

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 213 OF 2021

(Arising from a decision of Resident Magistrate Court for Coast Region at Kibaha in Criminal Case No. 179 of 2021 dated 14th September,2021 Hon. J. L. Mushi - RM)

HADIJA MWISHEHE TINGISHA @ MAMA ZAKIA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th May, 2022 & 27th May, 2022

E.E KAKOLAKI, J.

The appellant Hadija Mwishehe Tingisha @ Mama Zakia is challenging both conviction and custodial sentence of 30 years imprisonment meted to her by the Resident Magistrates Court for Coast Region at Kibaha in Criminal Case No. 179 of 2021, handed down on 14th September,2021. Before the trial court the appellant was charged jointly with another person not subject of this appeal, each facing her own count to 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] (the DCEA).

It was prosecution case against her in the first court that, on 12/8/2017 at Mwandege Tanki la Maji area within Mkuranga District in Coast Region, the appellant was found in possession of prohibited plants namely cannabis sativa commonly known as bhangi to wit 18 dices (kete 18) weighing 8.75 grams, 16 (puli) weighing 696 grams and 19 (puli) weighing 818.45 grams without a permit from the authority. As the appellant denied the charge when called to answer it, the prosecution paraded six (6) witnesses and seven (7) exhibits one of them being appellant's cautioned statement (exh. P3) in its bid to disprove the appellant's innocence. Upon full trial the trial Court was satisfied that prosecution case was proved beyond reasonable doubt against her and proceeded to convict and sentence the appellant accordingly. It is from that conviction and sentence this appeal has been preferred on six (6) grounds of appeal going thus:

1. That, the Trial Court erred in law and fact by convicting the Appellant on the reason that the Appellant did not bring her neighbour as witness to rescue her while it is not the appellant's duty to prove that she committed the offence.

2. That, the learned Resident Magistrate grossly misdirected and erred in law and in fact for believing that the exhibit's chain of custody were correctly handled to warrant conviction and sentence of the Appellant.
3. That, the learned Resident Magistrate grossly misdirected herself in law and facts for issuing a verge conviction and sentence that contradicted the charge sheet.
4. That, the learned Resident Magistrate grossly misdirected herself in fact and law for not observing that the rules of Procedure were not complied with.
5. That, the learned Resident Magistrate grossly misdirected herself in fact and law for admitting the cautioned statement of the Appellant as exhibits while the said cautioned statement was illegally obtained.
6. That, the learned Resident Magistrate grossly misdirected herself in fact and law for believing that the prosecution side had proved their case beyond reasonable doubt against the appellant.

Basing on the strength of the said grounds of appeal the appellant is urging this court to allow the appeal by quashing the conviction against her and set aside the sentence meted on her.

During hearing of this appeal both parties appeared represented and were heard viva voce. The appellant hired the services of Mr. Nickson Ludovick learned advocate while the respondent defended by Ms. Elizabeth Olomi who from the outset supported the appeal basing on submission of Mr. Ludovick in support of the 3rd and 6th grounds of appeal. In this judgment I have opted too to address them first and if need be I will extend to the rest of the grounds.

Submitting in support of the 3rd ground of appeal, Mr. Ludovick faulted the learned trial magistrate to convict and sentence the appellant basing on the contradictory charge sheet. He said, while the accused was convicted believed to have been found in possession of dried leaves of cannabis sativa the particulars in charge sheet referred to the prohibited plants, which contravened the provisions of section 132 of Criminal Procedure Act, [Cap. 20 R.E 2019] (the CPA) requiring the charge to specify the particulars of offence tallying with the statement of offence. As the charge sheet on unlawful possession of prohibited plants was not supported by the prosecution evidence to the effect that the appellant was found in possession of dried cannabis sativa instead of prohibited plants, then the case against her was not proved beyond reasonable doubt as contended in the 6th ground

of appeal. He therefore prayed the Court to allow the appeal, quash the appellant's conviction and set aside the sentence.

