IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 41 OF 2021

(Originating from Liwale District Court Criminal Case No. 39 of 2020)

SUPANZIGE MANYANGU..1ST APPELLANT

IDD NGUSA GOD..2ND APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

4th & 25th October, 2021

DYANSOBERA, J.:

The appellants, Supanzige Manyangu and Idd Ngusa God, hereinafter called the 1st and 2nd appellants, in that order, stood trial before the District Court charged with being found in unlawful possession of prohibited plants contrary to section 11 (1) (a) of the Drugs Control and Enforcement Act [CAP. 95 R.E.2019]. The prosecution alleged that on 1st day of July, 2020 at Ngumbu village, Kibutuka Ward within Liwale District in Lindi Region, the appellants were alleged to have been found cultivated prohibited plaints, to wit. one acre and 100 miters (sic) of cannabis plant without having permit. They were convicted and each was sentenced to thirty (30) years term of imprisonment. They were aggrieved by both conviction and sentence. In their joint memorandum of

appeal, the appellants have raised nine grounds of appeal. I am, however, of the view that this appeal may be determined by considering the first ground only, namely-

1. That, the trial magistrate erred in both points of law and facts when he convicted and sentenced the appellant without taking into account that the prosecution side failed to prove the charge against the appellants as required by the law.

Briefly, the facts of the case for purposes of determining this appeal are the following. Vicent Amede Ndasa (PW 1) , an OC-CID stationed at Liwale was, on 30th June, 2020 informed that there were people who were dealing with the cultivation of bhang at Ngumbu Village. He with his fellow police officers, namely D/C Issa, D/C Beatus, D/C Cola, D/C John and D/C Mohamed went to the Village and arrived there at 0300 hrs the following day that is on 1st July, 2020. According to Vicent Amede Ndasa, there were many people to be arrested. The appellants were found in their house and there were plants of bhang around the house. These police officers then went to the appellants' farm and arrived there at 0400 hrs. The following morning the Ngumbu Village Chairperson, one Mohamed Ally Ngoima (PW 3), was called to witness the appellants being found with the bhang. He then called the Ward Executive Officer who is also the Agricultural Officer one George Joseph Thadei (PW 2)

who measured the farm and found it to be one acre and one hundred metres. Vicent Amede Ndasa prepared two copies of inventory of seized exhibit for disposal which was signed by himself and the appellant and took it to the magistrate for approval (exhibits P 1 and P 2). The said bhang was destroyed by fire. The appellants were taken to Liwale Police Station and charged.

In their defence, the appellants denied being found in possession of the said substance. The 1st appellant told the trial court that he has a total of ten acres but has managed to till only four of them in which he planted banana plantation, sugar cane, pigeon peas and *akaemu*. Upon being arrested, the 1st appellant was found with the 2nd appellant who had come from Mpiluka and gone there to prepare his farm. They denied to have cultivated the bhang but only *akaemu* which was not bhang.

The 2nd appellant denied to be the owner of the farm in question. He supported the version of the 1st appellant that he was a stranger and had gone there to prepare his farm.

In his judgment, the learned trial Resident Magistrate was satisfied that the case against the appellants was proved beyond reasonable doubt.

At the hearing of this appeal, the two appellants prosecuted their appeal on their own while the respondent was represented by Mr. Ndunguru, learned Senior State Attorney.

In prosecuting the appeal, the first appellant had nothing useful to add to his grounds of appeal. The 2nd appellant, on his part, told this court that it was wrong on part of the learned Resident Magistrate to convict him while the 1st appellant had admitted to have planted akaemu in his farm.

As with the respondent, Mr. Wilbroad Ndunguru supported the appeal. He submitted that the offence was not proved against both appellants. He reasoned that the appellants were convicted of cultivating prohibited plant bhang. There had to be evidence to prove the cultivation of bhang and to link the charge with the appellant. According to the learned Counsel, there was no cogent evidence in this case led to prove the bhang. He argued that since no expert testified on the said plant confirming it to be bhang, the failure rendered the prosecution evidence against the appellant too weak to ground a conviction. He prayed the appeal to be allowed.

