

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)  
AT MTWARA  
CRIMINAL APPEAL NO. 70 OF 2021**

*(Originating from Nanyumbu District Court in Criminal Case No.72 of 2018)*

**SAID HASSAN IBRAHIM..... APPELLANT**

***VERSUS***

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 11/4 /2022*

*Date of Judgment: 13/6/2022*

**LALTAIKA, J.:**

The appellant, **SAID HASSAN IBRAHIMU**, was charged in the District Court of Nanyumbu at Nanyumbu with the offence of unlawful possession of prohibited plants contrary to Section 11 (1) (d) of the Drugs Control and Enforcement Act, Act No.5 of 2015. The particulars of the offence being that on 18th day of February 2017 at Magomeni village within Nanyumbu District in Mtwara Region the appellant was found in unlawful possession of prohibited plants to wit 5 kilograms of *cannabis sativa* commonly known as bhangji. When the charge was arraigned against the appellant, he pleaded not guilty to the offence thus, the matter went to full trial. After the trial, the trial court was convinced that the prosecution had proved its case beyond reasonable doubt. Thus, it found the appellant guilty, convicted and meted a sentence of ten (10) years imprisonment. Dissatisfied and aggrieved with

the decision of the trial court, the appellant has now preferred this second appeal on the following eight (8) grounds: -

1. *That the learned trial magistrate erred in law in relying on seizure certificate (exhibit P2) which was procured in contravention with the requirement of section 38 of the Criminal Procedure Act [Cap 20 R.E. 2002].*
2. *That the trial Magistrate erred in law and facts by unprocedurally admitting exhibits P1, P2, P3, P4 and P5 as evidence in court.*
3. *That the trial magistrate erred in law by relying in the alleged search which was conducted in contravention with the requirement of Criminal Procedure. Section 38 (1) of the Criminal Procedure Act requires a search warrant to be issued when it is not an emergency search.*
4. *That the trial Magistrate erred in law and facts by convicting and sentencing the appellant relying on exhibit P1 and P5 (caution statement and extra judicial statement) while the prosecution side failed to prove if exhibits were legally procured.*
5. *That the trial Magistrate erred in law and facts by failing to consider the defence of the appellant he did not comply with the requirements of section 235(1) and 312(2) of the Criminal Procedure Act [Cap 20 R.E. 2002].*
6. *That the trial Magistrate erred in law by conducting the whole case without complying with the section 210(3) of the Criminal Procedure Act [Cap 20 R.E. 2019].*

7. *The trial Magistrate erred in law and facts by failing to scrutinize on the legitimacy and credibility of the PW2 (Inspector Lugaila) who was also the Public Prosecutor in this case. The PW2 (A/Inspector Lugaila) was among the prosecution witness and at the same time he was a Public Prosecutor.*
8. *The trial Magistrate erred grossly in law and facts by convicting and sentencing the appellant while the prosecution side failed to prove their charge beyond reasonable doubt.*

During the hearing of the appeal, the appellant appeared in person and unrepresented, While the respondent Republic was represented by Mr. Wilbroad Ndunguru, the learned Senior State Attorney.

Arguing in support of the appeal, the appellant prayed this court to adopt his ground of appeal as part and parcel of his submission. However, he stressed that his cautioned statement was taken while time had lapsed and none of his relative was present. He further contended that he was arrested for not having a valid driving license and not wearing a helmet but in court tables were turned around and he found himself charged with the offence of possessing prohibited plants "bhangji". The appellant argued that he was surprised because the public prosecutor was also a witness which, in his opinion, justifies that there was no fair trial.

In his response, Mr. Wilbroad Ndunguru, learned Senior State Attorney supported the appeal. His unwavering support for the appeal was centered on on the eighth ground of appeal which entails that the prosecution case was not proven beyond reasonable doubt. To this end, the learned Senior

State Attorney addressed the court on the Chain of Custody. Mr. Ndunguru argued that the chain of custody did not prove the offence since it is not clear if the bhangi found with the appellant was the same that was produced in court and taken to the Government Chemist. To fortify his argument, the learned Senior State Attorney referred to the testimony of PW2 (Assistant Inspector Lugaila which is found at page 9 of the typed proceedings of the trial court). PW2 had testified that he was the one who arrested the appellant, searched and seized the contraband and the motorcycle from the appellant. He further stressed PW2 testified that he only took the seized items to the Police Station in Nanyumbu. In view of that testimony Mr. Ndunguru wondered to whom PW2 had handled over the exhibits.

On top of that, Mr. Ndunguru referred to the testimony of PW5 (F9012 DC Deusdedit) exhibits keeper who had testified that he received the exhibits from Assistant Inspector Lutonja. The learned Senior State Attorney argued that the whole testimony does not make it clear whether Lutonja and Lugaila are one and the same person or not. To that end, Mr. Ndunguru submitted that the chain of custody was broken down hence it affected the rest of the exhibits including the 5 kilograms of bhangi (Exhibit P3).

Mr. Ndunguru finalized his submission by submitting on the fifth ground of appeal. The learned Senior State Attorney argued that although the trial court had considered the appellant's defence, such consideration was not deep enough. Thus, Mr. Ndunguru called upon this court to step into the shoes of the trial court and arrive to a just decision. To that end, the learned Senior State Attorney conceded to the grounds of appeal and prayed that this court to allow the appeal.

