemist who analysed the specimen found in the deceased's estate was not lead to identify the clotheses sent to her for analysis. The court had this to say:

> Going by the evidence PW6 Gloria, only specimens which do not "yield good results" are disposed of. Since the alleged appellant's clothes yielded "good results", we should safely assume they were preserved. In that case ***why were they not tendered in evidence to reinforce the findings of PW6 Gloria***? We are posing this question deliberately. This is because PW1 Philipa was specific in her evidence on the type of clothes the appellant

> was putting on the fateful day. Were the clothes PW1 Philipa saw the very ones analysed by PW6 Gloria? Incidentally, she mentioned a red shirt and not a T-Shirt. Were the clothes, the subject of PW6 Gloria's evidence, the very ones taken by PW3 ASP Kalinga from the appellant? Positive answers to these questions were unavoidable before predicating the conviction on PW6 Gloria's evidence"

In the instant case, PW2 and PW3 were very specific of the drugs found ti be in possession of the appellant. PW1 was very specific on what he analyzed, PW3 was equally specific on what they found at the scene. It was therefore paramount important that PW1, and PW3 be led to identify the drugs tendered as Exhibit PE3 to so as to establish that the drugs examined by PW1 or alleged seen by PW3 were in deed the ones tendered as exhibit in court. The 1st and 3rd ground are therefore meritorious.

On the second ground of appeal, upon scrutiny of the record, I have found a slight discrepancy on the items allegedly found to be under the possession of the appellant. In exhibit PE.2 search warrant, the items listed to have been found under the possession of the appellants were "*Puli mbili za bangi, misokoto sita ya bangi, kete saba za bangi , kiberiti kimoja, viwembe viwili na kisu kidogo kimoja.*" On the other hand, PW3 stated that they found leaves stored in a gazette looking like bangi, candles, razors and some ketes also packed in the gazette. The discrepancy of items creates doubts as to what exactly was found to be in the possession of the appellant. In criminal law, the duty casts on the prosecution case prove the guilty of the accussed

beyond reasonable doubt. With this discrepancy, the requirement of proof beyond reasonable doubt was short of being met. The second ground is therefore found to have merit.

Finally, on the issue of chain of custody, I have noted that PW2 searched, seized exhibits and arrested the appellants on the 6/2/2017. On 8/2/2017 the exhibit was taken to the Government Chemist Department by Police No G.123 DC MATHEW where they were received by PW1, who told the court that he received an envelope with exhibits from DC Mathew PW2 for analysis on 8/2/2017 and registered it as no 125/2017. Later on 17/2/2019 PW 4, WP 4148 D/CPL EVa, was given the appellant's case file together with exhibits bangi put it in the envelope. The exhibit was admitted in Court on 18/9/2017. The main issue to be determined is the propriety of manner in which the drugs was handled. It is a truite law that in establishing the chain of custody the prosecution must say how and where the alleged drug was stored before it was given to PW 4 and to the officer who took the same to the Government Chemist Department. The prosecutions case must clearly show how the exhibit was handled and stored from the time of seizure to the date it was admitted in court as evidence. The requirement is well articulated in **Maduka and Others V R**, Criminal appeal No 110 of 2007 (Unreported) " where the Court of Appeal held that:

> By "a chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain on 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 appear guilty ... the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it".

(Also see **Malik Hassani Suleiman V S.M.Z** [2005] T.L.R 236 (C.A.T AT Zanzibar) 2004)

Guided by the position articulated in the authorities above, I am of the settled view that the chain of custody was broken as Exh.PE.3 passed from PW2, to PW4 then to PW1 without any documentation. Thus, the trial court erred in acceding weight to this evidence as a material evidence upon which the appellant was convicted.

Considering the burden of proof in criminal case purview of section 111 Evidence Act [Cap 33 R.E 2002] proof beyond reasonable doubt, as it was held in **Moshi d/o Rajabu V Republic** (1967) HCD the court held that the prosecution must prove its case beyond reasonable doubt. Therefore, in the instant case the prosecution failed to prove that the alleged bhangi tendered and admitted as exhibit before the court is the same as the one found in appellants 'possession. Having said that I find no reason to determine the 5th and 6th grounds of appeal as the prosecution failed to prove their case beyond reasonable doubt.

On the bases of the foregoing, I allow the appeal quash the conviction and set aside the sentence inflicted on the appellant by the the District Court of Kinondoni. I further order that the appellants be released from custody with immediate effect unless they are otherwise held for a lawful cause.

DATED at DAR ES SALAAM this 4th day of December 2019.

J.L. MASABO

JUDGE