

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MASASI**

**ORIGINAL JURISDICTION**

**CRIMINAL SESSION CASE NO. 21 OF 2020**

**THE REPUBLIC**

**VERSUS**

**TRASFORD BATHOLOMEO.....ACCUSED**

**JUDGMENT**

**Z.G. Muruke,J.**

Trasford s/o Batholomeo, 35 years resident of Mdenga Chikundi within Masasi District in Mtwara Region, stands charged with offence of Drug Trafficking contrary to section 15(1) (b) of the Drug Control and Enforcement Act, No. 5 of 2015. It is alleged that on 21<sup>st</sup> day of January, 2016, at Mdenga village within Masasi District in Mtwara Region, did traffick narcotic drug commonly known as "Bhangi" by storing the said Bhangi in his house weighing 47.5 kg only. The accused person owns more than one house located at Mdenga village within Masasi District in Mtwara Region. On 21/1/2016 around mid-night hours, Erick s/o Richard was at one of the accused person's house at Mdenga village within Masasi District in Mtwara Region.

Police Officers from Ndanda police station arrived at one of the accused house, where Erick s/o Richard was living with an intention of

conducting a search having received information there is bhangī stored in the house. Police Officers introduced themselves before Erick s/o Richard and asked him whereabouts of the accused person. Erick s/o Richard told them that the accused person is at his other house with his wife. The Police Officer entered in the said house, conducted a search and found 47.85 kg of Bhangī stored inside the said house. Upon interrogating Erick s/o Richard he told police that bhangī belongs to the accused.

Following the incident, the accused person was arrested and taken to Police Station for further action. During interrogation he admitted in his cautioned statement to be the owner of bhangī that was found in one of his houses. The accused person was later taken to Justice of peace in which he kept on confessing that he was found with 47.5 kg of bhangī in his Extra Judicial Statement.

The suspected sample of bhangī was taken to Government Chemist Laboratory after analysis, report revealed that the substance found at the accused person house, is cannabis sativa commonly known as bhangī and the plant is dangerous to human as it may cause central nervous system disorder. On 5<sup>th</sup> August 2020, accused was arranged in court, upon charge being read to him, he pleaded not guilty. Prosecution then arranged 8 witnesses to prove their case.

PW1, WP3045 SGT Magreth, recorded accused caution statement on 21/11/2016, that was received in court as exhibit P1. PW2, Christopher Sam, Resident Magistrate of Chikundi Primary Court, he recorded accused extrajudicial Statement, received in court as exhibit P2.

SP Nathaniel Bahati Kyando testified as PW3. By then he was CID Masasi, at Masasi police station. He told this court that he went to Ndanda after receiving phone call from OCD Ndanda. He took three bags of sulphate with the covering letter to government analyst Southern zone, by then, Mr. Mchibya who took samples from all three sulphate bags. He then returned the three sulphate bags to masasi police station for safe keeping. The three parcel of sulphate bags were admitted as exhibit P3.

Ziliwa Peter Machibya testified as PW4. He is a senior Chemist in the drug control and enforcement authority (DCEA) having worked for three years. Before, he worked with the Government Chemist Laboratory for 11 years, with the duty of analyzing various exhibits, one of them being narcotic drugs. He told this court that, on 22/01/2016 he received exhibit from OC-CID Masasi district, one Kyando, it was with covering letter and dispatch book. The Exhibit was brought for identification to ascertain whether they are narcotic drugs or not. After physical examination it was weighted at 47.5kg. Then samples were taken from the three packets, physically and instrumental analysis proved to be bhanghi. He then sent the samples to Head Quarters and handled it to Elias Mlima (Chemists). After examination result came out that sample taken were bhanghi. Then result was sent back to OC-CID Masasi. Witness identified Exhibit PW3 being the three parcels labeled NDN/IR/26/2016

PW5 Elias Mlima, testified that his duties are to receive sample and do chemical analysis as chemist, having experience of 14 years. He received sample from Ziliwa Peter Machebya, on 15/03/2016, while at Dar es Salaam laboratory office. He gave the sample reference number

374/2016. He did the analysis of the samples he received from PW4 and found that the sample were Bhangi. He identified the envelop named 376/2016 and tendered Chief Government report Exhibit P4. His statement he made earlier was also received as Exhibit D1 upon request by defence counsel. PW6 D/CPC Sangwa testified that He works at investigation department Ndanda police station for six years by the time he testified. He investigated this case, he identified Exhibit P3 in court

