IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 86 OF 2021

(Arising from a decision of District Court of Ilala at Kinyerezi in Criminal Case No. 349 of 2019 dated 15th December,2020 Hon. Mshomba - RM)

GABRIEL ALOYCE MBENA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

1st April, 2022 & 22nd April, 2022

E.E KAKOLAKI, J.

Before this Court the appellant is challenging both conviction and custodial sentence of 30 years meted to him by the District Court of Ilala in Criminal Case No.349 of 2019 on 15/12/2020, where he stood charged with the offence of Unlawful Possession of Prohibited Plant; Contrary to section 11(1)(d) of the Drugs Control and Enforcement Act [Cap 95 R.E 2019] herein referred to as DCEA. He has therefore preferred this appeal equipped with five grounds of appeal going thus:

1. That there was no evidence that proved beyond reasonable doubt that the appellant put the prohibited substance in his belongings.

2. That the trial court erred in law and in fact in convicting and sentencing the appellant herein above without satisfying itself on the proper and correctness of the scene of events.
3. That the court erred in law and facts by relying on the expert evidence of witness that was not an expert.
4. That as a whole, the prosecution did not prove the case beyond reasonable doubt i.e. the prosecution witnesses time and time again contradicted themselves.
5. That the trial Magistrate erred in law and in fact to deal with the prosecution evidence on its own and arrived at the conclusion that it was true and credible without considering the circumstances and facts in the records.

It was prosecution case during the trial that, the appellant **Gabriel Aloyce Mbena**, on 20th day of April, 2019 at Bandarini (Baggage room) area within Ilala District in Dar es salaam Region, was **found in possession of prohibited plants** of **Narcotic drugs** namely **Cannabis Sativa** commonly known as **''Bhangi''** weighing **3.28** kilograms. When called to answer the charge against him the appellant strenuously denied the accusation the fact which forced the prosecution to call in eight (8) witnesses and tender seven

(7) exhibits in its urged to prove its case, while the appellant defended himself on oath without exhibits but called only one witness to back up his defence. The prosecution exhibits included 3.28 kilograms of cannabis sativa (exh. PE1), Government Laboratory Analyst Report DCEA Form No. 009 (exh.PE2), Seizure Certificate, Form No. 003 (exh. PE3) and Appellant's Ferry ticket issued by Azam Marine Services (Kilimanjaro) on 19/04/2019 (Exh. PE4). Others were witness statement of Gabriel Enock Mbwire (exh. PE5), Sample Receipt Notification from Government Chemist Laboratory Authority (GCLA) From No. GCLA 01 (exh. PE6) and certified copy of Police exhibit Register (exh.PE7). Having considered evidence of both sides the trial court was satisfied that the prosecution proved its case to the hilt hence conviction and sentence of the appellant which resulted into this appeal.

During hearing of the appeal on 18/03/2022 both parties appeared represented and were heard viva voce. The appellant hired the services of Ms. Assella Kokushubira Archard, learned advocate whereas the respondent enjoyed the good services of Mr. Timotheo Mmari, learned State Attorney. After having addressed the court on the merits and demerits of the appeal the Court suo motu prompted parties to address it on the issue which did not feature in their submissions as to whether the substance in which the

appellant is alleged to have been found in possession of is a prohibited plant and whether the charge was proved against the appellant to the hilt which also answers ground number four. As both parties were not prepared on that date, the hearing was adjourned to 01/04/2022 with leave of the Court sought and granted. For the reasons to be apparent in the course of writing this judgment I will address first the issues raised by Court as argued by the parties.

