THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 98 OF 2022

(Originating from the District Court of Lindi at Lindi in Criminal Case No. 46 of 2021)

SALUM MTOPA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDEN

JUDGMENT

16th & 30th June 2023

LALTAIKA, J.

The appellant herein **SALUM MTOPA** was arraigned in the District Court of Lindi at Lindi on three counts: (ii) Trafficking in drugs c/s 15A (1) and (2)(c) of the **Drug Control and Enforcement Act** Chapter 95 RE 2019. It was alleged that on 20/7/2021 at Namkongo Village in the District and Region of Lindi, the appellant was found in possession of 19.5 kilograms of bhangi.

(2.) Unlawful possession of Narcotic Drugs c/s 11(1)(b) of the Drug Control Act (supra). It was alleged that the appellant was found with 132.9 kilograms of seeds used to manufacture drugs. (3.) Unlawful cultivation of prohibited seeds c/s 11(1)(a) of the Drug Control and Enforcement Act (Supra). It was alleged that on the same date and place, the appellant was found having cultivated 6.46 acres of *bangi*.

When the charge was read over and explained to the appellant (then accused) he pleaded not guilty. The trial court conducted a full trial. To prove the allegations, the prosecution paraded 7 witnesses. The appellant also climbed the witness box and offered his defence as the only defence witness (DW1).

Having been convinced that the prosecution had proved its case beyond reasonable doubt, the trial convicted the appellant as charged and sentenced him to 30 years imprisonment for each count, running concurrently.

Dissatisfied, the appellant has fronted seven grounds as follows:

1. *That the seizure was irregular as it contravened with the provision of section 38(3) of the Criminal procedure Act CAP.20 R.E.2002.*
2. *That the learned trial Magistrate Court erred in law and facts by convicting and sentencing the appellant without consider that the evidence testified by PW6 proved on Court to records the caution statement of the accused person out of time without permission from the magistrate.*
3. *The trial magistrate erred grossly in law and fact by convicting and sentencing the Appellant each Count 30 years imprisonment while the prosecution side failed to prove their charge beyond reasonable doubts as required by law.*
4. *Hon Judge the trial Magistrate erred in law and fact by convicting the appellant while there was contradiction in adducing the evidence before the Court of law.*

5. *The learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant basing on defective charge as charged on the 1st Count of trafficking of narcotic drugs contrary to section 15 A (l)(2)(c) of the drugs control and enforcement Act (Cap 95 RE 2019)*
6. *The learned trial Magistrate erred in law and fact without the prosecution side to admit the chain of custody of both exhibit P2, P3 and P4 from 20/07/2021 to 23/11/2021 when it was tendered to the Court as exhibit.*
7. *The learned Magistrate erred in law and fact by convicting and sentencing the Appellant without taking into consideration the mandatory of the law as stipulated by drugs control and enforcement Act (cap 95 R.E.2019).*

When the appeal was called for hearing, the appellant appeared in person unrepresented. The respondent Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney.

The appellant, not being learned in law, had nothing substantial to add except an earnest plea that his written grounds of appeal be considered. He also reserved his right to a rejoinder. This paved the way for Mr. Hurubano.

Taking the podium, Mr. Hurubano declared that the respondent was in support of the trial court's conviction and sentence. He proceeded to make the following submission in opposition to the grounds of appeal.

Mr. Hurubano stated that the first complaint was regarding the lack of an acknowledgement receipt. He agreed with the appellant's argument that no receipt was issued but believed that such an omission could not invalidate the decision of the District Court. Referring to the CAT case of **RAMADHANI IDDI MCHAFU V. R.**, he mentioned that the CAT had stated that the absence of a receipt could not be fatal if a certificate of seizure was issued and signed by the appellant. He prayed for the ground to be dismissed.

Regarding the second ground, Mr. Hurubano explained that the complaint concerned the evidence of PW6, who claimed that the cautioned statement was taken out of the prescribed time. He asserted that this ground had no merit because the cautioned statement was not presented in court at all.

