IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 126 OF 2022

BETWEEN

MODEST FREDERICK MAJALIWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Bagamoyo at Msoga before V.P. MWARIA, RM in Criminal Case No. 30 of 2021)

JUDGMENT

Date of Last order 03/10/2022
Date of Judgment 20/10/2022

A. Z. BADE, J

This is an appeal against the judgment of the District Court of Bagamoyo against conviction and sentencing; having been convicted of trafficking in narcotics drugs contrary to section 15 A (1) and (2) (c) of the Drug Control and Enforcement Act (Cap 95 RE 2019), and was sentenced to serve 30 years in jail.

The appellant has filed 5 grounds of appeal and argued them into three grounds by way of written submission. The respondent did not wish to file any opposition but made it clear that they support the conviction and sentencing.

1. THAT, the trial court misdirected itself by convicting the appellant based on belief that what was seized from him was narcotic drug (Bhangi) without considering that it was not proved beyond reasonable doubts that exhibit P.3 was real bhangi as the expert from the office of the chief Government Chemist was not called to confirm.
2. THAT the trial court erred in law and fact to convict the appellant based on exhibit P.3 (Bhangi) without considering that the chain of custody of the same was not established and proved as the exhibit was not labelled and sealed at the scene before moving the same to another place which is contrary to PGO No. 229.
3. THAT, the trial court erred in law and fact to convict the appellant b) not believing his defense evidence that raised reasonable doubt to the case.
4. THAT, the trial court erred in law and fact to convict the appellant based on his cautioned statement (P.4) that was not objected while:
   I. It was the duty of the court to inform the appellant who is a lay person and was not represented, the danger and effects of P.4 being admitted without being objected as it was an implicating evidence. Thus the appellant was not aware of its effect.
   II. The alleged statement of the appellant to the justice of peace (Hon. Daudi Hashim) was not tendered to corroborate the evidence of Pw4 that the appellant confessed to commit the charged offence.

5. THAT, the trial court erred in law and fact in convicting the appellant based on prosecution witnesses (Pw1, Pw2, Pw3, and Pw4) who were not reliable at all as:
    I Though it seems the arrest and seizure of the Motor Cycle and the contraband was emergency one, it was imperative for them to fill seizure certificated immediately as they reached Chalinze police station and before handing those exhibits to the custodian.
    II They (arresting officers) were duty bound to label and seal the alleged two packets of Bhangi before handing exhibits to the custodian.
    III Even Pw2 (custodian), did not label the exhibit before recording the same in PF. 16 (exhibit P.2) so that to distinguish the same from other exhibits in the store to avoid tampering.

The facts of this case as gleaned from the evidence are a manifestation of fate on record are that the appellant was a contracted motor cycle rider; who got hired to transport a customer who had with him a parcel. He was hired to take him to Morogoro. The owner of the M/Cycle is the one who caused the accused appellant to be arrested, having herself reported to the police in Kibamba that the accused has abandoned their contract for the whole past week; which he was supposed to bring account daily. So upon being issued with an RB, he was phoned by the investigating officer that the reported missing M/cycle was found in Chalinze with drugs (marijuana), and that is how the accused got apprehended.

Meanwhile looking back to the M/Cycle found itself in Chalinze, the accused took his customer heading to Dar from Morogoro. When they reached a

police check point, they turned off the light and quickly turned back towards Morogoro. The police made a chase after them on a motor vehicle, where they left the tarmac and headed to the bush, following a dead end road, and they found out that duo had abandoned the M/Cycle. When the police had checked the M/Cycle, they allegedly found it with a sack that had marijuana in. This is how the M/Cycle got to be at the Chalinze Police Station.

The grounds of Appeal were paraphrased as

1. That the chain of custody of the alleged contraband / exhibit (P.3) was not established and proved.
2. That the cautioned statement (exhibit P.4) was admitted in evidence illegally
3. That the case was not proved to the standard required in criminal trials that is beyond reasonable doubt

They argued on the chain of custody ground, the appellant complain that there is no paper trails to indicate handing of exhibit between the different policemen from when it was ceased to when it was tendered in evidence. This was contrary to PGO no 229, therefore there was a possibility of tampering with it. They reason that PW3 ceased the exhibit P.3 on 14/01/2021 at early hours of the morning. On the same day at 0700hours he handed the same to PW2 for safe custody at Chalinze Police Station. The evidence on record is silent whether there was any documentary evidence to indicate that PW3 handed the exhibit to PW2. Further, there is no evidence that PW3 labeled and sealed the exhibit for safe custody at the scene.

