

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO.81 OF 2022

(Originating from Criminal Case No. 119 of 2021 of Shinyanga District Court)

JILALA PETER KIDALU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27th February & 28th April, 2023

MASSAM J:

This is an appeal arising from Criminal case No. 119 of 2021 of Shinyanga District Court where appellant on 22nd October 2021 was charged with the offence of BEING IN UNLAWFUL POSSESSION OF NARCOTIC DRUGS contrary to sections 15A (1) and (2) (c) Stealing of the Drugs Control and Enforcement Act Cap 95 R:E 2019. The charge was read over and explained to the accused who disputed to commit the offence charged to him.

The facts leading to the charge and this appeal are that on 31/10/2021 the Police Officer one Inspector Kipenga conducted a search in the premises house of the appellant as it was suspected that the appellant committed the offence of stealing of bricks at Ibadakuli Primary School as it was reported by one Gabriel Medald Walinguzo that on course of searchin the said house of the appellant, it was found a plant suspected to be Cannabis Sativa (bhang). Upon found that the said Inspector Kipenga seized the said plant and filled the certificate of seizure then sent the said plant to the government chemistry.

It was alleged that after the inquiry and analysis, the result came with the findings that the plant was Cannabis Sativa, accused was interrogated in response he admitted to be in possession of the said plant, on 22nd October 2021 he was arraigned in Shinyanga District Court to answer the Charge.

In proving the charge against the appellant, the prosecution summoned 6 witnesses and 6 exhibits, while the appellant had one witness himself. The allegation of committing the offence by the appellant as testified by PW1 (the Government Chemistry) who said that, on 17/07/2021 while in his office he received an exhibit form the OC-CID of

Shinyanga District which was suspected to be narcotic drugs. He said he was asked to make an analysis if it was cannabis sativa.

He informed that after he received the exhibit he sent it to the laboratory, he measured it and found with 170 grams there after he made an analysis, the inquiry discovered that it was cannabis sativa. He said that the test and analysis was conducted by using dulqwinoislevin test which involved the reagent called SIX which has chemical known as vaneline mixed in 100 mills of 95 % Ethanol with mix of chemical called Asetalddehyde of all came with the result of cannabis sativa. He said after the analysis he submitted the report with registration No. 41/2022 in form No. DCEA-009. He tendered the Government report which the court admitted it as exhibit P "1" and leaves of the said Cannabis sativa was admitted as exhibit P2.

PW2, a Village Executive Officer at Ibadakuli Village testified to the effect that on 13/10/2021 Police Officer together with him went to the house of the appellant to investigate as he reported the suspect that appellant did steal the bricks of Ibadakuli Primary school. He said when they reached at the home of the appellant the police Officer investigated the said house inside and outside of the house. On that search they

managed to find the plant suspected to be cannabis sativa which was planted by the appellant. Appellant when interrogated, he admitted that he planted the said cannabis sativa which he used for smoking and he obtained the seed from Kolandoto. He said he know the appellant as he was his resident of the Village he leads.

PW3, an Agriculture Officer testified that he was called by the Village executive Officer of Ibadakuli Village where the appellant was caught with the said plant. He said he went there and found the plant of cannabis sativa which was fresh. When accused what was asked the plant, accused admitted that it was bhanghi he was selling it.

PW4, on his testimony testified to the court that called he was the one recorded the caution statement of the appellant which the court admitted it as exhibit "P3"

PW5 the Inspector of Police testified in the trial that on 13/10/2022 they inspected the house of the appellant after he was alleged to steal the bricks. He said that they searched inside his house, they found nothing and went outside, they found the plant of cannabis sativa plant watered. He said he called the Agriculture Officer who identified the plant to be cannabis sativa. He said he prepared the certificate of seizure which signed

by the appellant. The said certificate of seizure was admitted in the court as exhibit P4. He ended to testify that the same he handled to the exhibit keeper.

PW 6 a Police Officer with duty to keep exhibits, his evidence was to the effect that on 13/10/2021 at 18:00hrs he was called by Inspector Daniel Kipenga (PW5), he was handled with a plant suspected to be cannabis sativa, he said he took the said exhibit and kept in the exhibit room and registered in exhibit register. On 17/01/2022 he handled the exhibit to D/C Stanslaus who took it to the Government Chemist. On 26/02/2022 he said he received it and kept it in the exhibit room. He tendered the said exhibit in court which was identified as exhibit P2.

After the prosecution closed their case, and the court finds they established the prima facie case for the appellant to enter for his defence, appellant had few words to defend he said that he know nothing about cannabis sativa, and when cross examined he admitted that the plant was found at the rear side of his house.

