IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 52 OF 2022

(*Originated from Criminal Case No.56 of 2019 in the District Court of Magu District at Magu)*

HALULA S/O MALOLE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

17th October 2022 & 12th April 2023

ITEMBA, J.

In the District Court of Magu, the appellant Halula Malole and his brother Miha Malole were charged with the offence of unlawful cultivation of prohibited plants namely Tetrahydrocannabinol (THC) also known as '*Bhangi'*.

It was alleged at the trial court that on 3/4/2019 a police officer named Omary Kipenya (PW7) was alerted by an informant that at place named Ibisa in Mwalinha village there is a shamba where people have cultivated narcotic drugs PW7 went to said shamba and arrested 2 people the one Leah who is the appellant's wife and the second accused.

That, the said Leah told PW7 and other arresting officers that the shamba belongs to their clan, they cultivate it in turns and for that year it was their turn to cultivate it. The officers uprooted and seized a total of 353 plants of narcotic drugs, filled a certificate of seizure form no. DCEA 003 which was admitted as **Exhibit P.1**. That Leah also stated that both accused owns the shamba and the Police Officers believing that the 2 accused person is working with the 1st accused as syndicate, they arrested both of them.

It was further alleged that on 4.4.2019 the said '*bhangi'* was taken by one **DC Robert** to the office of the Chief Government Chemist at Mwanza and handled to Tupeligwe Maisaka (PW5). PW5 told the court that upon her scientific examination she conducted, the said plants weighed 108.8 Kg and were cannabis sativa commonly known as '*bhangi*.' She produced a report DCEA 009 (**exhibit P.E.I**) to that effect. The appellant was arrested later and his wife Leah was released.

It was further alleged that the said plants were disposed through burning on 4/10/2019 in the presence of **PW6 Gladnes Mseke** a Resident

Magistrate. It was PW7 who took the plants to PW6. She also produced DCEA no.6 (exhibit P.2).

PW2 who is the hamlet leader held the court that he witnessed uprooting of the said '*bhangi*'. He stated that on the shamba there was maize and cotton and a garden. The '*bhangi*' way in the middle. However, in cross examination he said he does not know the arrangement of using the shamba.

After a full trial, the appellant was sentenced to 10 years imprisonment while the second accused Miha Malole was acquitted.

The appellant is aggrieved by the said decision and he has filled six grounds of appeal, I will reproduce them hereunder;

1. *That, Your Hon. Judge, the trial magistrate erred in law and fact to convict me while there was no evidence tendered to prove the ownership and turn of a person responsible to cultivate the piece of land at material time.*
2. *That, Your Hon. Judge, the trial magistrate misdirected in law and fact to convict me while prosecution side failed to observe S.48 (c) (iii) and (vii) of the Drug control and Enforcement Act or S.38 of CPA Cap 20, (RE: 2019).*

3. *That, Your Hon. Judge, the trial magistrate misdirected the law and fact to convict me while prosecution side failed to prove the chain of custody.*
4. *That, Your Hon Judge, prosecution side failed to summon the credible witness (Maryciana Nyange. I respect S.143 of TEA but the one who could've solve the riddle is Maryciana Nyange that to whom the land belongs to.*
5. *That, Your Hon. Judge the lower court erred in law and fact to convict relying on uncorroborative evidence.*
6. *That, Your, Hon. Judge, Entirely the Prosecution side failed to prove the said offence beyond all reasonable doubt.*

When the appeal was scheduled for hearing, the appellant fended for himself while the respondent was represented by Ms. Rehema Mbuya, learned senior state attorney who strongly opposed the appeal. After considering the records of appeal and submissions by both parties, the issue is whether the appeal is meritorious.

For the reasons about to unfold, I will mainly discuss the first ground of appeal.

In the first ground of appeal, the appellant disputes ownership of the shamba. He stated that it belongs to Merisiana Nyanda their mother. The learned state attorney stated that the evidence shows that the shamba was

owned by the clan under guardianship of their old mother. That PW2 established that the shamba belongs to Merisiana Nyanda the appellant's mother.

Section 3 (2)(a) of the Evidence Act provides that:

'A fact is said to be proved when-

> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists'.*

Having gone through the records, it is undisputed that the shamba was clan land. PW2 being a hamlet leader, he told the court that the shamba belonged to Merisiana Nyanda but it is located closely to both appellant's and 1st accused's house. However, PW2 stated that he did not know the family arrangement of using the said shamba.

The appellant in his defense, did not say anything about the ownership of the shamba. He said he does not know the exact place where the said *'bhangi'* was cultivated and uprooted. This is most likely because when the seizure and uprooting was going on, he was absent.

