IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 42 OF 2022

(Originating from Criminal Case No. 168 of 2020 of the District Court of Mwanga at Mwanga)

HASSAN NURU JUMA ..... 1ST APPELLANT

RAMADHANI ALEN MNDEME ..... 2ND APPELANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29/03/2023 & 16/05/2023

SIMFUKWE, J.

Before Mwanga District Court, the appellants Hassan Nuru Juma and Ramadhan Alen Mndeme were charged with the offence of unlawful trafficking of Narcotic Drugs contrary to **section 15A (1) and (2)(c) of the Drugs Control and Enforcement Act, Cap 95 R.E 2019.**

It was the prosecution's case at the trial that on 13th day of November, 2020 at or about 16:00 hrs at Kileo Village within Mwanga District in Kilimanjaro Region the appellants were found in unlawful possession of 26 kilograms of narcotic drugs "khat" commonly known as 'Mirungi'.

It was alleged that, the appellants were among the passengers who were travelling from Mwanga to Moshi on 13th day of November, 2020. They boarded the bus at Kileo bus stand and they had a basket. While on the way, the bus was stopped by Police officers who were on patrol. The police officers inspected the bus and discovered that inside the basket which belonged to the appellants, there were leaves suspected to be narcotic drugs commonly known as *'mirungi'*. When the bus conductor was inquired as to whose basket was that, he named the appellants. Thereafter, the police officers filled up the certificate of seizure and the appellants together with the alleged mirungi were taken to the police station. The said Mirungi were handled over to PW2. It was alleged that the alleged drugs were taken to the Government Chemist at Arusha by PW5 where the same were confirmed to be mirungi.

In their defence, the appellants admitted that they were travelling from Mwanga to Moshi on the fateful date. However, they denied the charge by stating that the said luggage was not theirs. They told the court that at the police station they were forced to give and sign the caution statements. Both of them complained to the trial magistrate that the alleged mirungi were not brought before the court as exhibits.

After full trial, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubts. The appellants were convicted and sentenced to twenty (20) years imprisonment. Aggrieved, they preferred this appeal.

In their Memorandum of appeal, the appellants have advanced twelve grounds of appeal as reproduced hereunder:

1. *That, trial magistrate erred in law and facts to rely on uncorroborated evidence of certificate of seizure which was not witnessed by credible independent civilian which would allay tears of planting evidence against appellants.*

2. *That learned trial Magistrate erred in law and fact for convicting the appellants while the offence was not prove (sic) beyond reasonable doubt.*

3. *That trial Magistrate grossly erred in both law and facts to convict and to sentence the appellants on relying to contradictory evidence adduced by prosecution side.*

4. *That, trial Magistrate grossly erred in both law and facts to convict and to sentence the appellants without considering the evidence adduced by defense side.*

5. *Trial Magistrate erred in law and fact to convict and sentence the appellants on relying to insufficient evidence adduced by prosecution side. (sic)*

6. *That, the trial court grossly erred in law and fact in finding and holding that the Appellants were indeed found in unlawfully (sic) trafficking of "Mirungi" despite the same being not produced and tendered in evidence as exhibit. Further, Neither the Inventory form nor Disposal order*

form was produced nor tendered in Evidence to prove the existence of alleged "Mirungi"

7. *That, the learned trial Magistrate grossly erred in both law and fact in failing to note that, there was no report on the weight of alleged Mirungi which was prepared, produced and tendered in Evidence as Exhibit.*

8. *That, the trial court grossly erred in both law and fact in failing to Note that, Exhibit PE2 (the handing over form between PW2 and PW4) and Exhibit PE5 (Unknown) were wrongly admitted in Evidence as exhibits as they were not cleared for admission. (sic)*

9. *That trial court grossly erred in both law and fact in convicting and sentencing the Appellants while the key and very important witness (i.e The Government chemist) were (sic) not called to testify so as to prove whether what was alleged to be seized from the appellants were indeed "Mirungi".*

10. *That the trial court erred in law and fact in convicting the Appellants based on Exhibit PE3 (the certificate of Seizure) but failed to note that, it was neither described nor identified by its maker (i.e., PW4). Further, even the Exhibit.PE2 was never described nor identified by the PW4*

(sic) who was alleging to be the arresting and seizing officer.