After both side closed their case, the trial court determined the matter in a results appellant found guilty, he was convicted with the offence he was

charged. He was punished to serve 30 years imprisonment, he was aggrieved on both conviction and the sentence, he lodged his appeal in the following grounds;

- 1. That, the trial magistrate erred in fact and law by convicting the appellant without evidence leading to proof beyond reasonable doubt.*
- 2. That, the trial magistrate erred in fact and law by convicting the appellant without considering the defense given by the appellant.*
- 3. That, the trial Magistrate erred in fact and law by convicting the appellant without committing the offence of unlawful possession of narcotic drugs contrary to section 15A (1) and (2) of the Drugs Control and Enforcement Act Cap 95 RE 2019*
- 4. That, in alternative, the trial magistrate erred in fact and law by convicting the appellant while the respondent failed to prove the offence of unlawful possession of narcotic drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act Cap 95 RE 2019.*

When the appeal called for hearing, appellant was represented by one Timotheo Surusi Advocate whilst the respondent/Republic, represented by Ms. Glory Ndoni learned State Attorney.

In support of his appeal, counsel for appellant first prayed the court to adopt the appellant's grounds of appeal and argue it grounds jointly. In his submission he told this court that the appellant was convicted in the charge which was not proved beyond reasonable doubt. He faulted that the evidence which connected the appellant is a plant which was not planted but it was just grown by itself. In regards to that he said that appellant was charged with the offence of possession contrary to section 15A (a) (c) of the Drugs Control and Enforcement Act. He said the section used to charge and convict the appellant did not connect with the plant which just growing, and according to the evidence produced, the section deals with trafficking, meanwhile the evidence brought was not showing that appellant found in possession the said Drugs as per page 2 of the trial judgment where PW3 said he saw the plant grow and uprooted which alleged to be narcotic drugs.

He went on faulting the trial decision by submitting that PW4 said that Policemen came and found a plant which is narcotic drugs nearby the

appellant's house, but the same evidence show that they found the plant in the surrounding of appellant's house. He said that in order the appellant to be connected on it was required to prove that appellant had a farm which had bhang or himself planted that bhang or being found in possession of that bhang. He argued that planting is not qualifying or amount to possession, for that case, he said the fact that the plant of bhang being found in the farm is not amount to possession.

Mr. Timotheo again submitted that the evidence brought were different with the charge sheet, he said the appellant was not well charged and convicted. In thus he prayed the appeal to be allowed, the sentence and conviction to be quashed and the appellant be set free.

In reply, Ms. Glory opposed the appeal, in her submission she prayed the court to consolidate grounds 1,2 and 3 to argue them jointly and ground 4 to argue separately. He started the consolidated grounds by opposing the point concerning that prosecution failed to bring strong evidence and that the appellant was required to be charged under section 11 instead of section 15A of the Drugs Control and Enforcement Act.

She submitted that in their side the law and section was proper as the witnesses proved that they found a plant in surrounds of the house of

the appellant proved that the charge of unlawful possession of narcotic drugs, she argued that it is not disputed that the said plant was found outside the house, but the act of that bhang found outside the house, constitute a charge of possession of bhang. She said she read the section 15A (1) (2) and (c) it said that it deals with trafficking and not possession, in taking the law of the drugs Control and enforcement Act under section 2 for interpretation, she noted that the provision elaborates the word trafficking means importation, exportation, buying, selling, giving, supply, store, possession and production. In her view, she said the word had wide meaning, possession means trafficking. In thus she said as far the plant/narcotic drug found in the house compound of the appellant which proved by PW3 and PW5 of which PW5 seized the same and the certificate of seizure (P4) which identified in the trial said to be bhang exhibit P2 all proved the same.

Again, Ms. Glory went on submitting that at the trial, appellant was given right to cross examine, he asked no question concerning being found with the narcotic drugs, at the same time the evidence of PW5 did support with the evidence of PW3 that he was the one who identified that the plant to be bhang and the appellant failed to cross examine PW3, he said failure

to cross-examine on that issue, proved that the said evidence was true. She cemented her argument by citing the case of **Nyakwama Onderee Okware vs The Republic**, Criminal Appeal No. 507 of 2019 Court of Appeal. In that case she said the court gave the elaboration on failure for the party to cross examine to adverse party concerning some facts, this will make that the said party did agree on that facts. In instant case appellant failed to cross examine PW3 which made the trial court to believe what PW1 and PW3 were testified.

He went on arguing that the evidence of PW2 who said that he was in that search and appellant did agree he planted the alleged plant for his own use, he bought its seed from Kolandoto. She said the oral confession proved that appellant was the one who found in possession of that bhang and he is the one who planted it, she referred the case **of Posolo Wilson @ Mwalyego vs Republic**, Criminal Appeal No. 613 of 2015.

