

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA**

CRIMINAL APPEAL NO. 36 OF 2021

(Originating from District Court of Mtwara at Mtwara in Criminal case No.
101 of 2020)

PATRICK JOACHIM NAKUCHIMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

22nd July & 20 Oct., 2021

DYANSOBERA, J.:

The appellant, Patrick Joachim Nakuchima, appeared before Mtwara District Court at Nanyumbu on a charge of being found in unlawful possession of prohibited plants, contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act, Act No.5 of 2015. The prosecution alleged that on 18th day of June, 2020 at Bima area within the Municipality and Region of Mtwara the appellant was found in possession of prohibited plants to wit.one point zero six (1.06) kilograms of *cannabis sativa* commonly known as Bhang.

In summary, the prosecution case at the trial court was that on 18th day of June, 2020 at around 10. 00 hrs, A/ Insp. Juma Brown (PW 5) was, together with his fellow police officers assigned to do the patrol. At around

1100 hrs they arrived at Bima area along the wall of CWT building, near the CRDB Bank. According to PW 5 they spotted a youth sitting by the side of a sulphate commonly known as *shangazi kaja*. They arrested him and an introduction ensued. That youth introduced himself to be Patrick Joachim. Mzee Selemani Libubuyu (PW 2) who was around the CRDB Bank premises outside was picked by the police to be a witness to the search. In the sulphate found was a total of five *bando* of bhang. A certificate of seizure was filled in and signed by the appellant, PW 5 and PW 2. The appellant was sent to the Police station with the bhang and a police file was opened. In the trial court, PW 4 tendered the certificate of seizure (exhibit P 6). E. 6021 Cpl Mwaya (PW 4) testified to have been called by A/Insp. Suma on 18th day of June, 2020 and given five *bando* of bhang which was rolled in a newspaper and kept it in the store. On 12th August, 2020 she handed the exhibit to WP 9484 Angelina (PW 2) who prepared a file took the bhang to the Government Analyst. The bhang was accompanied with Form DCEA No. 001 (exhibit P 3). She handed them to Eliamini Ismail Mkenga (PW 1). According to PW 1, she received the sample and was required to examine what those leaves were, that is if they were bhang or something else. PW 1 assigned the sample with laboratory number SZL/80/2020. He weighed the sample and found it to be 1. 06 kilograms. He then examined the

leaves through *dequenois- lavine* test [correct Duquenois-Levine test]. He established that the leaves were bhang. He prepared report on his findings. The same report was admitted and tendered in the trial court (exhibit P 1).

The defence of the appellant was that on the material day, he was at his usual place where he works as a car washer. He found policemen there and thought that they had brought their motor vehicle for washing. He was then told that in the morning he had ordered the *bodaboda* to throw the bhang over the wall. That the police could not identify that person. The police then brought one of the youths who had run away. He identified himself as a car washer. The police handcuffed both of them and took them where the bag was and upon search, they found therein seven piles - migomba and decided to divide them by two whereby the appellant was given five while the other one was given two migomba. He was then taken at home and searched but nothing was found.

In his judgment, the learned trial Resident Magistrate was satisfied that the prosecution side adduced strong evidence against the appellant and found the case against him proved beyond reasonable doubt.

This decision aggrieved the appellant who, through Mr. Robert Dadaya, learned Advocate, has appealed to this court challenging both conviction and sentence on the following grounds:-

1. That the trial Court Magistrate erred in law to convict and subsequently sentence the appellant on the proceedings emanating from illegal proceedings.
2. That the trial Court Magistrate erred both in law and fact to convict and subsequently sentence the appellant while the offence he was charged was not proved beyond reasonable doubt.
3. That the trial Court Magistrate erred both in law and fact to convict and subsequently sentence the appellant on the alleged offence due to the fact that there was no fair trial against the appellant.

At the hearing of the appeal on 22nd July, 2021 the appellant was represented by Mr. Robert Dadaya, learned Advocate whereas the respondent was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney.

When invited to argue the appeal, Mr. Dadaya started his submission on the second ground of appeal. He asserted that there is inconsistencies

in the testimonies of the witnesses first on exhibit P 3. He explained that while PW1 one Eliamin Mkenga said that he received a sample from WP Angelina DCA/001, PW3 one WP Angelina testified to have handed over the sample in a Form No. DCEA 001. Mr. Dadaya argued that with this contradiction, it is unclear if what PW3 submitted is what PW1 received meaning that there was possibility that exhibit P1 is not the same as that submitted by PW3 for testing. It is Counsel's contention that since that exhibit formed the basis of the whole case, the evidence had to be clear on its identification. He thought that there was doubt and prayed the doubt to be resolved in the favour of the appellant.

Another inconsistency pointed out by learned Advocate was the evidence of PW 2 on where he was on that material day and if he was present when the appellant was being apprehended and if at all the person he was referring to as a youth was actually the appellant. According to him, the arrest and search did not follow the laid down procedure and urged the court to find that the appellant was not found with the bhang.

