

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

ECONOMIC APPEAL NO. 154 OF 2019

*(Arising from Resident Magistrate's Court of Mbeya at Mbeya in
Economic No. 15 of 2017)*

**DAUDI ALLY KAMWELA.....APPLICANT
VERSUS
THE REPUBLIC.....RESPONDENT**

JUDGMENT

Date of last Order: 09/04/2020

Date of Judgment: 28/05/2020

NDUNGURU, J.

Daudi Ally Kamwela, the appellant was arraigned before the Resident Magistrate Court of Mbeya facing three counts, namely being in possession of Narcotic drugs, contrary to Section 17 (1) (a) and (2), trafficking in Narcotic drugs contrary to Section 15 (1) (b) and cultivation of Narcotic Drugs contrary to Section 11 (1) (a) both of the Drug Control and Enforcement Act, No. 5 of 2015. The prosecution alleges that the accused on 13th day of June, 2017 at Ipinda Village within the District and Region of Mbeya was found in possession of between 2.4 and 3.0 k.gs of Narcotic

drugs to wit cannabis sativa. The prosecution also alleges that the accused on the same date was found cultivating 2.4 k.g. of the same drug commonly known as cannabis sativa.

Having denied the charge, the appellant was fully tried. In the end, the appellant was convicted in all counts under Sections 15 (1) (b), 11 (1) (a) and 17 (1) (a) & (2) of Act No. 5 of 2015 and was sentenced to serve five years for the first and the second count, while in the third count, he was sentenced to serve thirty years in jail term concurrently. Undaunted, the appellant marshaled his appeal in this court.

Brief facts of the case from the prosecution side can be recapped as follows. ASP Majura Kyariga PW1, received an information from a whistleblower that there are people who used to cultivate and sell bhangì at Ipinda Village within Chunya Road. With the company of 27 police, they stormed into such village looking for one suspect called Ally Joseph. Since they did not know such suspect, the village chairman led them to where the suspect was. According to PW1, the said suspect admitted to have stockpiled bangì in his house but denied to own it, instead he mentioned his own son Dauli Ally Joseph Kamwela as the owner.

The appellant was not there when the police were conducting searching at his father's compound. The search warrant was filled, signed

by witnesses to mean Ally, Raphael and other. The same was admitted as Exhibit PE7. The record reveals further that on the same date, the suspect and other witnesses together with the police went to the appellants farm only to find him cultivating 670 bhanghi plants. PW1 informed the court that he admitted to cultivate the said bhanghi to generate income. The said bhanghi was taken to the Chief Government Office for confirmation. PW1 who appears to be the Chemist from the office of the Chief Government Office informed the court that on 29/06/2017 he received an exhibit from OCCID Mbeya, which is equivalent to 16 days after the arrest of the appellant. After examining the dry leaves, he discovered that the leaves were actually bhanghi. He prepared the report and remitted back the said contents to OCCID. The village chairman (PW3) was also called to give evidence. In his testimony, he informed the court that as the village chairman, he led the police to the house of Mzee Ally where they found bhanghi in a sulphate bag. He added that Mzee Ally, the appellant's father led the police where the appellant used to cultivate bhanghi and they found 670 plants which were all set in fire.

In his defence, the appellant denied the allegations and told the trial court that he was not found with bhanghi. He further informed the trial court that he was stopped by three police vehicles when he was from work as a laborer at a Reserve Farm. He insisted that he never admitted to have

been found in possession of the alleged bhanghi instead, he signed the paper for fearing to be hanged. The appellant also denied to have been searched by the police. The appellant also submitted at the trial court that he was kept in remand for two months and subsequently, he was sent to court. As shown earlier, the appellant was convicted and sentenced as such.

