IN THE HIGH COURT OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

(APPELLATE JURISDICTION)

DC. CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Ngara District Court, Criminal Case No. 171 of 2020)

MAJALIWA IGNAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

20/09/2022 & 23/09/2022

Isaya, J.:

The appellant, Majaliwa Ignas appeared before the District Court of Ngara where he was charged with and convicted of the offence of Possession of Narcotic Drugs contrary to section 11(1) of the Drug Control Enforcement Act No. 5 of 2015. He was subsequently sentenced to the mandatory custodial sentence of thirty years imprisonment.

The brief background facts leading to the present matter are that on 01/05/2020 at around 2.00 pm at Kamuzuza village, the appellant was arrested by a militia man (PW1) while smoking bhang. He took him to the WEO (PW3) who searched

him and found him in possession of four rolls of bhang. He was taken to Kabanga Police station by PW4 where the certificate of seizure was prepared and filled by PW2. Thereafter, the bhang was received by PW5 who was the exhibit storekeeper. PW5 forwarded the bhang to the Chief Government Chemist who after analysis confirmed the same to be narcotic drug (bhang) weighing 40 grams.

In his defence, the appellant under oath denied the involvement in the commission of the alleged offence. He refuted the prosecution evidence implicating him with commission of the offence.

Aggrieved by decision of the trial court, the appellant has appealed to this court citing five grounds of appeal which were framed as hereunder, thus:

1. *That the learned trial Magistrate erred in law and fact by convicting the appellant in absence of evidence from a very important witness who was said to have conducted the search one Ward Executive officer.*
2. *That the trial Magistrate erred in and fact on proceeding with the case knowing the procedure of search was not adhered as testified by PW1.*
3. *That the learned trial Magistrate erred in law by basing her conviction on contradictory evidence*

adduced by PW1 and PW3 on the number of arresting persons.

4. *That the trial magistrate erred in law and fact by relying her conviction on a planted and falsified case.*
5. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellant on basing on evidence which was not proved beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant who appeared in person, unrepresented hurriedly asked the court to adopt the grounds of appeal in the memorandum of appeal. He thereafter, briefly asked the court to allow his appeal and set him free.

Mr. Amani Kilua, learned State Attorney who appeared for the respondent/Republic declined to support the appellant's conviction. The learned State Attorney submitted firstly that, the charge sheet suffers a serious defect because the weight of 10 grams of narcotic drugs (bhang) is in the category of small quantity of drugs, hence section 11(1)(d) of the Drug Control Enforcement Act No. 5 of 2015 does not apply to the stated amount. He contended that the proper section for the small quantity of narcotic drugs is section 17(3) of the Drug control Enforcement Act no. 5 of

2015. He referred us to Rule 3(1)(a) of the Drug Control an Enforcement (General) Regulations of 2016, to reinforce his point that 50 grams and below of the narcotic drugs falls within the ambit of small quantity.

In other hand, he submitted that there is contradiction on the weight of the bhang. That the appellant was arrested while in possession of 4 rolls of bhang which were not weighed by the Weight and Measurement Agency. PW5 took only 3 rolls to the Chief Government Chemist which weighed 45.0 grams with packaging material inclusive. The same weighed 40.0 grams when the packaging material was removed. That the oddity is to charge the appellant to have been in possession of 10 grams of bhang. He contended that the contradiction gives benefit of doubt to the appellant.

In his last point, he submitted that the chain of custody was not observed because PW5 stated in his evidence that he received 4 rolls of bhang from DC Athumani (PW2) on the 3rd September,2020. But PW2 received it from the Accused on the 1st September,2020. It is not stated where PW2 kept the exhibit for the duration of two days. He argued that that there was a possibility of tampering with the exhibit in the absence of good explanation.

Having carefully studied the evidence in record. In his first point Mr. Kilua, submitted that the appellant was charged and convicted on wrong provision of law because 10 grams of bhang fall under small quantity, that the law applicable is section 17(3) of the Drug control Enforcement Act No. 5 of 2015 but not section 11(1)(d) of the Act. Rule 3(1)(a) of the Drug Control Enforcement (General) Regulations, 2016 defines small quantity as follows:

> *"3 (1) Subject to Section 17(3) of the Act, the following quantity of narcotic drugs and psychotropic substances shall be treated as small quantity:*
>
> *(a) Cannabis that does not exceed 50g;"*

In the light of the above cited provision of law, it is obvious that the amount of 10 grams which appear in the charge sheet or 40.0 grams being below 50g as weighed by the Chief Government Chemist, fall within the ambit of section 17(3) of the Drug Control Enforcement Act. I entirely agree with the learned State Attorney that the appellant was charged on inapplicable provision of law.

Mr. Kilua as well faulted the conviction basing on the inconsistent evidence on the real weight of drug the appellant was arrested while in

possession of in relation to the charge sheet. As rightly argued by Kilua, all prosecution witnesses testified that he was arrested in possession of 4 rolls of bhang. There is no explanation as to why PW5 took only 3 rolls of bhang to the Chief Government Chemist. As noted by Mr. Kilua the drugs weighed 40.0 grams when the Chief Government Chemist examined them. In the charge sheet, he was charged to have been in unlawful possession of 10 grams of narcotic drugs. What is gathered from this situation is that, the evidence adduced do not support the charge sheet. In the case of **Thomas Chengula and Another vs Republic,** Criminal Appeal No.255 of 2017, High Court, Dar es salaam, the court stated:

> *"...the position of the law is very clear that, the prosecution has the duty to prove what has been stated in the charge sheet."*

Where there is variation in the charge sheet and the evidence creates doubts on the prosecution case and hence it cannot be said that the case was proved as alleged in the charge sheet. The same situation was stated in the case of **Edward Luambano Vs Republic,** Criminal Appeal No. 190 of 2018 where the Court of Appeal stated that:

"...the effect of the variation between the charge sheet and evidence in proof of such case is that the offence was not proved"

Regarding the chain of custody pointed out by Mr. Kilua to have been broken, definitely he made a point worthy to note because, PW2 having seized the 4 rolls of bhang from the accused on 01.09.2020, it is in the record that he handed over the same to PW5 on 03.09.2020. However, it is unfortunate that there is no explanation as to where the exhibit was kept between those days. It is again a glaring incident that the Chief Government Chemist received only three rolls of bhang instead of four for analysis.

This court and the Court of Appeal has stressed in a number of cases on the importance of chain of custody from the stage the exhibit is received to when the same is tendered in court. For instance, in the case of **Paul Maduka and 4 Others vs Republic,** Criminal Appeal No. 110 of 2007, CAT- Dodoma, the Court stated that:

"The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone appear guilty...the chain of custody requires that from the moment the evidence is

collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.

For the above stated reasons, and as rightly submitted by Mr. Kilua, I think I have amply demonstrated that the appellant was wrongly convicted. I accordingly allow the appeal, quash his conviction and set aside the sentence of 30 years which was imposed on him. He is to be set free forthwith unless he is otherwise lawfully withheld.

It is so ordered.

G.N. Isaya

JUDGE

23/09/2022

Court: Judgement delivered this 23rd day of September, 2022 in the presence of the appellant and Mr. Amani Kilua, the learned State Attorney for the Republic.

G.N. Isaya

JUDGE

23/09/2022