IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 81 OF 2022

(Originating from Criminal Case No. 30 of 2022 in the District Court of Iramba at Kiomboi)

JACOBO JEREMIA @ NAKEMBETWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20th October, 2023

HASSAN, J.:

The appellant herein appeared before the District Court of Iramba at Kiomboi where he was charged with the offence of Unlawful Trafficking in Narcotic Drugs [In Large Quantity] contrary to section 15A(1) and (2)(c) of The Drugs Control and Enforcement Act [Cap 95 R. E 2019]. It is in the particulars of offence that, on 22nd day of March, 2022 at about 17:45 hours at Tumuli Village and Ward, Kinyangiri Division within Mkalama District, Singida Region the Appellant was willfully and unlawfully found in possession of Cannabis Sativa commonly known as "BHANGI" , Rolls 111, weighing 301.0 Grams.

When the charge was read over to the appellant in the trial court, the appellant denied the charge. The prosecution, thereafter, called a total of five (5) witnesses, who testified against the appellant who entered his defence without calling any witness on his case. At the conclusion of the trial, the appellant was convicted and sentenced to serve thirty (30) years imprisonment. Aggrieved with the conviction and sentence, the appellant preferred an appeal on the following grounds:-

1. *That, the 101 rolls of cannabis sativa alleged to be seized from the appellant being seized from the appellant being the items change easily, the trial court wrongly convicted and sentenced the accused (here the appellant) of the offence charged without proper account of the chain of custody of the alleged prosecution exhibit two (PE2).*
2. *That, the search conducted into the TOYOTA Hiace with registration number T 997 DAC violated section 38(3) of the Criminal Procedure Act, Cap 20 (R. E 2022) as there was no receipt issued after the search was done.*
3. *That, the trial court erred in law and fact as he grounded his conviction on the weaknesses of my defence, rather than relying on the weight of the prosecution evidence.*

4. *That, the trial court erred in law and in fact by decide the case basing on the weakness shown by the appellant in his defence rather than basing on the weight of the prosecution evidence.*
5. *That, the trial court did not properly analyse and evaluate evidence adduced by both prosecution and appellant's evidence hence, wrongly convict and sentence the appellant.*

The appellant prayed the decision of the trial court to be quashed and set aside.

When the appeal came for hearing on the 20th day of July, 2023, the layman appellant appeared in person and prayed to adopt his petition of appeal, he added nothing except reserving his right of rejoinder, whereas the respondent Republic had the service of Mr. Francis Kesanta, learned State Attorney.

On his party, the learned State Attorney opposed the appeal by arguing against all grounds of appeal collectively. He started his submissions by arguing that, the objective of the prosecution was to prove the charge against the appellant and that was properly done. He added that, the prosecution called upon witnesses who testified on how the appellant was arrested, interrogated and how he admitted his offence. He

submitted further that, drugs which were found with the appellant along with other exhibits were tendered in the trial court and the appellant did not object. He cited the case of **Chande Zuberi Ngayaga & Another v Republic, Criminal Appeal No. 258 of 2020** (unreported) to cement his submissions.

The learned State Attorney added that, the argument that there was no chain of custody is baseless since the appellant admitted himself by not objecting his cautioned statement, certificate of seizure, the alleged drugs and certificate of analysis. Thus, his allegation is an afterthought and should be discounted.

The respondent prayed the court to dismiss the appeal and sustain conviction and sentence.

In the light of what was submitted by the parties, and having carefully gone through the available record, the issue for determination is whether the prosecution's case was proved beyond reasonable doubt in the trial court.