Before this court, the appellant has twelve grounds of appeal which I have conveniently paraphrased as follows:

- (i) *That the appellant was convicted while the prosecution failed to establish the charge in both counts.*
- (ii) *That it is Ally Kamwela who was searched at his house, and signed the certificate of seizure.*
- (iii) *Since Ally Kamwela was not charged, then the case against the appellant was framed.*
- (iv) *That Ally Kamwela who was found with bhanghi and led the police to the appellant's farm was not called as a witness to support the prosecution case.*
- (v) *That PW2 PW3 and PW4 lied to the court that they uprooted and destroyed 670 cannabis plants.*
- (vi) *That there is no sufficient evidence to prove that the appellant was cultivating bhanghi.*

(vii) There is no proof that the appellant was the owner of the alleged farm that the prosecution alleged to have cultivate bhangi. No title was tendered to prove ownership.

(viii) That the charge against the appellant was not proved to the required standard.

(ix) That the appellant's defense was not considered.

When the appeal was called for hearing, the appellant appeared in person defending for himself, whilst Ms. Ezaveria Makombe learned state attorney appeared for the respondent Republic.

In arguing this appeal, the appellant was very brief and equally to the point. He submitted that he was convicted on the basis of the prosecution evidence and his defense was not considered at all. He further added that there was no evidence to prove that he owns the said farm that bhangi was found. He prayed for the court to consider his grounds of appeal.

In reply, Ms. Zaveria resisted the appeal by supporting the conviction and sentence meted to the appellant. Arguing the 1st and the 13th ground, the learned state attorney submitted that the appellant was charged with three counts. The evidence of PW2, PW3 and PW4 proved the offences the appellant was charged. She added that the appellant has admitted to have cultivated bhangi. The learned state attorney insisted that the weight of

the prosecution evidence was based on oral confession of the appellant. She invited the court to refer the case of **Godfrey Sichiza vs. Republic**, Criminal Appeal No. 176 of 2017 Court of Appeal of Tanzania (unreported).

In the 2nd, 3rd and 11th grounds, the learned state attorney contended that they are baseless. She submitted that the evidence of PW2 PW3 and PW4 proved that the appellant's father house was searched and bhanghi was been found. The evidence also shows that the said appellant's father is the one who led the police to the appellant's farm where the alleged bhanghi was found.

As regards to the 4th and 9th ground, the learned State Attorney supported the evidence of PW2 and PW3 that Ally Kamwele sent them to the appellants farm and was found cultivating bhanghi. She referred to this court the case of **Goodluck Kyando vs. Republic [2006] T.L.R 3679 (Court of Tanzania of Tanzania)** and also **Section 143 of the Evidence Act.**

Submitting on the 5th, 6th and 8th ground, the learned State Attorney stated that the exhibit was sent to the office of the Government Chemistry and the results were proved. She added that the village chairman was among the witness during the search and seizure. On 7th and 10th ground the learned State Attorney submitted that there was no need for sketch map to prove that the appellant was found with cannabis sativa. She also

insisted that not every ownership of land is proved by the certificate of title. Urging on the last ground, the State Attorney avers that PW1 stated the procedures used to examine the exhibit presented to him. The said report was Exhibit P1, P3 and P5 which was admitted without any objection. She therefore prays for the appeal be dismissed.

I have considered the grounds of appeal and the submissions of the parties. I am now posed to decide this appeal. To start with, I find it prudent consider all grounds of appeal raised under the umbrella of two main issues which are neither addressed by the appellant nor by the learned state attorney. The said issues may in turn dispose the whole grounds of appeal.

Whether the contents of Exhibits PE3, PE5, PE7, PE8, PE9, PE10 were read in court? Having gone through page 28 of the typed proceedings, the contents of the cautioned statement was not read to the appellant before the court. The trial Magistrate ignored the appellant's statement that it was not read to him instead he went on to admit the same. This admission prejudiced the appellant because he did not know the contents of the caution statement. The same was made at Exhibit PE5, PE3, PE1, PE8, and PE9. The foregoing omissions make Exhibits PE1, PE3, PE5, PE8 and PE9 to lack evidential value. This was a fatal omission and the Court of Appeal of Tanzania has on various occasions stated so for

example in the case of **Robinson Mwanjisi vs. Republic** [2003], T.L.R 218, **Mbaga Julisu vs. Republic**, Criminal Appeal No. 131 of 2015, **Ramadhan Mboya Mahimbo vs. Republic**, Criminal Appeal No. 325 of 2017 (both unreported). The same stance was taken by the Court of Appeal in the case of **Semen Mgonela Chiwanza vs. The Republic**, Criminal Appeal No. 49 of 2019, Court of Appeal of Tanzania at Dodoma (unreported).