PW7 ASP Isaya testified that he was police incharge of Ndanda police station on 21 January 2016. While in patrol at Mdenga, Chikundi area with other 7 police they were told by their informer and shown the accused house that deal with Bhangi. PW7 and seven police went straight, knocked they at accused house. They were replied by Erick who opened the door. Upon PW7 asking whether there are Bhangi, Erick replied yes, and showed them three sacks(viroba). PW7 together with other police officers led to where accused was sleeping by Erick, who knocked the door. Accused opened, PW7 introduced himself with other police to the accused. Then asked if he knows Erick and the house where he was sleeping. Accused replied positive to both questions. They all went straight to the house where Erick was sleeping. PW7 explained to accused and Erick that to traffic bhangi is contrary to the law. PW7 had no search warrant as it was emergency and more so, he PW7 was incharge of Ndanda police station thus himself, Erick and accused signed receipt of seizure. They took accused, Erick and three parcels of bhangi to Ndanda police station. PW7 tendered receipt of seizure Exhibit P5 and also identified Exhibit P3 because it had reference number

NDN/IR/2016. While being cross examined by Steven Lekey counsel for the accused as to the time Exhibit P5 recorded, he replied that it was at 12:10 hours midnight, and that from where accused was sleeping to where they found bhangi was about (2) kilometers.

Last Prosecution witness was WP 3647 Detective Coplo Hidaya, PW8, she testified that, she was amongst the police who were in patrol the day accused was arrested. They went to accused 1<sup>st</sup> house and knocked the door where Richard opened the door, and they found three parcel of bhangi. PW8 told this court that upon finding three parcels (viroba vya bhangi), they took them to where accused was in company of Erick Richard in which accused admitted that the said bhangi belong to him. On being cross examined by defense counsel, she said she has been at Ndanda police station for about 20 years. On 22/1/2016 at around 8:00am she was at Ndanda police station her working station. She wrote statement of Erick Richard as an accused person. PW8 while being cross examined whether she recorded question that she was asking Erick Richard while recording caution statement, she said there is no need to write questions she was asking.

Upon close of prosecution case and after court ruling of a case to answer to the accused, he testified as DW1 and only witness for his case. He denied to have admitted when arrested, at police, and before justice of peace that sulphate bags found at his house with Erick Richard are not his properties. He told court that police went with three sacks to where he was sleeping. He was forced to carry them to where the car was packing. They were taken to Ndanda Police Station together with

Erick Richard. DW1 told this court that his statement was taken at around midnight upon arrival at police after arrest. He was then taken on 22/01/2018 to justice of piece, whom he saw him recording what was brought by the police. He did not sign in any document. In totality he denied to have admitted the offence at police and before justice of peace. Upon close of defense case, then both sides made closing submissions.

Nancy Mshumbusi learned state attorney for the Prosecution submitted that: accused person is charged with an offence of Drug trafficking Contrary to Section 15(1) (b) of Drugs Control and Enforcement Act, Act no 51/2015. Prosecution have paraded 8 witnesses and 5 exhibits tendered. There are two issues to consideration

- (i) Whether, accused was found with drugs.**
- (ii) Whether the Drugs were dangerous drugs.**

**On the first issue of possession,** PW7 Inspector Isaya, proved how he searched the appellant house together with other police officers. They found Bhangi at accused house, and lead to where accused was by Erick who was sleeping at accused house where bhangi were found. PW7 tendered exhibit P3, that proved inspection was done and Bhangi was found. Accused signed on the seizure receipt exhibit P5. Accused also admitted as seen at exhibit P1 and P2. To support possession State Attorney cited the case of YANGA OMARI Criminal Appeal no 132/2021, Court of Appeal, in which Mugasha J. A held on possession that, for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercise control over them, or that the goods came albert in his presence, at his invitation and arrangement. Evidence of PW7 and PW8 proved that, the Bhangi were found at accused house and that PW7

proved that accused has control of the house and that everything was being done was aware of the same, insisted State Attorney. What was found at accused house was proved to be Bhangi in terms of evidence of Elias Mulima PW5, who tendered exhibit P4, report of investigation from Government Chemistry Laboratory Authority. According to the report, exhibit P4 and P5 proved before this court that, what was seized at accused person was Bhangi. Prosecution exhibited the said Bhangi as exhibit P3. Prosecution proved chain of custody from when exhibit was found from accused to when was tendered in court.