Going through the record of proceedings of the trial court, I have noted that some of the exhibits tendered in the trial court were not read after their admission in compliance with the mandatory requirement of the law. The exhibits are the appellant's cautioned statement (exhibit PE1), search warrant (exhibit PE3), certificate of seizure (exhibit PE4),

form No. DCEA 001 used to send the alleged narcotic drugs to the office of the government chemist (exhibit PE5), form No. GCLA 01 sample receipt (exhibit PE6) and report from the government chemist (exhibit PE7). This omission is fatal and contrary to the guidance of the law in **Robinson Mwanjisi and Three Others v. Republic [2003] T.L.R 218** where the court held;

> *"Whenever it is intended to introduce any document in evidence it should first be cleared for admission/ and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same."*

In **Misango Santiel vs Republic**, Criminal Appeal No. 250 of 2007 (unreported) the court held thus;

> *"The statement was then tendered in court as exhibit P6, Since the witness did not read the whole statement it is hard to say that* ***the appellant became aware of what was written in exhibit P6 and cross-examine on it effectively...Under such circumstances it is doubtful to say that the appellant was fairly treated*** *when the statement was used to form the basis of his conviction."* ***[Emphasis added].***

Also see, **Roland Thomas @ Malangamba vs Republic**, Criminal Appeal No. 308 of 2007, **Petro Teophan vs Republic**, Criminal Appeal No. 58 of 2012 and **Juma Mnyama Kinana and Another vs Republic**, Criminal Appeal No.133 of 2011 (all unreported decisions of the Court). This is a fatal omission and the remedy to cure the anomaly is to expunge the unread exhibits PE1, PE3, PE4, PE5, PE6 and PE7 from the record of the respondent's case.

The cannabis sativa (exhibit PE2) allegedly found with the appellant were also not counted in the trial court after its admission for the court and the appellant to be assured whether or not there were 111 rolls of bhang as alleged by the prosecution side. Thus, the same is also expunged from record of the prosecution's evidence for the ommission.

After expunging all the exhibits tendered by the respondent in the trial court, we remain with the witnesses' oral evidence. Having a look on the evidence of the prosecution witnesses I have also found that there is a missing link in the prosecution evidence on how alleged narcotic drugs found with the appellant were handled after the same were allegedly taken from the appellant when he was arrested to Iguguno Police Station, thus a break in chain of custody. PW3 testified in the trial court as an arresting officer who was assigned by the OCS of Iguguno Police Station to make follow up of the appellant after being informed by an informer of the

allegations that the appellant was in possession of the narcotic drugs. He alleged to have seized the 111 rolls of the "bhangi" after they searched and found him with the said "bhangi". That, he then filled a certificate of seizure. But did not state further from there where did he take the narcotic drugs to. Another witness PW4, the investigator testified on how he prepared the exhibits and forward them to the office of the government office without any explanation on how the drugs came into his hand. There was neither handing over register nor a storekeeper of the exhibits called by the prosecution as a witness. Thus, there is a break in a chain of custody as alleged by the appellant in this appeal.

The rationale behind the principle of chain of custody was established in the case of **Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 100 of 2007 (unreported) where the court made an observation:-

> *"The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime rather than; for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another*

must be documented and that it be provable that nobody else could have accessed it." [Emphasis added]

There is also another irregularity on the part of the appellant being denied his right of defence contrary to section 231(1) (a) and (b) of the Criminal Procedure Code, Cap 20, R. E 2019. In the record of proceedings there is only Ruling on *prima facie* case, there is no record showing right for defence being addressed to the accused person and the court recording his answer as required by the law prior to the appellant's testimony. Thus, the defence case was opened without adhering to the mandatory requirement of the law. The court has given its direction on the importance of informing the accused of his right before defending himself in **Ally Juma Faizi @ Mpemba vs Republic, Criminal Appeal 401 of 2013** (unreported) where the court held:-

"We think the failure by the trial court to address the appellants in terms of section 231 was highly irregular"

Also in **Namashule Ndoshi v. The Republic, Criminal Appeal no. 120 of 2005** (unreported) the court addressed section 231, thus:-

".....a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict. Not

only is an accused entitled to give evidence- in their defence but also to call witnesses to testify in their behalf. So, the section is an elaboration of the all-important maxim- audi alteram partem and that no one should be condemned unheard."

That said and done, considering the omission by the trial court and the doubtful evidence by the prosecution, I am of the firm position that the prosecution's evidence in the trial court was short of proving the case against the appellant beyond all reasonable doubt. The appeal therefore is allowed accordingly. Conviction quashed and sentence set aside, at the end, the appellant shall be set at liberty forthwith if he is not detained for other lawful cause.

DATED at **DODOMA** this 20th day of October, 2023

S. H. Hassan

JUDGE