Then, there is PW4 who is the appellant's son. At page 20 of the typed proceedings, he told the court that he was born at the house close to the shamba and he knew the shamba belongs to the second accused person and it is close to his (2nd accused) house. At the same time the 2nd appellant told the court at page 38 of proceedings, that the shamba belongs to the family but it was divided among them after both the appellant and 2nd accused being permitted to use it by their mother, and that, and the location or the part of land where '*bhangi'* was planted belonged to the appellant. The arresting officer, PW8 mentioned that Leah, the appellant's wife, told him that the shamba belonged to the appellant and the second accused. Leah did not testify.

Finally, there is Killeja Malole, DW3 who is the elder brother of both the appellant and the second accused. DW3 is insisting that the shamba belongs to the appellant. That, the appellant has been growing '*bhangi*' and even the clan had earlier ordered him to uproot it. The trial court hearing relied on DW3's evidence. I find that, based on this contradictory evidence from family members, there was a need of more clarity before declaring who exactly owned or was in control of the shamba. The trial magistrate did not explain why he chose to rely on evidence of DW3 as

opposed to other witnesses. This was an important aspect especially when the appellant had mentioned in his defense that there was a family conflict. It is likely that some of the witnesses had interest to serve. I think one Merisiana who is said to be the mother of the appellant, the second accused and DW3, would have been the best person to clarify as to who owned the shamba and if it was cultivated in turns, what was the arrangement and who among her children had the control of the shamba at the time of arrest.

In absence of such evidence, I find that there is a reasonable doubt which taints the prosecution's case and therefore the case could not be proved in terms of section 3(2) (a) of The Evidence Act.

While this 1st ground suffices to dispose this appeal, I think it is worthy to point out on the 3rd ground raised by the appellant on chain of custody of the said '*bhangi*.' It is alleged that, after the search and seizure has been done on 3.4.2019 by PW7 and other 7 police officers, it was taken to PW5 for scientific examination. That, it was one DC Robert who took the '*bhangi*' to PW5. However, DC Robert did not testify during the trial. We are not told how did DC Robert came across the said exhibit? It is

further alleged that, after the scientific examination the exhibit was taken for disposal to PW6 by PW7. The evidence is also silent on how did PW7 regained access of the exhibit after it has been under the control of D.C Robert? or were PW7 and DC Robert working together throughout? Moreso, between the date of seizure on 3.4.2019 and the disposal on 4.4.2019 there is a duration of about a month, the question is, where and how was the exhibit stored? Who was the custodian? The seized products were allegedly to be narcotic drugs. Due to the nature of the substance and the related offence, it was important for the chain of custody to be maintained to ensure that the type, weight and amount of products seized is not tempered with, that, it remains the same throughout investigation and prosecution.

In the case of **Chukwudi Denis Okechukwu and 3 others v R** Criminal Appeal no. 507 of 2015 Court of Appeal, Dar es salaam, when insisting on the importance of maintaining the chain of custody, the Court had this to say:

> *Indeed, as it was submitted by the, learned counsel for the appellants, for an exhibit let alone narcotic drugs, to be relied upon by the court to found conviction against an accused, its*

chain of custody from the time of its seizure to when it is tendered in Court as exhibit, has to be satisfactorily established. The rationale is not farfetched, it includes, ***one****, to ensure the integrity of the chain of custody to eliminate the possibility of the exhibit being tampered with.* ***Two****, to establish that, the alleged evidence is in fact related to the alleged crime in which it is being tendered, rather than for instance having been planted fraudulently to make someone guilty. See:* ***Paulo Maduka and Others Vs Republic****, Criminal Appeal No. 110 of 2007,* ***Swahibu Ally Bakari Vs Republic****, Criminal Appeal No. 309 of 2010 and* ***Paschal Maganga and Another Vs Republic****, Criminal Appeal No. 268 of 2016 (all unreported).*

Also, in **DPP V Shiraz Mohamed Shariff** [2006] TLR 427 it was held that the chain of custody of the drugs had not been established, this was after the prosecution failing to account for a period of about five days, from when they had been seized, to when they were sent to the Government Chemist for analysis.

Lastly, looking at the charge sheet, it does not mention any existing law. I find that, it would have been difficult for the accused persons to know which offence he was charged with and the sentence thereof. It is no

surprise that even the sentence issued for the appellant was of 10 years imprisonment while the law provides that, if the offence of cultivating narcotic drugs is established, the sentence is imprisonment for not less than 30 years.

That being said, the prosecution did not prove their case to the required standard of proof.

To conclude, in view of what I have endeavoured to explain, I find that the appeal is meritorious and I allow it. Consequently, I quash the appellant's conviction and set aside the sentence thereof. I further order for the appellant's immediate release from prison unless he is otherwise held for other lawful reasons.

Right to appeal explained.

Dated at **MWANZA** this 12th Day of April 2023.

L. J. ITEMBA

JUDGE

Judgment is delivered in the chamber this 12.4.2023 in the presence of appellant in person and Ms. Ghati, State Attorney.

L. J. ITEMBA

JUDGE
12.04.2023