

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA DISTRICT REGISTRY)**

AT TABORA

DC CRIMINAL APPEAL NO. 32 OF 2021

*(From the decision of the District Court of Nzega at Nzega, Original Criminal Case No. 08 of
2020, S.C. Mushi, RM)*

1. JUMA NGANZA

2. MOHAMED SAID..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 21/11/2022

Date of Judgment: 06/2/2023

KADILU, J.

The appellants were charged jointly with the offence of trafficking in narcotic drugs contrary to Section 11 (1) (d) of the Drug Control and Enforcement Act (DCEA) [Cap. 95, R.E. 2019]. They were convicted of the offence and sentenced to serve the imprisonment term of 25 years each. Dissatisfied with the conviction and sentence, they preferred a joint appeal containing five (5) grounds as follows:

- 1. That, the prosecution did not prove the case against the appellants beyond reasonable doubt as required by the law.*
- 2. That, possession and/or storage which are necessary ingredients in establishing the offence of trafficking within the meaning of Section 2 of the Drug Control and Enforcement Act were not cogently established by the prosecution witnesses. The circumstances obtaining at the*

scene of crime were not strong enough to establish possession or storage.

- 3. That, sampling of the alleged narcotic drug for submission to the Chief Government Chemist for analysis was not done in accordance with the requirements of Regulations 15, 18 and 20 of the of the Drug Control and Enforcement General Regulations of 2016.*
- 4. That, exhibit "P3" (the alleged samples of narcotic drug) were sent to the Government Chemist Laboratory for analysis where they were consumed in the test. It was not explained by the prosecution how the samples found their way back to the trial court as exhibits.*
- 5. That, there was a break in the chain of custody of the alleged narcotic drug because PW4 allegedly handed the same to (exhibits P4 and P5) to PW5, the exhibits Manager on 11/8/2017 while the same were seized on 6/8/2017 without explanation on how they were handled in between.*

The appellants prayed this court to allow the appeal, quash the conviction set aside the sentences and order the appellants to be released from prison.

On the day of hearing, the appellants appeared in person and reiterated the contents of petition of appeal. They both prayed the grounds of appeal in the petition to be adopted by the court as their submissions. The respondent was represented Ms. Tunosye John Luketa, learned State Attorney. She argued the 1st and 2nd grounds of appeal jointly and stated that the respondent paraded 7 witnesses and 9 exhibits to prove the prosecution case during the trial. She submitted that on circumstantial evidence, the case was proved beyond reasonable doubt that the appellants were in possession of narcotic drug.

Responding to the 3rd ground of appeal, Ms. Tunosye stated that all the legal procedures were complied with as can be depicted from pages 21 to 23 of the typed proceedings. She then addressed the 4th and 5th grounds of appeal jointly. She told the court that PW1, PW2 and PW4 testified clearly how the appellants were arrested with bhang and detained to the police post. Thereafter, the drugs were measured and exhibits were labelled. After measuring, the measuring officer handed over the samples to the police who sent them to the Government Chemist Laboratory for analysis.

The report was then prepared and tendered during the trial. The samples were also tendered and admitted. Ms. Tunosye submitted that the grounds of appeal are baseless and they should all be dismissed.

I have examined the records thoroughly and considered submissions by the parties. I will start with the first ground of appeal in which the appellants have contended that the prosecution did not prove their case beyond reasonable doubt. It is a cardinal principle of law that he who alleges must prove. In criminal matters, the accused person has no duty to prove his innocence. It is obligation of the prosecution to prove beyond reasonable doubt that the accused person is guilty as charged. In the instant appeal as well, the prosecution had to discharge this legal obligation. The matter for determination is therefore, whether or not the prosecution proved the case against the appellants beyond reasonable doubt.

It is on record that the appellants were charged on the 2nd day of December, 2019 alleged to have trafficked narcotic drugs on 6th July, 2019. However, all the prosecution witnesses testified that the offence was committed by the appellants on 6th July, 2017. This means that the accused persons were charged two years after the alleged offence was committed. The Criminal Procedure Act (CPA), [Cap. 20 R.E. 2019] requires a formal charge to be laid against the accused person within twenty-four hours after he was arrested and he should be arraigned to the court without unnecessary delay.

The records reveal further that plea of the accused persons was taken on 31/3/2020 and preliminary hearing was conducted on the same day. Thereafter, the charge was amended on 28/4/2020. The amended charge was not read over to the accused persons and require them to plead. This is contrary to Section 234 (2) (a) of the CPA which requires that where a charge is altered, the accused person should be called upon to plead to the altered charge. The substituted charge was not filed for this court to verify if the particulars of the offence on which the accused persons were arraigned were the same as in the original charge or not.

