

IN THE HIGH COURT OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC. CRIMINAL APPEAL NO. 4 OF 2023

(Originating from Criminal Case No. 6 of 2021, Songea Resident Magistrate Court)

SEIFU RASHID @ SEIF.....1ST APPELLANT
AWADU AMIRI @ MBURU2ND APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

24/02/2023 & 17/03/2023

E.B. LUVANDA, J.

At the trial court the First and Second Appellants named above were tried for the offence of trafficking narcotic drugs and eventually were convicted and sentenced to jail term of ten years each. The Appellants are challenging both conviction and sentence on the following grounds:

One, the trial court erred in law and fact by convicting and sentencing the Appellants while there is no evidence to prove the charged offence;

Two, the trial court erred in law and fact by convicting and sentencing the Appellants basing on contradictory evidence especially PW1 and PW2 instead the trial court based on assumption and suspicious which is contrary to the law; Three, the trial court erred in law and fact by

convicting and sentencing the Appellants while the adduced evidence and tendered exhibit are contrary to the charge.

In his written submissions, Mr. Bernard Mapunda learned Counsel for the Appellants combine the first and third grounds and argued that, there is a variation between the evidence of PW4, exhibit PE and a charge sheet, in that PW4 said he seized two sacks of cannabis sativa, but those sacks were not tendered instead they tendered two sulphate bags. He cited the case of **Jonathan Joseph vs The Republic**, Criminal Appeal No. 391/2020 C.A.T. at Bukoba. The learned Counsel queried as to how exhibit C could carry both accused including exhibit B, without any object. He submitted that A/Insp. Yona (PW4) ought to have summoned independent witness, because the accused persons were not arrested at the bush rather within the village of Mtwara Pachani. He cited the case of **Jason Pascal & Others vs Republic**, Criminal Appeal No. 615/2020 C.A.T. at Bukoba; **Samwel Kibundali Mgaya vs Republic**, Criminal Appeal No. 180/2020 C.A.T, regarding the requirement of independent witness during search and seizure. He submitted that exhibit D, was not signed by a concerned person, and another one signed but not stamped.

In response, the learned State Attorney submitted that there is no variation between the charge, exhibit E and PW4's evidence. He submitted that the particulars of offence in the charge sheet reflect that the Appellants were found trafficking forty four point five (44.5) kilograms of cannabis sativa which were tendered as exhibit PE-B. He submitted that the word sulphate bags as stated by prosecution or sacks as appearing in exhibit E are the same and they both indicate the packaging in which cannabis sativa was kept. That the translation of the word sulphate bags in Swahili normally means sacks. He submitted that when exhibit E was tendered and its contents read out the Appellants did not bother to cross examine for PW4 to clarify between sulphate bags and sacks. He cited the case of **Simon Steven vs Republic**, Criminal Appeal No. 192 of 2020 High Court of Tanzania at Dar es Salaam, for a proposition that failure to cross examine means admission. He submitted that an argument that the prosecution failed to tender an object which the Appellants used to tie exhibit B with two sulphate bags, is baseless, because PW4 and PW7 are the one who arrested the Appellants with a motor cycle carried both Appellants and sulphate bags with cannabis sativa. He submitted that PW4 and PW7 stated clearly that they arrested the Appellants at Suluti Village within Namtumbo District Ruvuma region along Songea road and not within the Mtwara

Pachani as alleged by the Appellants. He submitted that PW4 and PW7 explained the reasons for failure to procure an independent witness is because it was at night and there was no person at that time to be an independence witness. He submitted that search and seizure were done in the circumstances which excluded the presence of independent witness as per the case of **Jason Pascal** (*supra*).

Regarding an argument that PW1 and PW3 lack corroboration, the learned State Attorney submitted that PW1 was an eye witness whose testimony is corroborated by PW7. He submitted that PW3 received narcotic drugs from PW7 and in turn submitted to the chemist PW2. He submitted that the evidence of PW3 and PW7 corroborate each other and therefore are entitled to be believed and hence credible and reliable, citing **Goodluck Kyando vs Republic** [2006] T.L.R. 363, also **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2016 C.A.T. at Mwanza. He submitted that the Appellants alleged exhibits B and E were wrongly admitted while the Appellants neither objected their admission nor cross examined witnesses for clarity and yet putting blame to the court for a fact which they admitted for being silent during tendering the exhibits. He submitted that the difference of colours as per PW3 does not affect credibility of PW1, PW3, and PW4, because it is

clear that those colours that is red and blue were only strips on both sides of the bags. He submitted that the anomaly appearing in exhibit D if any does not go to the root of the case and contradictions between prosecution witnesses were normal errors, because witnesses cannot be accurate in everything they testify, citing the case of **Emmanuel Lyabonga vs Republic**, Criminal Appeal No. 257 of 2019 C.A.T. at Iringa

