IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 150 OF 2020

Appeal from the Criminal Case No. 202 of 2019 in the District Court of Nyamagana at Mwanza (Kabuka, RM) dated 13th of August, 2020.)

EMMANUEL MALIMI @ MALIGANYA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

7th June, & 14th June, 2021

ISMAIL, J.

The appellant was arraigned in court on two counts of illicit trafficking of narcotic drugs, contrary to section 15A (1) and (2); and unlawful consumption of narcotic drugs, contrary to section 18 (a), both of the Drugs Control and Enforcement Act, No. 15 of 2015, as amended by Act No. 15 of 2017. With respect to the first count, the contention is that on 10th November, 2019, at Kishiri area in Nyamagana District within Mwanza Region, the appellant was found in an unlawful possession of 3.8 kg of narcotic drugs, commonly known as "Bhangi". In the latter count, the allegation is that between 13th October and 13th November, 2019, the

appellant was alleged to have unlawfully consumed narcotic drugs, commonly known as "Bhangi". This offence was allegedly committed within Nyamagana District in Mwanza Region.

The appellant pleaded not guilty to both counts, necessitating a trial in which four prosecution witnesses, against one for the appellant testified in Court. In the end, the District Court of Nyamagana at Nyamagana, in which the appellant was arraigned, found the appellant culpable of the allegations levelled against him. He was convicted and sentenced to imprisonment for thirty years and payment of TZS. 1,000,000/-, on the first count, while in respect of the second, the imposed sentence was three years' custodial sentence.

The facts constituting the charges against the appellant are rather straight forward. They run as follows. In the night of 9th November, 2019, PW1, Inspector Katani Makia, was at his duty station at Nyakato police station. He received a tip-off that the appellant, a resident of Ihushi Kishiri within Nyamagana district, was dealing in narcotic drugs, known as bhangi. PW1, along with his colleagues, went to the scene of crime, arriving there at 0045 hours. On arrival, they found the appellant's house cordoned off by villagers and militia men. PW2 testified that the said villagers informed him that unknown persons who are not residents were seen frequenting the

house and suspected that they were involved in the drug business. They succeeded in nabbing the appellant who told the police that he hailed from Magu district and confessed that he was involved in the business. When the appellant's room was searched, two polythene bags, containing some leaves suspected to be bhangi were located and seized. These substances were taken to the Government Chemist, PW2, who examined them. The test revealed the said substances, weighing 3.8 kg, were actually narcotics known as "*bhangi*". On the same day, the appellant's urine sample tested positive, meaning that the appellant was consuming narcotic drugs known as bhangi. After conclusion of the investigation, the appellant was arraigned in court.

The appellant maintained his innocence with respect to dealing in narcotic drugs. With respect to the use of narcotics, the appellant confessed that he used to smoke but he had since stopped, though he tested positive. He alleged a mistaken identity of the person found with narcotics as the search in his room found him with nothing. As stated earlier on, the trial court was convinced that guilt of the accused had been established, hence the conviction and the sentence handed to him. Feeling hard done, the appellant has instituted the present appeal and six grounds of appeal have been preferred as paraphrased hereunder:

1. *That, the trial court grossly erred when it relied on the appellant's weaknesses and failure to examine PW1 and PW2, thereby convicting and sentencing the appellant without considering that the prosecution failed to prove its case, by not bringing signatories of the certificate of seizure to testify.*
2. *That exhibit P3 was suspect since the same was neither examined nor confirmed by PW2 that it was owned or touched by the appellant and that the alleged possession by the appellant was a result of torture and coercion perpetrated by the police.*
3. *That the trial court's blame apportioned to the appellant was in contravention of section 147 (4) of the Evidence Act, Cap. 6 R.E. 2019.*
4. *That no local leader participated when the PW1 conducted a search with his colleagues.*
5. *That the search warrant in respect of conducted search was not found.*
6. *That the case was not proved against the appellant.*

At the hearing of the appeal, the appellant fended for himself, unrepresented, while the respondent was represented by Ms. Jovina Kinabo, learned State Attorney. Appearance by the parties was through audio conference.

The appellant's submission was simply a liner. He only urged the Court to receive his petition of appeal, consider it and allow the appeal.

Submitting in rebuttal, the respondent's counsel began with supporting the conviction and sentence passed by the trial court. She chose to address the Court on ground six of the appeal as she believed that this ground covers the appellant's consternation in other grounds. Ms. Kinabo argued that PW1 testified on how the appellant was arrested while in possession of exhibit P2, narcotic drugs, and that he was arrested in the presence of other people. The counsel further argued that the seizure was witnessed by a certificate of seizure, exhibit P1, and that the chain of custody was explained by PW1.

The learned attorney further contended that the testimony of PW2, PW3 and PW4 corroborated the testimony of PW1 and concluded that the seized substance was bhangi. Ms. Kinabo further argued that PW2's testimony corroborated the testimony of PW3 that the appellant tested positive of narcotics use. It was her conclusion that the prosecution proved its case, and that the totality of this testimony was strong, and that the respondent does not see how the court erred in that.