On the 01/04/2022 it was Ms. Archard who took the floor first to address the court on the issues raised assisted by Ms. Faith Kiwanga, learned advocate too. She told the court that, as per the particulars of offence the appellant was found in possession of prohibited plant namely cannabis sativa commonly known as bhangi weighing 3.28 kilograms. According to her the term ”prohibited plant” is defined under section 2 of the DCEA to mean ***cannabis plant****, khat plant, coca plant, papaver somniferum or opium poppy and papaver setigerum*. And that, the ordinary meaning of the term plant means a living organism of the kind exemplified by trees, shrubs, herbs, ferns and mosses typically growing in a permanent sight. It was her argument that according to testimonies of PW1, PW2,PW3,PW4,PW5 and PW7 what was obtained from the appellant was dry leaves of cannabis sativa

and not what is described to be prohibited plant as provided in the charge sheet. She said as there was variance between the particulars of the charge and what is stated by prosecution witnesses on what substance was the appellant found in possession of between prohibited plant and dried cannabis sativa, his case was not proved beyond reasonable doubt. Further to that he mentioned, the defect of the charge sheet prejudiced the appellant as was disabled to marshal his defence properly for believing was charged of being in unlawful possession prohibited plants as per the statement of offence while the particulars of offence provided that, it was cannabis sativa (dried leaves). She added it was the trial court's duty to make sure that, the charge is proper drawn and discloses the essential ingredients as provided under 132 and 135(a)(i) of the Criminal Procedure Act, [Cap. 20 R.E 2019], before the case proceeds to the full trial. The learned counsel supported her stance with the Court of Appeal decision in the case of **Hamis Mohamed Mtou Vs. R**, Criminal Appeal No. 228 of 2019, (CAT-unreported) where the Court said the charge being a foundation of a criminal trial, the try court admitting it should satisfy itself that it is drawn in compliance with the law. In this case he submitted, since the testimonies of prosecution witnesses did not prove to the hilt that what the accused was found in possession of was prohibited

plant within its meaning the appellant was wrongly convicted and therefore this appeal has merit. She invited the court to allow it and release the appellant.

On the other hand resisting the appeal and submitting against Ms. Archard's submission Mr. Mmari for the Respondent contended, the charge against the appellant was proved beyond reasonable doubt. He said, section 11(1)(d) of the DCEA provides that the person shall be guilty of the offence of Unlawful Possession of Prohibited Plant if he possesses, exports, sells and do any other act in respect of prohibited as mentioned in the provision. In the case at hand he argued the appellant was charged of being in possession of prohibited plants which includes cannabis plant as defined by section 2 of DCEA. He argued cannabis plant is also defined to mean a plant of genus cannabis by whatever name called and includes any part of the plant containing terahydocannabinol. As to what does the term plant imply Mr. Mmary referred the Court to Collins Dictionary and Thesaurus to mean a living thing that grows in the earth and has stem, leaves and roots. From this plain meaning a conclusion is drawn that any part of cannabis plant containing tetrahydrocannobinol is a cannabis plant. And since the substance found in possession of the appellant contained tetrahydrocannobinol

chemical found in cannabis sativa as tested and confirmed by PW1 during his testimony then it is conclusive that the appellant was in possession of prohibited plant in the form of cannabis sativa (bhangi). Coming to the contents of charge he said, the offence was very descriptive drafted in ordinary language to enable the appellant to understand his accusation that was found in possession of prohibited plant of the scientific name of cannabis sativa commonly known as bhangi. With these submissions the learned counsel differed with Ms. Archard's submission that the appellant was prejudiced anyhow and failed to enter his defence properly for failure to understand the nature of his offence which according to him was so clear and understandable. To reinforce his submission Mr. Mmari cited to the court the case of **Abas Kondo Gede Vs. R**, Criminal Appeal No. 472 of 2017 (CAT-unreported) where the appellant was charged with Unlawful possession of cocaine but the report shown the substance was cocaine hydrochloride and the Court held the substance contained similar contents thus the appellant was not prejudiced. He rested his submission by inviting the court to find the prosecution's case was proved beyond reasonable doubt as the substance found in possession of the appellant in whatever name is called contained tetrahydrocannobinol chemical which is cannabis or comes

from cannabis plant which is prohibited plant according to the law. He therefore prayed the court to dismiss the appeal.

