**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 15 OF 2022**

*(Originating from the decision of the District Court of Kibaha at Kibaha, in Criminal Case No. 02 of 2021, by Hon. F.L Kibona-RM dated 29th day of June, 2021)*

**JOHN s/o KANUTI PETER.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

14th February, 2022 & 14th February, 2022

**ISMAIL, J;**

In the District Court of Kibaha at Kibaha, the appellant was arraigned on a charge of trafficking in Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement (Amendment) Act, Cap. 95 R.E 2019. It was alleged that on 5th October, 2020 (the material day) at Mailimoja area within Kibaha District in Coast Region, the appellant trafficked in narcotic drugs to wit, cannabis sativa commonly known as "Bhangi", weighing 102.08 grams.

The appellant denied the allegations, necessitating a full trial, at the conclusion of which he was found guilty, convicted and sentenced to serve a thirty-year custodial term.

The factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant is that, on the material day, the appellant and a certain Mr. Hussein Bashiru, his co-accused, were in the appellant's room. Police officer suspected that the appellant was involved in a criminal undertaking. The suspicion was based on the tip-off that the police received from their source. This necessitated action that entailed PW2, Inspector Millinga, together with his colleagues, to carry out a search in the appellant's room. On entry into the house, the police officers found the appellant smocking bhangi. Besides that, six (6) dices and one pellet of cannabis sativa (Exh P3) were found lying on the floor. The substances were seized.

PW1, one Hamzuhun Aziz, the appellant's close relative, witnessed the search in which a seizure certificate was issued (Exh P1). Thereafter, the appellant was put under restraint and conveyed to the police station while the seized substances were handed to WP 126698, PC ZENA (PW3), who subsequently handed them over to PW4, F4035 CPL MUHAMED. After sometime, the narcotics were placed in the custody of WP 3665 CPL

MWAMVITA (PW7). The seized substances were subjected to an examination by the Government Chemist. The finding (Exhibit P2) was that the pellet was bhangi while the other was what the prosecution witness called *canabino* that is found in cannabis sativa.

In his defence, the appellant did not have much to say except denying the allegations. He contended that it was his father who called the police officers to come and arrest him in his room.

The trial court was satisfied that the case against the appellant had been made out. It went ahead and found the appellant guilty and, accordingly, convicted and sentenced him accordingly.

The decision of the trial court has disgruntled the appellant, hence his decision to prefer the instant appeal. Seven (7) grounds of appeal have been raised, containing the following points of grievance:-

> ***One,*** *there were material irregularities in conducting search, contrary to section 40 of the Criminal Procedure Act, Cap 20 R.E :2019 (herein CPA).*
>
> ***Two****, the trial Court erred in law to rely on the unsworn testimony of PW2 contrary to the requirement of the Law.*
>
> ***Three,*** *that the case against the appellant was not proved beyond reasonable doubt. Four, there was contradiction of evidence given by prosecution witnesses.*

*And **Four,** there were material irregularities conducted in violation of section 231 (1) (a) an (b) of CPA.*

At the hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic enjoyed the services of Ms. Laura Kimario, learned State Attorney. When the appellant was accorded an opportunity to amplify on the grounds of appeal, the appellant opted to offer the right to begin to the respondent, while he, retained the right to rejoin to the respondent's submission.

Submitting on the appeal, Ms. Kimario readily submitted that she was supporting the appeal. She specifically conceded to the second ground of appeal which took an exception to the trial court's reliance on an unsworn evidence of PW2. The learned State attorney accentuated that, section 198 (1) of the CPA and section 4 of the Oaths and Statutory Declarations Act [Cap 34 R.E: 2019] require a witness to swear or affirm before he or she testifies. In this case, Ms. Kimario argued, PW2, who conducted search at the appellant's premises and testified in testified without conforming to the imperative requirement of the law. For that reason, the respondent's attorney urged the Court to expunge PW2's evidence. To bolster her preposition, she invited the Court to make reference to the decision by the Court of Appeal of Tanzania in ***Christian Ugbechi v. Republic,*** CAT-

Criminal Appeal No. 274 of 2019 (unreported), in which evidence procured in similar circumstances was expunged from the record.

Explicating on the effect of deletion of the discrepant testimony, Ms. Kimario argued that the residual testimony is too deficient to prove the offence of trafficking narcotics.

In a laconic rejoinder, the appellant had nothing much to say than supporting the respondent's submission and praying for the Court to allow his appeal.

Having dispassionately gone through the parties' submission, the central issue for determination by this court is ***whether this appeal is meritorious.***

My scrupulous review of the records of the trial proceedings convince me to restate the position of the law as it currently obtains. It is to the effect that a witness to any criminal matter cannot testify in court unless steps preceding his testimony are follows. These steps are provided for under section 198 (1) of the CPA which provides as hereunder:-

> *"Every witness in a criminal cause or matter, shall subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with*

*the provisions of the Oaths and Statutory Declarations Act".*

The use of the word **"shall"** in the cited provision confers the imperativeness in performance of a certain function and, in this case, in taking an oath or affirmation prior to adduction of the testimony. This is consistent with the spirit enshrined in section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E. 2019.

It is apparent from the record of the trial proceedings that PW2 who testified on the arrest of the appellant and recovery of the substances considered to be narcotics neither swore nor affirmed when he took the witness box and adduced his evidence. To appreciate the point raised by the appellant and conceded by the respondent's counsel, it is apposite that an extract of the typed proceedings as found at page 10 of the proceedings be reproduced as follows:

*PW2: INSPECTOR MILINGA, 48 YEARS OLD, RESIDENT OF KIBAHA TANITA, POLICE OFFICER, CHRISTIAN*
*XD BY PP*
*I am working at police station as a assistance of the OCCID I studied at Moshi Collage Dar es salaam...*

It is clear from the above excerpt that PW2 was not sworn contrary to the requirements of the law and, as Ms. Kimario correctly posited, the failure was a serious travesty that rendered the unsworn evidence not only lacking in evidential value, but also discrepant and deserving nothing better than crossing it off the record. (See the case of ***Membi Steyan v. Republic***, CAT-Criminal Appeal No. 300 of 2008, ***Nestory Simchimba v. Republic***, CAT-Criminal Appeal No. 454 of 2017 and ***Christian Ubechi (Supra)*** (All unreported). Inspired by the cited decisions I accede to counsel's prayer and order that the evidence of PW2 be hereby expunged from the record.

After obliteration of PW2's testimony, what follows next is the evaluation of the rest of the testimony with a view to assessing if the same can be the basis for ordering a retrial. I take the view that the only vital evidence that remains is Exhibit P3 which was adduced by PW2. This testimony dies with the testimony of PW2 because it also suffers from credibility crisis that arises from what ailed PW2's testimony. This means that the prosecution's case has been significantly debilitated and full of worthless third party account (hearsay) that it cannot ground any conviction against the appellant.

Consequently, and on the basis of ground two of the appeal alone, this appeal succeeds and I allow it. I quash the conviction and set aside the sentence, respectively, and order that the appellant be immediately released from prison unless he is held for some other lawful reasons. Other grounds of appeal are rendered superfluous.

Order accordingly.

Rights of the parties have been duly explained.

**M.K. ISMAIL,**

**JUDGE**

**14/02/2022**

DATED at **DAR ES SALAAM** this 14th day of February, 2022


**M.K. ISMAIL,**

**JUDGE**

**14/02/2022**