IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 124 OF 2022

(Appeal from the Decision of the District Court of Kibaha in Criminal Case No. 06 of 2021)

MUSTAFA OMARI MUSTAFA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

28th September & 11th October, 2022

BWEGOGE, J.

The appellant namely, Mustafa Omari Mustafa, was charged in the District Court of Kibaha with the offence of trafficking in narcotic drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act

[Cap. 95 R.E 2019] and convicted forthwith. A sentence of thirty (30) years imprisonment was imposed on the appellant by the trial court. The appellant, being aggrieved, has appealed to this court on both conviction and sentence. The same has advanced seven grounds of appeal in an attempt to defeat the decision of the trial court. This court, upon going through the grounds of appeals filed by the appellant herein, apprehends that they all boil down to a single ground of appeal that the prosecution case was not proved beyond reasonable doubt.

The facts of this case may be stated, albeit briefly, as follows: on the fateful day of 20th February, 2021 the law enforcement agents under the supervision of Assistant Inspector James Bubinga (PW3) were on patrol. At dawn, they received information from the anonymous informer to the effect that the appellant herein and his wife namely, Happy Chrisant who resided at Tanita Mnarani area within Kibaha District were dealing in drugs. PW3 had procured an independent witness from the neighborhood to witness the search exercise. The said witness is namely Bakari Selemani (PW8). The search exercise conducted into the residence of the appellant led to the discovery of a sulphate bag. Inside the bag, they found 143 rolls containing substances suspected to be *cannabis sativa,* commonly known as *bhangi.* PW3 had filed a seizure form (exhibit P5) which was

signed by the witness (PW8). PW3 had handed over the seized suspicious substance to Corporal Pili (PW6) who was on duty at the charge room. PW6 was also vested with custody of suspects. Later on, PW6 handed over the exhibit to Sergeant Athuman (PW4) for safe custody whereas PW4 instructed Sergeant Mwanvita (PW7) to register the same. The exhibit was registered as Exhibit 062/2021 and stored. One, Corporal Ombeni (PW2) was assigned to investigate the case and he had taken the cautioned statement of the suspect namely, Happy Chrisant (2nd accused). Sergeant Rehema (PW5) had taken the appellant's cautioned statement (Exh. P.6).

Later, on 22nd February, 2022, the suspicious substances were submitted to the Chief Government Chemist for analysis. One Derick Martin Masako (PW1), the Government Chemist, had conducted confirmatory tests on the substances brought for analysis whereas the test confirmed that the alleged substances were *cannabis sativa* weighing 67.23 grams. PW1 had testified in Court and tendered his report which was admitted as exhibit P2.

The appellant, when called to make his defence, was very brief. He deponed that the substance tendered as exhibit in court was found in his possession and it was for his personal use. The appellant had enlightened

the trial court that his wife had no knowledge of the said incriminating exhibit. He prayed to be condemned to pay fine. The trial court, based on the evidence brought to its attention, coupled with the appellant's admission, found that the prosecution case was proved to the standard required in a criminal case and convicted the appellant forthwith. Hence this appeal.

The appellant fended for himself in this court whereas the respondent Republic was represented by Mr. Emmanuel Maleko, the Senior State Attorney. During the hearing of this appeal, the appellant informed this court he had already filed his written statement of arguments and he had nothing else to submit in court.

In the interest of brevity, the appellant's statement of arguments may be stated as follows: The appellant opened his arguments with the complaint that the trial magistrate convicted him on the fatally defective charge as the particulars of the offence didn't disclose the essential ingredients constituting the offence of tracking in narcotic drugs. That the alleged omission has occasioned a miscarriage of justice as he failed to understand the allegation against him. Consequent to the above, he failed to marshal his defence.