In her brief rejoinder Ms. Archard was insistent of her earlier submission what the appellant is alleged to have been found in possession of is not prohibited plants and goes against the prosecution witnesses testimonials stating that he was found in possession of dried leaves of cannabis sativa. She said, even the marginal note of the provision of section 11(1)(d) of DCEA is elaborate of what the provision carries when refers to prohibition of cultivation of certain plants and substances. As to the issue of defectiveness of the charge she responded the dried leaves are different from living plants. The act of the charge mentioning unlawful possession of prohibited plant while the particulars of offence and evidence in support of it refers to cannabis sativa which is dried leaves, then the defect goes to the root of the case hence the submission that, the appellant was prejudiced and therefore the charge against him was not proved beyond reasonable.

I have taken time to chew out the fighting submissions from both parties as well as perusing the record and revisiting the laws governing the matter in dispute which is DCEA (supra) and Criminal Procedure Act, [Cap. 20 R.E 2019] hereinafter referred to as CPA. It is the principle of law that, a charge

being a foundation of criminal trial, the same must disclose the offence against the accused person by properly stating the statement of the offence and particulars of offence describing all necessary elements of the offence as per the requirement of section 132 of the CPA. The provision of section 132 of the CPA provides:-

> *132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.*

Likewise, section 135(a)(ii) of the CPA reads:

> *"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence."*

The essence of the above provisions is not far-fetched as it is as to enable the accused person to know the nature of the offence he is going to face and prepare his defence if possible. This stance of the law was emphasized

in case of **Mussa Mwaikunda Vs. R [2006] TLR 387**, where the Court of Appeal, observed, inter alia:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

As alluded to above in this matter the appellant is charged of the offence of Unlawful Possession of Prohibited Plant as stated under section 11(1)(d) of DCEA. What is gleaned from parties' submissions in which this court subscribe to is that, both are at one on the definitions of the terms prohibited plants and cannabis plant and that cannabis plant is part of the prohibited plant. They are also not at dispute on the fact that what is alleged to have been found in possession of the appellant is the dried leaves of cannabis sativa containing tetrahydrocannobinol chemical. They only part their ways when it comes to the issue as to whether the said dried leaves of cannabis sativa are prohibited plants within the meaning of section 11(1)(d) of the DCEA. It is Ms. Archard that they are not because the same were not living plants when allagedly found in possession of the appellant while Mr. Mmari is of the different view that were cannabis sativa or "bhangi" for belonging to the class (genes) of cannabis plant with tetrahydrocannobinol chemicals

as established through exhibit PE2 by PW1 chemical analyst. The issue for determination is whether the said seized dried leaves of cannabis sativa were prohibited plants within the meaning of section 11(1)(d) of DCEA. In order to disentangle the parties from the hurdle leading them to disagreement, I find it pleasing to revisit the definition of the terms prohibited plants, cannabis plant and plant so as to come up with the common understanding on whether the dried leaves of cannabis sativa are prohibited plants within the meaning of section 11(1)(d) of the DCEA. The term **''prohibited plant''** is defined under section 2 of the DCEA to mean and include among others plants, **cannabis plant**, khat plant or coca plant. The definition provides:

> *"**prohibited plant**" means **cannabis plant**, khat plant, coca plant, papaver somniferum or opium poppy and papaver setigerum;*

The term ''cannabis plant'' is also defined under section 2 of DCEA as follows:

> *"**cannabis plant**" means **a plant of the genus cannabis** by whatever name called and includes **any part of that plant containing tetrahydro-cannabinol**;*

What is gathered from the above definition of cannabis plant is that, it refers to the **plant** of **cannabis genus** (class) by whatever name is called. As per the **Collins Dictionary and Thesaurus**, found in

www.collinsdisctionary.com on 11/04/2022 the term **plant** is defined as hereunder:

> *"A **plant** is a **living thing** that **grows in the earth** and has a **stem, leaves, and roots**."*

