

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 14 OF 2022

(Appeal from the decision of the District Court of Simanjiro in Criminal Case No. 91 of 2021 Hon. C. S. Uiso-PRM dated 14th July 2022)

FRANCIS COSTA @MODA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Date: 16/3/2023 & 17/4/2023

BARTHY, J.

Before Simanjiro District Court (hereinafter to be referred to as the trial court), the above-named appellant before the trial court he was charged with one count of unlawful possession of narcotic drugs contrary to section 11 (1)(d) of the Drugs Control and Enforcement Act No. 5 of 2015.

It was alleged that, on 25th October 2021 at Mererani area within Simanjiro District in Manyara Region, the appellant was found in unlawful possession of 185 rolls of narcotic drugs namely cannabis sativa commonly known as bhang.

The appellant pleaded not guilty to the offence, hence full trial ensued, at the end the appellant was convicted and sentenced to serve 30 years imprisonment.

A brief factual background leading to the arraignment of the appellant before the trial court as gathered from the record is that, PW1 a police officer was on 25/10/2021 in his official duties at Mererani mining centre where he was stationed at the main gate.

His duty was to inspect people going in and coming out of the mining centre. PW1 suspected the appellant to have hidden something inside his clothes. He decided to search him and found he was carrying 185 rolls of cannabis sativa also known as '*bhang*'.

PW1 filled the certificate of seizure which was tendered as exhibit P1 and later on handed over the appellant and the seized drugs to PW2, who also recorded the appellant's cautioned statement which was admitted as exhibit P2. PW3 took the seized drugs to the government chemist Arusha zone and he tendered the chemist report which was admitted as exhibit P3.

On the side of PW4 who is the exhibits keeper at Mererani police station, his testimony was how he received the seized drugs from PW3 and he kept

them in a store room. PW4 tendered chain of custody form which was admitted as exhibit PW5.

The appellant denied to have committed the offence, but he admitted to have been at the Mererani mining gate.

The trial court did not buy the appellant's story, it was convinced that the prosecution had proved the case beyond reasonable doubt. Thus, he was convicted and sentenced to serve 30 years imprisonment.

The appellant was distressed with the conviction and sentence meted against him; hence he preferred the instant appeal with 8 grounds of appeal which after a careful scrutiny can be reduced into three grounds as follows;

- 1. There was no sufficient evidence to ground the appellant's conviction.*
- 2. The appellant was convicted on non-existing offence.*
- 3. The trial court passed the sentence un-procedurally.*

When the appeal was called on for hearing, the appellant appeared in person, while the respondent was represented by Ms. Loida Kisinga learned state attorney.

When the appellant was called to expound the grounds of appeal, he opted to let the learned state attorney respond first and the retained his right to rejoin should the need arise.

Ms. Rhoida without mincing words, she supported the appeal. She contended that the charge against the appellant was not proved beyond reasonable doubt as the chain of custody with respect of the seized drugs was broken.

She contended that on exhibits involving mobility, the chain of custody is of utmost importance to be maintained. To argument her point, she referred the decision in the case of **Paulo Maduka & 4 others v. R**, Criminal Appeal No. 110 of 2007 Court of Appeal of Tanzania at Dodoma (unreported).

She added that, exhibits must be documented to verify they are the same exhibit seized from the scene of the crime then tendered before the court, and even at the time of disposal.

The learned state attorney submitted that, in the instant case, it was stated the appellant was arrested on 25/10/2021 by PW1 in possession of 185 rolls of narcotic drugs. Ms Kisinga added that, PW1 filled the certificate of

seizure and made the call to the police station to come pick up the appellant where two police officers including PW2 arrived at the scene and took the appellant to the police station. However, there is nowhere it has stated as to what happened to the seized exhibits since the record of the trial court are silent.

She contended further that, the records show that PW2 took the appellant to the police and the exhibit was handled to the custodian of the exhibit. However, it was not clear who handled it over and was the custodian of the exhibit at the police station.

Ms. Rhoida was firm that this raised the doubt if at all the exhibits reached the police station. She went on to argue that, on the testimony of PW4 he never mentioned to have received 185 rolls of narcotic drugs on 25/10/2021 the day the appellant was arrested.

She claimed that PW4 testified that he usually receives the exhibit from the investigator or the arresting officer, therefore it was not clear to whom he had received the exhibit seized at the scene.

She argued further, the chain of custody from tendered as Exhibit P5, shows on 26/10/2021 PW4 handed over narcotic drugs to Sgt. Omary.

However, the record is silent about Sgt. Omary as he never testified. Again, PW4 had stated that, on 9/11/2021 he received 185 rolls of narcotic drugs from PW3; who on his testimony never mentioned about the same.

