THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRIC REGISTRY

AT MBEYA

CRIMINAL APPEAL NO.132 OF 2021

(Originating from criminal Case No. 17 of 2021 of the District Court of Momba)

Between

HALSON KALIMANJALA MWASHAMBWA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 23/03/2022
Date of judgment: 25/05/2022

NGUNYALE J.

The appellant was arraigned in the District Court of Momba for an offence of cultivating prohibited plants contrary to section 11(a) of the Drug Enforcement and Control Act [Cap. 95 R: E 2019] in Criminal Case No. 17 of 2021. It was alleged that on 29th January, 2021 at about 1630hrs while at Songambele area within Momba District in Songwe Region the appellant was found by one A/INSP Dennis Kihengu in unlawful cultivates of prohibited 12 plants weighing 3 kilogram and 82 grams of cannabis sativa commonly known as bhang. The appellant denied the charge. To

prove the charge the prosecution side paraded five witnesses and produced three exhibits box containing bhang(PE1), cautioned statement of the appellant(PE2) and seizure certificate(E3). The appellant defended himself, called no witness in support.

Briefly, Insp Dennis Kihengu(PW5) and G. 2620 D/C Yonah(PW4) received information that at Songambele there was a person who had planted bhang on his maize farm. They went at the scene of crime with chairman area one Michael Sichula who testified as PW2. Upon arriving they started looking for bhang crops which they found at the middle of the farm. Then PW5 seized them and produced certificate of seizure Exhibit PE3 and took the appellant to police station. G. 6859 D/C Jeremiah (PW3) recorded cautioned statement of the appellant exhibit PE2 in which he admitted to use and cultivate bhang as a medicine. The seized bhang were taken to the government chemist where Jackson Mwijage(PW1) examined them and discovered to be cannabis sativa, bhang. He tendered a box containing leaf and report which was admitted as exhibit PE1,

In defence the appellant denied to have been found with bhang. He stated that although his rooms and compound were searched by the police but nothing was found. He complained that the case is fabricated one.

In its judgment the trial Court found the charge proved by the prosecution beyond reasonable doubt. The appellant was consequently found guilty convicted and accordingly sentenced to thirty years imprisonment. The appellant is aggrieved by the whole judgment and preferred six grounds of appeal namely;

1. *That he District Court erred in law and fact to convict the appellant as the prosecution failed to prove their case beyond reasonable doubt*
2. *That the District Court erred in law and facts to convict the appellant as the prosecution failed to establish chain of custody of the exhibits*
3. *That the District Court erred in law and facts to convict the appellant for failing to properly analyse and evaluate evidence adduced before it.*
4. *That the District Court erred in law and facts for failure to consider the appellant's defence.*
5. *That the District Court erred in law and facts to convict the appellant basing on contradictory evidence*
6. *That the District Court erred in law and facts to convict the appellant as the search was illegally conducted.*

When the appeal came for hearing the appellant was represented by Mosess Mwampashe, learned advocate whereas on behalf of the respondent Republic appeared Mr. Mgaya, learned State Attorney.

Mr. Mwampashe was the first to take the ball rolling, in the first ground he submitted that the prosecution did not prove the case beyond reasonable doubt in that there was no relation between exhibit PE1 and evidence adduced by PW2, PW4 and PW5. He continued to submit that while PW4 said 12 seedlings were sent to government chemist, PW1 said the box marked 'S'. Mr. Mwampashe complained the delay to send to the government chemist. On this he cited the case of **DPP v Shiraz Mohamed Shareef** [2006] TLR 427 in which it was stated that the seized drugs were, for about five days, not accounted for and no explanation was given by the prosecution witness is not a minor irregularity and, therefore, the case was not proved beyond reasonable doubt. He strongly submitted that the prosecution delayed for 14 to send sample to the government chemist.