The Court of Appeal has outline conditions before documents are received as evidence in court. This is well stated in the case of **Robinson Mwanjisi and three Others vs. Republic [2003] T.L.R** where it was stated that:

*".....Whenever is intended to introduce a document in evidence, **it should be first cleared for admissions, and be actually admitted, before it can be read out**".*

Basing on the above stated position, in the case at hand, after exhibits PE3, PE5, PE7, PE8, PE9, PE10 were introduced and cleared for admission, the trial court did not complete the third stage to be read out in court so that the contents could be clearly heard by the appellant. As I said earlier, the foregoing omissions make exhibits PE3, PE5, PE7, PE8, PE9, PE10 to have no evidential value and are hereby expunged from the court record.

The second legal issue is on whether the chain of custody was set in motion. I have assertively raised this issue since the case involves the search and the seizure of the alleged narcotic drugs. The appellant denied to have been found with the alleged cannabis sativa commonly known as bhang. Exhibit PE2, PW3 and PW4 was the sulphate bag and the leaves or seeds of bhang. With regards to ground number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 the chronological handling of the alleged bhang from its seizure, storage and until when it was presented to the office of the Chief Government Chemistry is not documented. The pertinent question is whether the tendered exhibits alleges to be substance that is said to be seized from the appellants farm and from his fathers house on 13th day of June, 2017, is the same substance which the office of the Chief Government Chemist (CGC) in Mbeya received for chemical analysis on 29th day of June 2017 and determined the same to be Tetrahydrocannabinol (THC) that destroys central Nervous System Disorders.

Referring to the decision of the Court of Appeal in **Abuhi Omary Abdallah and 3 others vs. Republic**, Criminal Appeal No. 28 of 2010 (unreported) where it was held that there was no cogent evidence which the prosecution presented to prove that 960 pallets which were examined by Government Chemist and proved to be Heroine Hydrochloride were obtained from the appellants.

In our case at hand, the prosecution witnesses specifically PW1, PW2 and PW4 failed to detail the chronological documentation showing how each stage of handling the exhibit was done from seizure, custody, control, transfer, analysis and when the exhibit was presented in court. This is in line with **Police General Orders (PGO) No. 229**, Order 40 which guides the police on how to handle exhibits from seizure to its exhibition as evidence in court. It reads as follows:

".....whenever an exhibit is passed away from the custody of an officer to that of another, the officer who hands over the exhibit must record in the presence of the later officer the name, rank and numbers of the officer to whom he hands over the exhibit and the date and time of the handling over on the back of the exhibit label".

What can be grasped from this Order is that the exhibits concerned must not only be properly handled but also each stage of custody through which the exhibits pass, must be documented. In the case of **Zainabu Nasoro @ Zena vs. Republic**, Criminal Appeal No. 348 of 2015, Court of Appeal of Tanzania at Arusha, quoting with approval the case of **Swahibu Ally Bakari vs. Republic**, Criminal Appeal No. 309 of 2010 (unreported), underscore the importance of the integrity of chain of custody to eliminate the possibilities of the exhibits being tempered with. The Court of Appeal

of Tanzania cited its earlier observation about what a chain of custody is in the often-quoted case of **Paulo Maduka and Others vs. Republic**, Criminal Appeal No. 110 of 207 (unreported) where it was stated that:

*".....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 of custody....is to establish that the alleged evidence is in fact related to the alleged crime, rather than, for instance having been planted to make someone 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."*
[Emphasis mine]

Basing on the court record, the following is a summary of the evidence pertinent to the question of chain of custody of substance which PW1 had confirmed to be cannabis sativa or commonly known as bhangi. When the appellant was arrested, he was taken to the police station together with exhibits seized from him; the case was thereafter filed against him. We are not told who received the exhibit and how it found its way to the office of Government Chemist. PW1 said that he received a letter and the exhibit from OCCID. There is no document to show how the said exhibit was moved from the police front desk to the office of OCCID.

