IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 94 OF 2020

(Originating from Criminal case No. 166 of the Resident Magistrates' Court of Bukoba at Bukoba)

SADATH S/O MUSA@ IBRAHIM@KABUZI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

21/02/2022 & 06/05/2022

NGIGWANA, J.

In the Resident Magistrates' Court of Bukoba at Bukoba the Appellant Sadath s/o Musa@ Ibrahim@ Kabuzi and Dickson s/o Wilbard @Makonokono were jointly and together charged with the offence of Unlawful possession of prohibited plants contrary to section 11(1) (d) of the Drugs Control Enforcement Act, No.5 of 2015

At the trial court, it was alleged that on 5th day of May 2019 during evening hours at TRA barrier within Misenyi District in Kagera Region, the appellant and one Dickson Wilbard were found in possession of prohibited plants to wit; 1.323 kg of Catha Edulis (Khat) commonly known as "Mirungi"

When the charge was read over and explained to the appellant the said Dickson Wilbard, they pleaded not guilty to the charge. After full trial which involved four (4) prosecution and one (1) defense witnesses, the trial court was satisfied that the prosecution had proved the offence beyond reasonable doubt and proceeded to convict the appellant and sentenced

him to thirty (30) years imprisonment. The, said Dickson s/o Wilbard who the 2nd accused jumped bail even before the preliminary hearing is conducted. The case proceeded against him under section 226 of the Criminal Procedure Act, Cap 20 R: E 2019 and finally he was convicted and sentenced absentia to serve a term of 30 years imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to this court. In the memorandum of appeal, he has lodged six (6) grounds of appeal upon which he asked this court to quash the conviction, set aside judgment and set him free. For easy reference, the grounds of appeal are hereby reproduced as follows;

One, that **Exhibit P1** (WMA) was improperly admitted as it was not read out as required by the law. **Two**, that Exhibit P2 (**Chief Government Chemist Report)** was improperly admitted as it was not read out as required by the law. **Three**, that the chain of custody of the seized drugs was not properly maintained. **Four,** that there was failure of controlling the chain of custody **Five,** that the appellant's cautioned statement (**Exhibit 6**) was taken after the statutory time of four hours, and no extension of time was sough and granted. And, **Six,** that the prosecution evidence by PW1, PW2, PW3 and PW4 is full of contradictions.

At the hearing of this appeal, the appellant appeared in person and unrepresented while the respondent/ Republic was represented by Ms. Veronica Moshi, learned State Attorney. The layman Appellant prayed the Court to adopt his grounds of Appeal to form submissions in support of his Appeal in the Court. He further prayed the Court to intervene accordingly.

Before, the learned State Attorney is invited to take the floor, considering that the grounds of appeal were interrelated, it was agreed that the 1st and 2nd grounds of appeal be merged and argued together, likewise the 3rd and 4th grounds save for the 5th and 6th grounds of appeal.

Opposing the appeal, Ms. Veronica argued on the 1st and 2nd grounds of appeal that, page 16 and 17 of the trial court typed proceedings show that exhibits were identified, cleared, admitted and then read out in court, and no objection raised by the appellant to their admission. In that respect, the learned State Attorney urged the court to dismiss the 1st and 2nd grounds of appeal for being baseless and unfounded.

As regards the 3rd and 4th grounds of appeal, Veronica submitted that the trial court record is very clear to the effect that the chain of custody was well maintained. She added that according to page 37 of the typed proceeding of the trial court, PW3 is the person who seized the drugs from the appellant, and PW1 has explained from page 14-15 of the typed proceedings how the appellant was found in possession of the drugs, and how the same was kept by PC. Salum after being seized from the appellant. According to her, the chain of custody was maintained according to law, thus prayed the court to dismiss the 3rd and 4th grounds for being devoid of merit.

On the 5th ground of appeal, Ms. Veronica submitted that this ground is baseless and unfounded, because the appellant was asked whether he had any objection before the cautioned statement is admitted but he raised no objection, thus he cannot do so at this stage. She further submitted that, the trial court shows that the appellant was arrested on 5th day of May

2019 at 16:00 hours, and officer ended the recording of his cautioned statement on the same date at 19:05 hours, and for that matter, the same was recorded within four hours of the arrest of the appellant.

Arguing the last ground, Ms. Veronica submitted that, the contradictions do not exist as alleged by the appellant. That the prosecution witnesses have testified how the accused was arrested in the public motor vehicle, and he has confessed voluntarily that he has committed the said offence. Veronica added that, the best evidence in criminal trial is a voluntary confession from the accused himself. To support her argument, Veronica referred me to the case of **Nyerere Nyague versus The Republic,** Criminal Appeal No.67 of 2010 CAT (Unreported). She added that, it is also the position of law that minor contradictions (if any) cannot affect the prosecution case. She ended her submission urging the court to dismiss this appeal in its entirety for want of merit.