The last ground that the trial court did not consider the defense, she submitted that at page 4 of the judgment show that the court did consider the evidence of the appellant. with that she prayed the court to upheld the trial court decision.

In his rejoinder, counsel for the appellant insisted that appellant was charged and convicted with bad law as in Section 2 as interpreted that cannabis sativa said to be any part of plant and not a plant, in thus he submitted that the law which was to be charged was section 11 and not otherwise. He prayed the appellant's appeal to be allowed.

Having considered the grounds of appeal, submissions by both counsels and passed through records and the trial judgment, **the tusk of this court** to is see if the appeal is merited.

In determination of this matter at this stage as this appeal as the first, I must confine myself with the guided cardinal principle that the first appellate court has duty bound to re-evaluate the evidence, and if warranted, come into its own conclusion, the case of **Faki Said Mtanda vs The Republic**, Criminal appeal No. 249 of 2014 (unreported) where it was stated that:

*"We are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, **the first appellate court, ought to have re-evaluated the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact.**"*

In the light of the above principle, the duty in me is to scrutiny re evaluate the evidence of both sides and come with findings of whether appellant committed the charged offence. The evidence to connect the appellant that he committed the offence as per charge sheet, is in the chain story narrated by Prosecution witnesses starting by PW 5 who informed the trial court that, on 13/10/2022 appellant was brought before the Shinyanga Police Station for a suspect that he stole bricks, PW5 with other Police Officers went to the house of the appellant. He testified that upon reached the house of the said suspect, they searched inside and outside, searching outside the house they found one plant of cannabis sativa which was watered by the appellant.

The counsel for the appellant faulted to the effect that the charge was not proved beyond reasonable doubt as the evidence which connected with the appellant is a plant which not planted but was just growing by itself. He challenged that appellant was charged with the charged of possession under section 15A (1) (c) of the Drugs Control and Enforcement Act Cap 95 RE 2019. He said appellant did not connected with the said

plant which just growing. He argued that the said charge deals with trafficking while in hand case the evidence show that appellant was found in possession of the said drugs.

Indeed, I agree with the counsel for the appellant that the facts revealed that the Appellant was found in possession of the drugs commonly known as bhang. The facts do not tell that he was conveying an act which would have amounted to "trafficking" but I had an ample time to read between the lines the definitions under section 2 of the **Drug Control and Enforcement Act**, [Cap. 95 R.E 2019] and found the word "trafficking" is defined as follows:-

*"2- trafficking" means the importation, exportation, **buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution by any person of narcotic drug or psychotropic substance** or any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer...."*

The definition also cemented in the case of **Martin Ike vs Republic**, Miscellaneous Criminal Application No. 58 of 2020 (unreported). Which Interpreting Section 2 of the Drug Control and Enforcement Act as amended by Act No. 15 of 2017 that the word "trafficking" includes "possession"

With those wording in the above case I find the testimony of PW 5 with corroborative evidence testified by PW2 and PW3 they went to the house of the appellant where the police searched inside and outside the house of the appellant on their search, they found a plant suspected to be cannabis sativa which alleged to be planted by the appellant. They are evidences in particular, for instance PW2 the Village Executive Officer of Ibadakuli Village his testimony said that he went to Police station to report the matter of stealing of bricks of Ibadakuli Primary where appellant suspected to steal the same. He said when they searched outside and inside the house they went to the rear side of the bathroom they found one plant suspected to be cannabis sativa. He testified that the police called the agriculture officer who proved that said plant was cannabis sativa, then they uprooted it, when interrogated, appellant admitted that

the suspected plant is cannabis sativa he plated it for smoking he obtained the seed from Kolandoto.

PW3 an agriculture Officer told the court that he was called by the Village Executive officer of Ibadakuli, he was asked to go to Bujija Sub Village as there was an incident, reaching there with police officers he found the appellant under arrest and there was a plant required to be identified if it was cannabis sativa. He testified that he went to the rear side of house of the appellant where he saw the plant and identified to be cannabis sativa with two features, the leaves are sharp with one cluster. He said, when appellant asked he admitted that plant to be bhanghi he was selling.

The testimonies of PW5, PW3 and PW2 are evidence proving without doubt that the house of the appellant was found with a plant of cannabis sativa which said to be planted by the appellant. in proving that the same is in possession of the appellant, the evidence from the prosecution witnesses that the said plant found in the compound house of the appellant and when he was asked what was the plant, he admitted that

the plant is bangi (cannabis sativa) he planted it for using and selling it. He told them he obtained seeds from Kolandoto.

