

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TANGA)

AT TANGA

CRIMINAL APPEAL No. 52 OF 2020

(Arising from the District Court of Tanga at Tanga in Criminal Case No. 29 of 2020)

KASSIM ABDALLAH ----- APPEALLANT

Versus

THE REPUBLIC ----- RESPONDENT

JUDGMENT

12.07.2021 & 14.07.2021

F.H. Mtulya, J.:

This appeal emanated from the judgment of the **District Court of Tanga** at Tanga (the District Court) in **Criminal Case No. 29 of 2020** (the case) delivered on 29th May 2020. In the judgment, the District Court convicted Mr. Kassim Abdallah (the Appellant) with the offence of trafficking banghi contrary to section 15A (1) & (2) (c) of the **Drugs Control and Enforcement Act, No. 5 of 2015, as amended in 2017** (the Drugs Act), and sentenced him to thirty (30) years imprisonment as per section 15A of the Drugs Act.

The evidence available on record shows that the Appellant was arrested on 19th July 2020 by police officers who were in patrol at 16th street within Tanga Region. After the arrest, the Appellant was detained at Chumbageni Police Station and on 6th March 2019 was

arraigned before the District Court to answer the charges against him. To substantiate its case, the Republic summoned a total of four (4) police officers who were involved in arrest and investigation of the case. The record shows that G. 4488 DC Simai (PW1), a police officer, testified that the Appellant was found with bhanghi and tendered a Chief Government Chemistry Report admitted and marked as exhibit P.1.

On the other hand Assistant Inspector Salum Shayo (PW2) testified that in the course of patrol at street No. 15 to 16 in the area commonly known as *Soko la Mlango wa Chuma* they arrested the Appellant holding a sulphate bag of red colour containing bhanghi. However, during a prayer to admit certificate of seizure to be part of evidence, the Appellant protested, as depicted at page 24 of the proceedings conducted on 11th May 2020, contending that no any other independent witness was called to substantiate the allegation of the police officers in arresting him in possession of narcotic drug bhanghi. However, Appellant's protest was declined by the District Court and the certificate was admitted and marked P.3.

Following this protest registered on the first day of the hearing at the District Court and his conviction, the Appellant decided to raise the complaint again in this court attached with other three grounds

on, *viz*: first, the prosecution failed to call witness Mr. Fidelis Segumba, who prepared exhibit P.1, to testify as per section 203 (3) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act); second, failure on the part of the prosecution to register receipt issued by the seizing officer as per law in section 38(2) of the Act; and finally failure of prosecution to prove its case beyond reasonable doubt.

When the appeal was scheduled for hearing on 12th July 2021, the Appellant appeared in person without any legal representation, and argued all four points in this appeal whereas Mr. Paul Kusekwa, learned State Attorney appeared for the Republic. With the first complaint the Appellant submitted that the prosecution failed to call witness Mr. Fidelis Segumba to testify so that he would have cross examined him on P.1 as per requirement of the law in section 203 (3) of the Act. In his reply Mr. Kusekwa submitted that section 203(3) of the Act used the word *may* which invites flexibility on calling the analyst who prepared the report. To bolster his argument, Mr. Kusekwa invited section 19 of the **Government Chemistry Laboratory Authority Act, No. 8 of 2016** (the Chemistry Act) which allows reports issued by Government Laboratory Analyst to be sufficient evidence of facts on the subject.

Mr. Kusekwa submitted further that the records are silent on whether the Appellant entered the prayer to summon Mr. Fidelis Segumba or court issued any summons to call Mr. Fidelis Segumba and therefore calling him at the appeal stage is an afterthought. In a brief rejoinder, the Appellant submitted that the law gives mandate the Republic to call analysts and that silence on registration of a prayer from accused person or order from the court is not necessary.

On my part I think, when a statute uses the word *may*, it invites discretionary powers as per section 53 (1) of the **Interpretation of the Laws Act** [Cap. 1 R.E. 2019]. This issue is certain and received a bundle of precedent and may not detain this court into details of the decision (see: **Benjamin Manota & Two Others v. Geita Gold Mine Ltd & Two Others**, Civil Appeal No. 44 of 2015). This court cannot fault enactment of the law which has received precedent of the Court of Appeal. It is not allowed to add further interpolations in interpretation of the word.

The Appellant in his second ground complains on non-applicability of section 38 (3) of the Act with regard to receipt issued by seizing officer. According to the Appellant, exhibit P.3 was admitted in the case without abiding with the law in section 38 (3) of the Act which require the seizing officer of a thing to issue a receipt

acknowledging the seizure of the thing attached with signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises. The invitation of section 38 (3) of the Act in the present case was protested by Mr. Kusekwa who contended that the contents in certificate of seizure drafted in section 38 (3) of the Act are equivalent to Form DCEA No. 0003 made under section 48 (2) (c) (vii) of the Drug Act and regulated by section 48 (2) (c) (ii) of the Drugs Act.

