IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 230 OF 2021

(Arising from the decision in Criminal Case No. 37 of 2018 of the District Court of Temeke, at Temeke (by Hon. Fimbo -RM) dated 2nd day of May, 2021,)

GEOFREY ELIAS KIGALA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

28th February, & 3rd March, 2022

ISMAIL, J.

The appellant was charged with a single count of unlawful possession of prohibited plants, contrary to sections 11 (1) (d) of the Drugs Control and Enforcement Act No. 5 of 2015. The allegation, as gathered from the charge sheet, is that on 2nd August, 2018, at Kisiwani area within Kigamboni District in Dar es Salaam Region, the appellant was found in an unlawful possession of prohibited plants by the name of Cannabis Sativa, commonly known as "Bhangi', weighing 233.14 grams.

The prosecution's side of the story is better narrated by PW3, a detective police officer who testified that on the fateful day he, along with

his colleagues, were on patrol at Kisiwani kwa Mkorea, in Kigamboni. They then came across the appellant and other people who, on noticing that PW3 and his colleagues were police officers, attempted to run away. They were arrested and, upon search, the appellant was found in possession of 146 pellets and 3 bundles of bhangi. The impounded substance was taken to a Government Chemist who certified that indeed the same were narcotic drugs by the name of bhangi.

Completion of investigation ushered the arraignment of the appellant in the District Court of Kigamboni at Kigamboni, where he pleaded not guilty to the charge. Four witnesses testified for the prosecution, while for the defence none testified, following disappearance of the appellant midway through the prosecution hearing. At the conclusion of the proceedings, the trial court convicted the appellant of the charged offence and sentenced him to imprisonment for 30 years.

The conviction and sentence were met with a serious outrage. Feeling hard done, the appellant preferred a ten-ground petition of appeal, seeking to challenge the conviction and sentence imposed on him. For reasons that will be apparent shortly, the said grounds of appeal will not be reproduced herein.

Hearing of the appeal saw the appellant fend for himself, unrepresented, whilst Ms. Dhamiri Masinde, learned State Attorney, appeared for the respondent. When she rose to submit, she stated that she was supporting the appeal. Ms. Masinde raised two reasons to back up her view.

One, that the record of the trial proceedings and even the judgment, reveal that chain of custody of the impounded narcotics, exhibit P2, was not properly established. Ms. Masinde argued that the said exhibit was allegedly recovered from the appellant by PW2 who sent it to police and delivered to the RO section, then under a Mr. Hamisi, and that the same was kept there for three days without conveying it to the exhibits room. It was her view that, under such circumstances, the said exhibit was prone to manipulation or change, considering that there were several members of staff in that section.

Reviewing PW4's testimony, Ms. Masinde submitted that his evidence was to the effect that he collected exhibit P2 from Hamisi for registration before it was taken to the Government Chemist. The available testimony, contended Ms. Masinde, does not tell how Hamisi got it from the arresting officer and hand it to PW4, the investigator. Glaringly missing, according to the respondent, is the testimony of Hamisi who was mentioned by both PW2

and PW4 and how the said exhibit P2 found its way to PW4 and the Government Chemist. It is not known, either, if what was handed by PW2 is the same substance that went to PW4 and to the Government Chemist.

Ms. Masinde's second argument is that there is a contradiction in the testimony of PW2, who testified that the substance was in a white plastic bag, while PW4 testified that he received it while in black plastic bag. She took the view that the variance brings the impression that these two witnesses testified on two different substances.

As stated earlier on, the respondent's reason for not supporting the appellant's conviction and sentence is mainly on account of the manner in which exhibit P2 was handled. The view held by Ms. Masinde is that the chain of custody of exhibit P2 was not established by the prosecution. This created serious doubts, and the genuine fear is that the same might have been tempered with before it was conveyed for examination by the Government chemist.