In defence, appellant had a denial defence that he know nothing about the cannabis sativa but when cross examined, he admitted that it is true the cannabis sativa was found at his house after Police searched for bricks the plant was found at the rear side of his house. Though appellant denied the possession but as per evidence of PW5, PW2, and PW3 proved that appellant plant it in his house compound, for personal use and sell, that conduct is in the line of contravening the section 15 (1) of the Drugs Control and enforcement Act Cap 95 RE 2019 which stipulates that;

*15A (1) Any person who traffics in narcotic drugs, psychotropic substances or **illegally deals** or diverts precursor chemicals or substances with drug related effects of substances used in the process of manufacturing drugs of the quantity specified under this section commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years."*

With that bundle of evidence, I cannot escape from the allegation of the prosecution side that the suspected plant was in appellant's knowledge

to plant for his use and sell and the conduct of obtaining seeds from Kolandoto, watering it, smoking and selling conotates the possession and producing more plants. In **Haji Mwalami Mkumba and Another vs Republic**, Miscellaneous Criminal Appeal No. 104 of 2020 (unreported) stated as follows:-

"The catch word in the above amendment is the inclusion of the word "possession" in the offence of trafficking, meaning under the new amendment the offence of being found in possession of narcotic drug fall under the definition of trafficking under the law."

The Court went on saying that: -

"For the foregoing reasons I shoulder up with Mr. Msemo's submission that possession is not an independent offence and proceed to dismiss the applicant's contention that the act of possession constitutes an independent offence and it does not mean trafficking."

In the light of the above authorities, it is obvious that the word possession includes dealing with narcotic drug and psychotropic substance as one of the categories of trafficking. In other words, the terms

"possession" and "conveying" mean one and something both connoting "trafficking."

Again, to prove that the said plant is cannabis sativa, the prosecution proved by the evidence of PW2 a Government Chemist Officer, who in his evidence testified that on 17/10/2022 he received an exhibit suspected to be narcotic drugs registered as No. 41/2022 measured 170 grams from the office of OC-CID Shinyanga District. He said he examined and analyzed it, the result shown to be cannabis sativa, he prepared the report which the court admitted as exhibit P1 the said exhibit P1 in form No. DCE 009 shows the results at paragraph 2 with wordings that,

"Nimefanya uchunguzi wa kielelezo na kupata matokeo yafuatayo:

*KIELELEZO A: MCHE WENYE MAJANI YADHANIWAYO KUWA NI
DAWA ZA KULEVYA AINA YA BANGI*

*(a) Uchunguzi wa kielelezo umedhihirisha kuwa na dawa za
kulevya*

*(b) Aina ya "Cannabis" (Bhangi) ambayo ina kemikali ijulikanayo
kama Tetrahydrocannabinol" (THC)*

(c) Uzito wa kielelezo bila kifungashio ni gramu 170"

More also PW1 identified the exhibit P2 he worked with which was wrapped in a white paper with registration No. 41/2022. PW6, H.5878 PC Fortunatus the exhibit keeper at Shinyanga Police Station, testified that on 13/01/2022 at about 18:00hrs one Inspector Daniel Kitenga handled to him a fresh plant suspected to be cannabis sativa, he took it to the exhibits room, on 17/01/2017 the said exhibit again handled back to the said Daniel Kitenga who took it and sent to the government chemist, on 26/02/2022 the exhibit was returned to him (PW6) which inside there is a plant suspected to be cannabis sativa, later he identified exhibit P2 which are leaves of cannabis sativa which wrapped in white paper.

Basing on the evidence of PW1 that on 17/01/2022 he received exhibit suspected to be cannabis sativa, he examined it and found with the result that the said exhibit, was cannabis sativa which was found in possession of appellant, seized as per testimony of PW5 and exhibit P4 certificate of seizure which the content read that Insp Daniel Kitenga on 13th October, 2021 about 17:00hrs at Shinyanga Busina seized "*MUCHE 01 UZANIWAO KUWA DAWA ZA KULEVYA AINA YA BANGI MBICHI*"

In my evaluation I have also considered the movement of the exhibit since found at the appellant home, it is my agreement that, the chain of custody of the exhibit was not under unbroken chain as the evidence available since uprooted, handled to the exhibit keeper, taken to Government chemist Officer, examined, handled back to Shinyanga Police Station and tendered at the trial. The chain of custody complied with law.

In upshot, as I have demonstrated in the light of this appeal, I find nothing to fault the prosecution evidence and the trial court decision, given the circumstances I find the appeal against the Appellant lacks merit it is hereby dismissed I upheld the conviction and sentence of the trial court.

It is so ordered.



DATED at **Shinyanga** this 28th day of April 2023.


R. B. Massam
JUDGE
28/4/2023

COURT: Right of appeal explained.