Moving on to the third ground, which involved a contradiction in the testimonies of PW2 and PW3, Mr. Hurubano expressed his opinion that this ground lacked merit. He argued that the evidence provided by the two witnesses appeared to be consistent. Referring to page 21 of the proceedings, he highlighted that PW2 had provided a clear explanation of how the incident occurred and the subsequent arrest of the appellant. He also mentioned that the evidence of PW3, found on pages 27 to 33, aligned with PW2's testimony. Mr. Hurubano referred to the case of **EVARIST KACHEMBEHO V. REPUBLIC** to support his argument, stating that minor contradictions in the evidence should not invalidate the decision. Even if the court considered it a contradiction, he believed it to be a minor one.

Addressing the third and fifth grounds, Mr. Hurubano asserted that the respondent had failed to prove the offense beyond reasonable doubt. He outlined the two main elements that needed to be established: first, that the seized substance was narcotics called bangi, and second, that the substance belonged to the appellant. He relied on the evidence provided by PW1, who had explained that he received the substance for forensic examination and determined it to be bangi seeds weighing 132 kilograms. Mr. Hurubano emphasized that PW1 also examined leaves and found them to be bangi. Referring to pages 11 to 20 of the trial court's proceedings, he pointed out

that the report tendered by the government chemist, as per section 48A(2) of the Drugs Control and Enforcement Act, served as prima facie evidence. He believed that the first element had been proved based on this evidence. Regarding PW2, Mr. Hurubano mentioned that he testified about finding a tented hut containing seeds suspected to be bangi during a patrol, and the appellant led them to the farm where he cultivated bangi. Dry leaves amounting to 19.5 kilograms were also discovered. Mr. Hurubano argued that the evidence of PW1, supported by PW2, satisfied the second element without any doubt.

Concerning the second count of trafficking in narcotic drugs, Mr. Hurubano stated that it was a matter of law, not fact. Referring to section 17(2) of the Drug Control and Enforcement Act, he explained that quantities below 50 grams were not considered trafficking, as defined by Regulation 3 of the Drugs Control and Enforcement Act Regulation 2016. Since the amount seized in this case was 19.5 kilograms, well above the small quantity threshold, the law presumed it was for trafficking and not personal consumption.

Regarding the sixth ground, Mr. Hurubano argued that the complaint about the chain of custody not being maintained was unfounded. He referred to precedents in Tanzania, stating that it was not necessary to prove the chain of custody with documentary evidence. He highlighted the case of **MYCHEL ANDRIANO TAKAHINDENGENG V. R.** Crim App No 76 of 2020 in which the apex Court stated that chain of custody could be proved orally.

Mr. Hurubano stated that in the matter at hand, the bangi had been seized by PW2, who then handed them over to PW7. Subsequently, PW7 passed them on to PW6, who, in turn, transferred them to PW1, the government chemist. According to Mr. Hurubano, they believed that the chain of custody had been maintained, and therefore, the ground challenging it had no merit.

Regarding the seventh ground, the complaint revolved around the absence of photographs taken at the farm. Mr. Hurubano acknowledged that section 36(3)(b) of the Drugs Control and Enforcement Act required photographs to be taken in the presence of a magistrate who would certify them. However, he pointed out that this requirement had not been fulfilled in the present case. Consequently, he argued that this lack of photographic evidence exonerated the appellant of unlawful cultivation, while leaving the other grounds unaffected. In conclusion, Mr. Hurubano prayed that the appeal be partially allowed and partially dismissed.

In rejoinder, the appellant stated that he was a 72-year-old man born in 1951 in the rural areas of Lindi near Ruangwa. He narrated that he became disabled in 1986 after falling down a tree.

He acknowledged the truthfulness of the lawyer's statements to a large extent. It was indeed true that he was arrested on the specified date and time. The police had received information that he possessed six guns, but upon their arrival, they found only one legal firearm. After inspecting the firearm and confirming its legality, they shifted their focus to a different matter.