Ms. Rhoida went on stating that, PW3 did not state to whom he handed over those drugs at the office of Chief Government Chemist at Arusha. She added that, it was not certain whether the sample was left at the chemist lab or PW3 went back with them. Since PW2 tendered 185 rolls of bhang (Exh. P4) but it was not clear where PW2 got those drugs.

Ms. Rhoida pointed out that, it is clear the was chain of custody-broke from the time of seizure, where it was stored, to the time it was tendered I court. As PW1, PW2 and PW3 did not indicate they signed on the form when handing over the drugs in various stages.

Ms. Loida pointed out that, handling of the exhibit was irregular, therefore it is unjust to rely on it to ground conviction. She therefore urged the court to allow the appeal.

On rejoinder the appellant had nothing of substance to say.

Having gone through the respondent's argument, this court is called in to determine as to whether the appeal has merits. I will begin my deliberation

with the concern raised by Ms. Loida, the learned state attorney regarding the chain of custody in the manner of handling of the exhibits related to this case that led to the conviction of the appellant.

As the submission of Ms. Loida was centered on handling of exhibit P4 (185 rolls of narcotic drugs), and how the chain of custody in handling the same was broken from the point it was claimed to be seized during the arrest of the appellant to the time it was taken to the government chemist for test and when it was tendered in court.

Ms. Rhoida claimed the paper trail does not show how it moved hands and even the evidence of the witnesses do not give the link from one person to another.

The importance of having a chain of custody is being well observed has been stated by courts in number of times. As held in the case of **Paulo Maduka & 4 others v. R.** (supra), the court observed that;

By "chain of custody" we have in mind the chronological documentation and or/paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody it is stressed, it to

establish that the alleged evidence is in fact related to the alleged crime.

While the procedure on the chain of custody should be perfect and unbroken. In reality, it is almost always impossible to obtain an unbroken chain. The importance factor therefore to be considered, is the integrity and evidential utility of the seized drugs remained intact. See **Kadiria Kimaro v. Republic**, Criminal Appeal No. 301 of 2019, Court of Appeal (unreported) quoting with approval the case of **The People of the Philippines v. Susan M. Tamano & Another**, G. R. N. 208643.

According to the record, it is not in dispute that the appellant was arrested at Mererani mines gate on 25/10/2021. It was then alleged by PW1 that he inspected the appellant and found him in possession of 185 rolls of narcotic drugs (exhibit P4). However, the manner how the said exhibit passed hands from one witness to another leaves a lot to be desired as there was no paper trail or clear evidence connecting the dots.

As PW1 stated after he had arrested the appellant, he made the phone call to police officer by the name Athuman, who arrived at scene accompanied by D/C Haji (PW2) and took the appellant to Mererani Police Station.

However, it was not clear as to who carried exhibit P4 from the scene to the police.

PW2 claimed to have handed over the exhibit to Mererani police station, but he never mentioned the name of the said store keeper.

On the other hand, PW4 who is the store keeper at Mererani police post in his testimony he informed the trial court he received exhibit P4 on 9/11/2021 from PW3.

According to the prosecution evidence, PW4 (the exhibit keeper) was handed over exhibit P4 for the first time on 9/11/2021. It is therefore not clear as to who had the possession of the said exhibit from 25/10/2021 the date it was seized. The prosecution evidence is silent on this aspect.

Also, considering the nature of the exhibit which is drug, it is in the danger of being easily tampered with, it was therefore important to have a proper chain of custody.

In the present case, I agree with Ms. Loida that in this case there was the serious breach of the chain of custody of Exh. P4 which was the gist of the case. Therefore, to rely on the same will occasion the miscarriage of

justice. I therefore expunge Exh. P4 from the records as it was not properly handled.

Apart from the chain of custody being broken and Exh. P4 being expunged from the records of the trial court, with the remaining evidence, the pertinent issue that needs to be addressed is whether the offence of unlawful possession of narcotic drugs Contrary to Section 11(1)(d) of the Drugs control and Enforcement Act Cap. 95 R.E. 2019 was proved to the required standard.

Possession of narcotic drugs is the key ingredient in the offence of possession of narcotic drugs. The absence of the drugs 'pers-se' it will make the offence itself non-existent.

It will therefore be safe to hold that the offence was not proved to the required standard. Under the circumstances, I find the appeal has merit and is allowed.

I proceed to quash the conviction and set aside the sentence of 30 years meted against the appellant. I further order the appellant be released forthwith from prison unless held there for other lawful cause.

It is so ordered.

Dated at Babati this 21st April 2023.



G. N. BARTHY,

JUDGE

21/4/2023

Judgment delivered by V.J.Kimario Acting Deputy Registrar in the presence of the appellant in person and Ms. Kisinga State Attorney for the respondent.

DEPUTY REGISTRAR,

21/4/2023