Further, in substantiating his interlinked grounds of appeals, the appellant argued on the following points: **First,** he alleged that the trial court had based its conviction on the evidence of PW1 namely, Derick Martin, a Government Chemist whose expertise and analytical work was not explained in court. **Second,** the appellant alleged that the trial court failed to consider that the chain of custody in respect of the incriminating exhibit P.1 (*cannabis sativa*) was not maintained by the prosecution as required by law. The appellant referred the mind of this court to the case of **Paulo Maduka and 4 Others vs. Republic**, Criminal Appeal No. 110 of 2007(unreported) to validate his point. **Third**, the purported seizure of incriminating evidence was unlawful as the law enforcement agents had no search warrant when they searched him at midnight. **Fourth**, the prosecution case was tainted with discrepancies in testimonies adduced by key witnesses, specifically with regard to the discovery of the alleged narcotic drugs and the source of light for identification of the same. The appellant charged that PW8, the purported independent witness, had deponed implausible evidence. **Fifth,** the trial court had based its conviction on his caution statement and consequential confession without regard to the fact that it was illegally procured. **Sixth,** the trial court erroneously accorded weight to the seizure warrant which he didn't sign. That his objection to its admission was not considered. **Seventh,** the trial

court has likewise based its conviction on an ambiguous admission made during his defence. That the trial court didn't inquire whether the purported admission was made under threat or promise. **Lastly,** the prosecution failed to prove the charge beyond reasonable doubt as required by law.

On the other hand, Mr. Maleko, counsel for the respondent Republic, primarily, made it clear that he supports the conviction and sentence entered by the trial Court. And, he informed this court that the appellant has impliedly supplemented his grounds of appeal, without leave, averring that the charge was defective. He opined that the charge preferred by the prosecution at the trial Court was proper in the eyes of law as it disclosed essential ingredients of the offence as required under S.135 of the Criminal Procedure Act (Cap 20 R.E. 2022). Therefore, the appellant herein had been well informed of the nature of the case facing him to enable him to make defence thereto. Otherwise, Mr. Maleko referred the mind of this Court to the provisions of S.388 of the Act which instructs that defects on charge sheets are curable under the relevant section. In the same vein, the case of **Peter Marco @ John vs Republic**, Criminal Appeal No. 258/2017 (unreported) was referred to buttress the point.

In reply to the written statement of argument filed by the appellant in support of the appeal herein, Mr. Maleko submitted that the prosecution case was proved beyond reasonable doubt. That the prosecution witness namely, Derick Martin (PW1) is the witness of truth who had given credible evidence in respect of matters within his expertise as a Government Chemist. And, it is apparent that the appellant failed to cross examine this crucial witness which is tantamount to an admission of his evidence.

In respect of the appellant's argument that there was no chain of custody relating to exhibit P1. (143 rolls of *bhangi*) Mr. Maleko stated that it is self-evidence that chain of custody was maintained by PW3, PW4, PW6, PW7 as well as PW1 and PW2 in later stages and the case of **Paulo Maduka** cited by the appellant doesn't fit in this case.

In reply to the complaint that no proper search was conducted by the police officers in absence of the search warrant Mr. Maleko stated that the evidence indicates that Inspector Bubinga (PW3) had received information about the appellant's dealing in narcotic drugs whereas he had rushed to the scene of the crime and conducted search thereof. The requirement of the search warrant was done away with owing to an

emergency and the seriousness of the alleged crime in line with provisions of s.42 of the Criminal Procedure Act.

And, in respect of the allegation that the alleged narcotic drugs were not identified at the crime scene, the counsel submitted that the record of the trial Court is clear in this aspect in that the appellant's room was illuminated by electric light and the appellant was found into his room. That the search exercise was witnessed by an independent witness who is the appellant's neighbour (PW8).

Further, the counsel contended that the appellant's complaint that the trial Court had relied on his cautioned statement to ground his conviction is unfounded. That, notwithstanding the fact that the impugned caution statement (exhibit P6) was admitted without objection, the conviction was not based on the same. And there was no confession statement referred to by the trial court. Likewise, counsel contended that the requirement for proof of signatures on the seizure warrants to establish its authenticity is unknown to the law of this land.

In concluding his submission in reply, the counsel reiterated his opinion that the prosecution had proved the charge beyond reasonable doubt. In support of his opinion, the counsel stated that the appellant in his defence had admitted possession of narcotic drugs (bhangi) though he had stated

that it was for personal consumption. Based on the above submission, the counsel prayed this appeal to be dismissed in its entirety.