In her brief reply submission Ms. Olomi submitted that, since as per PW1 and PW2 the appellant was found in possession of dried cannabis sativa which were confirmed by PW5 the Government chemist to be so, and since as per the Cambridge Dictionary and the decision of this court in the case of **Gabriel Aloyce Mbena Vs. R**, Criminal Appeal No. 86 of 2021 (HC-unreported), the term Prohibited plant is defined to be a living thing that produces seeds and flowers, then the prosecution case was not proved against the appellant beyond reasonable doubt as complained in the 3rd and 6th ground. She said in this case the appellant was informed of her charge as per the requirement in the case of **Mussa Mwaikunda Vs. R** [2006] TLR 387, that was accused of being found in possession of prohibited plants but the evidence led against her was on dried leaves of cannabis sativa, something which contravened the provisions of section 132 of the CPA. She rested her submission by supporting the appellant's prayers. Following Ms. Olomi's submission Mr. Ludovick had no rejoinder to make.

Having considered both learned counsels' submissions and perused the evidence on record, I find the only issue this court is called to determine is

whether the charge against the appellant was proved beyond reasonable doubt. It is trite law that in criminal proceeding a charge against the accused person must be proved beyond reasonable doubt. See section 2(2)(a) of Evidence Act, [Cap. 06 R.E 2019]. It is also a settled principle of law that, every charge sheet must disclose the offence as provided under Section 132 of the Criminal Procedure Act, [Cap. 20 R.E. 2019] so as to enable the accused person to know the nature of the offence he is going to face and prepare his defence if possible. The section 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.

The above principle was emphasized in the case of **Mussa Mwaikunda** (supra) 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."

In this matter as per the charge sheet, the appellant was charged with the offence of Unlawful Possession of Prohibited Plants. Prohibited plant is not defined under DCEA but this court in the case of **Gabriel Aloyce Mbena** (supra) when discussing the provision of section 11(1)(d) of DCEA where the appellant was charged and convicted with similar offence to the one facing the appellant in the present matter, the Court stated thus:

*"...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 Tetrahydrocannabinol 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)."*

What is gleaned from the above definition is that a prohibited plant must be *a living thing/organism growing on earth with stem, leaves and roots*. In the present matter, it was in PW1 and PW2's evidence confirmed by PW5, the

Government chemist that, the appellant was arrested and found in possession of dried grasses (leaves) of cannabis sativa and not prohibited plants within the meaning ascribed in **Gabriel Aloyce Mbena** (supra). Since the particulars of offence referred to prohibited plants commonly known as cannabis sativa in which the evidence led by PW1, PW2 and PW5 proved to the contrary to be dried leaves of cannabis stativa, I hold the charge contravened the provisions of section 132 of the CPA as the particulars of offence differed materially with the statement of offence. Thus the appellant was denied of her right to be supplied with reasonable information for her to prepare an informed defence, hence the charge against him was not proved to the hilt. It was recently held by the Court of Appeal in the case of **Hamis Mohamed Mtou Vs. R**, Criminal Appeal No. 228 of 2019, (CAT-unreported) on the need of the charge to disclose to the accused all necessary and reasonable information, when observed thus:

*"...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).

Applying the above cited case to the facts of this matter where the appellant no doubt was stifled when denied with her right to necessary and reasonable information as was supposed to be disclosed in the charge sheet hence incapable of marshalling a meaningful defence, I hold the conviction against her was wrongly entered. The 3rd and 6th grounds of appeal therefore suffice to dispose of the appeal. Thus I don't intend to further determine the rest of the grounds of appeal.

Having so said and done, I find the appeal to be meritorious and proceed to allow the same. I quash the conviction and set aside the sentence meted on the appellant. I further order her immediate release from prison unless otherwise lawfully held.

It is so ordered.

DATED at Dar es salaam this 27nd day of May, 2022.



E. E. KAKOLAKI

JUDGE

27/05/2022.

The Judgment has been delivered at Dar es Salaam today on 27nd day of May, 2022 in the presence of the Appellant in person, Mr. Genes Tesha, learned State Attorney for the Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
27/05/2022