In his brief rejoinder, the appellant stated that the contradictions were on the time and place of his arrest. He said, PW2 told the trial court that the appellant was arrested at 15:00hours while PW1 said the appellant was arrested at 16: 00hours.That PW1 said the appellant was arrested in the public motor vehicle while PW2 said he was arrested in the mid of the people.

I have carefully gone through the grounds of appeal, submissions by the learned State Attorney and the record of the trial court. The issue for determination is whether this appeal is meritorious. It must be noted that, the cardinal principle in criminal cases places on the shoulders of the

prosecution the burden of proving the guilt of the accused beyond all reasonable doubt.

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists."

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that;*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking."

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence

might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

As already pointed out, in the matter at hand, the trial court relied on the strength of the prosecution evidence to convict and sentence the appellant, but the appellant was aggrieved by both conviction and the sentence of 30 years imposed against him, hence this 1st appeal.

Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu versus Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No. 341 of 2017 CAT (Unreported*).*

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence

or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32.***

In the 1st and 2nd grounds of appeal, the appellant's complaint is that the Exh.P1 and P2 upon being admitted were not read out in court as required by the law. On her side, Ms. Veronica submitted that the same were duly read out after being admitted. At this point, I agree with Ms. Veronica that the complaint of the appellant is baseless and unfounded because the trial Magistrate well complied with the law. The documents before being admitted were identified by the witness, cleared, and admitted without any objection, and after being admitted and marked as exhibits, they were read out in court. Page 16 of the typed proceedings read as follows;

"...I pray to tender the letter-report from Weight and Measurement Agency if there is no objection.

Accused: I have no objection.

Court: A letter from Weight and Measurement Agency dated 07/05/2019 admitted as Exhibit P1.

Sgd. R. C. Migani -RM

14/02/2020

Court: The same has been read over in court by PW1.

Sgd. R. C. Migani -RM

14/02/2020

Page 17 of the typed proceedings read as follows;

"..... I pray to tender the same as exhibit if there is no objection from the defence.

Accused: I have no objection.

Court: The letter from the Chief Government Chemist dated 11/02/2020 is admitted and marked Exhibit P2. Exhibit P2 is read over by PW1 court.

Sgd. R. C. Migani -RM

14/02/2020.

As regards the 5th ground of appeal, I agree with Ms. Veronica that the appellant was arrested on 5th day of May 2019 at 16:00 hours, and PW1 started recording of his cautioned statement from 18:00hours – 19:05 hours thus, the appellant's cautioned statement **(Exh. P6)** was recorded within four hours of the arrest of the appellant. However, I do not agree with Ms. Veronica that the appellant raised no objection to its admission. Page 20 of the typed proceedings revealed that the appellant objected cautioned statement that the statement was not voluntarily obtained and that, he was forced to sign the same.

It is the common understanding that even if the confession was not objected to by the defence, the court was still bound to be cautious in admitting such statement, and ought to have looked for corroboration and could only convict if it is satisfied that the confession contained nothing but the truth. But where the same is objected the trial court has to be extra-careful to see whether it is safe to act on the objected cautioned statement or otherwise.

It is true as per the case of **Nyerere Nyague versus The Republic (Supra)** that the best evidence in criminal trial **is a voluntary confession from the accused himself**. In the case at hand, the cautioned statement of the appellant was not voluntarily given, therefore, it cannot be said it was the best evidence. In such a situation no reasonable court could safely convict the appellant basing on such cautioned statement.

As regards the 6th ground of appeal, the complaint is that the prosecution evidence was characterized with contradictions in relation to the time in which the appellant was arrested whether it was at 16:00hours or at 15: 00hours. It is the finding of this court that the contradictions were very minor because the date, and place of arrest were very clear. However, the contradictions being minor in itself does not mean that the case had been proved beyond reasonable doubt.

As regard the 3rd and 4th grounds, the appellant's complaint is that the chain of custody was not well maintained hence occasioned miscarriage of justice. Ms. Veronica on her side is to the effect that the same was well maintained.

Indeed, I agree with Ms. Veronica that there was a documentation or chain of custody record (**Exh. P5)** on the handling of the drugs from the date of seizure to wit; 05/05/2019 until 07/05/2019 when the drugs were handed over to the Weight and Measures Officer Mr. Adam Owange by G.595 D/C Dotto (PW1). Mr. Wange measured the purported drugs and confirmed vide that their weight was 1.323 kg. The report from the Weight and Measurement Agency was admitted by the trial court and marked Exh.p1.