That, the trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellants basing solely on the certificate of seizure (Exhibit.PE3), but failed to note that the same was un procedurally acquired and wrongly admitted in evidence as Exhibit. Since the PW3 (sic) and the Public Prosecutor prayed to tender what they categorically describe (sic), astonishingly the trial court admitted the certificate of seizure (Exh.PE3) which was neither described nor identified by the witness (PW3).

11. *That the trial Magistrate grossly erred in both law and facts in finding and holding that, the appellants herein were found in possession of "Mirungi" despite there being no receipt produced and tendered in evidence pursuant to section 38(3) of the Criminal Procedure Act Cap. 20 R.E. 2019.*

12. *That, the learned trial Magistrate erred in law failing to note that Exhibit (PF .16 the Exhibit PE1 (PF .16-the Exhibit Register) flouted the mandatory provisions of section 67 (1)(i) and (b) of the Evidence Act, Cap.6 R. E 2019. Futher, (sic) the Exhibit PE1 was never read out loud before the court, therefore its contents remained unknown to the Appellants.*

When the appeal was set for hearing, the appellants appeared in person; whereas the respondent/Republic had the services of Ms. Grace Kabu, learned Senior State Attorney.

On the first ground of appeal, the appellants submitted that Exhibit PE3 (Certificate of seizure) was not signed by independent witness. That, the one who was regarded as independent witness was the conductor of the said searched car (T.920 DJM) who testified as PW1. The appellants blamed the trial court for treating PW1 as an independent witness because he had an interest to serve as they were arrested together with PW1 and incarcerated in police cells (lock-up) for almost four (4) days. Later, PW1 was released for the reasons known to the police officers and PW1 himself. The appellants opined that PW1 should have not been treated as an independent witness, because the act of being arrested and released, he could be ready to testify or do anything against them so as to be free.

The appellants continued to argue that PW1 was not entitled to be believed as he was not credible and reliable witness, regardless of being a civilian. They wondered why the police did not use any of the passengers who were inside the alleged searched vehicle as an independent witness to the search. They referred the court to the case of **Shabani Said Kindamba vs Republic, Criminal Appeal No. 390 of 2019** at page 18 where the Court of Appeal held that:

> *"Witness to a search must be respectable person of that locality. An independent witness to a search must be credible, unless otherwise the whole exercise would be rendered suspect ..."*

Addressing the 10th ground of appeal, the appellants faulted the trial court for relying on **Exhibit PE3** (the certificate of seizure) which was unprocedurally acquired and wrongly admitted in evidence as Exhibit. They referred the court to page 31 of the typed proceedings and argued that when PW3 and the public prosecutor (PP) prayed to tender what they described as the caution statement of the 1st accused, the learned trial magistrate admitted in evidence the certificate of seizure and marked it as Exhibit PE3. The appellants believed that it was wrong and prejudicial for the trial court to admit the certificate of seizure in evidence as exhibit, as it was neither described nor identified by PW3 before being admitted in evidence. That, it was not cleared for admission. The appellants cemented their argument with the case of **Said Kihedu Irira and Another vs Republic, Criminal Appeal No. 19 of 2022** in which at page 9 of the judgment, this court cited the case of **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC, [2003] T.L.R 218** where the Court of Appeal held that:

> *"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually be admitted before it can be read out."*

On the 11th ground of appeal, the appellants averred that the learned trial Magistrate erred in law as she failed to note that there were no proof that the Appellants were found trafficking Narcotic drugs because there was no receipt produced, issued and tendered in evidence as exhibit pursuant to **section 38(3) of Criminal Procedure Act, Cap. 20 R.E 2019**. It was the appellants' argument that certificate of Seizure (EXh.PE3) cannot be equated to a receipt as held by the Court of Appeal in the case of

Andrea Augustino @ Msigara and Another vs Republic, Criminal Appeal No. 365 of 2018 that:

> *"Following the above section and taking into account that in the* case *at hand there were no receipts issued by PW2 and PW3. There is no doubt that the procedure was flawed. Again, as rightly put by Mr. Kibaha, the interpretation of the receipt given by Mr. Mauggo is unfounded* as *there is no way the certificate of seizure or seizure form can be equated to* a *receipt."*

Moreover, the appellants referred to the case of **Patrick Jeremiah vs Republic, Criminal Appeal No. 34 of 2006** (C.A.T) in which it was held that:

> *"Failure to comply with section 38 (3) of the C.P.A is* a *fatal omission"*

The appellants submitted that what happened in the above cited cases, happened in this case. They highlighted that it cannot be said with certainty that they were found and subsequently arrested trafficking Narcotic drugs namely *'Mirungi'*.