Fortifying her position, the respondent's counsel argued that the appellant did not cross-examine PW1 and PW2, meaning that he admitted

to the facts testified against him. On this, she relied on the decision of the Court of Appeal in ***Nyerere Nyegue v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (unreported).

Contrary to Ms. Kinabo's earlier plan, she chose to argue two more grounds of the appeal, and on ground three she argued that applicability of section 147 (4) of the Evidence Act, Cap. 6 R.E. 2019 is only when such need arises. Ms. Kinabo argued that, in this case, the appellant's failure to recall PW1 and PW2 was his own fault and the Court did not err on this. With respect to ground two, the respondent's argument is that exhibit P3, tendered by PW2 was unblemished, and that PW2 was not under any obligation to say that the said exhibit is owned by the appellant. He submitted that this ground is hollow and deserving nothing better than a dismissal.

In reply, the appellant submitted that he was arrested but neither the hamlet chair nor other village leaders were called to testify in his case. He argued that he was not accorded the opportunity to call them for testifying in court. He took the view that he was convicted because of his illiteracy. He urged the Court to set him free.

From these brief submissions, one crucial issue for determination is whether this appeal carries with it any merit that can justify the prayer for setting aside the conviction and sentence imposed on the appellant.

I will begin with ground one in which the contention by the appellant is that the trial court's conviction was based on the appellant's weakness in cross-examining PW1 and PW2, and that the prosecution failed to prove its case. By and large, this ground carries the same message as that conveyed in ground six of the appeal. Inevitably, the discussion will cover both of these grounds.

Submitting on the cross examination, Ms. Kinabo was emphatic that, in law, failure to cross-examine a witness on an important point is taken to constitute an admission of the fact not cross-examined on. While I fully subscribe to this settled presumption, as confirmed in the case of ***Nyerere Nyague*** (supra), I am also mindful of recent decision of the Court of Appeal in ***Zakaria Jackson Magayo v. Republic***, CAT-Criminal Appeal No. 411 of 2018 (DSM-unreported), in which it was held as follows:

> *"It appears to us to be clear that the rule is not absolute. Our understanding of it is that it focuses on the material evidence adverse to the other party excluding incredible evidence."*

Significantly, the upper Bench's position was inspired by the decision of this Court in ***Kwiga Masa v. Samweli Mtubatwa*** [1989] TLR 103, wherein, Samatta, J., as he then was, stated as hereunder:

> *"A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-examine the witness, was not making a concession that the evidence of the witness was true."*

From the foregoing excerpts, it is clear that the assumption laid down in ***Nyerere Nyague*** (supra) and a host of other decisions can only hold a sway if the unchallenged testimony is not improbable, vague or contradictory, and it is not incredible. In our case, the testimony of PW1 and PW2, which was not challenged by the appellant, did not carry any of the weaknesses enumerated in the cited authorities as to be cast away from the assumption set in ***Nyerere Nyague's case*** (supra). I take the

view that the appellant spurned the glorious chance of impeaching veracity of the testimony adduced by the prosecution witnesses and he has himself to blame for that.

The other limb of the appellant's complaint in these grounds is that the case against him was not satisfactorily proved. As I address this point, it compels me to state that the enduring position of the law is that the prosecution is charged with the responsibility of proving its case against an accused person. This position has been judicially acknowledged in a plethora of decisions across jurisdictions. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence.*

In the persuasive but captivating decision, the High Court of Kenya (Ojwang, J., as he then was) held as follows in ***Republic v. Cosmas Mwaniki Mwaura***, H.C. Criminal Case No. 11 of 2005 (as quoted in **R v. Elizabeth Nduta Karanja & Another** [2006] e KLR):

> *"The basic principle applicable in criminal trial is that any doubts in the prosecution case, at the end of the trial, will lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear*

compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment. The logical inference is that whereas the prosecution must be heard in a criminal case, the accused does not have to be heard. The accused can only be heard if the court determines that the weight of the evidence laid on the table is so implicative of the accused, that considerations of justice demand that he be accorded a chance to answer."

Making an assessment with respect to the second count, my unflustered conclusion is that the prosecution's testimony was sufficiently implicative of the appellant with respect to the count of unlawful consumption of narcotic drugs. This conclusion is drawn from the fact that the testimony of PW1, PW2, exhibit P4, P8, and the appellant's own confession during his defence testimony, all point to the fact that the appellant was involved in the offence he was charged with. In that respect, I hold the view that the prosecution proved the appellant's involvement in the second count and I take the view that the conviction and sentence

imposed in respect thereof was quite in order, and I find nothing to fault the trial court's reasoning and conclusion. On whether the prosecution discharged the burden of proof in the first count, this will be covered in due course.

