

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 19 OF 2021

(Originating from Criminal Case No. 45 of 2020 of the District Court of Biharamulo at Biharamulo)

PETRO MAZIKU @ SAFI SANA----- APPELLANT

VERSUS

REPUBLIC----- RESPONDENT

JUDGEMENT

Date of Last Order: 08/02/2022

Date of Judgment: 18/02/2022

Hon. A. E. Mwipopo, J.

Petro Maziku @ Safi Sana, the Appellant herein, was charged in the District court of Biharamulo at Biharamulo for the offence of being in possession of narcotic drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act (Amendment Act), 2017. Particulars of the offence reveals that on 20th February, 2020 at Nyambale Village within Biharamulo District in Kagera Region the Appellant was found in unlawful possession of 1.5 Kg of narcotics drugs commonly known as bhang. After hearing of the case, the trial Court convicted the

Appellant for the offence charged and sentenced him to serve 30 years in jail. Aggrieved by the decision of the trial District Court, the Appellant filed the present appeal.

The petition of appeal filed by the Appellant contains a total of 10 grounds of Appeal reproduced hereunder:

- 1. That the evidence of PW1 and PW2 had material contradictions to prove the same which affects their testimonies to be credible and reliable in Court.*
- 2. That PW1 and PW2 in their testimony were not credible and believable as no specific time was stated by these witnesses on material day when the incident took place.*
- 3. That the evidence of PW2 contradicted each other in terms of date (time) when the Appellant was under arrest.*
- 4. That the Exhibit P1 (Certificate of Seizure) which indicates that Appellant to be in unlawful possession of the allege bhang was not read over to the Appellant after its admission.*
- 5. That the Exhibit P3 (Chief Government Chemist Report) was improperly tendered by incompetent person who had no material knowledge on the content of the document.*

6. *That the Exhibit P3 was not read over loudly to the Appellant after its admission.*
7. *That the Exhibit P4 was not read over to the Appellant after its admission.*
8. *That the Chain of Custody (Exhibit P4) of the seized drugs was not completely maintained where nowhere the Appellant signed the document.*
9. *That the learned Magistrate erred in law and facts for failure to consider that the Appellant was arrested for other offence of grievous harm and not the offence of being in possession of narcotics drugs therefore the said case was brought later on and was planted fraudulently to make him appear guilty as pertaining to circumstances surrounding the matter.*
10. *That the trial Court did not consider the defence evidence contrary to the law.*

At the hearing of the appeal, the Appellant appeared in person, whereas the Respondent was represented by Ms. Happyness Makungu, State Attorney.

The Appellant being a layman prayed for the Court to consider all grounds of appeal found in his Petition of Appeal.

The Respondent Counsel supported the appeal on the reason that the chain of custody of the alleged narcotics drugs was not complete. She stated that page 19 of the typed proceedings of the trial Court shows PW3 testifying that he was

the 1st person to seize the alleged drugs. PW3 said that he took the seized drugs to Biharamulo Police Station, but, he does not state the person whom he handled the exhibit. Testimony of PW4 shows that Exhibits P4 was handled to him by OC-CID to deliver it to the Government Chemist. The proceedings shows at page 24 that PW4 testified that he was the one who handled the Exhibit P4 to PW3. However, PW4 is not the OC-CID. It was not clear as to whom the Exhibit P4 was put in his custody before that person handled Exhibit P4 to PW3 to deliver it to the Government Chemist. Those witnesses did not testify satisfactory to the claim of custody. Also, the Appellant did not sign to any document relating to the seized drugs including certificate of seizure. The learned Counsel concluded by stating that as the Exhibit P4 which is narcotic drugs could be easily tempered, the chain of custody was not complete and there is possibility of being tempered.

In his very brief rejoinder, the Appellant prayed for the court to allow his appeal and release him from imprisonment.

From submissions, the issue for determination is whether the appeal has merits.

The burden of proof in criminal cases is always on the prosecution as it was held in the case of **John Makolobola v. Republic, [2002] TLR 296**, and the same is beyond reasonable doubt. This being the first Appeal, the Court has duty to evaluate and scrutinize the records of trial Court without limitations.

I have read the record and the judgment of the trial Court. The available prosecution's evidence reveals that the Appellant was first apprehended and was kept under custody at Nyambale Village Office by acting Village Executive Officer – PW2 on 18th February, 2020 for allegation of stabbing another person with a knife. PW2 informed the police who came to the village office and take the Appellant to police station. The evidence is silent as to the name of the officer who arrested and took the Appellant to police station. But, on 20th February, 2020 the police visited the house of the Appellant for the purpose of searching it.

PW3 who is Police Officer Incharge of Lusahunga Police post stated that on 20th February, 2020, he took the Appellant from police lock up at Biharamulo Police Station to Appellant's house for the purpose of conducting search following information that the Appellant has bhang and instruments he uses to commit crimes in his house. The Appellant was in police lock up since 18th February, 2020, for allegations of causing grievous harm and being found with possession of narcotic drugs known as bhang. PW3 said that they went to the Appellant's house together with leaders of the area. They called neighbours' after they arrived at the house, Appellant opened the door and led the police officers, leaders and neighbours inside the house. The police searched the house and found two rolls (misokoto) of bhang and a plastic (sandarus) bag hanged at a roof of the house which was full of dried dry bhang. PW1 and PW2 testified to have witnessed the

search. PW3 filled certificate of seizure – Exhibit P1 which he signed. The Exhibit P1 was also signed by the Appellant and witnesses of the search. Thereafter, the Appellant, Exhibit P1 and Exhibit P2 were taken to the Biharamulo Police Station. PW3 did not testify as to whom the Exhibit P2 was put into his custody after they arrived at Biharamulo Police Station. This means the chain of custody was not completed.