PW7 Inspector Isaya, is the one who arrested accused, and found exhibit P3 at accused house. PW7 told this court that, after seizing exhibit P3, and accused having signed seizure receipt exhibit P5 he handled the same to exhibit keeper Sargent Hamisi. Evidence of PW7 was corroborated PW3 who explained how he identified exhibit P3 as it had number written on the exhibit reference NDN/IR/26/2016. PW3 explained how he received three sulphate bags of bhangi from Sargent Hamisi exhibit keeper. PW3 Nathenial Bahati Kyando, SP, took exhibit P3 to PW4. After investigation, PW3 returned the same to exhibit keeper for safe custody. PW4 explained he received exhibit from PW3 Nathenial Kyando SP in which PW4 took sample to PW5. Sequence of events proved chain of custody. PW3, PW4 and PW7 both identified exhibit P3 for having reference number NDN/IR/26/2016. On those ground, case against the accused has been proved beyond reasonable doubts, insisted learned State Attorney.

On other hand Steven Lekey counsel for the accused submitted that, accused is being charged with the offence that he did not commit. It is surprisingly, that accused who was found with Bhangi is not accused

person before this court, and not even a witness. The court should be guided with an issue that,

**(i) whether Bhangi sought to seized was found at accused house.**

**(ii)Whether the said Bhangi belongs to accused.**

**(iii)Whether the seized Bhangi said to have been seized, it is the same that has been produced in this court.**

- 1. It is prosecution side to prove the case beyond reasonable doubts. That responsibility does not diminish for accused weak defense case.**
- 2. Court be guided with rules governing search and seizure.**
- 3. Confession oral and written.**
- 4. Chain of custody**

In this case, prosecution ought to prove that Bhangi was inside the accused house. In this case it is only PW6, PW7 and PW8 who said there were at accused house. PW7 told this court that they got intimation from good samiratan. But such good Samaritan has not been brought before this court. It was fatal as was held in the case of **Aziz Abdal Vr, 1997 TLR 71** and case of **Hemed Said Vs. Mohamed Mbilu 1984 TLR 113**. Failure to bring good Samaritan gives benefits of doubts to the accused. After getting information, PW6, PW7 and PW8 told this court that, upon receiving information they went to the accused for inspection. They did inspection in the night without leave of the court and more so no reason for such happening recorded and tendered.

**Section 40 Criminal procedure Act Cap 20R.E 2022. States that: -**

**“a search warrant may be issued and executed on any day including Sunday and may be executed between hours of sun rise and sun set, but the court may upon application by the police or other person to whom it is addressed permit him to execute it at any hour.**



Defence, counsel insisted that this court was not told if there was any leave of the court given. On those premises, inspection contravened the law. It might be argued that circumstances allowed such search. After such search has been done, it was upon PW7 to record reasons of the emergency search. PW7 or any other witness did not bring any evidence in court on that issue.

More serious, inspection was done while accused was absent. In the case of Shabani Said Kindamba VR, Criminal Appeal No 390/2019 Court of Appeal at Mtwara, accused Mr. Kindamba was outside his house. Court of Appeal at page 18 allowed the appeal, because the accused, the owner of the house was not present in the search exercise and independent witness did not enter the house during inspection. It is true PW8 Detective, Coplo Hidaya said, before going where accused was, they inspected the accused house and took three sulphate bags of bhangi. Even PW7 corroborated the evidence of PW6 that, accused was not around while exhibit P3 was being found by police.

Court should see that evidence of PW8 on other side and PW6 and PW7 on the other side they contradict each other. Once there is contradiction of witnesses, such contradiction should be for the benefits of the accused. Even if, this court decides to believe PW8, yet, on inspection there was no independent witness. Circumstances of this case, does not show, that, availability of independent witness was impossible. PW7 admitted that, at Mdenga area there are leaders. Above all PW6 at para 42 of typed proceedings last paragraph 6 and 7 lines from the bottom explained that, he got information from the village leaders, that the said Bhangi was at accused. Why the said witness were not called, court was not told reasons. Defence counsel asked this court to take adverse inference for the prosecution case for failure to bring those witnesses. It might be argued that Erick Richard, who said to have put signature in

exhibit P5 was an independent witness. That is not right. Erick Richard was not independent witness, because, was one of the accused. That's why he was taken to police Ndanda and reminded, thus, he had interest to serve as Court of Appeal saw and decide in the case of Ndima Kashenie @ Joseph, VR, Criminal Appel No. 446/2017. KAIRO JA at page 12. After inspection, the law requires : The law required PW6, PW7 and PW8 to prepare two things: -