I have carefully considered the submissions of both sides and perused the impugned judgment and other materials on record, the issue for determination is whether the prosecution proved the case against the appellants beyond reasonable doubt. There is no dispute that the prosecution bore that burden to prove the case against the appellants beyond reasonable doubt as clearly stipulated under Section 3 (2) (a) of the Evidence Act [CAP. 6 R.E.2019] as follows:-

'3

(2) A fact is said to be proved when-

(a) in criminal matters, except where any statute or other laws provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists'

The Court of Appeal in the case of **Mariki George Ngendakumana v. R**, Criminal Appeal No. 353 of 2014 CAT-Bukoba had the following to observe:

'it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed, two that it is the accused person who committed it'

In this case, the appellants were charged with being found in unlawful possession of prohibited plants. It was in the evidence of Vicent Amende Ndasa, a police officer and George Joseph Tadei, a VEO and Agricultural Officer, Ngumbu village that the said plant was bhang. As to how Vicent Amende Ndasa identified the said plant to be bhang, he is recorded to have said during re-direct examination by Mr. Josephat, the public prosecutor at p. 12 of the trial court's typed proceedings thus:-

"REXD PP: I recognised bhang through smell and appearance. Smell of bhang is different from other plants as very sensitive. Appearance of bhang is different from other plants and I have more than 20 years' experience. I know bhang very well and the accused her4e were found cultivating bhang and no other plants'.

George Joseph Tadei, an Agricultural Officer, told the trial court at p. 14 of the typed proceedings of the trial court that:-

> 'As Agricultural Officer, I am acquainted with all plants. From such experience I know bhang. The plants in accused farm were bhang'.

During his defence, the 1st appellant maintained that in his farm he had planted various crops including *kaemu*. The two appellants insisted on this in the 9th ground of appeal in the following terms:

> '9. that at the trial court during the hearing in his defence the 1st appellant was confessed that in his farm there was certain crops including pigeion peas and crops named KAEMU why the prosecution side was failed to brought the said KAEMU to be examined by the expert in drugs to prove if it was bhang? And why they charged the second appellant whenever the first appellant was confessed the said KAEMU plants was in his farm?'

In his judgment, the learned trial Resident Magistrate found the evidence of the prosecution witnesses on identification of bhang credible and relying on such evidence, concluded that the plant the appellants were alleged to have cultivated in their farm was bhang.

Mr. Ndunduru submitted before this court that the said plant was not sufficiently proved to be bhang as there was no expert who testified to that effect.

With respect, I agree to both appellants' and the learned Senior State Attorney's argument that it was not positively proved that the plant the appellants were alleged to be cultivating in the farm was bhang. My view is that

the plant does not become bhang or *cannabis sativa* simply because the police or agricultural officer says that it is. Proof that the plant or substance in question is bhang must come from a government analyst with a certificate of analysis which is a document which confirms what the plant or substance is. I am fortified in this by the clear provisions of the Drug Control and Enforcement Act [CAP. 95 R.E.2019], Section 48A (1) and (2) in particular. For instance, sub-section (2) of section 48A of the said Act provides thus:-

> 'Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a government analyst shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive.'

This provision envisages the necessity of the expert and the government analyst report. My view is further fortified by what the Court observed in the case of **Silvery Paschal v. R** [1983] TLR 130 that:-

> A conviction for unlawful possession of part I poison cannot be sustained on the basis of identification of labels of the drug by a medical officer who is neither pharmacist nor empowered to determine the chemical components of the drug.

That being the case, I am far from being convinced, leave alone satisfied that the prosecution proved the plant allegedly found in the appellants' farm was bhang.

Besides, the procedure to be followed in the seizure of the said plant was not adhered to; in other words, the seizure was made in violation of Section 36 (3) of the Act in that there was no proof of any application to the magistrate and his full involvement for purposes set out under paragraphs (a), (b), (c) and (d) of sub-section (3) of Section 36 which enacts thus:-

> 'An officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substances proved to have drug related effects shall make an application to any magistrate having jurisdiction under this Act for the purpose of-
>
> a) Certifying the correctness of the inventory so prepared
> b) Taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true, or
> c) Allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of sample so drawn.

Provided that, where it is not practicable to secure the presence of such magistrate the requirement of subsection (3) (b) (c) shall be dispensed with.

In that respect, the exhibits P 1 and P 2 which were allegedly approved by the magistrate lacked probative value.

For the reasons stated above, the appeal is allowed. The conviction quashed and sentences set aside. The appellants should be released from prison forthwith unless lawfully held of other causes.

Order accordingly.

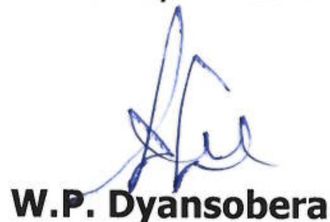
W.P. Dyansobera

Judge

25.10.2020

This judgment is delivered under my hand and the seal of this Court on this 25th day of October, 2021 in the presence of both appellants and Mr. Wilbroad Ndunguru, learned Senior State Attorney for the respondent.

Rights of appeal explained



W.P. Dyansobera

Judge