IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 66 OF 2019

(C/F Criminal Case No. 104 of 2018 in the District Court of Mwanga at Mwanga)

WILSON RAMADHAN MAGOME ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

13th July & 24th August, 2020

JUDGMENT

MKAPA, J;

In the District Court of Mwanga at Mwanga, (the trial court) Wilson Ramadhani Magome the appellant, was charged with the offence of unlawful possession of narcotic drugs with two counts contrary to sections 11 (1) (d) and 17 (1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015.

After a full trial the appellant was found guilty, convicted and sentenced to serve five years imprisonment for the 1st count and pay a fine of Tshs. 500,000/= or three years imprisonment in default of fine for the 2nd count. Dissatisfied with the conviction and sentence the appellant lodged this appeal advancing five grounds that;-

1. The trial magistrate erred in law and fact in convicting the appellant despite of the insufficient evidence and reasonable doubts.
2. The trial magistrate erred in law and fact in relying on the prosecution evidence which was in variance with the charged offence of being found possession and transportation of "bhang"
3. The trial magistrate erred in convicting the appellant solely on the evidence of police officers while the incident occurred during the day and witnessed by other eye witnesses.
4. The trial magistrate erred in law and in fact in holding that the appellant was found in possession of narcotic drug without Government Chemistry Certification.
5. The trial magistrate grossly erred in admitting exhibit P4 which was read over before the court prior to tendering the same which is contrary to the law.

At the hearing of the appeal the appellant appeared in person unrepresented while the respondent was represented by Ms. Grace Kabu learned State Attorney. By consent the Court ordered the appeal be argued by filing written submissions.

Arguing in support of the 1st ground, the appellant submitted that, the trial Magistrate erred in convicting him basing on

insufficient evidence coupled with reasonable doubts. On the 2nd ground, the appellant contended that the trial magistrate erred in holding that the conviction was based on reliable prosecution evidence while the evidence adduced had variances to the effect that, at the trial court it was alleged that the appellant was found with unlawful possession and transportation of 1750 grams of cannabis sativa commonly known as "bhang" and 50 gram of narcotic drugs known as "Mirungi" while witnesses testimonies were to the effect that the appellant was riding a motorbike heading to Langata when he was stopped and found with the alleged drugs. It was appellant's further contention that the motorbike was never exhibited before the court. Furthering his argument the appellant challenged the trial court the fact that while the minimum sentence of the charged offence under section 11 (i) (d) of Drugs and Enforcement Act is thirty years, upon conviction he was sentenced to 5 years imprisonment only and the respondent never objected such sentence.

Regarding the 3rd ground, the appellant submitted that despite the fact that the incident had occurred during the daytime at 13:00 hours and witnessed by the public including some villagers the prosecution did not summon any of them as witnesses. This raised some doubts which the trial court ought to have addressed and give the appellant the benefit of doubt.

The appellant submitted in respect of the 4th ground the fact that, PGO 229 (28) requires that drugs alleged to have been seized by the police should be submitted to the Chief Government Chemist for analysis and report, but the appellant contended that no such report from the Government Chemist was tendered to prove the substances seized were prohibited drugs, instead the prosecution relied on police experience. To support his argument the appellant cited the decision in the case of **Charo Said Kimilu and Anor V, The Republic, Cr. Appeal No. 111 of 2015** where the Court of Appeal held that, the expert in determining the weight of cannabis sativa is the Chief Government Chemist's report not the police.

It was appellant's further submissions that, in the case of **Robinson Mwanjisi and 3 Others V R**, Court of Appeal disapproved the tendency by the court of reading documents in court before admission. The appellant explained further that at the trial court the statement was read before the court prior to its admission and despite the objection he raised, the trial magistrate proceeded in admitting without inquiry. Furthermore, the alleged drugs were taken as sample to the trial magistrate, an inventory was filed, and the drugs were destroyed. However neither the trial magistrate nor the appellant did witness the incident. He finally prayed for this court to allow the appeal, quash the conviction and sentence.

In reply Ms. Kabu supported the appeal in particular the submission relating to the 4th ground which challenges appellant's conviction in the absence of the Chief Government Chemist Certificate. Supporting the appeal Ms. Kabu cited the decision in the case of **Charo Said Kimilo and Another V R** (*supra)* at page 14 where the court underscored the fact that narcotic drugs or psychotropic substances should be submitted to the Government Chemist Laboratory Agency for weighing and analysis before tendering as evidence in court. There was no rejoinder.

Having considered both parties submission the only issue for consideration is whether the prosecution has proved its case against the appellant to ground conviction.

It is plain clear from both parties submission the fact that, the alleged narcotic drugs which were seized from the appellant were not submitted for analysis and subsequent report of the Chief Government Chemist as required under section 48A of the **Drugs Control and Enforcement (Amendment) Act, 2007** which requires the seized substance suspected to be narcotic drug to be submitted to the Government Analyst for analysis. The provision reads as follows;

> *"(1) The Government Analyst to whom a sample of any narcotic drugs, psychotropic substance, precursor*

chemicals, controlled or any other substance suspected to have drug related effect has been submitted for test shall deliver to the person submitting it, a signed report in quadruplicate in the prescribed form and forward one copy thereof to such authority as may be prescribed.

(2)Notwithstanding anything contained in any other law for the time being in force, any document purporting to be ***report signed by the Government Analyst shall be admissible as evidence*** *of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive."*

This legal requirement was underscored in **Mwinyi Bin Zaid Mnyagatwa V Republic** [1960] EA 218 (HCZ) to the effect that, "*the prosecution in the offences related to narcotic drugs has a duty to submit expert analysis which is* ***mandatory as its result is final, conclusive*** *and it provides check and balances that* ***warrants convicting.*** [Emphasis supplied]

From the foregoing, in the present case, it is established that the prosecution did not comply with the mandatory requirement of section 48 A of the Drugs Control and Enforcement

(Amendment) Act, 2007, thus failed to prove its case beyond reasonable doubt against the appellant.

From the reasons discussed above, I have no hesitation to come to a conclusion that the present appeal has merit and the 4th ground of appeal alone suffices to dispose of the appeal more so, I feel that it is not necessary to dwell on discussing the remaining grounds. Consequently, I allow the appeal by quashing the conviction and setting aside the sentence. I further order the appellant to be released from custody unless lawful held for other reasons.

It is so ordered.

Dated and delivered at Moshi this 24th day of August, 2020.

S.B. MKAPA

JUDGE

24/08/2020