

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**(APPELLATE JURISDICTION)**

**RM. CRIMINAL APPEAL No.11 OF 2020**

**(Originating from Resident Magistrate Court Njombe**

**in Criminal Case No.96 of 2019)**

**ABASI KASSIAN KILIPASI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*4/9 & 25/9/2020*

**JUDGMENT**

**MATOGOLO, J.**

The appellant one Abasi Kassiani Kilipasi was arraigned in the Resident Magistrate Court of Njombe with an offence of Unlawful Trafficking of Narcotic Drugs contrary to Section 15A (1) and (2), (C) of Drugs Control and Enforcement Act (Amendment) No. 15 of 2017. It was alleged in the particulars of offence that, on 23<sup>rd</sup> day of May 2019 at Mtulingala village Makambako within the District and Region of Njombe the appellant was found in possession of Narcotic Drugs to wit 4.26 kilograms of Cannabis Sativa without any permit. He pleaded not guilty to

the charge. He was tried and was found guilty. He was convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved with both conviction and sentence, he has come to this court with a petition of appeal of five grounds as follows;

1. That , the learned Magistrate erred in point of law and fact in convicting the appellant while the available evidence failed to establish the case against the appellant beyond all reasonable doubt.
2. That, the learned Magistrate erred in law and fact by admitting the evidence of prosecution witnesses without regarding the evidence of alibi given by the Appellant.
3. That, the learned Magistrate erred in law and fact by admitting the cautioned statement of the Appellant which was conducted under threats and fear as the appellant was tortured during the time of interrogating as well as when PW1 was conducting the cautioned statement.
4. That, the Hon. Magistrate erred in admitting and acting on cautioned and confession of the appellant that was retracted and no case within a case was conducted by the trial magistrate.
5. That, there was no proof of possession and the intention to traffic as the element of the offence was not proved.

At the hearing the appellant appeared in person (unrepresented). Ms. Kasana Maziku learned Senior State Attorney appeared for the respondent Republic. The appellant adopted his grounds of appeal and he added one ground that, he is not a resident of Mtulingala but he is living at Ihowanga village in Mufindi District.

He submitted that he was invaded by the Police Officer at Ihowanga village, they broke the door saying they were looking for bhang. He responded that he had no bhang. They beaten up him until he became unconscious.

He gained conscious while he was at Makambako police station the second day. Then he was charged with unlawful possession of narcotic drugs. He prayed to this court to consider his grounds of appeal.

On her part Ms. Kasana Maziku learned Senior State Attorney supported the conviction and sentence against the appellant. She responded to each ground of appeal.

With regard to the first ground of appeal, she submitted that there is sufficient evidence by PW2 as shown at page 15 to 16 of the trial court proceedings that they went to the appellant's house after being informed that he is dealing with narcotic drugs. They arrested him who led them to the shamba where they found ten plants of cannabis sativa.

Ms. Kasana submitted further that, PW1 recorded appellant's cautioned statement on 24<sup>th</sup> May 2019 at 7:00 am although the appellant

was arrested the same day at 12:40 am the cautioned statement was recorded within time and was admitted in court without objection.

She went on submitting that PW4 the appellant's village chairman witnessed the search at the appellant's house and the appellant was found possessing 10 plants of bhang. The certificate of seizure was prepared after the appellant found possessing bhang which was admitted as exhibit "P4".

She also said, there is evidence by PW3 that the bhang was sent to the Government Chemist and a report was issued which was tendered in court and admitted as exhibit "P4". She argued that although the Government chemist who prepared a report did not testify but in his cautioned statement appellant admitted to be found with bhang thus the charge was proved against him beyond reasonable doubt.

Regarding the second ground of appeal, Ms. Kasana submitted that she did not see the defence of alibi, although the appellant said he was not living at Mtulingala village but there are witnesses who testified that the appellant was arrested at Mtulingala village having the bhang, she was of the considered opinion that his defence that he is living at Mufindi is an afterthought.

With regard to the third ground of appeal that, the trial court magistrate erred to admit the cautioned statement which was admitted by torture, Ms. Kasana submitted that the appellant did not object for the cautioned statement to be admitted. He agreed for the statement to be

admitted in court, had the appellant being tortured, he would have disclosed that at the time the statement was sought to be tendered in court.