According to Mr. Kusekwa, Form No. 0003, a certificate of seizure, may be issued in alternative of a receipt so long as it complies with the laws regulating criminal procedure and the Drugs Act. Mr. Kusekwa submitted further that when there are conflict of laws in the Act and Drugs Act, the Drugs Act overrides the Act as per section 48 (6) of the Drugs Act. In a brief rejoinder, the Appellant submitted that he is not aware of the cited sections 48 (2) (c) (ii) & 48 (6) of the Drugs Act, but Mr. Kusekwa is silent on the validity of section 38 (3) of the Act.

On my part, I have decided to visit provisions in section 38 (3) of the Act, section 48 (2) (c) (ii) and 48 (6) of the Drugs Act. For purpose of clarity, I will quote of all them inhere:

s.38 (3): Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

s.48 (2) (c) (ii): an officer of the Authority and other enforcement organs who searches for an article used or suspected to have been used in commission of an offence shall stop, search and detain any person who is reasonably suspected of carrying, conveying, storing, transporting, cultivating, importing, exporting, possessing any narcotic drug, substance with drug related effects or precursor chemicals or substances used in the process of manufacturing of drug;

s.48 (6): Where there is a conflict between the provisions of this section and those of the Criminal Procedure Act on matters provided for, the provisions of this Act shall prevail.

In my opinion, the cited provisions were enacted to allow different circumstances of arrest and presence of an independent witness. In order to appreciate the criminal law enacted by our parliament and actual circumstances on ground, I will quote evidence of the Appellant in the District Court as displayed at page 38 of the proceedings conducted on 27th May 2020:

I remember it was on 19/07/2019 around 07:00hrs, I was at street 16 Mlango wa Chuma Market Place. I was at the said market for purpose of purchasing orange and ready to sale them in various parts of Tanga town by using a tricycle. I saw people running those people were being chased by police officers. Some of the people were running towards the market while others followed the road. I then heard a voice saying *na huyo mchukueni msimuache*. The police officer appeared and arrested me. I told the police officer that the orange on tricycle were mine, but the police officer did not listen to me rather we boarded me in the police vehicle. From there I was taken to Chumbageni Police Post where the present case was prepared and hence instituted to this court.

This piece of evidence was considered by the District Court. However, its holding and reasoning shoulders the Appellant to prove his innocence. For clarity purposes, I will quote briefly the issue, holding and reasoning of the District Court as displayed from page 5 to 7 of the judgment:

The next pertinent question to be considered is whether the said exhibit P.2 was seized from the accused person. The evidence of PW2 and PW4 reveal that on the material day they arrested the accused person at Mlango wa Chuma area. This piece of evidence is also reflected in the accused person's defence...the police officers searched the accused person and seized from him exhibit P.2. However, in his defence the accused testified that on the material day he was at the market buying and loading oranges ready to sell

them...this kind of version ought to have been risen since the beginning of the trial...apart from that, he did not distance himself from the sulphate bag in exhibit P.4...prior to his arrest he had no grudges with any of the prosecution witness...this court has been satisfied that exhibit P.2 was seized from the accused persons...the evidence of DW1 has not raise any doubt in the prosecution case.

However, in his assessment, the learned trial magistrate had completely forgotten to analyse the complaint registered by the Appellant on 11th May 2020 as displayed at page 24 of the proceedings on independent witness to substantiate the allegation of the police officers in arresting the Appellant with narcotic drug bhangi in a market area full of individual persons, market and street leaders.

In short, this appeal concerns the powers of the police or any arresting authority in drugs related matters and invitation of independent witnesses. The question before this court is therefore whether a person may be suspected, arrested and searched for drugs related matters at *Mlango wa Chuma Market* area of Street 16 of Tanga City at 07:15 hours without involvement of a third party or independent witness. In order to resolve this dispute, ground three and four of appeal may also be invited for fair judgment in appeal.

The third and last grounds of appeal registered by the Appellant relate to absence of any third party or independent witness during the

arrest, search and detention of the Appellant and finally *onus* and standard of proof in criminal cases under section 3 (2) (a) of the Act and precedents in **Said Hemed v. Republic** [1987] TLR 117 and **Mohamed Matula v. Republic** [1995] TLR 3.

According to the Appellant, the prosecution fabricated the case against him and failed to invite any independent witness during his arrest and search of the alleged bhangi and his opinion while the prosecution claimed that he was arrested at market area where there were several individual persons, market leaders and local leaders, but failed to invite any one from them. On the other hand Mr. Kusekwa thinks that the prosecution proved its case beyond any doubt as the evidences from the arrest to arraignment of the Appellant to the District Court depict sequence of events without any faults. In order to bolster his argument, Mr. Kusekwa cited page 11 to 17 of the proceedings contending that reading evidence of PW2 & PW4 and exhibits in P.1 to P.4 there are no doubts on commission of the offence by the Appellant.

This court after visitation of the facts and evidences on record and citation of laws in this appeal, it found out that there is no dispute on laws regulating arrest, search and detention of persons reasonably suspected of carrying, conveying, storing, transporting,

cultivating, importing, exporting, possessing any narcotic drugs, substance with drugs related effects or precursor chemicals or substances used in the process of manufacturing of drugs.