At Biharamulo Police Station, the OC – CID assigned the case to PW5 for investigation. PW5 stated that he was assigned the case file, accused and the Exhibit P2. After completing Preliminary investigation he took Exhibit P2 to Exhibit keeper. During investigation he took a sample from Exhibit P2 and gave it DC Eliza PW4 together with Chain of Custody Form – Exhibit P4 for PW4 to take the sample to Chief Government Chemist Office at Mwanza for further Examination. After examination, PW4 returned the sample and Exhibit P4 to PW5 who took the sample back to the Exhibit keeper. On her side, PW4 testified that the sample from Exhibit P2 which was in gray envelop was handled to her by OC CID at Biharamulo Police station so that she can take it to Chief Government Chemist Office at Mwanza. She took the sample to the Office of Government Chemist at Mwanza and submitted them. After examination, the Government Chemist filled form – Exhibit P3 before they handled both the sample and Exhibit P3 to her. PW4 took the sample and Exhibit P3 back and handled them to the OC – CID.

As it was submitted by the learned State Attorney, this case is centred in the chain of custody of the alleged narcotic drugs. Proof of a chain of custody is required in this type of case as the relevance of the evidence depends on its analysis after seizure. The proper chain of custody substantially proves the exhibit is in the same condition from the moment it was seized until the moment it is tendered as evidence in Court. The need to document and prove the chain of custody was stated in the case of **Paulo Maduka and 4 Others V. Republic**, Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania at Dodoma, (Unreported), where it was held that:-

"The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

The rationale for ascertaining a chain of custody is to show a reasonable possibility that the item that is finally exhibited in Court as evidence has not been tampered with along its way to Court. This was held by Court of Appeal of Tanzania in the case of **Zainabu Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015, Court of Appeal of Tanzania at Arusha, (Unreported). The absence of a

proper account of the chain of custody of the exhibits, leaves open the possibility of the exhibits being concocted or planted. This was held by Court of Appeal of Tanzania in the case of **Iliminatus Mkoka v. Republic [2003] T.L.R 245.**

In the present case, the evidence available in record on the chain of custody of the narcotic drugs to wit bhang - Exhibit P2 was not complete as it leaves a lot of questions to be desired. Despite the evidence from chain of custody form – Exhibit P4 revealed how the custody of Exhibit P2 was moving from one hand to another there is no explanation from PW5 on the movement of the exhibit. The testimony of PW5 and that of PW4 contradicts each other as to who handled the alleged sample from Exhibit P2 to PW4 who submitted the sample to Government Chemist Office for further examination. The said contradiction is that PW4 testified that the sample was handled to her by OC CID Biharamulo and she returned it back to him after examination, while PW5 testified that he was the one who handled it to PW4 and after examination by Chief Government Office PW4 returned it to him. This brings possibility that the sample of the alleged Exhibit P2 passed in the hands of other people than those who testified or those who were listed in Exhibit P4 (Chain of Custody Form). The said OC CID Biharamulo was not called to testify if the said Exhibit passed in his hands. In the case of **Mussa Hassan Barie and Another v. Republic**, Criminal Appeal No 292 of 2011, Court of Appeal of Tanzania, (Unreported), while discussing the chain of custody of the

laptop alleged to be found in the possession of suspect recently after the crime was committed held that, I quote:-

".....The chain of custody of laptop (Exh. P3) in this case is broken by the absence of Melita as witness who would have told the trial Court, where he got the laptop from and would have identified whether it was the same laptop which was handed over to him".

From the decision cited above, failure of PW3 to name in his evidence the person whom he left the Exhibit P2 and failure to call OC CID Biharamulo to testify if he handed over a sample to PW4 and where he got the said sample, means that the chain of custody of the Exhibit P2 was broken. There is doubt that there is possibility that the sample taken by PW4 to Chief Government Office at Mwanza was not from the Exhibit P2 which is alleged to have been seized from Appellant's house.

Further, there is no evidence at all in record to show that the Appellant was charged for the offence of causing grievous harm which was the reason for his arrest on 18th February, 2018. There is no dispute that the Appellant was arrested for the allegation of stabbing another person in a quarrel. PW2 who apprehended the Appellant stated in cross examination that the Appellant was searched and found with rollers of bhang. This evidence is not found anywhere else in the proceedings. Even the said rollers of bhang which was alleged to be found in Appellant's on 18th February, 2020 was not tendered and its where about is not

known. All of this raises doubt in the prosecution evidence and I find that the prosecution case was not proved in the required standard.

Therefore, this appeal is found to have merits and I allow it. The Appellant's conviction by the trial Court is quashed and the sentence thereto is set aside. I order for immediate release of the Appellant from the Prison otherwise held for other lawful cause.

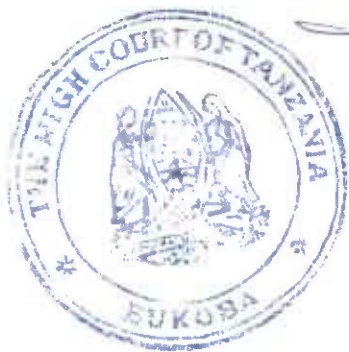


A.E. Mwipopo

Judge

18.02.2022

The Judgment was delivered today, this 18.02.2022 in chamber under the seal of this court in the presence of the Appellant and State Attorney for the Respondent.



A. E. Mwipopo

Judge

18.02.2022