IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.77 OF 2019

(Original Nanyumbu District Court Criminal Case No.6/2016 before Hon. G.A. MWAMBAPA-Resident Magistrate)

FADHILI IMANI MAKOROBOI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

19 May & 16 June, 2020

JUDGMENT

DYANSOBERA, J.:

The appellant,Fadhili Imani Makoroboi appeared before Nanyumbu District Court at Nanyumbu on a charge of being found in unlawful possession of prohibited plants, contrary to section 11(1)(d) of the Drugs Control and Enforcement Act, Act No.5 of 2015. It was alleged in the particulars of the offence that on 27th day of January 2018 about 06:45 hours at Kigamboni street Mikangaula village within Nanyumbu District in Mtwara Region, the appellant was found in possession of 250 grams of cannabis sativa plants commonly knows(sic) as Bhangi.The appellant

denied the charge. Nevertheless, he was convicted and sentenced to thirty (30) years term of imprisonment.

In summary, the prosecution case at the trial court was that on 27th January, 2018 at 13:30 hours, Assistant Inspector Lugaila Luitonja(PW1), F. 157 D/Cpl Vicent (PW 7) and other police officers, were tippedthat the appellant was dealing with bhang. They went to the appellant's house and in the presence of the village chairman one Elias Abdi (PW 6) and Hassan Said, the appellant's neighbour, searched the house. In the bedroom, they retrieved bhang wrapped in a black plastic bag kept in the bucket. The item was seized in the presence of the appellant's wife and a certificate of seizure prepared and signed. It was tendered in court and admitted as exhibit P. 1. The black plastic bag in which the said stuff was found was also tendered in court and admitted as exhibit P. 2. According to D 7531 Sgt Ally (PW 5), the bhang weighed 250 grams. PW 5 then, on 9th April, 2018, handed over the bhang to G 4283 DC Mohamed (PW 4) who took it to the Chief Government Chemist for analysis. Gabriel J. Gabriel (PW 3), a Chemist Grade II working with the Chief Government Chemist Laboratory Authority confirmed that the item he received from PW 4 was substance commonly known as cannabis sativa. He prepared a report and signed it.

The same report was counter signed by the Chief Government Chemist. PW 3 tendered the report in court (exhibit P 4). PW2 one G. 6211 DC Azizrecorded the appellant's confessional statement (exhibit P. 3).

After the prosecution side closed their case, the District Court observed that it was of the view that a prima facie case had been established. Thereafter, the record reads:

"Court: s. 231 of CPA is complied with.

Accused: I leave it for the court to read its final decision."

The trial District Court proceeded to compose the judgment which it delivered on 17th April, 2019.

Thus,the District Court heard the evidence from the prosecution witnesses and the appellant was not heardin his defence. At the end of the trial the appellant was found guilty of the offence of being found in unlawful possession of Prohibited plants was accordingly convicted and sentenced to suffer a sentence of thirty (30) years in prison.

Aggrieved, the appellant has appealed to this court, against both conviction and sentence. His dissatisfactionwith the decision of the District Court is expressed in the following grounds of appeal:

1. That the learned trial magistrate fundamentally erred in law by failing to adhere to the legal prerequisites of a judgment, and as a result it is not a judgment properly so called since, among other defects, it did not specify the offence and the section of the law under which the appellant was convicted as stipulated under the Criminal Procedure Act [CAP. 20 R.E. 2002].
2. That the trial magistrate incurably erred in law and facts by relying on the alleged search which was illegal since it was conducted in contravention of the law.Also those who did the alleged search were incompetent persons to performs such a search as they had no authority to do so under section 38(1) of the Criminal Procedure Act [CAP. 20 R.E.2002].No reasons are reflected in the judgment or in evidence to show why the search warrant was issued nor signed by the appellant.
3. That the trial magistrate fatally erred in law and fact by convicting the appellant while the prosecution did not prove their case to the standards required by the law.
4. That there are material inconstancies and contradictions in the testimonies of the prosecution witnesses which goes to the roots

of the case and as a result the case was not sufficiently proved against the appellant.