From there, there is no documentation showing that Mr. Wange handed over the purported drugs back to PW1 or to any other person.

However, the inventory form (Exhibit P3) shows that on 08/05/2019 the purported drugs whose weight was 1.323 were taken in the primary Court of Kyaka by the Officer in charge of Misenyi police Station, and on 09/05/2019 the Magistrate ordered the same to be destroyed, and the order was fully complied with. Part of the evidence of PW1 as per page 17 of the typed proceedings is on that effect. The same read;

"*The next step which I took was to take the khat that was in the exhibit room and wrote inventory and I then took it at Kyaka Primary Court to destroy it. That the exercise was successful"*

In the inventory form, the purported drugs were described as follows

"Majani Mabichi yadhaniwayo kuwa ni mirungi pakiti/gomba arobaini na nane yenye uzito wa kilogramu 1.323"

It is trite law that the charge is the foundation of criminal trial. It should also be noted that one of the basic principles of our criminal justice is that the prosecution is, in every trial bound to prove the charged offence beyond reasonable doubt. In the matter at hand, it was alleged in the charged sheet that on 5th day of May 2019 during evening hours at TRA barrier within Misenyi District in Kagera Region, the appellant and Dickson Wilbard (2nd accused) were found in possession of prohibited plants to **wit; 1.323 kg of Catha Edulis (Khat) commonly known as "Mirungi".** According to the evidence of PW1, and the inventory form (Exh. P3), the alleged drugs with the same weight to wit**; 1.323kg were destroyed on 09/05/2019**.

It is surprising that on 25/06/2019 one police officer namely; G.1146 D/C Boniface is alleged to have taken the specimen of the drugs weighed 76 grams to the Government Chemist for him to confirm whether the specimens were drugs or otherwise. The Government Chemist confirmed that, the specimen taken to him were drugs known as **"Khat Edulis", and the prepared the report to wit; Exhibit P2**. Under the circumstances of this case, these questions are inevitable; if the alleged drugs were all destroyed as per inventory form and per PW1, where did D/C Boniface get the specimens weighed 76 gram which he took to the Government Chemist? Who handed over the same to him? Do the said specimens have any connection with the case at hand?

The Court of Appeal in the case of **Paulo Maduka and 4 Others** versus **Republic**, Criminal Appeal No.107 of 2007 (Unreported) when expounded some guiding principles relating to chain of custody. The Court had this to say as it stated that;

"By chain of custody we have in mind chorological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having planted fraudulently to make someone appear guilty."

In the case of **Chacha Jeremia Murimi and 3 Others versus Republic,** Criminal Appeal No. 551 of 2015 (unreported), the Court of Appeal also stressed that:

"In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence... ***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 to tampering of that exhibit."***

I am also alive of the case of ***Joseph Leonard Manyota versus Republic, Criminal Appeal No. 485 of 2015 (unreported),*** *where the Court of Appeal went a further milestone and stated that;*

"It is not every time that when chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted and/or in any way tampered with. ***Where circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."***

The rationale of recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having planted fraudulently to make someone appear guilty.

In this case, nowhere is shown in the chain of custody that purported drugs seized from the appellant were ever handed over to G.1146 D/C Boniphace. Since, the purported drugs alleged to have been seized from the appellant were destroyed on 09/05/2019 as inventory form and

confirmed by PW1, it is apparent that the specimen which were sent to the Government Chemist on 25/06/2019 had no connection with the case at hand. The Chemist report tendered in the trial court is liable to be expunged from the record as I hereby do. **Exh. P2** is expunged from the record. Having done so, the remaining evidence is far short of proving that the appellant was really found in possession drugs. Furthermore, the chain of custody was broken, and with no doubt has extremely affected the prosecution case.

Principally, the prosecution had not managed to discharge its duty of proving the case beyond reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense. **See KERSTIN CAMERON V.R [2003] TLR 84, and** JOHN **S/O MAKOLOBELA KULWA MAKOLOBELA AND ERICK JUMA @ TANGANYIKA V.R [2002] TLR 296**.

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years imprisonment meted against the appellant. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause. It is so ordered.

E.L. NGIGWANA

JUDGE

06/05/2022

Judgment delivered this 6th day of May 2022 in the presence of the Appellant by Virtual Court while at Kwitanga Prison -Kigoma, Mr. E .M Kamaleki, Judges' Law Assistant and Tumaini Hamidu, B/C but in the absence of the Respondent/Republic.

E.L. NGIGWANA

JUDGE

06/05/2022