THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO 2 OF 2019

(Arising from Criminal Case No. 4 of 2018 of Nanyumbu District Court at Mangaka)

BAKARI MUSSA MERE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Hearing date on: 17/2/2020

Judgment date on: 02/3/2020

NGWEMBE, J:

In the District Court of Nanyumbu at Mangaka, the appellant Bakari Mussa Mere stood charged for two counts, that is, being found in unlawful possession of prohibited plants contrary to section 11 (1) (d) of the Drug Control and Enforcement Act No 5 of 2015; and in the second count is being found in unlawful possession of seeds in production of Drugs contrary to section 11 (1) (b) of the same Act. He was convicted and sentenced to each count to serve thirty (30) years imprisonment, both to run concurrently.

Being aggrieved with that conviction and sentence, the appellant preferred this appeal armed with seven grounds, that is, four grounds from the original grounds of appeal and three grounds in supplementary grounds of appeal, forming a total number of seven (7) grounds. However, the learned advocate Ms. Eveta Lukanga, condensed those grounds of appeal into three, namely:-

1. The prosecution failed to prove the case beyond reasonable doubt;
2. The trial court erred in law and fact in convicting the appellant using contradictory evidences from the prosecution witnesses;
3. The trial court erred in law and in fact by failure to adhere to section 231 of Criminal Procedure Act and give chance to the accused to defend.

On the hearing date, both parties were represented, while the appellant procured legal services of learned advocate Ms. Eveta Lukanga, the Republic/respondent, was represented by learned State Attorney Meshack Lyabonga. The appellant's advocate commenced by a prayer to abandon all grounds of appeal, save only three grounds as quoted above. Ground three of the supplementary grounds of appeal was combined with ground three of the original grounds of appeal, forming one ground. The prayer was granted and the learned advocate argued forcefully, that the first ground is on failure of the prosecution to prove the case beyond reasonable doubt. She referred to the evidences of PW1 which testimonies did not align with the charge sheet. She added that, even the certificate of seizure is contrary to what is stated in the charge sheet.

In the same vein, the evidence of PW7, who is an expert from the Chief Government Chemist, did not support the charge sheet to the extent that PW7 testified that there was 250 grams of pellets, grains 500 grams of seed and 1350 grams of leafs. More so, there was no prosecution witness who testified in court on seizure of 1.6 kilograms as per the charge sheet. She maintained that the evidence was so contradictory, failing to link the evidence with charge sheet. It is therefore, wrong to convict the accused on a charge which was not proved by evidence. To comprehend her arguments, referred this court to the case of **Sylvester Stephano Vs. R, Criminal Appeal No.527 of 2016** at Arusha (unreported). On that basis, she insisted that when there is a failure of the prosecution to link evidence and the charge sheet same should not lead into conviction of the accused.

Further argued by referring this court into another similar case of **Salum Rashid Chitende Vs R, Criminal Appeal No.204 of 2015,** at Mtwara (unreported), in which the court of appeal acquitted the accused because of differences of time between the evidence and the charge sheet. Likewise in this case there are variances of evidence and charge sheet.

In the second ground, the learned advocate argued convincingly, that the certificate of seizure was not read over in court, thus, making the accused unaware of the contents of what was tendered in court. She contended that the evidence of PW6 is related to the caution statement, the same was not read over to the accused as required by law. Therefore, it is unsafe to relay on documents, which were tendered in court without reading their contents. Consequently, the caution statement be expunged. To buttress

this proposition, she referred this court to the case of **DPP Vs Ayubu Bakari Changalima, Criminal Appeal No.3 of 2019,** at Mtwara (unreported). Exceedingly, asked this court to expunge both the certificate of seizure and caution statement from the record and the appellant be acquitted.

On contradictory evidences, the learned advocate Lukanga argued by referring to the testimonies of PW1 that upon search they found Bhang in a plastic container (ndoo), which was about ¾ of the container weighed 1350 grams and 217 sticks of Bhang weighed 250 grams and seeds weighed 500 grams. That piece of evidence was supported by PW2. But that piece of evidence was contrary to the testimonies of PW7, an expert from the Chief Government Chemist. She invited this court to refer in the case of **Wilfred Lukago Vs. R, [1994] TLR 189** and in the case of **Michael Haishi Vs. R, [1992] TLR 92,** where the court held that, contradictory evidences create doubt, which doubts should be decided in favour of the accused/appellant. That the same legal principle should apply to the appellant.

On the right to defend, the advocate argued that, the accused had a right to defend and the court had a duty to inform the accused on that basic right. In pages 32 and 33 of the proceedings, the court failed to inform the accused to exercise his right to defend. She added, there is no record indicating that the court informed the appellant on his right to defend. Thus, rested her submission by asking this court to acquit the appellant forthwith.