It was noted under the 6th ground of appeal that the prosecution claimed to had arrested the Appellants with what they termed as 'mirungi' but the alleged Mirungi were neither produced nor tendered in evidence to prove the allegations. The appellants were surprised with the findings of the trial magistrate at page 5 last paragraph to page 6 of the judgment where she stated that:

…It is vivid clear to the extent that, the chain of custody was clear (sic) indicated from the time of seizure until the exhibits was presented before the court of law."

The appellants' question was that "where did the trial magistrate see the alleged "Mirungi" while they were never at all produced or tendered before the court?" The appellants urged this court to see and find that, the learned trial magistrate used speculative ideas which influenced her judgment.

The appellants challenged the findings by the trial magistrate that the chain of custody of the alleged, "mirungi" was clear. They argued that, this was clear misdirection and grave error in law, since from the prosecution's evidence it is clear that the chain of custody of the alleged Mirungi was irretrievably broken beyond repair. That, there was no inventory form nor Disposal order form which was tendered in evidence to prove whether the alleged seized *"mirungi"* were disposed as the same were perishable exhibits which could not be stored for a long period of time to await a trial.

In addition, the appellants faulted the exhibit Register PF 16 (exhibit PE 1) on the reason that the same was not read out aloud before the trial court. That, the Appellants' attention was not drawn to the contents of EXh.PE1.

Also, the appellants asserted that Exh.PE1 flouted the mandatory provisions of **section 67 (1)(i) and (b) of the Evidence Act, CAP.6 R.E.2019** because PW2 tendered a certified copy of the Register- PF 16. They alleged that the proper procedure was that before the said certified copy was produced, the original copy was supposed to be

shown/produced before the court. Thus, the act of producing a certified copy without the original copy being shown contravened the above-mentioned section of law.

Supporting the 8th ground of appeal, the appellants submitted that Exhibit PE2 (the handing over form between PW2 and PW4) and EXh. PE5 were wrongly admitted in evidence, as they were never at all cleared for admission. That, the named exhibits were tendered in evidence so as to prove the chain of custody of the alleged "Mirungi" but at the end of the day, the said chain of custody was broken beyond repair.

Submitting on the 9th ground of appeal, the appellants condemned the prosecution for failure to summon the very important and key witness to wit, the government chemist who could have testified whether the alleged seized leaves were real Narcotic drugs (Mirungi). That, the trial court wrongly relied upon the government chemist's report which was tendered in evidence by incompetent witness.

In their final analysis, the appellants prayed the court to allow their appeal, quash the conviction, set aside the sentence and set them at liberty.

In response to the submission in support of the appeal, Ms. Grace learned State Attorney on the outset conceded with the 2nd, 6th and 9th grounds of appeal. She contended that as per the record, PW4 who was an arresting officer handled the seized mirungi to PW2 (exhibit keeper) on 13th November, 2020 at Mwanga Police Station. Then, PW2 handled the said mirungi to PW5 on 23rd November, 2020 to take them to the Government Chemist Laboratory Agency (GCLA) at Arusha. Thereafter, PW5 took the said mirungi to GCLA which was attended by Noela Enock,

who weighed them and found the same to be twenty-six (26) kgs and labelled the said mirungi as Lab. No. ZNL 822/2020 and took a sample from it. PW5 was then issued with a signed GCLA form No. 01 to acknowledge receipt of the drugs sample. That, PW5 was given the said mirungi after GCLA took a sample and returned the said mirungi to the storekeeper (PW2). However, evidence of PW2 (the storekeeper), PW4 the arresting officer and PW5 the one who took the alleged mirungi to GCLA is silence on the whereabout of the said mirungi. That, neither the said drugs nor inventory form were tendered in court as exhibits to establish that the seized mirungi were destroyed.