5. That the prosecution failed to establish an unbroken chain of custody and since the same was broken there was a possibility of fraudulent interference at every stage of chain of custody.PW4 claimed he was instructed to take specimen to chief government chemist on 10/4/2018 it contracts with testimony of PW5 who claimed that the sample of the alleged bhang was given to PW4 on 09/04/2018.PW1 claim that the alleged bhang was found during the search and it was unearhed from the bucket which was covered by peas[mbaazi] while PW6 who claimed to be present during the alleged search claimed that the appellant took one pallet of bhang from his packet and then went to show another bhang which were kept in a bucket while PW1 in his testimony did not mention if PW6 was present during the alleged search.
6. That the trial magistrate grossly erred in law by shifting the burden of proof to the appellant.

7. That there are material contradiction in the testimonies of prosecution witnesses regarding the date and time when the alleged specimen was taken from exhibits room by PW4 and given to PW5 for transporting the same to Government Chemist's laboratory. This contradiction and inconsistence is particularly on PW4 against PW5 whereas the same raises serious doubts regarding the chain of custody and effects the credibility of these two witnesses.

At the hearing of the appeal on 19th May, 2020 the appellant appeared in person and unrepresented whereas, the respondent Republic enjoyed the services of Mr. Paul Kimweri, learned Senior State Attorney.

When invited to argue his appeal, the told this court that he had nothing useful to add to his seven filed grounds of appeal.

Responding to the grounds of appeal, Mr. Paul Kimweri, supported the appeal in part. He submitted that grounds 2nd to 7threlate to the merits of the appeal and that the 1st ground of appeal is the cornerstone of the whole appeal and that the Republic was in support of it. He contended that as the appellant correctly argued in his first ground of appeal, the trial court, in convicting him, failed to abide by the mandatory legal

requirements stipulated under section 312 of the Criminal Procedure Act which requires that in case of conviction, the judgment must specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted and the punishment to which, he is sentenced. Learned Senior State Attorney pointed out that the law is couched in mandatory terms and the non-compliance renders the judgment a nullity. This court was referred to page 4 of the typed judgment and argued that it does not show under which law the appellant was convicted and sentenced. He was of the opinion that there is no judgment upon which the conviction and sentence could be validly grounded. He, however, thought that the anomaly is attributable to neither the prosecution nor the appellant but to the Court. Relying on the case of **21st Century Food and Package Ltd. versus Tanzania Sugar Producers Association and 2 others**, [2005] TLR 1 on the authority that where the court has failed to discharge its legal duty, it is the court which is to blame and not the parties. Learned Senior State Attorney suggested that in view of the fact the trial court failed to discharge its legal duty, the remedy is to return the record back to the trial court with directions to re-construct or compose a fresh and proper judgment which

has to be read over to the appellant who would then appeal on merit. He said that this avenue is not novel to this court as the same was employed in the case of **Yusuph Hassan Ndembo v. R**, Criminal Appeal No. 39 of 2019. He rested his submission by arguing that this ground suffices to dispose the whole appeal.

In his rejoinder the appellant prayed the court to set him free.

With unfeigned respect to Mr. Paul Kimweri, learned Senior State Attorney, I agree. A careful perusal of the trial court's record reveals that the mandatory provisions of section 312 of the Criminal Procedure Act were not complied with by the trial court. The law relating to the conviction and sentencing a person found guilty on a criminal offence is clear.

As far as this case is concerned, the conviction and sentence would have been legally sound and sustainable if the trial court complied with the provisions as hereunder stated:-

"*235 (1):*

The court, having heard the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law"

312 (2):

In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced".

These two sections are couched in a mandatory terms which needs no further elaboration or interpolation. In the instant case, page 4 of the typed judgment of the trial court supports the appellant's complaint in his first ground of appeal and the learned Senior State Attorney's concern on the violation of the mandatory provisions of law. For clarity and easy of reference, I quote the last paragraph of page 4 of the typed judgment as follows:

"Having all boxes ticking, this court find (sic) the accused guilty and is convicting (sic) to the offence charged."