As to ground No 4 for the trial court acting on the cautioned statement without inquiry after he has repudiated the statement, she submitted that there is no evidence on record to show that the appellant repudiated the statement because he did not even raise objection for it to be admitted in court.

With regard to the fifth ground of appeal that there was no proof of intention to traffic the narcotic drug, Ms. Kasana submitted that the appellant was charged with unlawfully trafficking in narcotic drug contrary to section 15A(1) and (2)(c) of the narcotic drug Act, No.15 of 2017 as amended. Section 3(g) defines the word trafficking.

She said, trafficking include possession. The appellant was found possessing ten plants of bhang thus the act fall within the definition of trafficking. She went on submitting that, the prosecution witnesses gave evidence to prove possession of bhang by the appellant, she said this ground lack merit.

With regard to the additional ground, she submitted that, the allegation that the appellant is not living at Mtulingala is a mere afterthought as there is evidence of PW4 that the appellant is a resident of Mtulingala village. She argued further that, while PW2 testifying that, he arrested the appellant at Mtulingala he did not even cross-examine him on

the place he was living and where he was arrested. This featured only in his defence. She argued that, failure to cross-examine PW2 shows that he admitted to what PW2 told the court, like wise for PW4, what the appellant stated in his defence is an afterthought. She thus prayed for this appeal to be dismissed.

In a short rejoinder, the appellant submitted that, he has heard what the State Attorney has said. And he re-emphasized that he has never lived at Mtulingala, he insisted for his appeal to be considered.

Having heard the respective submissions by the parties, and read the grounds of appeal and having gone through the trial court records, the only issue for determination is whether this appeal has merit.

The appellant's complaint in the first ground of appeal that the trial court erred to convict him while the evidence did not prove the offence is baseless because the trial court proceedings reveals that there is an ample evidence to prove the offence against the appellant. PW1, at page 13 to 14 of the typed proceedings testified that she recorded the accused cautioned statement and the appellant admitted to have found possessing bhang. The said cautioned statement was admitted into evidence without objection.

Apart from that, there is evidence of PW2 that they were making patrol at Mtulingala village Makambako, and they were informed that the appellant is involving himself in selling and planting Cannabis Sativa (bhangi), they arrest the appellant after found bhang in the kitchen and

after he has admitted to cultivate the said bhang and went to show them the farm where bhang was cultivated. They uprooted the same and took it to the police. The evidence of PW2 is corroborated with the evidence of PW3 who sent the said bhang to the Government Chemist Laboratory for analysis. He tendered in court the report (exhibit P.4) which shows that the leaves weighing 4.26 kilograms were Tetrahydrocannabinol which causes drug dependence. The evidence of the prosecution side was strong and established the case against the appellant beyond reasonable doubt. Ground No.1 is baseless and is dismissed.

With regard to the second ground of appeal on failure to consider appellant's defence of alibi, I have carefully read the judgment of the trial court. The trial court considered the appellant's defense of alibi, but accorded no weight to it on the ground that appellant did not give prior notice of his intention to rely on such defence of alibi as required under section 194(4) of the Criminal Procedure Act (Cap. 20 R.E. 2019) which provides:-

*"Where an accused person intends to rely upon an alibi in his defence, he shall give to the Court and Prosecution notice of his intention to rely on such defense before the hearing of the case"*

In the instant case the trial court did not give weight to the appellant's defense of alibi because he did not give the requisite notice

under section 194(4) of the Criminal Procedure Act, as it was held in the case of ***Masudi Amlima versus Republic [1989] TLR***, where the court held:-

*"The appellant's defence of alibi was properly rejected. He did not give the notice required under section 194(4) of the Criminal Procedure Act".*

It is my considered opinion that, the act of the appellant to raise the defense of alibi during the trial is an afterthought and the trial magistrate was right to reject the appellant's defense of alibi. The same position was taken in the case of ***Kibale versus Uganda[1999]1 EA 148*** in which it was held:-

*"A genuine alibi is, of course, expected to be revealed to the police investigating the case or to the prosecution before trial. Only when it is so done can the police or the prosecution have the opportunity to verify the alibi. An alibi set up for the first time at the trial of the accused is more likely to be an afterthought than genuine one"*

Thus ground No. 2 lack merit.