Further to that, the learned State Attorney submitted that PW2 tendered before the court other exhibits which were the exhibit register and handling over certificates which were admitted as exhibit PE1, PE2 and PE6 respectively. That, PW5 tendered a report of GCLA and there was no explanation as to why the GCLA officer was not called to explain the report.

Ms. Grace was of the view that since the appellants were charged for trafficking drugs, there should have been evidence to establish the fact that the seized items were actually mirungi. That, in absence of such evidence and chronological chain of events regarding custody and whereabout of the said mirungi, then the same vitiate the whole proceedings. Thus, the evidence adduced did not prove the offence beyond reasonable doubts.

Having gone through the submissions of both parties, and considering the fact that the learned State Attorney for the respondent supported the

appeal, the issue for determination basing on the noted irregularities is ***whether this appeal has merit?***

On the 6th ground of appeal, the parties conceded that despite the fact that the appellants were convicted with an offence of unlawful trafficking of mirungi, the alleged mirungi were not tendered in evidence as exhibit. That, the prosecution failed to tender even the inventory report or Disposal order form. In addition, the learned State Attorney told this court that evidence of PW2 (storekeeper), PW4 the arresting officer and PW5 who took the said mirungi to the Government Chemist Laboratory Agency (GCLA) is silent on the whereabout of the said Mirungi. She opined that in absence of the said Mirungi the whole proceedings are vitiated.

Having perused the trial court records, indeed as submitted by both parties, the said mirungi were not tendered before the trial court. That is to say, the chain of custody of the alleged mirungi was broken. In the case of **Ally Hassan Abdallah vs Republic (Criminal Appeal No. 383 of 2021) [2022] TZCA 654** it was held that:

> *"…where the chronological documentation and/or paper trail showing the seizure, custody, control, transfer analysis and disposition of evidence is not observed, it cannot be guaranteed that the said evidence related to the alleged crime."*

Guided by the above authority and equating it with the circumstances of this case, I am convinced that the chain of custody of the seized drugs was not observed since the final result of the alleged drugs was unknown. The prosecution tried to prove the seizure, custody and transfer and forgot to prove the most important aspect of the disposition of the said

mirungi. The police officers were bound to keep a proper documentation on the search, seizure and movement of the drugs from the time the drugs were seized to the time of tendering the same in court. I am in agreement with the parties that since the appellants were charged with an offence of trafficking narcotic drugs, the prosecution should have tendered before the court either the alleged drugs or the disposal form to prove the offence charged beyond reasonable doubts. In absence of such evidence, the prosecution case dismantles.

The above ground goes along with the 9th ground of appeal where it has been conceded that the Government Chemist as a key witness was not called to prove whether what was alleged to have been seized from the appellants were indeed 'Mirungi'.

As acknowledged by both the appellants and Ms. Grace, the Government Chemist was a key witness to support the prosecution case on whether the alleged drugs were indeed mirungi.

I am aware that in terms of **section 143 of the Evidence Act, Cap 6 R.E. 2019** no particular number of witnesses is required to prove the case. Much as I am aware with that provision of the law, still the law requires the key witness to be summoned. In the case of **Omary Hussein @ Ludanga & Another vs Republic (Criminal Appeal No. 547 of 2017) [2021] TZCA 543** at page 15 it was stated that:

> *"Failure to call such material witnesses entitles the Court to draw adverse inference where such witnesses are within reach but are not called without sufficient reason being shown by the prosecution -(See **Aziz Abdalla v. Republic** [1991] TLR 71."*

In the instant matter, the trial court was required to draw adverse inference against the prosecution since no reason was given for failure to call the Government Chemist. Given such circumstances, I also find that the 9th ground has merit.

Having found as such, discussing the rest of the grounds of appeal will be a mere academic exercise as the three grounds of appeal as conceded by both parties suffice to dispose of the appeal. In the event, I hereby quash the appellants' conviction and set aside the sentence. The appellants are henceforth set free unless lawfully held.

Order accordingly.

Dated and delivered at Moshi this 16th day of May, 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

16/05/2023