It is my firm view that there was no proper conviction according to section 312(2) of the Criminal Procedure Act as the necessary prerequisites were not indicated. The compliance with these mandatory provisions has been emphasized in various cases. For instance, in the case of **George**

Patrick Mawe& 4 others Versus Republic, Criminal Appeal No. 203 of 2011 (unreported) at page 4 the Court of Appeal observed:-

> *"In the case of conviction the judgment shall specify the offence of which and the section of the Penal Code or other law/the accused person is convicted and the punishment to which he is sentenced".*

The effects of the failure to observe the mandatory provisions of the laws and hence not properly convicting the accused are that the failure becomes fatal and an incurable irregularity, which renders the purported judgment and imposed sentence a nullity. A case in point is that of **Hassan Mwambanga v. R.** Criminal Appeal No. 410 of 2013 (unreported) where the Court of Appeal held that:

> *"It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".*

In view of the above irregularity where the mandatory provisions of the law are side stepped or contravened, the judgment is invalid and cannot be sustained and I so hold.

A further perusal has revealed another disturbing feature in the conduct of this case by the trial court which, in my view, occasioned miscarriage of justice and cannot be curable under section 388 of the Criminal Procedure Act. As indicated hereinabove, after the close of the prosecution case, the appellant did not enter his defence. He is recorded to have just said "I leave it for the court to read its decision". This is reflected at page 24 of the typed proceedings of the trial court. Although the trial court recorded to have complied with section 231 of the CPA, I am in no doubt that the law was not fully complied with. Section 231 (1) and (2) of the Criminal Procedure Act on defence of the accused is clear in its terms and provides as follows:-

"231

(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in

relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the ***court shall*** *again explain the substance of the charge to the accused and inform him of his right–*

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

(2) Notwithstanding that an accused person elects to giveevidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution.

(3) If the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well

as the prosecution shall be permitted to comment on the failureby the accused to give evidence.

(4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or takeother steps to compel attendance of such witnesses."

The record of the trial court shows that after the close of the evidence in support of the charge it appeared to the trial court that a case was made out against the appellant sufficiently to require him to make a defence and was liable to be convicted, the trial court failed to again explain to the appellant the substance of the charge. It failed to inform him of his rights he deserved under paragraphs (a) and (b) of sub-section (1) of section 231 of the Criminal Procedure Act. As if that was not enough, the same trial court also did not ask the appellant if he intended to exercise any of those rights. And worse still, the appellant's answer was not recorded and he was

even not called to enter his defence as per the law requires but was, instead, convicted and sentenced to thirty years term of imprisonment.

Since the trial magistrate convicted the accused person without according him the right to be heard, this definitely, vitiatedthe whole proceedings. In the case of **Abbas Sherally and Another vs Abdul S.H.M Fazalboy,** Civil Application No.33 of 2002(unreported) the Court did not hesitate to hold that:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because violation is considered to be a breach of natural justice.".

Since the law was not complied and there was a breach of natural justice, the judgment was a nullity and I so find.

Consequently and for the reasons I have explained, I allow the appeal by nullifying all the proceedings from when the trial court made a finding that the appellant had a case to answer. I quash the conviction and set aside the sentence imposed by the appellant.

I order the record to be remanded back to the trial court so that thetrial court considers if, at the close the evidence in support of the charge, a case was made against the appellant and proceed according to the provisions of section 231 (1) (a) and (b) and 235 (1) and 312 (2) of the Criminal Procedure Act [Cap. 20 R.E.2002, now 2019].

The trial court to act expeditiously and complete the proceedings within forty five (45) days from to-date.

Meanwhile, the accused is remanded pending being summoned by the trial court in compliance with the directions of this court. In case of conviction, the sentence to start running from the previous incarceration.

Order accordingly.

W.P. Dyansobera
JUDGE
16.6.2020

This judgment is delivered under my hand and the seal of this Court on this 16th day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney and the appellant (virtually present in court).

Rights of appeal explained.

W.P. Dyansobera
JUDGE