Submitting in the second ground Mr. Mwampashe submitted that chain of custody was not established on seizure, where it was kept, transfer analysis and disposition. He referred to the case of **Paul Maduka v Republic,** Criminal Appeal No. 110 of 2007. He contended that there was no documentation or oral evidence to show who received the exhibit at the police station, who kept it and how it was transferred to the government chemist.

Third and fifth grounds were argued together and Mr. Mwampashe submitted that evidence was not properly evaluated as there were contradictions. Evidence of PW1 contradicted with that of PW4. Whereas PW1 said he received a box with plants, PW4 stated the box was marked with X. He submitted that the trial Court did not see and resolve the inconsistancies accordingly. He cited the case of **Lenard Mwamashoka v R**, Criminal Appeal No. 226 of 2014 to support the argument.

In fourth ground Mr. Mwampashe submitted that defence evidence was not considered at all. He said the trial Court only picked weak defence evidence. He referred to the case of **Hussein Idd and Another v Republic** [1986] TLR 166 in which the Court stated it was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence.

The sixth ground is on illegal search. Mr. Mwampashe submitted that search was conducted contrary to the law as there was no search warrant and it was not an emergency search. He referred to the case of **Shaban Said Kimbamba v Republic**, Criminal Appeal No. 390 of 2019. Based on his submission above he prayed the appeal to be allowed.

Responding to the above Mr. Mgaya started to address the Court that exhibits were received in violation of the law. He submitted that exhibits PE1, PE2 and PE3 were read in Court before being admitted which was contrary to the law that before admission of any exhibit must be cleared and admitted. He cited the case of **Robinson Mwanjisi v R** [2003] TLR 218. He prayed all exhibits to be expunged. But insisted oral evidence were enough to sustain conviction relying on the case of **Elias Mwangoka v R,** Criminal Appeal No. 96 of 2019, **Chrizant Joan v R.** Criminal Appeal No. 313 of 2015.

Replying to the first ground Mr. Mgaya submitted that PW1 stated he received the box with plants and did not state that it had dry plant. As for delay to send them to the government chemist he distinguished the case of **DPP v Shiraz Mohamed Shareef** on that in the former it was heroin powder while in this appeal is Bhang. He continued to say that in this appeal the appellant admitted that the plants were his. He added that oral testimony is enough to ground conviction and, in this case, there was evidence of eye witness, that is, PW2, PW4 and PW5. He cited the case of **Posolo Wilson @Mwalyego v R**. Criminal Appeal No. 613 of 2015 to bolster the advance argument.

On chain of custody Mr. Mgaya replied that nowadays it is not relevant especially where there is eye witnesses. Referring to the case of **Song Lei v DPP,** Consolidated Criminal Appeal No. 16A of 2016 and 16 of 2017. He added that in the appeal at hand PW4 testified that the exhibit was taken to charge room and then to government chemist.

Regarding third and fifth on contradictions Mr. Mgaya submitted that there were no contradictions as PW2 did not state that he signed certificate of seizure. He continued to submit that evidence was properly evaluated but was quick to point that this being the first appellate Court may re-evaluate the evidence citing the case of **Province Charles Junior v R**, Criminal Appeal No. 250 of 2014.

On whether defence evidence was considered Mr. Mgaya submitted that it was considered. He added that the allegation of framed up case because of land disputes should be disregarded as PW2 was not cross examined on the issue by the appellant.

Submitting on illegal search Mr. Mgaya contended that oral testimony established that the appellant was found with illegal plants.

In rejoinder Mr. Mwampashe restated his submission in chief except he added that there is a difference between to summarise and evaluate. What the Magistrate referred in final submission which is not evidence.

I have considered the record, grounds of appeal and rival submission by the counsels which I found only to revolve around three issues;

i. *Whether the search of the appellant's compound was illegal.*
ii. *Whether the trial Court considered the defence of the appellant.*
iii. *Whether the prosecution proved the charge beyond reasonable doubt.*

Regarding illegal search in first issue, I will start with the requirement of the law. Search and seizure are governed by section 38(1)&(3) of the Criminal Procedure Act [Cap 20 R: E 2019] and section 32(7) of the Drug Control And Enforcement Act(Supra). Deducing from the provisions of law, no search of a premises has to be affected without **one;** search warrant, **two;** the presence of the owner of the premise, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property.