With respect to handling of the said drugs, Mr. Dadaya told this court that the prosecution failed to prove the unbroken chain of custody from the time it was seized to the time it was produced in court. To support this argument, learned Advocate cited the case of **Makoye Samwel**

@Kashinje and 4 others v. R Crim. Appeal No. 32 of 2014 in which the case of **Paul Maduka and 4 others v. R** was cited. It was his argument that there was no documentation. The court was referred to the case of **Kashindye Bundala and another v. R**, Criminal Appeal No. 352B and 349B on chronological documentation so as to avert planting of exhibits.

Mr. Dadaya also pointed out the inconsistency on the weight of the subject matter whether it was 1.06 kilograms or 1.00 kilograms.

With respect to the 2nd and 3rd grounds which were argued together, Mr. Dadaya complained that the trial was not fair as the prosecution witnesses were being asked leading questions.

Responding to the grounds of appeal, Mr. Wilbroad Ndunguru, supported both conviction and sentence but declined to support the appeal believing that the charge against the appellant was proved beyond reasonable doubt. He submitted that PW5 and PW2 were clear on how they arrested the appellant. According to him, after the arrest, a certificate of seizure and receipt were prepared and PW4 witnessed them. The appellant admitted to have been his property and, therefore, the question of possession and ownership is undisputed.

With respect to the proof of the nature and weight of the drugs, the learned Senior State Attorney explained that PW 1 proved those aspects, the charge sheet showed that the item weighed 1.06 and this amount is reflected in the trial court's judgment. He was emphatic that there were authentic documents which formed the basis of the case. It was his view that it is possible the difference between on the amount was a typing error which is a very minor error.

With respect to chain of custody, it was submitted for the respondent that that aspect was considered. He clarified that there was a certificate of seizure, the item was taken to PW4 who kept it and then handed it over to WP Anjelina who ultimately gave it to PW1 for scientific analysis. This court was also told that there was a documentation according to WP Angelina. Admitting that there were areas which needed documentation but no such documentation was done, Mr. Ndunguru explained that such failure is minor and argued that the Court of Appeal had occasion to deliberate on the chain of custody and chronological documentation and stated that oral evidence could suffice to prove the chain of custody provided the statement are detailed. This court was referred to the case of **Abas Kondo Gede v. R**, Crim. Appeal No. 472 of 2017 and urged to find the cases cited by Mr. Dadaya to be distinguishable.

As regards a fair trial, it was argued on part of the respondent that it was not true that those words were a proof that a leading question was asked but could possibly depict PW1's skills in testifying upon being led by the prosecution. Mr. Ndunguru clarified that the evidence of PW1 and other witnesses touched on the substantive aspect of the case; the nature of the object and its weight.

In his rejoinder, Mr. Dadaya reiterated what he had submitted in chief insisting that the evidence of PW2 was inconsistent and should be disregarded.

With regard to PW 5, Counsel for the appellant stated that he did not state how the item he impounded reached the Police Station to whom it was handed. He was insistent that there was a broken chain of custody.

HC: Analysis: PW 2:

The main issue which had to be resolved is on the identity of the owner of the said sulphate bag.

While PW 2 and PW 5 said that the appellant admitted that he was the owner of that bag, the appellant denied to have owned it. The issue is who should be believed between PW 2 and PW 5 on the one hand and the appellant on the other hand. As the evidence reveals, neither PW 2 nor

PW 5 positively confirmed that the appellant was found with the bag. PW 2 was clear in his evidence that:-

I remember on 18.6.2020 at 1100 hrs I was at the area around CRDB bank outside. Thereafter, I saw a group of policemen heading to the third building from that of CRDB. There were youths there, some were run (sic) and others tried to climb building wall. Police men were managed to arrest one youth who was tried (sic) to climb the wall. he noticed a group of youths who part of them were running and others were trying to climb the wall upon seeing police officers. The police managed to arrest one youth who was attempting to climb the wall. After that they found sulphate bag and wanted to search there. That youth was ordered to go back to where they had been and he obeyed. A search was conducted and the bag seized. That youth admitted to be the owner of the luggage. A document was prepared and signed.

In his second ground of appeal, the appellant is arguing that the

In short, the evidence fell short of proving the identity of the owner of the exhibit P 1. The circumstances of the case create doubts on the appellant being inculpated in the commission of the offence. As rightly

submitted by Mr. Robert Dadaya, such doubts should have been resolved in favour of the appellant.

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

Order accordingly.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge

20.10.2020

This judgment is delivered under my hand and the seal of this Court on this 20th day of October, 2020 in the presence of the appellant and Mr. Robert Dadaya, learned Advocate for the appellant and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent.

Rights of appeal explained.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge