IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 19 OF 2022

(Arising from Resident Magistrate Court of Bukoba at Bukoba (RM) Criminal Case No. 36/2018)

BYENCY S/O EMMANUEL---------- APPELLANT

Versus

THE REPUBLIC---------- RESPONDENT

JUDGMENT

Date of Judgment: 21.10.2022

A.Y. Mwenda, J.

Before the Resident's Magistrates Court of Kagera at Bukoba, the appellant stood charged for cultivation of prohibited plants contrary to section 11 (1) (a) of the Drugs Control and Enforcement Act, [Cap 95 RE 2019]. It was depicted by the prosecution's side that on the 23rd of March 2018, while at Bubale village, within Misenyi District in Kagera Region he was found cultivating prohibited plants to wit cannabis sativa (bhang).

Upon reading the contents of the charge sheet, the appellant entered a plea of not guilty. This triggered the prosecution's side to call witnesses and tender exhibits to prove its case. Having received both the prosecution's and defence evidence,

the trial court was satisfied that the prosecutions side discharged its duty of proving the case against the appellant. The appellant was then convicted and sentenced to serve a term of thirty (30) years jail imprisonment.

Dissatisfied with the conviction meted against him by the trial court, the appellant preferred the present appeal with 7 grounds of appeal. For reasons which will be advanced later, this count found no need to reproduce the said grounds of appeal.

At the hearing of this appeal, the appellant appeared in person without legal representation. On the other hand, the respondent, the republic, was represented by Ms. Magili learned State Attorney who was assisted by Mr. Alex Francis, State Attorney Trainee.

At the opening of the hearing of this appeal, the appellant submitted that the case against him which led to his conviction was fabricated by a woman called Tereza. He said she did so in order to prevent him from acquiring his monies to a tune of TZS. 300,000/= which he (the appellant) had given her to keep for him. He said, this woman lied that he attempted to commit suicide as a result he was arrested and later alleged he was cultivating cannabis sativa. He prayed this appeal to be allowed.

On her part, Ms. Magili, learned State Attorney for the republic informed the court that the republic is in support of the appellant's appeal. She submitted that the seizure certificate in respect of the impounded bhang which was tendered by PW2,

was not cleared for admission before tendering it in evidence. She said, the said exhibit which was admitted as P.1 was not read in court before it was tendered. Regarding consequence for such failure Ms. Magili said the same need be expunged from the records and added in that if that is done then it becomes clear that there is no linkage between the crops impounded and the appellant.

Further to that the learned State Attorney submitted that PW3 testified before the trial court in that the appellant showed him the bhang in question when it was in exhibit room and took it to the Weight and Measures Authority at Mtukula and later to the Government Chemistry Laboratory where the reports were prepared indicating the weight of the plant as being 375 grams and that it was cannabis sative (bhang). The learned State Attorney submitted that the said reports were admitted as exhibits P.2 and P.3 respectively without reading their contents in court. She said, with such failure the government chemist report should be expunged and if that is done, then since the PW3 had no detailed information/knowledge in respect of the plant, then the prosecution's case remains with no proof that the plants in question were cannabis sativa (bhang).

The learned State Attorney concluded her submissions with a remark that the prosecutions side failed to prove its case to the standard required.

With the submissions in support of the appellant's appeal, the appellant had nothing to be rejoindered. He repeated to his previous prayer longing for his appeal to be allowed.

The above being the summary of the submissions from both parties, the issue for determination is whether or not the trial court was justified to find the appellant guilty as charged. In convicting the appellant, the Hon. Trial Magistrate while relying on the evidence adduced by PW1, PW2 and PW3, was of the firm view that the same was sufficient to warrant conviction. He concluded that PW2 was credible eye witness whose evidence was not impeached. He said this witness testified how the appellant while at his homestead hurriedly took a hoe and went to a shamba where he uprooted bhangi plants in front of many onlookers including PW2. Also he considered PW1's testimonies evidence as he prepared the certificate of seizure (exhibit P1) and PW3 who send the said bhang to the Weigh and Measures Agency and later to the Government Chemist Laboratory for analysis.

In a bid to finding answers to the issues raised above, I have keenly gone through the trial court's records and found the following amiss. Firstly, regarding allegations that the appellant was found with prohibited plants only PW2 was called to testify in that the appellant while under their custody took the hoe to the shamba where he uprooted bhang and brought it to them when they were at his (appellant's) home. However although the trial court said while the appellant was uprooting the

said bhang there were many onlookers and PW2 alleged "some people followed him" the prosecution side did not call such witnesses to prove that allegation. Strangely, even his wife (appellant's wife) who is alleged to have triggered the information regarding the appellant owning cannabis plants was not called to testify.

Since the appellant's wife and persons who followed the appellant when he went to uproot the said plant were not called then such omission is fatal to the prosecution's case and the court draws an adverse inference. In the case of RIDHIKI BURUHANI VS. REPUBLIC [2011] T.L.R 303, CAT, the court held inter alia that;

> *"The general and well known rule is that the prosecution is under prima facie duty to call those witnesses who from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw adverse inference to the prosecution."*

Guided by above authority it is thus unsafe to conclude that the appellant was cultivating bhang and bad indeed there is no evidence which was tendered

regarding ownership of the shamba/farm where the purported bhang was grown/cultivated.

Secondly, there is no chain of evidence showing how the purported bhang was handled from when it is alleged it was uprooted to the stage when it was subjected to analysis by Weight and Measure Agency and the Government Chemist Laboratory. From the records, the only evidence available regarding exhibit P.2 (bhang) (though the trial magistrate forget to gave exhibit name) is that of PW1, PW2 and PW3. On his part, PW1, while testifying in court said on 23/3/2018 while in his office, one militia man and one locality leader from Kazizi came with accused alleging he was cultivating bhang. Having received this information he said he prepared a certificate of seizure. He then tendered the said certificate of seizure as exhibit P.2. I have considered this witnesses' evidence and noted the following shortfalls. One, is that PW1 did not say if he received the said bhang when the appellant was brought to him and two, he did not say as to who exactly handled him the said bhang. The prosecutions side ought to have narrated how the said bhang found its way directly to PW1. Also, in the circumstances of this case it is clear that PW1 had powers to prepare the certificate of seizure. I am saying so because there is no evidence which shows PW1 seized the said bhang, rather he prepared certificate of seizure while the said bhang were in exhibit room. For that

matter he bad no power to do so and was contrary to as section 38(3) of the Criminal Procedure Act, [Cap 20 RE 2019] which reads as follows, that;

> *"where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relation or other person for the time being in possession or control of the premises and the signature of witnesses to the search if any."*

Again, even if the certificate of seizure was prepared in accordance to the provisions of Section 38(3) of the Criminal Procedure Act, [Cap 20 RE 2019], still, (as it was rightly pointed by the learned State Attorney) by admitting the same in evidence without reading its contents in court affected the prosecution's case. Faced with similar scenario, the court of Appeal in the case of HASSAN SAID TWALIB VS. THE REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2019, while citing the case of ROBINSON MWANYISI AND OTHERS VS. REPUBLIC [2003] TLR 218, JUMANNE MOHAMED AND 2 OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 534 OF 2015 (unreported), LACK KILINGANI VS. REPUBLIC, CRIMINAL APPEAL NO. 402 OF 2015 (unreported) AND MAGINA KUBILU @ JOHN VS. REPUBLIC, CRIMINAL APPEAL NO. 564 OF 2016 (unreported) held inter alia that;

"it should suffice to state that the exhibit was not read out in court after admission which is fatal irregularity."

Guided by the above authority, since exhibit P.1 was not read before the court then the same is expunged from the record and thus it is not going to be referred anywhere in the records.

Also, PW3 testified that on 26/3/2018 when he received the appellant's criminal records, he went in the lock up where the appellant was kept and demanded to be shown where the bhang was. He said the appellant led him in the exhibit room and showed him the said bang. He said on 27/3/2018 he took the said bhang to the Weight and Measures Agency and to the Government Chemist Laboratory for analysis. The report from the respective offices were tendered in court as exhibit P.2 and P.3. Again with this evidence the following shortfalls are evident. Firstly, one may wonder why would the appellant lead the police PW3 to exhibit room which he had no control with. Also the prosecution's evidence is silent on who took the purported bhang to the exhibit room. It is also not clear if the custodian of exhibits was involved in the said exercise. Secondly, the record is also not clear as to who received the said exhibits at the Weight and Measures Agency and the Government Chemistry Laboratory and in what state the said exhibits were in. With such anomaly there is a likelihood of the said exhibit being interfered with.

Faced with similar scenario the Court of Appeal in the case of MIRAJI MALUMBO VS. THE DPP ZANZIBAR, [2008] TLR 260, held inter alia that;

> *"There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government of what was believed to have been found on the appellant."*

In the same case the court held further in that;

> *"It is most important that a complete record of every person who handled an exhibit is maintained. The evidence may be required to prove in court that there has been no interference with the exhibit from the time it comes into the hands of the police until it is produced in evidence in court. This record shall be made on the exhibit label (PF.145). Each officer who takes over an exhibits shall also make a note in his note book of the date, time and place and the person from whom he took over. He shall obtain a receipt in his note book for the exhibit when he hands it over."*

Guided by the authority above it is thus unsafe to conclude that the said exhibits P.2 and P.3 are a result of the materials which were seized from the appellant.

After all, even if the material seized from the appellant were handled in a proper manner, still since their contents were not read after they were tendered in court they should then be expunged from records as I hereby do.

From the foregoing analysis I am in agreement with both, the appellant and the learned State Attorney that the prosecutions side failed to prove its case beyond reasonable doubt. See HOROMBO ELIKARIA VS. REPUBLIC [2009] TLR 154.

This appeal therefore succeed and I thus allow it. Also, the conviction meted by the trial is quashed and sentence is set aside. I also order an immediate release of the appellant unless he is otherwise lawful held.

It is so ordered.

A. Y. Mwenda

Judge

21.10.2022

Judgment delivered in chamber under the seal of this court in the presence of Mr. Byency Emmanuel the Appellant and in the absence of the Respondent.

A. Y. Mwenda

Judge

21.10.2022