

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 116 OF 2020

(Original Criminal Case No. 172 of 2019 of the District Court of Kwimba District at Ngudu)

ISAYA S/O ERNEST..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

REASONS FOR THE JUDGMENT

30/09 & 13/10/2020

RUMANYIKA, J.:

When the appeal against conviction and fine of shs. 500,000/= or in default a custodial sentence of four (4) years dated 31/10/2019 was called on for hearing on 30/09/2020, Mr. Victor Kalumuna learned stated attorney for the respondent Republic readily supported it for three (3) reasons; **(1)** that the prosecution witnesses all were policemen and no independent witnesses appeared to support the latter's case **(2)** that it was not even established and proved who owned the house from which the alleged local liquor was found and recovered **(3)** that upon admitting it in evidence and it formed part of the conviction, the alleged appellant's cautioned statement was contrary to the law not read out in court. That's it.

The seemingly layman and typical poor peasant it appears from peripheral villages basically he submitted: **(i)** that no scientific and laboratory examination proved the substance to be "gongo" **(ii)** that the prosecution case was not proved beyond reasonable doubts, that if anything the court over relied on co-accused's evidence **(iii)** that the learned trial resident magistrate improperly evaluated the evidence.

May I from the outset make it clear that according to records the first three culprits were in the middle convicted on their pleas of guilty unless the context otherwise required, this judgment concerns only the applicant.

I allowed the appeal and reserved reasons therefor. Here are the reason:

A brief account of the evidence on record reads thus:-

Pw1 G.4518 DC Hemed stated that as he was (probably on duty) on 07/08/2019 at about 19.00 hours at work, 4 people were produced to him with some "gongo" and he recorded the latters' cautioned statements (Exhibits PE1, PE2, PE3 and PE4) respectively.

Pw2 F.8850 DC Leonard stated that as he was, together with fellows on 07/08/2019 at about 11.30 accordingly informed, they stormed into home and searched the 1st accused where they found all the four drunk and in possession of 52 litres of gongo together with copy of the material certificate of seizure they were admitted as Exhibits PE5 and PE6 respectively.

Pw3 H.2311 DC Erungu stated that on 07/08/2019 at about 16.30 hours, but in ordinary course of business and patrol they arrested the excessively drunk 4 accused drinking gongo with 52 litres of it with them. That is all.

The appellant denied the charges and stated that if anything, following the search he was only found in possession of shs. 200,000/= cash. Only having been arrested and thrown into the police car to see the alleged gongo therein. That is all.

It appears now beyond reasonable doubts convinced, the learned trial resident magistrate is on record in his own words saying:-

"...Apart from the 4th accused all the three other accused admitted in their defence that they were drinking gongo on the day they got arrested ... since they were found drinking and they admit it and exhibits PE1, PE2 and PE3 show that too 52 litres of gongo were there, there is no doubts were in possession of it ... 1st, 2nd and 3rd accused confirmed that they were with the 4th accused at the scene of crime ... Though the confession of three accused does not operate as evidence against the 4th accused this does not negate the fact that he was at the scene of the crime with traditional liquor @ gongo ...The question would be why would police officers arrest an innocent ... person... unless police officer had any bad motive towards the 4th accused his defence is not convincing ... "

From the above quotation therefore I entertain no doubts that the house (the scene of crime) it may had not been proved that it belonged to the appellant yes, but; **(1)** unlike others in all aspects the appellant denied the charges throughout **(2)** the learned trial resident magistrate recognized dangers of basing a conviction on evidence of co-accused but for his paradigm u-turn **(3)** in the end, but with greatest respect wrongly, the learned trial resident magistrate shifted burden of proof to the appellant. However weak the defence case might be, it didn't count but the prosecution's proof beyond reasonable doubts. The other accused may have, at the defence stage admitted the charges yes, but the learned trial resident magistrate simply entered a blanket conviction.


Moreover, without prejudice to the foregoing discussion, and that is also the reason why I allowed the appeal upright, having had common interest in the matter, evidence by the three policemen should have been corroborated by evidence of equally competent but independent witnesses much as I am also aware of the legal principle that in order for the court of law to ground a conviction, it is not quantity but quality of evidence that counted leave alone upon admitting it in evidence, the trial court's omission to read out in court the 4 cautioned statements for the accused. In deed the prosecution case was not beyond reasonable doubts proved. It is for the above stated reasons that I allowed the appeal and set the appellant at liberty on 30/09/2020.



S. M. RUMANYIKA
JUDGE
04/10/2020

The reasons are delivered in chambers this 13th October, 2020 in the presence of Ms. Subira state attorney and in the absence of the Appellant who was set free on 30/09/2020.




J. M. KARAYEMAHA
DEPUTY REGISTRAR

13/10/2020