

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CRIMINAL APPEAL CASE NO 47 OF 2023

(Originating from Mtwara District Court at Mtwara in Criminal Case No 25 of 2022)

RUFINA JOSEPH KAMBEJIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

20th & 30th October 2023

LALTAIKA, J.

The appellant herein **RUFINA JOSEPH KAMBEJI** was arraigned in the District Court of Mtwara at Mtwara charged with the offence of trafficking in drugs c/s 15A (1) and (2) of the Drug Control and Enforcement Act Cap 95 RE 2019 as amended by the Written Laws Miscellaneous Amendment Act No 5 of 2021.

It was the prosecution story that on 2/2/2022 at MUHURUNGA village in Mtwara District, the appellant was found in possession of illicit drugs

namely 340 grams of *cannabis sativa* commonly referred to as bhangi (also spelled as bangi).

When the charge was read over and explained to the appellant (then accused) she pleaded not guilty. This necessitated the conducting of a full trial. The prosecution paraded 5 witnesses and tendered 5 exhibits. After the full trial the appellant was convicted as charged and sentenced to a term of 30 years imprisonment. The appellant is dissatisfied with the conviction and sentence, hence this appeal. The memorandum of appeal filed in this court contains six grounds of appeal. I take the liberty to reproduce them as hereunder:

1. *The trial Magistrate erred in law and fact by relying on the alleged search which was alleged to be done and did not comply with the provisions of the Criminal Procedure Act section 38(1)(2) Cap 20, RE 2022.*
2. *The trial Magistrate erred in Law and fact by convicting and sentencing the Appellant while the Exhibit Register was not tendered to prove of the said Bhang.*
3. *The trial Magistrate erred in law and fact by convicting and sentencing the Appellant basing on exhibits P1 (Bhang) which its chain of custody was not established this exhibit apart from being not accompanied with police form no. 145 as per Police General Order (PGO). The same was not consistent and documented.*
4. *The trial Court's sentence was too excessive and in contravened with the law.*
5. *The trial Magistrate erred in law and fact by convicting the Appellant in a case which was conducted contrary to the law whereby he failed to comply with the mandatory of section 230 (1) of the Criminal procedure Act Cap 20, RE 2022.*
6. *That the trial Magistrate erred in law and fact by convicting and sentencing the Appellant while the prosecution failed to prove their case beyond reasonable doubt regarding the law under section 3 (2) of Tanzania Evidence Act Cap 6, Re 2022.*

When the appeal was called on for hearing on the 20th of October 2023, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, enjoyed skillful services of **Mr. Melchior Hurubano**, learned State Attorney.

The appellant, not being learned in law, indicated that she had nothing more to add to her expounded grounds of appeal forming a part of the petition. She, therefore, requested that the learned State Attorney be allowed to proceed with his part. The appellant, however, reserved her right to a rejoinder.

The learned State Attorney, kickstarted his submission opposing the first ground of appeal. He stated that the complaint was about the appellant being arrested without a search warrant. The learned State Attorney acknowledged his agreement with the appellant on this point, emphasizing that the proceedings revealed the absence of a search warrant with the arresting officer.

However, Mr. Hurubano expressed the opinion that this ground held no merit. He pointed out that although **section 138 of the Criminal Procedure Act** mandated a police officer to carry a search warrant, an exception was provided by section 42 in cases of emergency searches.

Mr. Hurubano referred to the evidence of PW4, indicating that the search conducted was indeed an emergency. He highlighted that PW4 had also signed the certificate of seizure and receipt, without raising objections to their admission in court. The prosecution firmly believed that, despite the lack of a warrant, the appellant had not suffered any prejudice. Mr. Hurubano concluded by requesting the court to dismiss the first ground of appeal.

Opposing grounds 2 and 4 collectively, Mr. Hurubano addressed the complaint regarding the **proof of the chain of custody**. He informed the

court that, according to exhibit P4, the chain of custody had been maintained, and the prosecution successfully demonstrated this through an oral account. Mr. Hurubano then acknowledged the appellant's assertion that failure to tender the exhibit register could potentially invalidate the trial court's decision.

However, Mr. Hurubano disagreed with this perspective, asserting that there was no necessity to present the exhibit register. He argued that the sole purpose was to establish the maintenance of the chain of custody, and the prosecution had effectively achieved this goal without tendering the exhibit register.

Mr. Hurubano addressed ground 3, stating that the complaint was about the sentence being excessively harsh. He expressed the opinion that the ground was baseless. According to the learned State Attorney, the sentence of 30 years was justified as it was the **maximum sentence stipulated by section 19 of the Written Laws Misc. Am. Act No. 5 of 2021**, which specified a range of 20 minimum to 30 maximum years. Mr. Hurubano affirmed the belief that the imposed sentence was appropriate. Regarding the 5th ground, he mentioned that he would skip it as it pertained to a nonexistent provision.