In response, the Republic/Respondent resisted the appeal by supporting both the conviction and the subsequent sentence meted by the trial court. Mr. Lyabonga argued so strongly, that all grounds of appeal are irrelevant and should be dismissed. He justified his assertion by responding on variances found in the charge sheet and the evidences adduced by prosecution witnesses. He contended that those variances are immaterial, since the bhang seized was weight 1.6 kilogram, found hidden in a plastic bag. That the appellant was arrested after being found with bhang in a plastic bag of 1350 gram and sticks grams 250 which added together equal to 1.6 kilograms. Meanwhile, the failure of the prosecution to amplify how the 1.6 kilograms were found in a charge sheet does not deny the fact that 1.6 kilograms of bhang were found with the accused/appellant. Therefore, the charge sheet is correct and the amount of bhang found with the appellant was proper.

On the exhibits he admitted that it was true they were not read over to the accused upon being tendered and admitted in court. However, he argued that the accused knew the contents of both the certificate of seizure and caution statement, hence no need to read something which is known to the appellant. He stated further, that the purposes of reading is to let the accused know the content of the documents, since the appellant knew the contents of those documents then there was no need to read them.

Further argued that even during the tendering of those documents, the accused did not ask questions an indication that he knew the contents. To comprehend his argument, he cited the case of **Robert s/o Faida**

Samora Vs. R, Criminal Appeal No.276 of 2016 (CAT) Arusha (unreported), that the appellant/accused failed to ask questions in an important point of fact, hence decided against him. He concluded this point by arguing in alternative that even if the two documents will be expunged, yet the oral evidences testified in court were strong to find the appellant liable.

On contradictions of evidences between PW1 and PW7, he answered in affirmative that there are no contradictions, but the evidences supported each other. In respect to right to be heard, likewise he argued as irrelevant claim. Further, submitted that, section 231 of the CPA give right to the accused to defend and call witness, but the appellant left the matter to court to decide. The right to be heard is a constitutional right, but the accused is not forced to defend. Finally, rested his submission by a prayer to confirm the conviction and sentence meted by the trial court.

In rejoinder, the learned counsel for the appellant submitted that, in the charge sheet there is 1.6 kg which is different from the evidence adduced in court. There is no one who said how the 1.6 kg was found. She insisted that, the prosecution failed to prove the case and reiterated to the prayer made in submission in chief.

Having summarized the arguments of learned counsels, I wish to begin my consideration by stating a well-settled principle of law, that once a document is intended to be relied up on in court, such document must be tendered by a witness testifying the contents of that document. Secondly,

upon being admitted in court, the contents of such document must be read loudly in court. The purpose of reading the contents of such document is to let the accused understand its contents and be prepared if any, to ask relevant questions related to such document. Third, failure to read the contents of the document, in principle such document may be expunged from the court record. This court and the Court of Appeal has tirelessly repeated on this principle in several judgements, including in the case of **Aneth Furaha and three Others Vs. Director of Public Prosecutions, Criminal Appeal No.161 of 2018** at Bukoba (unreported), the Court of Appeal held:-

> *"After the documents is admitted, is for the contents to be read over before being acted upon in evidence".*

In the same vein the Court of Appeal insisted on the legal requirements to read the contents of the document in the case of **Robison Mwanjisi and three others Vs. R, [2003] TLR 218,** held:-

> *"Whenever it is intended to introduce any documents in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have been influenced by the same".*

The consequences of failure to read the contents of the document admitted in court is to expunge it forthwith as if it never existed. This position was clearly pronounced in various cases including in the case of

Issa Hassan UKI Vs. R, Criminal Appeal No. 129 of 2019; DPP Vs. Kashen Joseph Mtambo, Criminal Appeal No. 10 of 2019; and Jumanne Mohamed & 2 others Vs. E, Criminal Appeal No. 534 of 2015. In all these cases the court arrived into one conclusion, the exhibit should be expunged.

Similarly, in this appeal the two Exhibits (PE4) certificate of seizure and (PE7) caution statement as reflected in the proceedings, were admitted by the trial court, but were not read over to the accused/appellant to let him understand the contents of those documents. The learned advocate rightly asked this court to expunge the two documents. In the contrary, the learned State Attorney strongly resisted the prayer by arguing that failure to read the content of the document is not fatal, because the accused knew the contents before tendering them in court. As an alternative, the State Attorney argued that even if same are expunged, yet the oral testimonies adduced in court were sufficient to find the appellant liable to the offences charged. I fully, subscribe to the assertions of the learned State Attorney, that oral evidences may suffice to convict the accused. Documentary evidence is not the only evidence to lead the trial court to convict the accused. However, it is a cardinal rule of law and practice developed by our courts for several years that documentary evidences once admitted in court must be read over loudly so that the accused may understand its contents. If the document is written in a language not known to the accused, must be interpreted in a language understood by the accused. Failure of which is equal to not reading it and the same consequences should follow.

Since the two documents were rightly admitted, but the contents were not read, same cannot stand and remain in the court record. Accordingly, I hereby expunge exhibits PE4 and PE7 as rightly argued by the learned advocate.