Before discussing the merit or otherwise of this appeal, this court finds it imperative to respond to the appellant's 1st argument which was not pleaded in his petition of appeal in that the trial court had convicted him based on a fatally defective charge. The appellant's argument is as thus: The particulars of the offence didn't disclose or state the specific offence that the appellant was alleged to commit. That it was important for the particulars of the offence to state clearly the offence committed by the appellant whether it was importation, exportation, buying, using, manufacturing, etc. Further, the appellant charged that the omission was fatal as it prejudiced the appellant in terms of the preparation of his defence evidence. Hence, concluded the appellant, the plea taken on a fatally defective charge was invalid and it could not be the foundation of his conviction. The appellant has directed the mind of this court to the decision of the apex court in the case of **Hamis Mohamed Mtou vs. Republic**, Criminal Appeal No. 228 of 2019 [2021] TZCA 478 to bring his point home.

This court is alive to the fact that it is a requirement of law that an accused must be enabled to know the nature of the case facing him which can be

achieved through disclosure of the essential elements of the offence charged [**Musa Mwaikunda vs. Republic** [2006] TLR 387. Notwithstanding the acknowledgement made above, this court refuses to purchase the argument made by the appellant herein above as it is buttressed on a dead law as hereunder explained.

In **Hamis Mohamed Mtou vs, Republic** (supra) the appellant was convicted on a charge of trafficking in narcotic drugs c/s 16 (1) (b) (i) of the Drugs Control and Enforcement Act [Cap. 95 R.E. 2002]. The particulars of the offence alleged that on 17th November, 2010 at Julius Nyerere International Airport within Ilala District Dar es Salaam Region one, Hamis Mohamed Mtou, did traffic in narcotic Drugs namely, Heroin hydrochloride weighing 811.54 grams valued at Tshs. 24,346,200/.

The apex court, having explored the definition of the term "trafficking" under s. 1 of the Act, observed the following:

> *"Under this provision of the law, the modes in which trafficking in drugs can take place have been shown to include importation, exportation, manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person."*

Further, the court expounded:

> *"Looking at the particulars of the offence in comparison with the definition of trafficking, we have not found anything explaining on what the appellant is alleged to have done to be said that he was trafficking in narcotic drugs. There is no mention of any of the categories of trafficking in drugs to constitute the offence charged. The prosecution ought to have indicated in the particulars of the offence what the appellant was doing with the narcotic drugs to constitute the offence charged so that he can well understand the allegations against him and be able to marshal his defence. The charge is therefore lacking in the particulars of the offence."*

The above decision was made based on the Drugs Control and Enforcement Act [Cap. 95 R.E. 2002]. The charge levelled against the appellant is coached under the revised edition 2019. This edition of the Act has been revised up to 30th July, 2019. In this edition, the definition of the term "trafficking", includes possession. It is obvious that the alleged possession of *cannabis sativa* by the appellant, in the current edition of the law, amounts to trafficking in drugs. The above explanation deposes the appellant's purported supplementary ground of appeal in negative.

Now, at this juncture, this court proceeds to determine whether the appeal herein is meritorious. Primarily, this court finds it pertinent to restate the cherishable cardinal principle of our law that the burden is on the prosecution to prove its case, no duty is cast on the accused person to prove his innocence [**John Makune vs. Republic** (1986) TLR 44]. The appellant's complaint is premised on the ground that the charge was not proved against him beyond reasonable doubt.

This court has gone through the proceedings and judgment of the trial court. The case against the appellant was a straightforward one. The appellant's residence was searched at the dawn of 20th February, 2021 following an intelligence clue furnished by an anonymous informer which was received by PW3 alleging that the appellant was a dealer in narcotic drugs. The search exercise has led to the disclosure of 143 rolls of suspicious leaves enclosed in the sulphate bag. The scientific analyses of the suspicious leaves conducted by PW1 resulted in the finding that the substance was nothing but *cannabis sativa* containing *tetrahydrocannabinol* (THC), the chemical causing drug dependence (psychoactive and intoxicating effects) and consequential brain damage. The Scientific Laboratory Report was admitted in court as exhibit P2.