The third ground of appeal also has no merit because the cautioned statement under attack was admitted in evidence without any objection by



the appellant, nor did he cross-examine the witness who tendered the same. His failure to cross-examine the witness who recorded and tendered the cautioned statement in the court, implies that the appellant accepted to what the witness told the court as it was held in the case of ***Nyerere Nyague versus The Republic***, Criminal Appeal No. 67 of 2010 (unreported) where at page 5 the Court of Appeal held:-

*“As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said”*

In the instant case the trial court proceedings reveal that when the said cautioned statement was tendered in court, the appellant did not object nor did he cross- examine the witness who tendered the same, for that reason this court as an appellate court cannot allow matters not taken or pleaded and decided in the court below to be raised on appeal. (See the case of ***Kennedy Owino Onyango and Others versus Republic*** Criminal Appeal No.48 of 2006). This ground also fails the same is dismissed.

Regarding ground No.4 that the trial court erred in acting on cautioned statement without inquiry after he has repudiated, upon going through the trial court proceedings I did not see anywhere revealed that the appellant repudiated the cautioned statement, rather than showing

that he did not object to its production and it was admitted as exhibit "P1". As the same was admitted without being objected the trial court could not hold an inquiry *suo motu*, as its voluntariness was not contested. The same position was taken in the case of **Stephen Jason** Criminal Appeal No. 79 of 1999 (unreported). The trial court was correct to act on the cautioned statement as the same was not repudiated or retracted. It was taken as appellant's confession. This ground also lacks merit.

As to the fifth ground of appeal that, there was no proof of possession and the intention to traffic as the element of the offence was not proved. Looking at the evidence of prosecution side there is no doubt that, the offence against the appellant was proved beyond reasonable doubt. PW1 informed the trial court that when she interrogated the appellant he admitted to be found possessing bhanghi and the cautioned statement was admitted without objection. Confession by the appellant in his cautioned statement which was made voluntarily is an admission of the offence such that the prosecution has no reason to labour to prove mens rea. After all in offences of this nature what matters is possession. If this is proved then the burden shifts to the accused to prove that his possession of the narcotic drug was lawful one as provided under section 28(1) of the Drug Control and Enforcement Act, and he may only do so by showing that the possession is with permit from relevant authorities. But appellant did not do so.

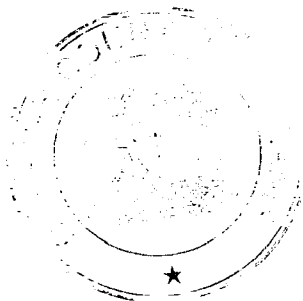
It is my considered opinion that, the prosecution side managed to prove possession and intention of trafficking of the said bhanghi, as he was

aware of their presence and he exercised control of the same. This ground is baseless.

With regard to the additional ground that appellant is not living at Mtulingala village but he is a resident of Ihowanga village, this ground in my considered view is baseless. I agree with what was submitted by Ms. Kasana learned Senior State Attorney that it is an afterthought, as the appellant failed even to cross-examine PW2 who testified that he arrested the appellant at Mtulingala village. Failure to cross-examine PW2 signifies that he accepted that he is a resident of Mtulingala village. Not only that, PW4 the village Chairman of Mtulingala village testified that the appellant is a resident of Mtulingala village, this shows that the appellant is a resident of Mtulingala village. This ground is disregarded.

Having explained as herein above and on the basis of the authorities cited, it is my considered opinion that this appeal lack merit the same is dismissed in its entirety.

**DATED at IRINGA** this 25<sup>th</sup> day of September, 2020.



  
**F.N. MATOGOLO**

**JUDGE**

**25/9/2020.**

Date: 25/09/2020  
Coram: Hon. F. N. Matogolo – Judge  
Appellant: Present  
Respondent: Veneranda Masai-SA  
C/C: Charles

**Ms. Veneranda Masai – State Attorney:**

My Lord I am appearing for the Respondent Republic. The matter is for judgment.

**COURT:**

Judgment delivered.



*F. N. Matogolo*  
**F. N. MATOGOLO**  
**JUDGE**  
**25/09/2020**