As from the above definition the term "plant" is defined to be a living thing or organism with its parts, I am therefore of the firm view that, for the purposes of this appeal the term **"prohibited plant"** as referred in the charge facing the appellant meant to refer nothing other than **cannabis plant or living organism/thing** that grows on earth, together with its parts be it stem, leaves and roots but which contains Tetrahydrocanabinol chemical (THC). In other words the catch words here are that, the said **prohibited plant** must be a living thing/organism growing on earth with stem, leaves and roots if any. (See the case of **Rahim Hussein Athuman and Another Vs. R**, Criminal Appeal No. 113 of 2021 –HC-unreported). I arrive to that conclusion while supporting Ms. Archard's proposition that, even the marginal note of the provision of section 11(1)(d) of the DCEA suggests that the section was meant to prohibit **cultivation** of prohibited plants and substances including seeds. The said marginal note reads:

> *"Prohibition of **cultivation** of certain plants and substances."*

Now back to the crux of the matter regarding to what is alleged to have been found in possession of the appellant it is in evidence of PW1, PW2, PW3, PW4, PW5, PW7and PW8 as well as exhibits PE1, PE2, PE3, PE6 and PE7 that what was seized, kept in exhibit room, taken and receive at the Government Chemist Laboratory Authority for testing, tested and later on tendered in court as exhibit PE1 is dried leaves (grasses) of cannabis sativa (bhangi). There is no dispute therefore that the same were dried up comes from cannabis plant contains tetrahydrocannobinol chemical as per the report in exhibit PE2 and as rightly submitted by Mr. Mmari. It is also uncontroverted fact the said alleged dried cannabis plant exhibit PE1 was not living thing or organism growing in earth as per the definition of the term plant above.

In this appeal since the claimed prohibited plant alleged to be found in possession of the appellant was not a living thing/plant growing in earth by the that time despite of containing tetrahydrocannobinol chemical contents, it cannot be concluded that, the prosecution case was proved beyond reasonable doubt against the appellant. I so conclude as under the provisions of section 132 and 135(a)(ii) of the CPA, the statement of offence and particulars of offence in the charge ought to have been clear and in

unambiguous language/terms so as to give the appellant all necessary and reasonable information that, what he was accused of, was unlawful possession of prohibited plants and not dried cannabis sativa as stated in the particulars of offence, for him to properly prepare his defence. The Court of Appeal in the case of **Hamis Mohamed Mtou** (supra) on the need of the charge to disclose to the accused all necessary and reasonable information as per the dictates of the above cited sections had this to say:

> *"It can thus be gleaned from cited provisions that, every charge should contain a statement of the specific offence, describing it in clear language together with* ***the particulars of the offence so as to give an accused person necessary and reasonable information and a clear picture of what is he is being accused of so that he can properly prepare his defence****." (Emphasis supplied).*

Since the particulars of the charge indicated that, the appellant was accused of being **found in possession of prohibited plants** of **Narcotic drugs** namely **Cannabis Sativa** commonly known as **''Bhangi''** weighing **3.28** kilograms and not prohibited living plants as stated in the statement of offence it is obvious the information obtained from the charge was not

sufficient enough to enable him understand the nature of the offence facing him hence prejudiced as stated by Ms. Archard for failure to prepare a meaningful defence. On the other hand the prosecution by tendering evidence to prove that the appellant was found in possession of dried cannabis sativa (bhangi) while the offence charged with is that of prohibited plants, I stress as already held above the case against him was not proved to the hilt.

In the upshot with the above findings, I find this appeal has merit and I don't intend to further determine the rest of the grounds of appeal. I therefore allow the appeal by quashing the conviction against the appellant and set aside the sentence meted on him. In the end I order his immediate release from prison unless otherwise lawfully held.

It is so ordered.

DATED at Dar es salaam this 22nd day of April, 2022.

E. E. KAKOLAKI

JUDGE

22/04/2022.

The Judgment has been delivered at Dar es Salaam today on 22nd day of April, 2022 in the presence of Ms. Assela K. Archard, learned advocate for

the Appellants, Mr. Adolf Kisima, learned State Attorney for the Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
22/04/2022