Ms. Masinde's worries are not imaginary, perceive or misplaced. They are real and justified. They are given credence by the variance and disharmony in the testimony exhibited by PW2 and PW4 each of whom gave a statement that conflicted that of the other. These pregnant disharmonies were not resolved or explained away by the trial court. They still linger and

yet they are fundamental, bringing out a genuine fear that the chain of custody was not observe. Resolving an issue which is similar to the position that obtains in the instant case, the Court of Appeal held, in ***John Joseph @Pimbi v. Republic***, CAT-Criminal Appeal No. 262 of 2009 (unreported), as follows:

> ***"Mohamed Said Matula v. Republic*** *(1995) TLR 3 this Court has stressed the point that where contradictions show up in evidence it is the duty of the trial court to either resolve them or explain them away. This has not been done in the present case. The contradictions are fundamental because the complainant admitted he did not know the identities of the three persons who robbed him on 16/8/2002 but learned of the recovery of the bicycle on 17/8/2002."*

I hold the view that failure to resolve issues pertaining to the highlighted contradiction's cast a serious doubt on the veracity of the testimony adduced by the prosecution's witnesses.

Reverting to the chain of custody, the issue is whether the same was observed or established. In my unflustered view, the answer to the question is in the negative. This is mainly because of what Ms. Masinde argued, that there was an irregular change of hands of exhibit P2 without engaging the internal procedures that guide the police officers on how to handle exhibits they recover from the suspects. The 'lawlessness' exhibited in the handling

of the exhibit in this case create a possibility of having it tampered. To appreciate the importance of observing this requirement, reference to the decisions of the Court of Appeal is invaluable.

In postulating the principle on the chain of custody, the Court of Appeal of Tanzania was, in ***John Joseph @Pimbi v. Republic*** (supra), inspired by its earlier decision on the subject and held as follows:

> ***"In Majid John Vicent @ Mlindangabo and Abdul Selemani Hamisi @ Miburo versus The Republic,*** *Criminal Appeal No. 264 of 2006 we had this to say on the chain of custody of exhibits:-*
>
> *"...Indeed that would help in allaying any fears about the "chain of custody" in handling the exhibit before its production in evidence at the trial. We say so because presumably in the course of tendering the exhibit PW4 would have been in a better position to tell the court how it was handled from the date of the appellants arrest to the date of its production in evidence at the trial such evidence would have been important in ascertaining whether or not there was any possibility of tampering with the exhibit in the process..."*

The foregoing position was essentially a leaf borrowed in two of the upper Bench's decisions on the subject. In ***Moses Muhagama Laurence***

v. The Government of Zanzibar, CAT-Criminal Appeal No. 17 of 2002 (unreported), it was guided as follows:

> *"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 chemist of what was believed to have been found on the appellant."*

A more lucid position was set in ***The Director of Public Prosecutions v. Shirazi Mohamed Sharif***, CAT-Criminal Appeal No. 184 of 2005 (unreported), wherein it was held:

> *"Compliance with internal procedures was essential to ensure that the movement of tablets was monitored to exclude the possibility of tampering of the evidence to the detriment of the respondent. We would like to stress the fact that we do not question the credibility of the witnesses up to the time they witnessed the respondent excreting the tablets/capsules from his bowels. What we are saying is that the whereabouts of the tablets/capsules was not accounted for for about five days and no explanation has been forthcoming from the prosecution witnesses. This is certainly not a minor irregularity as the learned trial magistrate would make us believe .... We entertain doubts that the prosecution proved its case to the required standard in criminal cases. The benefit of doubt must go to the respondent."*

The clear message here is that the mightily important requirement was not conformed, to leading to a fundamental breach that rendered the case against the appellant unproven.

From the totality of the foregoing, I hold the view that this appeal is meritorious and I allow it. Accordingly, I set aside the conviction and sentence, and order that the appellant be set free, unless held for other lawful reasons.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 3rd day of March, 2022

M.K. ISMAIL

JUDGE