IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 23 OF 2021

(C/O Criminal Case No. 163 of 2019 Mlele District Court)

PETER S/O GERALD @ CHUNDU ..... 1st APPELLANT
REHEMA D/O JUMA ..... 2nd APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

02 & 08/11/2021

JUDGMENT

Nkwabi, J.:

The evening of 04/01/2019 was a restless one for the Geralds. This is because their grocery styled as *Loliondo* which is situated at Kiwanjani hamlet unexpectedly received a police convoy who had been informed that the premises is used for selling narcotics and illicit local brew commonly known as gongo. The police searched the premises and recovered therefrom, gongo and six kilograms of substance which the government chemist confirmed to be Cannabis Sativa commonly known as *Bhang*.

In the search, PW5 Suzan, an independent witness and a hamlet leader, was involved in witnessing it and signed on the certificate of seizure. She confirmed in evidence that Cannabis Sativa was seized from the premises. In the course of the trial the prosecution tendered 8 exhibits, while the appellants jumped bail and they were convicted and sentenced in absentia for unlawful possession of cannabis sativa contrary to section 11(1) (b) and (d) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 3(e) (i) (a) of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017.

It appears that the appellants were subsequently arrested and jailed to serve their respective sentences.

Affronted with the conviction and sentence of the trial court, the appellant paraded four grounds of appeal in this court as they appear in the petition of appeal. The basic complaints in their appeal, are, that the charge was not proved beyond reasonable doubt since it is based on the evidence of search which was conducted without an independent witness, the chain of custody was admitted contrary to the law and no receipt was tendered for the alleged

seized Cannabis Sativa violating the requirement of section 38(3) of the Criminal Procedure Act Cap 20 R.E. 2019.

During the hearing of this appeal, the appellants were unrepresented while the Respondent was ably represented by Mr. John Kabengula, learned State Attorney. The 1st appellant's submission was short, he prayed the court to adopt the grounds of appeal as his submission in chief. It is worth noting here that the 2nd appellant, it was reported that she had been released from prison on the President's pardon.

For the respondent Mr. Kabengula stated that there are short comings in the trial. He outlined the charge sheet is defective in that it expresses unlawful possession of cannabis sativa, but the section 11(1) (b) states about another offence which is cultivation of cannabis sativa. The charge sheet therefore was defective. There was no offence before the court.

I am in agreement with Mr. Kabengula that the charge sheet that grounded the conviction and sentence was defective. What he did is in line with **DPP v Fitina Maliaga Criminal Appeal no 4 of 1990** (CAT) (MWANZA) (Unreported):

"The state attorney as an officer of the court should be vigilant at every stage of the proceedings, and has a duty to point out to the court, and in time, any errors or apparent errors in the proceedings."

And a reminder of the decision of the Court of appeal to the Magistrates would do the purpose. This is **Osward Mangula v Republic Criminal Appeal no 153 of 1994** (CAT) (MBEYA) (Unreported)

"We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused before the magistrate is satisfied, inter alia, that it discloses an offence known to law. It is intolerable that a person should be subjected to the rigors of a trial based on a charge which in law is no charge. It shall always be remembered that the provisions of S. 129 of CPA 1985 are mandatory. The charge laid at the appellant's door having disclosed no offence known to law all the proceedings conducted in the District Court on the basis thereof were a nullity since you cannot put something on nothing. Appeal allowed."

In essence the charge sheet is at variance with the evidence. While the section preferred for charging the appellants is in respect of cultivation of

narcotics, the evidence is that of possession of Cannabis Sativa. I will discuss at a later stage the effect of the anomaly.

Mr. Kabengula identified that the charge sheet too has alteration. He would not discern when the order was issued because under section 234 (1) of the Criminal Procedure Act. Such order is required to be made by the court. In the proceedings no such order was issued.

I agree, that is an obvious irregularity, for the charge sheet to be altered without an order of the court and without indicating the date when it was as such altered.

The last irregularity according to Mr. Kabengula is that the appellants jumped bail but were convicted without being called to be heard under section 226 of the Criminal Procedure Act.

Mr. Kabengula, after identifying the anomalies, prayed that this case be ordered for a retrial as the appellant was not heard and the charge was defective. It is as if they were not charged in court. The appellant had nothing in rejoinder. He merely prayed for justice. Understandably, as he is

lay person. In my considered view, I decline the prayer by Mr. Kabengula. In my finding, I hope, I am supported by **Merali & Others v. R. [1971] H.C.D. 145** (C.A.T.):

> *"It is clear that the original trial was neither illegal nor defective. It is well settled that an order for a retrial is not justified unless the original trial was defective or illegal. A retrial causing prejudice to the accuses (see Ahmed All Dharamshi Sumar v. R. (1964) EA 481 and Fatehali Manji m. R. [1966] EA 343). We are of the opinion that an order for a re-trial in this case was not justified and we accordingly set it aside.*

Now, a combination of irregularities amounts to a mistrial. This case, as well the irregularities found therein lands the trial to a category of a mistrial as per **Joseph Kimera v. Idd Hemedi [1968] H.C.D. no., 355** Seaton J. In the circumstances of this case the mistrial would cause prejudice to the appellant. Further, one of the appellants got pardon from the President. How would the prosecution charge her? The prayer for a retrial is with respect, thus rejected.

I would add, in conjunction with the complaint of the appellants that the search was conducted irregularly in contravention of a clear decision of the court of Appeal in **Paulo Maduka & 4 others v Republic, Criminal Appeal No. 110 of 2007** where the Court after quoting section 38(3) of the Criminal Procedure Act on issuance of a receipt acknowledging the seizure of a thing, had these to say:

> *The appellants and independent witnesses would have put their signatures thereon and each retained a copy of the same. ...*

In the end, with the greatest respect to the learned trial magistrate, the convictions and sentences, therefore, cannot be judiciously supported. Advocates of parties as well as courts are enjoined to act competently and efficiently, see **Musa Ramadhani Makumbi & 4 others v Republic, Criminal Appeal No. 199/2010** (CAT) (unreported) at page 12:

> *It's investigation, and the prosecution and trial of the suspects, therefore, in our considered opinion, called for greater circumspection, foresight and competence, in order justice to prevail.*

I therefore, allow the appeal as it has merits. I endorse the arguments of the learned State Attorney for the Respondent but differ with him on the order of retrial he sought. I hope, when praying for the retrial, Mr. Kabengula had in his mind the authority in the case of **Olonyo Lemuna and Lekitoni Lemuna V Republic 1994 TLR 54** (CA) where the court of appeal ordered for the proceedings to be remitted to the trial court for the invocation of section 226 of the Criminal Procedure Act, where it had held inta alia that:

> *(iii) Only prior to the close of the prosecution case are the circumstances set out in s 226 of the Criminal Procedure Act 1985 applicable; after the close of the prosecution case, s 226 is inapplicable and s 227 takes over;*
>
> *(iv) As in this case the appellants absconded before the prosecution closed its case, the trial court misapplied the provisions of s 227 of the Criminal Procedure Act 1985;*

I am of the view that in the circumstance of this case convictions have to be quashed and sentence set aside due to the combination of the irregularities just like I have tried to show hereinabove, I proceed to do so. The appellant is to be set free unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED at **SUMBAWANGA** this 8th day of November 2021.

J. F. Nkwabi

Judge

Court: Judgment is delivered in open court via video conference this 8th day of November, 2021 in the presence of Ms. Safi Kashindi, learned State Attorney for the respondent and the appellants who are present in person.

J. F. Nkwabi
Judge

Court: Right of appeal is explained.

J. F. Nkwabi
Judge
8/11/2021