IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 177 OF 2019

(Original Criminal Case No. 172 of 2018 of the District Court of Misungwi)

MAYALA MBITI ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

17th February & 24th February 2020

J. C. TIGANGA, J.

In this Judgment the Appellant Mayala Mbiti stood charged before the District Court of Misungwi with an offence of possession of narcotic drugs contrary to 15 (A) (1) 2 (C) of Drugs Control and Enforcement Act No 05 of 2015 as amended by Act No. 15 of 2017.

It was particularized in the charge sheet that on 3rd day of November, 2018 at about 02.00hrs at Gulumungu village within Misungwi District in Mwanza region the accused person was found in unlawful possession of 2.727 Kg of the Narcotic Drugs Commonly known as Bhang.

After full trial, which involved four prosecution and three defence witnesses the accused person was found guilty and convicted as charged.

Following his conviction he was sentenced to pay fine of Tsh.1,000,000/= (one million) or five years jail imprisonment in the alternative. He was however aggrieved by the conviction and sentence, and decided to appeal to this court. In his petition of Appeal he filed six ground of Appeal as follows;

i) That as per lacking positive proof upon drugs identification and its chain of seizure and custody by documentation into court, the conviction and sentence was wrongly based on the doctrine of recent possession/recovery of the alleged Narcotic drugs, which was predicated on a contrived evidence.

ii) That it is improper and unlawful for the court to rely on expert contents therein exh.P.03 introduced by Pw4 who never made it as the basis of conviction rather the needs to absorb opinion from the real qualifying attesting witness i.e Government analyst remains constant. (sic)

iii) That, no one had ever witnessed the manner appellant's how apprehension was effected, thus presumption upon his being found in unlawful possession of the claimed narcotic drugs Exhibit P.01. was merely a product of illegal planted search triggered by an afterthought ill-motive of the prosecution.

iv) That there is incurable intricacies upon presumption of emergence search as to per Exh.P.02 and the adduced evidence as to who witnessed it thus left the vacuum of doubt upon plantation of the evidence and exhibits in favour of underserved part i.e the prosecution. (sic)

v) That the prosecution evidence itself needs to be scientifically corroborated in the event it ought not to be relied/used as supportive/ corroborative evidence to justify conviction.

vi) That the appellant's strong defence was wrongly discarded into court whereas the prosecution case was/ is too dubious.

He asked the appeal to be allowed and be set free from custody.

When the appeal was called for hearing, the appellant did not add anything on his grounds as contained in the petition of appeal, he adopted his grounds of appeal and asked the court to consider them and decide his appeal.

The respondent republic under the representation of Mr. Castus Ndamugoba learned Senior State Attorney supported the Appeal. In supporting the appeal Mr. Ndamugoba chose to combine and deal with only ground number 1 and 2 of the appeal which deal with the chain of custody of the exhibit P.01 and the competence of the witness who tendered exhibit P.03 which is the report from the government chemist. In such endeavor, he submitted that the chain of custody of the alleged seized bhang was not established. He said the evidence of Pw3 a police officer G.339 D/C Tumaini was that, the accused was searched and found with bhang weighing 2.727kg but he does not say what happened to the seized exhibit. Further to that Pw4 who is also a police officer G3405 D/C Lucas, said that on 15 Sept, 2018 he took a sample of the said narcotic drugs to the office of the Chief Government Chemists for laboratory investigation, but he did not say where he got the said sample from. Further to that even the said government chemist who allegedly examined

the sample was not called to give evidence on how he conducted such investigation of the sample and what was the results, instead the report was tendered by the police officer Pw4 who is not a maker of the report and did not say how did the report came into his custody. He submitted that in his opinion, the competent witness to tender the report was a government chemist who conducted laboratory investigation but that witness was not called to testify and tender the said report. It was on those two grounds that he supported the appeal.

As rightly submitted that in most of the drugs cases, it is important to maintain the chain of custody of the seized drugs, non-maintenance has consequences on the credibility of the evidence and the exhibits itself.