In this appeal the first and fourth requirements were not met. PW5 is the one who initiated the move to go and search the appellant compound, he went with PW4. When PW5 was cross examined he said there was no need to prepare search warrant though he had received information three hours before conducting the search. Also, there is no evidence if he issued receipts to the appellant. See the case of **Mbaruku Hamisi & 4 others** v. The republic Consolidated Appeals No.141, 143 & 145 of 2016, CAT at

Mbeya, and **Shabani Saidi Kindamba v The Republic**, Criminal Appeal No. 390 of 2019, CAT at Mtwara (both unreported).

Failure to comply with the law one can conclude that search was illegal from the very beginning. I understand that, under certain circumstances, an emergency search under Section 42 of the Criminal Procedure Act Cap 20, dispenses with search warrant requirement but the circumstances in this case do not fall into that exception. The first issue is answered in affirmative.

The second issue on whether defence evidence was considered. I will start with the position of law that failure to consider the defence evidence is a fatal irregularity which vitiates the conviction. This has been the position of the Court in various decisions including, **Hussein Idd and Another v R** [1986] TLR 166 and **John Mghandi @ Ndovo v R**, Criminal Appeal No. 352 of 2018 (Unreported).

In this appeal the defence evidence was that on the fateful date the appellant was at his home when police officer broke in and mounted a search. They searched the seating room and other rooms they got nothing. Then they went to his farm where they also searched and found nothing. He added that it is not true that he was found with bhang.

In his judgment the Magistrate summarized evidence of the appellant as seen from page 4 to 5, then he went on to evaluate the prosecution evidence which at the end was satisfied that chain of custody was established and the appellant had admitted in cautioned statement exhibit PE2 to cultivate bhang. At the end, the Magistrate inferred that when the appellant raised the issue of torture in his defence was late as he did not object when cautioned statement was being tendered.

At the outset, I agree with the appellant that defence evidence was not considered at all. With respect to the Magistrate, it is one thing to summarize evidence and another thing to evaluate. Evaluation of evidence entails weighing the prosecution evidence vis a vis the accused defence. This was emphasized in the case of **Mkulima Mbagala v R**, Criminal Appeal No. 267 of 2006 (unreported) stated:

> *'For a judgment of any Court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.'*

Although the appellant defence was general denial and that the case was a fabricated one without any details but the Magistrate was obliged to

consider it and make analysis against that of the prosecution before concluding that the prosecution proved the charge beyond all reasonable doubt.

This being the first appellate has a duty to re-evaluate evidence and arrive at its own finding as per the case of **Province Charles Junior v R**, Criminal Appeal No. 250 of 2014 also cited by Mr. Mgaya for the respondent. This now brings me to the third issue.

In dealing with the third issue the appellant complains is that the charge against him was not proved beyond reasonable doubt. I will dispose this point starting with the issue of exhibits. Mr. Mgaya had concern on how exhibits PE1, PE2 and PE3 were admitted into evidence. He contended that they did not pass all stages required by the law, that is clearance, admission and reading them. Mr. Mwampashe did not make any comments even during rejoinder.

I entirely I agree with Mr. Mgaya that stages to admit exhibits PE1, PE2 and PE3 were flawed, that is clearing for admission, admission and reading it. The procedures were clearly stated in the case of **Robinson Mwanjisi** (Supra) also referred by the respondent counsel to the effect that;

'Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same.'