So it is doubtful whether what was received by the PW2 for safe custody is the real item that was ceased by PW3 (in terms of type and weight). In the case of **DPP vs Stephen Gerald Sipuka, Criminal Appeal No 373 of 2019** (unreported) the Court of Appeal held while observing that a chain of custody was broken:

> "worse enough it is on the record that the ceased items were not labeled and sealed immediately after being ceased from the respondents house to enable PW4 identify them when tendered in court."

The appellant argue further that since the handling of the Exhibit P3 was not as instructed by the laws and guidelines, then the exhibit in question was compromised, they urge this court to uphold it.

Looking at the evidence in record, I am in agreement with this reasoning.

The pointed out missing links in the prosecution witnesses with regard to the chain of custody cast doubts as whether the item seized by the PW3 from the scene where the M/Cycle was abandoned and ceased are the same one handed over to PW2, and tendered at the trial. This is what was guided by the Court of Appeal in the case of **Chacha Jeremiah Murimi and 3 Others v. Republic, Criminal Appeal No. 551 of 2015** (unreported) that:

> "….. The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit. …… Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time it is received as evidence in

court after being satisfied that there was no meddling or tempering done in the whole process."

This is vital particularly in the circumstances of this case where the link between the accused appellant, the drug ceased at the scene and the ownership is all unlinked. There is a lot of doubts on whether the person riding the bike is the one who had the luggage of drug. It is obvious that the doubt that it could be that the passenger was the actual owner of the contraband drugs, while the prosecution made no efforts to bring the said customer to books.

This is also pointing to the third ground of appeal that the case was not proved beyond reasonable doubt/ in which case I allow the 1st and 3rd ground of appeal together in this same reasoning.

On the second ground about admitting the cautioned statement P4 which was not objected by the appellant during trial is indicated on the record that the appellant was unrepresented; so when PW4 tendered his cautioned statement. That though is not indicating that he agreed to the commission of the offence since he denied at the pleading stage and the preliminary hearing stage, which is translated to mean he did not understand what was going on during the tendering stage and its danger.

This is important he reasoned because it is established principle that it is the duty of the trial court when the prosecution side intend to tender an implicating exhibit (like a cautioned statement) and the unrepresented accused is not objecting to the same, to inform the accused person the danger of not objecting on the implicating exhibit and whether the accused has any

comment about it. This was stated in the case of **Ally Ramadhani @ Dogo vs Republic, Criminal Appeal No 45 of 2007** (unreported) where it is held

> "It is trite law that before a trial court can act on a cautioned statement, it must satisfy itself that the statement is really given."

On the present case, the cautioned statement was admitted in evidence simply because the appellant did not object/ The trial court did not make any effort to try and satisfy itself whether it was voluntarily made or not. He thus pray to have this ground also upheld.

On the last ground, the appellant argue that the case was not proved to the hilt. Mainly because one, it was not proved beyond reasonable doubt that the alleged exhibit P3 ceased from the appellant was really narcotic drugs. This is because there was no chemist report from the office of the chief government chemist to prove the same. PW3 at p14 of the proceedings stated that the alleged that the exhibit was sent to the government chemist; but no one from the office of the Government Chemist came to testify in court. This left the prosecution case not being proved as required in criminal trial.

Two, the weight of the narcotic drugs as indicated in the charge sheet was not supported by the evidence on record that the charge sheet as duplicated. In the first page of the judgment, it shows that the alleged "bhangi" (p.3) weighed 6.71 kg, but going through all prosecution witnesses no one ever mention such amount of weight showing on the charge sheet. This once

again, puts the doubt on the prosecution case as argued by the appellant. And I have no other option than to allow the appeal.

So this Court conclude that the case was not proved beyond reasonable doubt. I hereby allow the appeal, quash the appellant's conviction and set aside the sentence meted against the appellant.

I so hold and order.

The appellant Modest Frederick Majaliwa is set free unless he is otherwise lawfully held.

Dated at Dar es Salaam this 20th day of October 2022

A. Z. Bade
Judge
20/10/22

Court: Judgment delivered by Hon Nyembele, DR in the presence of the Appellant, and the learned State Attorney. Right of Appeal explained to parties.

Signed