Essentially issues grounded on the first and third grounds are wanting on merit. The learned Counsel criticized the testimony of PW4 who alleged to have seized two sacks via exhibit PE B which also reflect two sacks, while PW3 said two sulphate bags, and indeed, what was tendered in court are two sulphate bags exhibit PE B. To my view these are trivial and negligible issues, and cannot be raised up as a matter of serious concern. It is common knowledge that sacks and sulphate bags are used interchangeably. As alluded by the learned State Attorney, of which I agree that sulphate bags or sacks are mere packaging material in which cannabis sativa was contained and that for Swahili sulphate bag connote a sack, the only difference is on material under which is made. No wonder Sgt Athuman (PW1) who is the exhibit keeper said he received two sulphate bags containing leaves of cannabis sativa (exhibit

PE B); A/Insp. Henry Mwakabangu (PW3) said sulphate bags; while A/Insp. Yohana Mngumi (PW4) the arresting and seizing officer referred to them as two sacks of cannabis sativa exhibit PE B. But when exhibit PE B was exhibited to PW4 referred it as two sulphate bags. Importantly, no question was put on cross examination to either PW1, or PW3 or PW4 to clarify whether sulphate bags and sacks mean the same thing or connote two things apart. As this fact was not tested, it cannot be raised at this stage. See the case of **Cyprian Athanas Kibogoyo vs Republic**, Criminal Appeal No. 88/1992. To my view what was seized by PW4, is the same which was tendered and admitted in court as exhibit PE B.

Regarding an argument that no object was tendered, to clear a doubt as to how a motorcycle exhibit PE C could carry two people and two sacks. This question was introduced for the first time by the Appellants on their defence, as to why rubber or ropes for fastening those two sacks exhibit PE B on a motorcycle exhibit PE C were not shown or tendered.

To my view this omission have nothing to do with the fact in issue, that the Appellants were found carrying those two sacks on a motorcycle. Even when the seizing officers (PW4) and DCPL Meck (PW7) testified and exhibited things they seized, on top of that he stated that he saw a

motorcycle carried two people and two sulphate bags, but no question arose during cross examination regarding this fact. Therefore apart from being a minor issue, still it was raised as an afterthought. Equally the question of independent witness was not cross examined to PW4 and PW7. Above all a seizure was effected in the mid night along the road, between 2:00 hours (as put by PW4) and 03:00 hours (as put by PW7). Going through a seizure certificate exhibit PE 'E' at a space for witnesses, indicate that it will be recorded depending on the circumstances. Indeed PW7 on examination in chief explained that they did not procure independent witness because it was in the night and was not cross examined on this aspect.

Regarding a complaint that a report of the chemist analysis exhibit PE D was not signed by the Acting Manager, only an officer rubber stamp was stamped. To my opinion, that alone cannot suffice to render the whole report invalid. This is because the author and the chemist who conducted analysis one Eliamin Ismail Mkenga (PW2) signed it. And so far it was stamped, the issue of authenticity cannot be said to be at stake.

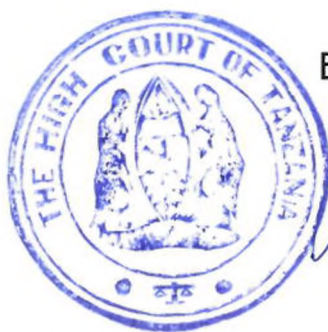
Ground number two. It is true that A/Insp. Henry Mwakabanga (PW3), when he was laying a foundation said one sulphate bag had a red strip

aside and the other one had a blue strip aside which were confirmed by DW1 on his examination in chief.

But PW1 did not mention the alleged white colour on sulphate bags. Therefore, the alleged contradiction between PW1 and PW3 is a mere imagination. As also submitted by the learned State Attorney that the difference of colours as per PW3, on itself does not affect credibility of PW1, PW2, PW3 and PW4, because the alleged red and blue colours were only in respect of strips on both sides of bags, which has nothing to do with a dominant colour of the said bags.

In this regard, the Appellants appeal cannot sail through in view of the damning evidence against them.

The appeal is dismissed.



E.B. LUVANDA

JUDGE

17/03/2023