In the case of **Paul Maduka & 4 Others vs Republic,** Crim Appeal No.110 of 2007 chain of custody was defined as follows:

> "------ *by 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 holding that 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 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 to nobody else could have assessed it.*

In law the chain of custody can be proved by both oral evidence and documentary. In the case of **Charo Said Kimilu & Another Vs Republic** (CAT) Criminal appeal No. 111/2015 – Tanga (Unreported) it was held *inter alia* that the chain of custody may be proved by the oral evidence which show that since the arrest and seizure of the said exhibit, the chain has never been broken.

On the second mode of proving the chain of custody which is documentary the authority in the case of **Meshack Abel Vs Republic** Criminal Appeal No. 297/2013 (CAT) Arusha (unreported) gives the principle and provides that the second mode is by tendering documentary exhibits showing how the exhibits has been handled to show how the exhibits has been changing hands from one person to another or has been moving from one office to another.

In this case as correctly submitted by Mr. Castus Ndamugoba, no prosecution witnesses and evidence whether documentary or oral which has demonstrated and proved that the chain of exhibit P.01 has never been broken from the alleged seizure up to when the said exhibit was tendered in court. The evidence shows that the exhibit was found in the possession of the Appellant, but does not show where was it taken thereafter, where was it stored from 3rd November 2018 up to 28th Feb 2019 when the same exhibit was tendered in court. Further to that the said exhibit was allegedly seized and weighed to be 2.727kg and was tendered in court while still with that weight. However, the evidence of Pw4 is to the effect that, on 15th Sept 2018 he took the sample of bhang to the Government chemists, but he did not say how many grams did he take to

that office, and the evidence is silent as to whether the said sample was returned to the place where it was stored before it was tendered in court. The issue remains if real the said sample of exhibit was taken to the government chemists and used for laboratory investigation, how did the exhibit P.01 remained weighing 2.727kg? If that is the case, the credibility and authenticity of the exhibit becomes questionable the fact which create doubt to the prosecution case.

In the case of **Illuminatus Mkoka Vs Republic** [2003] TLR 245 the Court of Appeal emphasized the needs of the trial courts remaining alive to the importance of proper custody of exhibits and requiring proof of in whose custody the exhibits were kept. Also see **Maliki H. Suleiman Vs SMZ** [2005] TLR 236,

In the case of **Abuhi Omary Abdallah & 3 Others Vs Republic** Crim. Appeal No. 28 of 2010 CAT Dar Es Salaam, it was held *inter alia* that

> "*where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts*"

Over and above these nagging doubts, there is yet one aspect which Mr. Ndamugoba has addressed in his submission in support of the appeal, that the witness who tendered exhibits P.03 is not a competent witness to tender it. It is true that the said exhibit a report from the Chief Government Chemist was supposed to be tendered by the expert who examined the said exhibit. Unfortunately this witness was not called to testify and there is no reason as to why he was not called to come and

testify. In law the evidence admitted un-procedurally deserves to be expunged from the record. The exhibit P.03 being tendered by an incompetent witnesses was un-procedurally admitted, it deserves to be expunged. That being the position of the law, the said exhibit is hereby expunged.

Further to that it is also the stand of the law that where an important witness to prove important facts who is within reach and was nc without explanation and who would have proved that important f he been called, the court is entitled to make adverse inference prosecution or a party liable to call him. See. **Aziz Abdallah Vs. R** (1991) T.L.R 71 (CAT)

As earlier on pointed out that the government chemist who examined the exhibit was not called and there is no explanation as to why they did not call him. The only inference adverse which can be made is that probably he did not do the job that is why they did not call him. That said, I find that under these two grounds, the evidence was not strong enough to warrant a conviction, the Appeal is therefore allowed, conviction quashed and sentence set aside. The appellant should be released from custody with immediate effect unless otherwise held for other lawful reasons;

It is so ordered

J. C. Tiganga
Judge
24/02/2020

Right of Appeal explained and guaranteed

J. C. Tiganga

Judge

24/02/2020