In doing so, the officer seizing the thing is required to issue a receipt acknowledging the seizure of that thing through the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any. The word **if any**, in the law invites special circumstances where the arresting machinery may justify invitation of the third party or an independent witness.

The Court of Appeal in **Tongora Wambura v. Director of Public Prosecution**, Criminal Appeal No. 212 of 2006 stated categorically that:

As there was no independent person to witness the arrest that in our considered view depends on particular circumstances of each case. However, it should be emphasised that the absence of such people per se did not render the operation illegal or prosecution case fail.

It is therefore certain and settled that the absence of independent witness in a prosecution case cannot render prosecution

case fatal. However, in the present appeal both parties are in no dispute that the Appellant was arrested and searched at *Mlango wa Chuma Market* area of Street 16 of Tanga City at 07:15 hours without involvement of a third party or independent witness.

Practice of this court and the Court of Appeal has been that when arrest and seizure occur in residential or market areas or bus stand places during day time, presence of an independent witness is an essential element in order to demonstrate fairness and truthfulness of the exercise (see: **Saidi Thabit & Another v. Republic**, Criminal Appeal No. 26 Of 2020; **Republic v. Mussa Hatibu Sembe**, Economic Case No. 4 of 2019; **David Athanas @ Makasi Joseph Masima @ Shando v. Republic**, Criminal Appeal No. 168 of 2017). For instance borrowing the words of the Court of Appeal in the precedent of **David Athanas @ Makasi Joseph Masima @ Shando v. Republic** (supra), this court in **Republic v. Mussa Hatibu Sembe** (supra) at page 27 & 28 of the decision stated that:

It is the defence submission that there was no independent witness during the search of the accused person...it raises doubt that the exhibit have been planted fraudulently to make someone guilt...in this case, the accused was arrested during the day time at the bus

stand. There was no urgency after the accused was placed under arrest...the arresting officer had ample opportunity to find any person to be an independent person to witness the search and fill the certificate of seizure at the place where the search was conducted...I find this is a serious irregularity. Thus, the court do not accord weight to the certificate of seizure Exhibit P.8, which was not filled and signed in presence of an independent witness...

This decision of this court was rendered down on 6th July 2020 and two months later, on 29th September 2020, this court in the precedent of **Saidi Thabit & Another v. Republic** (supra) insisted on the requirement of an independent witness in an arrest conducted in open areas with a bundle of persons and adopted the reasoning in the decision of **Republic v. Mussa Hatibu Sembe** (supra). At page 11 of the decision, this court stated that:

In view of this court in Sembe's Case, presence of an independent witness during search and seizure on any exhibit from a suspect is an essential element and a must in order to demonstrate fairness and truthfulness of the entire exercise unless for reasons which must be explained

it is impossible to obtain an independent witness in the circumstances.

In the present appeal, facts and evidences registered at the District Court do not display any reasons which explain impossibility of obtaining an independent witness during the arrest and search conducted to the Appellant at *Mlango wa Chuma Market* area of Street 16 of Tanga City at 07:15 hours.

For the stated above reasons, I am moved to believe that the prosecution failed to prove its case beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the Act and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Jonas Nkize v. Republic** [1992] TLR 213; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005

In my opinion, I think, it is an elementary rule of law that the burden of proof in criminal cases is on the prosecution side and the standard is beyond reasonable doubt. It is not the duty of the Appellant to prove his innocence. That is why the Court of Appeal in **Mohamed Matula v. Republic** (supra), stated that:

In a criminal case the burden of proof is always on the prosecution. It never shifts and no duty is cast on the appellant to establish his innocence.

I think, in my view, the holding and reasoning of the District Court in the present appeal required the Appellant to establish his innocence, which is against the law in Evidence Act and precedents of this court and the Court of Appeal. The judgment of the District Court cannot remain in the record of our courts for want of proper position of the law.

Having said so, I find merit in this appeal and I am going to allow it as I hereby do. I therefore quash the conviction, set aside the sentence of thirty years (30) imprisonment imposed against the Appellant and further order for an immediate release of the Appellant from prison unless otherwise held for some other lawful reasons.

It is accordingly ordered.



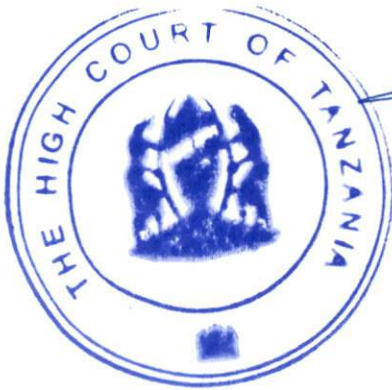
A handwritten signature in blue ink, appearing to read "F. H. Mtulya", with a long horizontal flourish extending to the right.

F. H. Mtulya

Judge

14.07.2021

This judgment is delivered in Chambers under the seal of this court in the presence of the learned State Attorney, Mr. Mr. Paul Kusekwa and in the presence of the Appellant, Mr. Kassim Abdallah who was connected through video link from Maweni Prison in Tanga Region.

A handwritten signature in blue ink, which appears to read "F. H. Mtulya", is written over the seal.

F. H. Mtulya

Judge

14.07.2021