There is no document to prove that all the sequence of events was documented. I do not think the chain of custody falls outside the parameters of the precedents of the cited Court of Appeal of Tanzania cases. The prosecution evidence merely stated that the appellant was found with 670 plants suspected to be bhanghi and the same were destroyed. There is no proof that the said plants were weighed 2.4 k.g. In the light of the doubt crated by the broken chain of custody, the doubt is hereby resolved in favor of the appellant. I will therefore agree with the appellant in ground number 1 till 6 and 8 of his appeal.

In addition to that, the prosecution evidence is marinated with testimonies from both PW2, PW3 and PW4 mentioning Ally Kamwela as the suspect who was being found with the alleged suplhate full of seeds and leaves believed to be cannabis sativa. The said Ally Kamwele was neither been indicted for the same offence with the appellant nor being summoned as a prosecution witness. The prosecution witness did not inform the court on why the said Ally Kamwele was not called or be joined with the appellant as a co accused. Ally Kamwela to me was an important witness who could aid the prosecution side to clear the pertinent doubts. That is whose house in which bhanghi was found. Whether it belonged to the appellant or Ally Kamwela. Who was living in that house; either the appellant or Ally Kamwela, if Ally Kamwela and not the appellant why the

appellant keep bhanghi in the house in which he is not living there in. To my view the prosecution has not linked the appellant with bhanghi which was found in the house in which Ally Kamwela was living. To my view it is also Ally Kamwela who was in a good position to tell the court whether the shamba in which bhanghi was planted belonged to the appellant or not, he was the competent witness to give the description of the farm he being the father of the appellant. This is due to the fact that even the Village Chairman (PW4) did not testify on the ownership of the farm in which bhanghi was grown. In the absence of all that it cannot be taken for granted that the farm belonged to the appellant while at the sametime the appellant denied to had cultivated bhanghi. I will therefore as well agree on ground number 1, 9, 10, 11 and 12 of the appeal.

The appellant in his 13 ground of appeal stated that the trial court did not consider his defense in its judgment. In his submission he has nothing useful to submit on this. I am aware that non consideration of defense evidence is fatal and it vitiates the conviction. There are rampant authorities that includes the case of **Moses Mayanja @ Msoke vs. Republic**, Criminal Appeal No. 56 of 2009 and **Simon Aron vs. Republic** Criminal Appeal. I had an ample time to go through the decision of the trial court and found that, the trial magistrate in his typed decision considered the appellant's defense. This is in line with page 7, 8 and 9 of

the typed trial court decision. I am also alive that non consideration of the defense case is the violation of the right to be heard which is enshrined in the constitution of the United Republic of Tanzania, 1977 under Article 13 (6) (a). It is not true that his defense was not considered. This ground of appeal has no merit. The same applies to ground 7th and 10 of the appeal since sketch map cannot alone prove ownership of land.

Basing on what I have stated hereinabove, I partly find merit in the appellants appeal save for ground No 13. The only option is to quash the conviction and set aside the concurrent sentences of 5 years and 30 years. I therefore order for the immediate release of the appellant from prison unless his continued confinement is related to other lawful cause.

It is so ordered.


D. B. NDUNGURU
JUDGE
28/05/2020

Date: 28/05/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Republic: Ms. Namkambe – State Attorney

B/C: Zena Paul

Mr. Namkambe – State Attorney:

The case is for judgment, we are ready.

Appellant:

I am ready.

Court: Judgment delivered in the presence of Mr. Namkambe State Attorney and the Appellant through Video Conference.


D. B. NDUNGURU
JUDGE
28/05/2020

Right of Appeal explained.