In this appeal PW1, PW3 and PW5 tendered exhibits PE1 box containing bhang, exhibit PE2 cautioned statement of the appellant and exhibit PE3 certificate of seizure respectively. When these exhibits were given to witness for purpose of clearing for admission it is when it was read. Then admission and marking them followed. The first stage of clearance was adhered to but the second stage of admission was not done instead the third stage of reading followed. The contents of exhibit PE1, PE2 and PE3 were made known to the Court before being admitted and forming as integral part of the record of the Court. Akin situation was discussed in the case of **Omari Said @ Mami & Baven Hamisi v The Republic,** Criminal Appeal No. 99/01 of 2014, CAT at Dar es Salaam (Unreported) where the Court held that;

'There is yet another ailment which goes with the admission of the cautioned statement; it was read over before admission. This was unprocedural and, we think, it prejudiced the appellants.'

Therefore, as rightly pointed by Mr. Mgaya, exhibits PE1, PE2 and PE3 were improperly admitted in evidence, it lacks evidential value and are hereby expunged from the record.

On whether the prosecution proved the case beyond reasonable doubt. Mr. Mwampashe submitted that there were contradictions in the evidence of the prosecution witnesses while Mr Mgaya for the respondent contended that the case was proved as required and there was no contradictions.

On my part upon going through the evidence of PW2, PW4 and PW5 I have noted one contradiction regarding label of box sent to the government chemist. PW4 during cross examination stated the box was marked 'S' while PW1 stated to have received the box registered as No. 25 of 2021. The follow up question will be was this a major or minor contradiction. In resolving the contradiction in the testimonies of the witness the test was laid in the case of **Mohamed Said Matula v Republic** [1995] TLR 3 where it was stated that;

> *'Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible; else the Court has to decide whether the inconsistencies and contradictions are* ***only minor, or whether they go to the root of the matter.'*** **(Emphasize mine)**

In this this appeal there were a lot of shortcomings in the evidence of PW4 and PW5 for there is no any documentation on when the exhibit was received at the police station, manner of identifying it and how was it

taken to the government chemist. During cross examination PW4 admitted to have no any document to prove movement of exhibit PE1.

Upon further scrutinising evidence I have found that PW2, PW4 and PW5 stated that they found twelve plants of bhang in the farm of the appellant but they did not give their experience on how they identified it to be bhang. For instance, PW2 stated it was his first time to see it yet he testified the plants to be bhang. During defence the appellant testified that he was not found with bhang. What is discerned in this evidence is that Exhibit PE1 forms the subject matter of the controversy. I noted that exhibit PE1 was not given to PW2, PW4 and PW5 for identification purpose after it had been examined by PW1 and confirmed to be cannabis Sativa, bhang. Therefore, evidence of PW2, PW4 and PW5 cannot be relied upon to prove that plaints found in the appellant's compound were cannabis sativa or bhang as they did not identify it in Court. Their experience of identifying bhang plants was not made known to the court

The other evidence is that of PW3 who recorded caution statement of the appellant exhibit PE2. Having expunged Exhibit PE2 from the record evidence of PW3 remain hearsay. As for that of PW1 although he examined contents contained in the box exhibit PE1 and found to be bhang. It has already been settled by this court that the obtained

substance was through illegal search. Hence PW1 evidence carries no evidential value.

The complaint on delay to send to Government Chemist holds no water as I have already expunged exhibits PE1 from the record. Oral evidence of PW2, PW4 and PW5 has failed to establish how they are acquainted with knowledge on bhang. Above that it was obtained through illegal search.

In view of what I have endeavoured to discuss on what transpired in trial Court, I agree with the appellant that the charge of cultivating prohibited plant was not proved against the appellant beyond reasonable doubt. In this regard, I allow the appeal and order the immediate release of the appellant unless lawful held with another good cause.

DATED at MBEYA this 25th day of May, 2022.

D. P. Ngunyale
Judge
25/05/2022

Delivered this 25th day of May 2022 in presence of the appellant represented by Ms Grace Swetbert learned Counsel.

D. P. Ngunyale
Judge
25/05/2022