Ground three of the appeal is not very clear in terms of what the appellant intends to raise a red flag on. But if the complaint is what the respondent's attorney submitted on, then the complaint is lacking in plausibility. My contention is premised on the import of section 147 (4) of the Evidence Act, Cap. 6 R.E. 2019, which states as follows:

> *"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further cross-examination and re-examination respectively."*

The meaning conveyed is that the recalling of the witnesses is done by the Court at the instance of either of the parties who wishes to have the witnesses recalled. Since a recall of the witnesses was in the best interest of the appellant, the expectation was that such request would come from the appellant. In the absence of such request, the conclusion is that need did not arise for such witnesses to be recalled for further examination. I find this ground of appeal underwhelming and I dismiss it.

Grounds 4 and 5 of the appeal query about the manner in which search of the appellant's premises was conducted. In the former, the complaint is that the search was not witnessed by a local leader. My hastened finding on this ground is that, while participation of a local leader is a good practice that is highly encouraged, absence of such leader does not render a search a nullity or flawed. This is in view of the fact that his presence is an alternative to the presence of an independent witness who was present in the search in question. I take the view that nothing blemished was committed by the trial court when it cast a blind eye on this requirement.

With respect to ground 5, the appellant's complaint is that no search warrant was issued to justify the search on his premises. As I tackle this ground, it behooves me to state that, search of premises in which a criminal undertaking is alleged to have been committed, is governed by section 38 of the CPA, read together with Police General Order 226 (made under section 7 (2) of the Police Force and Auxiliary Services Act, Cap.322). These pieces of legislation provide for requirements that must be observed in conducting search and seizure of property. With respect to the search, sub-section 1 of section 38 provides as follows:

(1) "If a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place–

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence,

and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be."

Police General Order No. 226:

"Item 17 (b) The services of a local leader or two independent witnesses who should be present throughout the search,

should be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."

Deducing from the substance of section 38 (1) of the CPA, the clear picture is that a search under such provision is quite opposed to what is provided for under section 24 of the CPA. While the latter is unprepared and arises out of the police officer's suspicion, in the former, the search is predicated on the prior information that is conveyed to a police officer before a decision is made to visit the suspected scene of crime and carry out the search. In that case, the search is considered to be pre-meditated, and the carrying out of it requires that the requirements of section 38 (1) of the CPA be followed. One of such requirements is that there should be a search warrant, duly issued by the Officer in charge of the police station, as defined under section 2 of the Police Force and Auxiliary Services Act, Cap.322 R.E. 2019. This position was fortified by the decision of the Court of Appeal in ***Mustafa Darajani v. Republic***, CAT-Criminal Appeal No. 277 of 2008 (unreported), in which it was held:

"Under s. 38 (1) of the CPA, police officers are empowered to search without search warrant, provided it is shown that there are reasonable grounds to do so and that the delay may result in the removal or destruction or endanger life

or property. Otherwise, a search warrant must always be issued."

From the testimony of PW1, the information that the appellant was suspected to be an illicit drug dealer was conveyed to him while he was still at Nyakato Police Station, his duty station, and that he left for the scene of the crime along with his colleagues. This confirms that the search was premediated and one in respect of which a search warrant was required. None of the conditions set out for carrying out a search without warrant were demonstrated to justify the carrying out of a search without issuance of a search warrant. Neither PW1 who oversaw the search, nor any of the remaining witnesses showed that circumstances of this case required a search without a warrant. The established position is that a search which is not preceded by issuance of a search warrant lacks legitimacy and the omission is far serious than a mere slip. It is fatal, rendering the entire process and all other subsequent actions a complete nullity.

(See: ***Frank Michael @ Msangi v. Republic***, CAT-Criminal Appeal No. 323 of 2013 (Mwanza, unreported); ***Ridhiki Buruhani v. Republic***, (HC) DC Criminal Appeal No. 40 of 2011 (Songea, unreported).

I take the view that failure to comply with the requirements of the cited section of the law constituted a serious infraction of the law which

vitiated the entire search process and what was allegedly recovered from that flawed search. This rendered the evidence in support of the charge of trafficking of narcotic drugs worthless, and the same, along with exhibits P1, P2, P3, P5 and P6, are expunged from the testimony adduced by the prosecution. Absence of this testimony renders the 1st count unsupported and not proved against the appellant.

In view of the foregoing, I take the view that, for reasons expounded above, this appeal partly succeeds to the extent that the conviction and sentence imposed in respect of the first count are hereby set aside, while conviction and sentence in respect of the second count are upheld, and the appeal on this ground is dismissed. The appellant shall continue to serve his three-year prison term imposed in respect of the second count after which he shall be set free.

It is so ordered.

Right of appeal duly explained.

DATED at **MWANZA** this 14th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 14/06/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online

Respondent: Ms. Ghati Mathato, State Attorney

B/C: P. Alphonce

Court:

Judgment delivered in chamber, in the virtual attendance of the appellant, and Ms. Ghati Mathayo, learned State Attorney, for the respondent, this 14th day of June, 2021.

M. K. Ismail

JUDGE

THE HIGH COURT OF TANZANIA MWANZA

At Mwanza

14th June, 2021