The second ground of the appeal is related to contradictory evidences testified in court. As a general rule of practice and law is that the burden of proof in criminal cases, lies on the prosecution. Section 3 of the Evidence Act place such noble duty to the prosecution to prove criminality of the accused beyond reasonable doubt. This principle is well stated by the Court of Appeal in the case of **Joseph John Makune Vs. R, [1986] T.L.R 44,** where the court held:-

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence"*

The same position was stated in the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda Vs. R, [2006] T.L.R 395**, where the court held:-

> *"In a criminal trial the burden of proof always lies on the prosecution, and the proof has to be beyond reasonable doubt"*

Based on this unshakable cardinal principle of law, the evidence testified during trial by PW1, is that in the course of searching the appellant's house they found bucket with amount of "bhang" inside. They proceeded to search in his bedroom where they managed to find 217 sticks of bhang in the plastic bag. Also they got seeds of bhang in a different plastic bags.

Further testified that, certificate of seizure was prepared in which he listed the amount of bhang in a container (ndoo) which was about ¾, and 217 sticks of bhang and seeds of bhang.

They collected the said bhang to Mangaka police station where they weighed. In the container weighed 1350gm and 217 sticks of bhang weighed 250 gm and seeds weighed 500gm. PW7 testified that, the substance were 250 gm of pellets, grains 500 grams and 1350 grams of leafs which after his experiment he confirmed that it was bhang. After looking on the evidences testified in trial court by both PW1 and PW7 as summarized above, read together with exhibit PE 8 report from Chief Government Chemist, the question is whether the evidences of two witness (PW1 & PW7) are contradictory when compared with particulars of the charge sheet? I think the answer will be found after examining in details exhibit PE8 (Examination report) "Taarifa ya Uchunguzi"

Exhibit PE8, examination report from Chief Government Chemist, (Taarifa ya Uchunguzi), is clear that they found 217 pieces of leaves of bhang, having 250 gm, another leafs of bhang having weight of 1350 gm. Also the said seeds (Mbegu) of bhang weight 500 gm. Accordingly, the leafs had 250 gm plus 1350 gm, in simple mathematics, the two form an aggregate of 1600 gm, while seeds had weight of 500 gm. Since I have expunged exhibit PE 4 and PE7, then I need not to consider it any more. I would therefore, compare this piece of evidence in Exhibit PE 8 with the charge sheet. In the first count of the charge sheet, the particulars of leafs were 1.6 kilograms of cannabis Sativa (Bhang) and in count two had 500 gm of

cannabis Sativa Seed. Therefore, this evidence is not contradictory because 1600 gm is equal to 1.6 kilogram. As such I would dismiss this ground forthwith.

The most calling ground advanced by the appellant's advocate is on the right to defend as rightly prescribed in section 231 (1) of CPA is quoted hereunder for ease of reference:-

> *"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 charged or.....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"*

This clause is couched in a mandatory manner, which must be complied with by the trial court. It is in line with the constitution of the United

Republic of Tanzania article 13 (6) on the right to be heard. In respect to this appeal at page 32 of the proceedings, the court found the prosecution have established a prima facie case against the accused. The court proceeded to record:-

> *"Court: S. 231 of CPA is complied"*
>
> Then followed with: *"Accused: I leave for the court to enter its final decision"*

An immediate question is what did the court mean when referred to section 231 as complied with? What did it mean when the accused said *"I leave for the court to enter its final decision"* I have no slight doubt in my mind that the trial magistrate had statutory duty to record properly and to comply with the provisions of law? To record merely as section 231 is complied, is not enough because at this level of appeal, we do not have advantage of hearing witnesses and what the court said until the accused responded *"I leave for the court to enter its final decision"*. I would therefore, conclude that the appellant was not given the right to defend and call witnesses.

In such circumstances, the appropriate verdict is to order retrial and direct the trial court to comply with all provisions of law. However, there are certain principles of law, which must be complied with prior to ordering trial *de novo*. In the case of **Peter s/o Mutabuzi Vs. R [1968] HCD 149** the court held:-

" Each case must depend on its own particular facts; re-trials should be ordered only ***"where the interests of justice require it*** *and should not be ordered where it is likely to cause an injustice to an accused person"*

The fundamental issue for consideration before ordering retrial is the interest of justice to the affected party. In this case the issue is whether the interest of the appellant and the interest of justice will be preserved when the order for retrial is issued? There are several precedents on similar issue including the case of **Fatehali Manji Vs. R [1966] E.A. 481** where the court held:-

"in general, a retrial be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the trial. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it"

The appellant was sentenced to serve thirty (30) years imprisonment in each count. He started serving that long imprisonment from 29th March, 2019, which is almost a year now since he started his custodial sentence. To order retrial will not be for the interest of the appellant rather will be for the interest of the prosecution to fill in gaps left during trial. Therefore, I find this appeal is meritorious, same is allowed. Consequently, quash the conviction and set aside

the sentence, and order an immediate release of the appellant unless lawfully held.

I accordingly Order.

DATED and DELIVERED at Mtwara this 3 March, 2020.

P.J. NGWEMBE

JUDGE

02/03/2020

Court: Judgement delivered at Mtwara in Chambers on this 2nd day of March, 2020 in the presence of Ms. Eveta Lukanga, Advocate for the Appellant and Mr. Meshack Lyabonga learned State Attorney for the Respondent.

Right to Appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P.J. NGWEMBE

JUDGE

02/3/2020