Seizure certificate and receipt to acknowledge seizure, Exhibit P5 receipt of seizure certificate or receipt acknowledging seizure. Which is between the two? Such doubts were not cleared. There is format of seizure certificate. Absence of either seizure certificate or seizure receipt, is a serious anomaly on the prosecution case. This court in the case of Ridhikr Burhani, Vs. Republic. Criminal Appeal no 40/2011, it was referred in the Book by Fauz Twalib, Criminal Procedure and Pracize in Tanzania a case Digest at page 43. Failure to produce certificate of seizure, High Court Judge Temba J, held that prosecution failed to prove the case.

Having heard eight prosecution witness, who both tendered five (5) exhibits, one defense witness (accused) and final submission by both sides, issue for determination is as correctly raised by State Attorney Nancy Mshumbusi, as to whether , prosecution have proved their charge against the accused ? . In resolving the major issue above, one sub issue need to be resolved namely: **Whether accused was found with the dangerous drugs (bhangi) or (Carnibal sativa)** Exhibit P3. Evidence of PW7 explained how they found exhibit P3 with Erick Richard then joined accused with Erick Richard, before taking exhibit P3 to Ndanda police station. PW7, Erick Richard, and accused signed exhibit P5.

Unfortunately, it is not clear whether exhibit P5 is seizure certificate or seizure receipt. Equally so is not signed by any independent witness.

Accused while giving evidence, he said he did not sign exhibit P5, prosecution did not bring other evidence, amongst others evidence of finger prints to prove that, exhibit P5 was signed by the accused person, thus, exhibit P5 lacked evidential value.

According to the records after seizure, this court, was not told clearly on the chain of custody. Court of Appeal decision in the case of **Paulo Maduka and others Vs. R. Criminal Appeal No 110/2007**, referred in the book by Fauz Twalib at page 49, Court of Appeal discussed chain of custody to be Chronological documentation and or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence, be physical or electronics. In this case, chain of custody is not exhibited properly on the following reasons:

**One,** according to the evidence of pw7, exhibit P3 was taken to Ndanda police post from Mdenga village and received by exhibit keeper surgent Hamisi, but neither surgent hamisi testified or exhibit register tendered in court as evidence

**Two,** exhibit P3 was taken from Ndanda in terms of evidence of PW3 to Masasi police station, how was it taken from Ndanda to Masasi, this court is not told.

**Three,** exhibit P3 was taken from Masasi to Government Chemistry office Mtwara, how was it taken; despite PW3 evidence at page 25 of the typed proceedings, that he sent the exhibit with letter, such letter has not been tendered as evidence.

**Four** exhibit P3 is said to have been received on 22/01/2016 to the Government Chemistry office by PW4 at Zone Office Mtwara no paper trail to show, PW4 sent the same to Dar es salaam on 15/03/2016, how was it transported and stored this court is not told .

**Five**, PW5 said he received sample from PW4 together with the letter, such letter has not been produced in court. In totality exhibit P3 cannot be said it was found at accused house.

DW1 denied to have signed exhibit P1 and P2. Looking at exhibit P1 accused put thumb as his signature but does not indicate which thumb. PW1 who took accused statement ought to have indicated whether it is right hand thumb or left. Same to exhibit P2, close look at exhibit P2, it is written name Transford Batholome as signature, not thumb as seen at exhibit P1, this court wonders which one is the signature of accused. DW1 having denied to have signed exhibit P1 and P2, evidence of hand written ought to have been brought to prove it is him who signed the same. That was not done by the prosecution. Thus, exhibit P1 and P2 lacks evidential value, cannot be relied by this court

This court having discredited exhibit P1 caution statement, P2 extrajudicial statement, and exhibit P5 seizure receipt, there is no any other evidence to prove that, Exhibit P3 was found at the accused house. It is the duty of the of the prosecution to prove their case beyond the reasonable doubts. Whatever weak defense case, cannot prove prosecution case. In totality charge against accused has not been proved by the prosecution. Accused person is not guilty, thus acquitted. Exhibit P3 to be destroyed upon following procedure. Deputy District Registrar of this court to ensure compliance.



  
Z.G. MURUKE

JUDGE

6/6/2023

Judgment delivered through video conference in the presence of  
Milikiori Hurubano state Attorney , and advocate Steven Lekey for the  
accused person



  
Z.G. MURUKE

JUDGE

6/6/2023