Mr. Hurubano addressed the sixth ground of appeal, highlighting the complaint about the proof of the case beyond a reasonable doubt. He expressed disagreement with this assertion. According to the learned State Attorney, to establish the offence, the prosecution had the duty to prove two elements: first, that the impounded substance was bhang, a duty fulfilled by the evidence of PW1, as evident on pages 12-13 of the trial court's

proceedings, where a witness from the Government Chemist confirmed it to be bhangi. The second element was whether the items suspected to be bhangi were found with the appellant.

Mr. Hurubano referred to pages 30 to 31, explaining that PW4 detailed how she conducted a search at the appellant's house and discovered 340 grams of bhangi. He further mentioned that PW4 asserted the presence of an independent witness and highlighted that the appellant had signed the certificate of seizure, indicating her agreement that she was found with the illegal substance. Concluding his statement, Mr. Hurubano prayed for the entire appeal to be dismissed.

The appellant, in her rejoinder, stated that there were two tenants in the house. When the police arrived, they expressed their intention to search the house. She reported opening the rooms of her children and her own room, explicitly mentioning that the other room did not belong to her. However, the police broke the door and discovered bhangi in that room.

The appellant claimed that she was coerced into signing a document stating that she was in possession of the bhangi, out of fear of physical harm. She requested the police to wait for the Chairman, who was familiar with her. Additionally, she observed the presence of someone the police referred to as an independent witness and clarified that the room in question belonged to **Salum Mwemedi**, her next-door neighbour.

The appellant noted that Salum Mwemedi was not found in the house, having one room while she had two. There was a belief that he was attempting to escape. Expressing her confusion about the reason for the

police visit to her home, the appellant emphasized her lack of prior criminal cases. She concluded her statement by praying for the acceptance of the appeal so that she could reunite with her children, highlighting the absence of anyone caring for them.

I have dispassionately considered the grounds of appeal, rival submissions, and the lower court's records. My analysis will center on the sixth ground, proof of the prosecution's case beyond reasonable doubt as I believe that the same is capable of disposing of the entire appeal.

The term proof beyond reasonable doubt has not been defined in statutes. However, an insight is given by the topmost Court of this jurisdiction in the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 where the CAT held:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."

I have examined the evidence adduced and I am fortified that it falls short of strongly point to the appellant. The amount of *bhanghi* she was allegedly found with is 340 grams is not a big amount. She tried to explain that the same belonged to her next-door neighbour. This raised doubts on the side of the prosecution case because the appellant, a woman, would be less likely than her next-door neighbour, a male person to be connected with the 340 grams for personal use.

It is the cannon principle of our law that one is not guilty of an offence simply because his or her story cannot be believed. The trial court did not show why the assertion that the alleged *bangi* belonged to a neighbour who

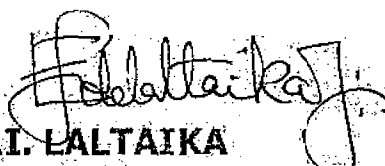
owned the room in which the bangi was found was not believed. This was aptly stated by the Court of Appeal in **JOHN MAKLOBELA KULWA AND ANOTHER V. R.** [2002] TLR 296 thus:

"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."

The trial court, in my considered view, failed to address many evidentiary gaps that, if carefully examined, would have brought doubts as to whether the appellant was the right person to be arrested or not.

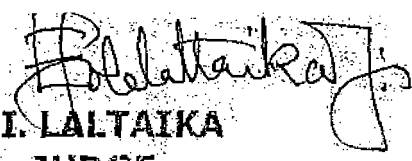
Premised on the above, I allow the appeal. I order that the appellant **RUFINA JOSEPH KAMBEJI** be released from prison forthwith unless she is being held for any other lawful cause.




E.I. LALTAIKA
JUDGE
30.10.2023

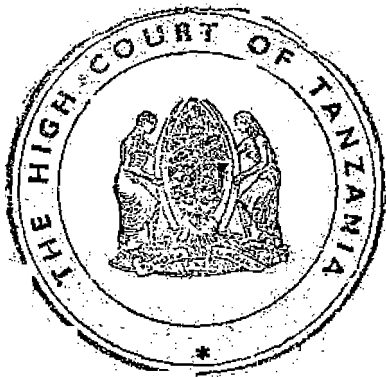
Judgment delivered under my hand and the seal of this Court this 30th day of October 2023 in the presence of Mr. Steven Aron Kondoro, learned State Attorney and the appellant who has appeared in person, unrepresented.

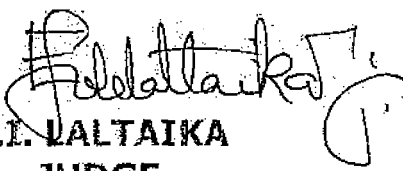



E.I. LALTAIKA
JUDGE
30.10.2023

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.




E.I. LALTAIKA
JUDGE
30.10.2023