Having summarized passionately considered the evidence and arguments from both parties and after considering the records, I am now in a position to determine the present appeal. My determination will be guided by the grounds of appeal advanced by the appellant and argued by the learned Senior State Attorney. I will therefore narrow down to the eighth ground of appeal that was the center of Mr. Ndunguru's insightful submission.

Premised on the eighth ground of appeal, it is without any delay and hesitation that I am inclined to say that prosecution did not prove their case against the appellant beyond reasonable doubt. I am saying so because the above evaluation makes it clear that the evidence by the prosecution contravened the chain of custody as required by law. It goes without saying that, proof of this case depended very much on how the chain of custody was observed.

I subscribe what the learned Senior State Attorney's submission that it it was not clear whether the bhangi found with the appellant was the same sent to the Chief Government Chemist and produced in court. It is not known who brought the contraband at the Nanyumbu Police Station between PW2 and Lutonja as was testified by PW5. I am saying so because PW2 testified that he arrested, searched seized the contraband and brought it to Nanyumbu Police Station. Whereas, PW5 at page 17 of the typed proceedings testified that Assistant Inspector Lutonja was the one who handled over the bhangi. In fact, this contradiction is calling and creates doubts as who really conducted search, seized and handled over the same to PW5?

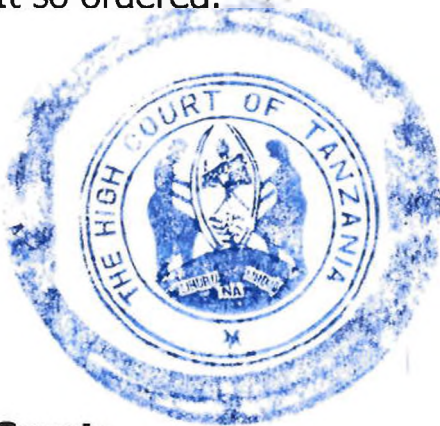
The doubt could only be cured if the prosecution could have established how the said bhangji moved from the appellant to either PW2 or someone Lutonja as testified by PW5. It suffices to say that the oral testimonies of the prosecution witnesses do not show how exhibit P3 moved from the point of arrest, search, seizure and handling it to PW5 at Nanyumbu Police Station, from PW5 to PW4 who sent it PW3. Then from PW3 to PW4, from PW4 to PW5 and from PW5 to the person who brought it in court for tendering as exhibit. This could have been proved by records on the flow of the certificate of seizure, seizure receipt, dispatch book, extract from the exhibit register, letters of handling over the bhangji from PW5 to PW4 and from PW4 to PW3 and vice versa and the valuation report. See **Son Lei vs Director of Public Prosecutions**, Consolidated Appeal No.16A of 2016 and 16 of 2017 (unreported) and **Paulo Maduka and Others vs Republic**, Criminal Appeal No.110 of 2007(unreported).

Also, it important at this juncture to address another anomaly featuring the record of the trial court. As per the testimony of PW5 it is clear that on 09/04/32018 PW4 went to PW5 and took a sample of bhangji which was taken to the office of PW3. It is not certain vide the evidence of either PW4 or PW5 if the sample taken and sent to the office of the Government Chemist Laboratory Agency was taken in the presence of the appellant. The act of PW4 and PW5 taking the specimen in the absence of the appellant offended **Reg.16(f) of the Drugs Control and Enforcement (General) Regulations,2016 G.N. 173 OF 2016**.The omission affected the integrity of the sample because there was no assurance that it was actually extracted from the seized plant. See: **Peter Kabi & Another vs Republic**, Criminal

Appeal No.5 of 2020 and **Jabril Okash Ahmed vs Republic**, Criminal Appeal No.331 of 2017.As intimated above, it is clear that the chain of custody was broken down which creates doubts as to the genuine of the exhibit P3.

In the upshot, I find the appellant's appeal meritorious and I allow it. Therefore, I quash the conviction and set aside the sentence meted on him. Also, I make an order that unless lawfully held for other justice causes, the appellant should be set at liberty forthwith.

It so ordered.



**E. LALTAIKA**

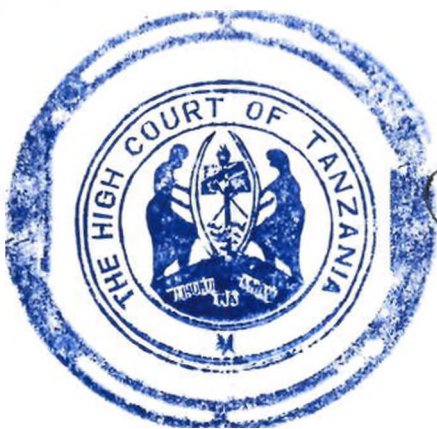
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**JUDGE**

**08.06.2022**

**Court:**

This Judgment is delivered under my hand and the seal of this Court on this 8th day of June,2022 in the presence of the Mr. Enosh Kigoryo, the learned Senior State Attorney and the appellant who have appeared in person and unrepresented.



**E. LALTAIKA**

A handwritten signature in black ink, appearing to read "E. Laltaika".

**JUDGE**

**08.06.2022**