The independent witness (PW8) had deponed in court that he resides at the same premise with the appellant and witnessed the search exercise conducted by PW3 having requested to be present.PW8 had ascertained in court that the incriminating evidence was found into the residence of the appellant. The appellant never cross-examined this vital witness. It is a rule of law, as restated in the case of **Amos Jackson vs. Republic,** Criminal Appeal No. 439 of 2008 [2022] TZCA 467 that:

> *"The law is long settled that failure to cross examine a witness on a certain relevant matter is deemed to have accepted the truth of the stated assertion. We have in times without number pronounced the said stance in various of our decisions including* ***Issa Hassan Uki v. The Republic,*** *Criminal Appeal No. 129 of 2017,* ***Nyerere Damian Ruhele v. Republic,*** *Criminal Appeal No. 501 of 2007, and* ***George Maili Kembogo v. Republic,*** *Criminal Appeal No. 327 of 2013 (all unreported) to mention but a few."*

Further, the court observed:

> *"In* ***Nyerere Damian Ruhele*** *(supra) we stated as follows: We are aware that there is a useful guidance in law that a person should not cross examine if he/she can not contradict. But it is also trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

The fact that the appellant herein had failed to cross examine PW8 whom he was acquainted, implies the fact that PW8 deponed nothing but the whole truth in respect of what had transpired at the residence of the appellant that fateful dawn. Contrary to the allegation made by the appellant, this court finds no cogent ground to discredit the testimony of PW8.

Apart from the above, it is a glaring fact on the record of the trial court that the appellant when called upon to make a defence, he had admitted possession of narcotic drugs, and enlightened the trial court that his spouse had nothing to do with the alleged drugs. The appellant was recorded to have pleaded with lenient punishment, preferably, a fine. It is obvious, the denial averred by the appellant in his pleadings is an afterthought. This court refuses to purchase the appellant's argument that his admission was ambiguous or otherwise instigated by threats.

The appellant had also alleged that the trial court had relied on his cautioned statement to convict him. This court subscribes to the counsel for the respondent Republic in that this complaint is not supported by the record of the trial court. It is obvious that the trial magistrate never

considered the appellant cautioned statement as the basis for convicting him, let alone mentioning it.

In the same vein, the appellant had alleged that the law enforcement agents searched his premise without the search warrant and the trial court had admitted and considered the seizure warrant (exhibit P.5) which he didn't sign. Upon scrutiny, this court found that the appellant and his spouse had signed the document, apart from PW8. This court is on all fours with the counsel in that under s. 42 of the Criminal procedure Act, law enforcement agents may search a premise without a warrant if the agency and, or other serious circumstances so demand.

Lastly, this court is obliged to respond to the appellant's averment that the prosecution failed to establish the chain of custody in respect of exhibit P.1 (143 rolls of *cannabis sativa*). Chain of custody refers to chronological documentation and, or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic aimed to establish that the evidence tendered in evidence is related to the charge facing the accused person [**Paulo Maduka and 4 Others vs. Republic** (supra)]. As properly submitted by the counsel for the respondent Republic and on account of the facts of this case previously revisited by this court, it goes without saying that the prosecution had

well established a paper trail of impugned exhibit P.1. The record clearly indicates that the exhibit was recorded on seizure warrant (exhibit P.5) by PW3 who had conducted search into the premise of the appellant. It was later handed to PW6 who was supervising the charge room that fateful day before it landed to PW 4 and PW 7, the exhibit keepers, who had registered the same, labelled and sealed it before it was delivered to PW1 through the investigator (PW2). The sample delivery Form No. DCEA 001(exhibit P3) executed by PW2 and sample receipt notification executed by PW, speak volumes about the paper trail maintained throughout the process. This argument is likewise without substance.

On the foregoing, this court finds that the prosecution had proved the case against the appellant beyond reasonable doubt. The appeal herein is devoid of merit and is hereby dismissed. The conviction entered and the sentence imposed by the trial court are hereby upheld.

Order accordingly.

DATED at **DAR ES SALAAM** this 11th October, 2022.

O. F. BWEGOGE

JUDGE

The judgment has been delivered this 11th October, 2022 in the presence of Mr. Emmanuel Maleko, Senior State Attorney for the respondent Republic and the appellant who is present in person and unrepresented.

Right of appeal explained.

O. F. BWEGOGE

JUDGE