

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 56 OF 2022

(Originating from Mlele District Court at Mlele in Criminal Case No. 39 of 2021)

SAYI S/O SAMWEL APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

14/03/2023 & 05/04/2023

JUDGMENT

MWENEMPAZI, J:

The appellant herein named was charged in the trial Court with the offence of unlawful possession of prohibited plants Contrary to Section 11(1) (d) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019. The particulars of the offence are that on 24th May, 2021 at Mamba Village within Mlele District in Katavi Region, the accused was found in possession of 120.1 grams of prohibited plants namely Cannabis Sativa commonly known as "Bangi" without having a permit. When the charge was read over and explained to him, the accused (appellant) denied to have committed the offence. However, upon hearing of the case, the accused was found guilty

to charge and was convicted 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. The accused (now convict) was sentenced to serve a term of thirty (30) years imprisonment in jail.

The appellant is aggrieved with both conviction and sentence. He has therefore filed this appeal raising four (4) grounds of appeal. For the sake of brevity and nature of the arguments in the appeal, I have opted not to reproduce them.

At the hearing the appellant was unrepresented and the Respondent enjoyed the services of Ms. Safi Kashindi, Learned State Attorney.

The appellant in his submissions was brief. He submitted that he has filed a petition of appeal with four (4) grounds of appeal which are contained in it; he prayed that the same be received and considered by the Court. Then prayed that the appeal be allowed, conviction quashed and sentence set aside and that he be released so that he can go back home to take care of his family.

On their part the respondent through Ms. Safi Kashindi, Learned State Attorney, they are supporting the appeal. The reason for support is the error accessioned during preparation of the charge sheet.

The appellant was charged with the offence of Unlawful possession of prohibited plants Contrary to Section 11(1) (d) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019. The section is for an offence of being found with prohibited plants. It reads as follow:

"11(1) Any person who.....

- (a)*
- (b)*
- (c)*
- (d) Produces, possesses, sells, purchases, transports, imports into mainland Tanzania, exports use or does any act or omits to do anything in respect of prohibited plants which act or omission amounting to contravention of the provision of this Act, commits an offence and upon conviction shall be liable to imprisonment for a term of not less than thirty years".*

The counsel submitted that the offence stated in the charge sheet is unlawful possession of prohibited plants. But the statement of the offence refers to the law on prohibition of cultivation of certain plants or substances. Therefore, in the charge sheet the statement of the offence and particulars of the offence are incompatible. The proper section was Section 17(1) (b) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019, read together with the 1st scheduled to the law. Section 3 of the same Act refers to prohibited plants as cannabis plant and khat plant ("mirungi").

In the testimony of PW1 at page 16 paragraph 5 the witness testified that after they had conducted a search, they retrieved narcotic drug and not plants. According to Section 132 of Criminal Procedure Act, Cap 20 R.E 2022 it is provided:

"Every charge of 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".

It is a prescription how the charge should be. It will be complete where it has a statement of the specific offence and particulars of the offence as to disclose the nature of the offence. Section 135 (a) of the Criminal Procedure Act, Cap 20 R.E 2019 provides for the mode in which the offences are to be charged.

In our case the testimony and the charge sheet are not compatible. The counsel referred to the case of **Musa Mwaikunda Vs. Republic [2006] TLR 387** and also **Isidori Patrice Vs. Republic**, Criminal Appeal No. 224/2007. The counsel submitted that the charge sheet did not meet the criteria prescribed in Section 132 of Criminal Procedure Act and therefore it is not curable Under Section 388(1) of the Criminal Procedure Act, Cap 20 R.E 2019.

It is a rule of law that when a person is charged with the defective charge, then the case against him is unfair. She referred this Court to the case of **Robert Madololyo and Another Vs. Republic**, Consolidated Criminal Appeal No. 46 & 428/2019 Court of Appeal of Tanzania (CAT):

"Being found guilty on a defective charge based on a non existent section entails that the appellant did not receive a fair trial".

The counsel concluded that since the charge did not disclose the offence which the appellant ought to have been charged with, he was charged on a wrong provision of the law and therefore the trial was unfair. The counsel submitted that they are supporting the appeal and prayed that the same be allowed.

Indeed, I have read the charge sheet in the trial Court record I had trouble in understanding whether that was the charge which was read over to the accused person during trial. I will reproduce the statement of offence and the particulars of the offence for easy of expressing what I have observed. It is as follows:

IN THE DISTRICT COURT OF MLELE

AT MLELE

CRIMINAL CASE NO. 39 OF 2021

REPUBLIC

VS.

SAYI S/O SAMWEL

CHARGE

STATEMENT OF OFFENCE

Unlawful possession of prohibited plants: Contrary to Section 11(1) (d) of the Drugs Control and Enforcement Act, [Cap 95 R.E 2019].

PARTICULARS OF OFFENCE

Sayi s/o samwel ON 24th day of May, 2021 at Mamba Village within Mlele District in Katavi Region, was found in possession of 120.1 grams of prohibited plants namely cannabis sativa commonly known as "bhangi" without having a permit.

In the charge sheet the reference is made to the prohibited plants but the testimony in the proceedings is referring to Narcotic 'drugs'. The counsel for the Respondent is right in the submission that the accused (appellant) was charged with the wrong provision of law but also the evidence tendered was on being found with prohibited drugs and not on cultivation of the prohibited plants.

In the case of **Isidori Patrice Versus the Republic**, Criminal Appeal No. 224 of 2007, Court of Appeal of Tanzania at Arusha, held that:

"It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence charged with the necessary mens rea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege essential facts of the offence and any intent specifically required by law".

In the referred case the Court of Appeal also referred the case of **Mussa Mwaikunda Vs. Republic**, Criminal Appeal No. 174 of 2006 for the holding that:

"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 elements of an offence".

The appellant in this case is said to have been found with 120.1 grams of Cannabis Sativa (bhangi) and that is a drug or psychotropic substance. The evidence tendered is different from the charge eg. PW1, PW2 and PW3. The charge is on cultivation of prohibited plants. The evidence is on narcotic drug. No compatibility.

Since the provision of law cited is wrong, the defect is not curable under Section 388(1) of the Criminal Procedure Act, Cap 20 R.E 2019, the charge was fatally defective.

The appeal is therefore allowed, conviction quashed, sentence set aside and the accused should that be forthwith released from prison unless he is otherwise being held for another lawful cause.

It is ordered accordingly.

Dated and delivered at Sumbawanga this 05th day of April, 2023.




T.M. MWENEMPAZI
JUDGE