The police officers noticed a path that raised suspicions of a hidden cultivation of bangi (narcotic plant). Without the appellant's presence, they went to investigate and later returned, requesting assistance to destroy the *bangi* farms. The appellant and some young individuals were taken along. They discovered several farms where the bangi was concealed outside the main agricultural areas. The plants were found in a hut and subsequently burned.

The appellant claimed that the police officers told him that if he did not know the individuals responsible for cultivating the bangi, he must be the one involved. He stated that he was beaten and coerced into agreeing with their assertions, but during the court proceedings, he pleaded not guilty.

According to the appellant, the individuals who cultivated the bangi were unknown to him, as these were secretive and guarded farms. He expressed frustration that his statements in court were not accepted, leading to his conviction, and sentencing. He decided to file an appeal after observing that some of his colleagues had been released in Lindi, both in police and the trial court.

The appellant questioned the feasibility of a disabled person like himself cultivating eight acres of land. He considered the case to be burdensome, as there was no evidence linking him directly to the illegal activities other than the fact that the path started from his house.

Having carefully considered the grounds of appeal and no doubt attentively attended to the rival submission by the learned State Attorney

and, more importantly, examined the lower court records, I take the liberty to reflect on the matter in a rather cross-cutting manner. I must admit that this is a very challenging case. There is no doubt that the appellant is an old man 72 years old. He is also a person with a disability. I cannot see his direct involvement in the crime he was charged for. Conviction and ultimate sentencing were based, it appears, on inability for him to prove his innocence. The police wanted him to mention the owners of the farms. He consistently denied ever knowing them. Can he be punished for that? I have no doubt that the answer is to the negative. In the case of **JOHN MAKOLOBELA KULWA AND ANOTHER v. R.** [2002] TLR 296 the Court of Appeal of Tanzania stated:

> *"A person is not guilty of a criminal offence simply because his defence is not believed. Rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution case that has proved the case beyond reasonable doubt"*

It is also a cannon principle of our laws that conviction must be based on the strength of the prosecution case and not on the weakness of the defence case. I have tried to observe the demeanor of the appellant as he was addressing this court in rejoinder. In addition to the evidentiary gap identified above, it is also unlikely that an old man of 72 years with physical disability would tolerate so much suffering just to conceal the perpetrators of the alleged illegal trafficking in narcotic drugs. Whether he took an oath "amelishwa amini" never to mention the perpetrators even if that means death, I really don't know what can be done about such "amini"

What I can derive from the above is that the police officers who arrested the appellant decided to go for the **"low hanging fruits."** The fact that the appellant had, allegedly, owned a gun for many years might have, understandably, added fuel to the fire of suspicion among the detectives. They probably thought the old *mzee* in spite of his advanced age and disability should be able to explain how he lived so close to the *bangi* farms.

I think if the police were a little bit more patient and tried harder to win the appellant to their side, their trap for the real perpetrators, those that benefit from the trade in *bangi* would have yielded some fruits. The appellant before me has been punished for living closer to the farms and not for his direct involvement in the crime. This should be avoided to ensure that the standard of proof needed for criminal conviction is not compromised to the detriment of the entire criminal machinery. Our criminal justice system is built on a solid rock of clear separation between the guilt and the innocent. There is no "halfway house." One is either guilty or innocent. Anything in between is injustice.

In the upshot, I allow the appeal. I hereby quash the conviction and sentence of the lower court. I order that **SALUM MTOPA be released from prison forthwith** unless he is being held for any other lawful reason(s)/

It is so ordered.

E.I. LALTAIKA
JUDGE
30.06.2023

THE HIGH COURT OF TANZANIA

Court

This Judgement is delivered under my hand and the seal of this court this 30th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
30.06.2023

Court:

The right to appeal to the court of appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
30.06.2023