From pages 5 to 6 of the trial court's typed proceedings, I reproduce the relevant excerpt as follows:

"Date: 28/4/2020

Coram: S.C. Mushi – RM

SA: Utafu

BC: Devis

Accused: Present all.

SA: *For hearing. We have two witnesses, but while leading them, I discovered that there is a huge gap between what transpired and the charge before the court. I pray for another date to rectify this charge.*

Court: Prayer granted.

Order: Hearing on 12/5/2020.

Date: 12/5/2020

Coram: S.C. Mushi – RM

SA: Utafu

BC: Devis

Accused: Present all.

SA: *For hearing. We are ready and we have one witness.*

Accused persons: We are ready to proceed.

Court: Prosecution case opens.”

The Court of Appeal in the case of ***Omary Juma Lwambo v R***, Criminal Appeal No. 59 of 2019 stated that the omission to comply with the provisions of Section 234 (2) (a) of the CPA renders the proceedings a nullity. In the case of ***Tluway Akonaay v R***, [1987] TLR 92, also the Court stated that it is mandatory for a plea to a new or altered charge to be taken from an accused person, as otherwise the trial becomes a nullity. See also the cases of ***Riziki Jumanne v. R***, Criminal Appeal No. 370 of 2019, ***Balole Simba v. R***, Criminal Appeal No. 525 of 2017 and ***Hassan Said Twalib v. R***, Criminal Appeal No. 91 of 2019 (all unreported).

According to the charge, the appellants are alleged to have committed the offence during day time where there were six (6) suspects in the scene of the crime together with six (6) bicycles carrying bhang. However, only two of them, the appellants herein were arrested. The proceedings and

judgment of the trial court are completely silent regarding the whereabouts of the four bags of bhang and four bicycles which were abandoned in the scene of the crime by four suspects who managed to escape. This creates doubt whether the two bags of bhang and two bicycles belonged to the appellants.

It is not in dispute that the police exploded a tear gas bomb on arriving at the scene thereby causing the appellants and others who escaped to run away. In these circumstances, it is difficult to comprehend how the arresting police officers ascertained the ownership of each bicycle as between the appellants and those who ran away. This was the testimony of PW1, PW2 and PW3 who participated in arresting the appellants. As this is the evidence available, it is impossible to rule out with certainty that the two bags of bhang on two bicycles belonged to the appellants.

They might belong to the appellants or to the other four suspects who escaped or to any other person. It was a duty of the prosecution to prove that the bags of bhang found on two bicycles belonged to no one else, but the appellants. In essence, direct linkage between evidence adduced and the appellants is wanting. The court relied entirely on circumstantial evidence to convict the appellants as depicted on page 26 of the judgment where the trial Magistrate observed as follows:

"However, together with evidence of PW1, PW2 and PW3, neither of them told this court that he saw any of the accused persons carrying the alleged narcotic drug either on the head or riding a bicycle carrying narcotic drug."

The law is settled that in a case depending entirely on circumstantial evidence, the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also necessary before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which weakened the inference. See the cases of ***Abdul Muganyizi v R***, [1980] TLR 263, ***Hassani Fadhili v R***, [1994] TLR 89, and ***John Magula Ndongo v R***, Criminal Appeal No. 18 of 2004 CAT (unreported).

Both the appellants explained the reasons for their presence at the forest when they were arrested by the police. The 1st appellant stated that he was passing-by heading to his relative. The 2nd appellant told the court that he was preparing charcoal when he heard the gun-shots and started to run away. The prosecution did not present any evidence to contradict these explanations by the appellant. A civilian who informed PW1 about presence of the appellants in the bush with narcotic drugs would be a key eye witness to corroborate evidence by PW1, PW2 and PW3. Unfortunately, the prosecution did not call him/her.

That said, I find that the prosecution evidence was tainted by a lot of doubts, leave alone a reasonable doubt. Therefore, this court is satisfied that the case against the appellants was not proved by the prosecution to the required standard. Having established so, I see no reason to deal with other grounds of appeal since they will not serve any meaningful purpose. In view

thereof, I allow the appeal, quash the conviction and set aside the sentences.
I order the appellants' immediate release from custody unless lawfully held
for some other reasons.

Order accordingly.


KADILU, M.J.,

JUDGE

06/02/2023

Judgement delivered on the 6th Day of February, 2023 in the presence
of the Appellants and Mr. Joseph Mwambwalulu, State Attorney, for the
Respondent.




KADILU, M. J.

JUDGE

06/2/2023