IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA SUB-REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL No. 33 OF 2023

(Originating from the decision of Hon. K.M. Saguda, SMR, Sumbawanga Resident Magistrate Court at Sumbawanga in Criminal Case No. 13 of 2022)

BETWEEN

ALPHONCE s/o CHOMOLA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Last order: March 14, 2024
Judgement: April 24, 2024

JUDGMENT

NANGELA, J.:

The appellant, Alphonce s/o Chomola is currently a prisoner at Sumbawanga remand prison. He was earlier arraigned before the Sumbawanga Resident Magistrates' Court facing the offence of trafficking narcotics drugs contrary to section 15 (1) and (2) (c) of the drugs control and enforcement Act. He was found guilty, convicted, and sentenced to thirty (30) years imprisonment.

Aggrieved by the conviction and sentence he has appealed to this court. Before I delve into the grounds of appeal which the appellant raised in his appeal, I will set out the facts albeit which led to his conviction and sentence, albeit in brief.

It all started on the 04th of April 2021 at Mkamba Village, within Sumbawanga District, Rukwa region. On that the appellant is alleged to be found in possession of 9.18 kgs of narcotics (drugs) to wit, *Cannabis Sativa* alias "**Bhangi**". His arrest is said to be facilitated by intelligence information received by the Police on the 03rd of April 2021 to the effect that the appellant was dubiously dealing in the supply of "**Bhangi**" at Mkamba Village.

A trap was laid, and the Police intelligence squad was sent to the scene of crime. At around 02:00hrs the appellant was thus nabbed having a bag suspected of stuffing *Cannabis Sativa* (Bhangi). A search exercise was done in front of one Deusi Ponsiano. A seizure certificate was raised and signed by those who witnessed the seizure including the appellant. The appellant was sent to Mtowisa Police Post and later to Sumbawanga Police Station. He was later arraigned in court, where he was found guilty and sentenced to 30years imprisonment.

The appellant is dissatisfied with his conviction and sentence and has raised six grounds of appeal, to wit, that:

1. The trial court erred in both law and fact when it convicted and sentenced the appellant while the prosecution failed to prove the charge against the appellant to the required standards.
2. That, the trial court erred in both law and fact when it convicted and sentenced the appellant

based on the evidence of Pw-1, Pw-2 and Pw-3 without taking into consideration that they were not present where a trap against the appellant was being laid, hence, creating doubt as to the credibility of their allegations that the appellant was found with the alleged sulphate bag containing Cannabis Sativa (Bhangi).

3. That, the trial magistrate misdirected himself when he convicted and sentenced the appellant as he failed to observe that the appellant's conviction was based on objected exhibits which were improperly admitted as evidence against the appellant.
4. That, the trial court had incurably gone astray in point of law and fact for failure to consider the weight of the defence case which coherently established the innocence of the appellant.
5. That, the trial court was biased as it based its decision to convict the appellant on the cautiones statement of the appellant, while the same was procured outside the time contrary to section 50 (1) (a) of the Criminal Procedure Act.
6. That, the case against the appellant was framed and planned by the prosecution side since the

appellant did not commit the serious offence as claimed by the Prosecution side.

When this appeal was called on for its hearing on March 14th, 2024, the appellant appeared in person unrepresented. The republic enjoyed the services of Ms. Atupele Makoga, learned State Attorney. In arguing his appeal, the appellant urged this court to adopt his grounds of appeal and he be released from jail because he did not commit the alleged offence which he was convicted of and sentenced to 30 years imprisonment.

The appellant submitted that, he was initially arrested because he had demolished a house belonging to one, Madanganya. He told this court that, when he was sent to Police and later charged, the charge was different, and he was, instead, framed up with an offence he has never committed. He therefore urged this court to uphold his grounds of appeal and grant his prayers for his release from prison.

Ms. Makoga opposed the appeal and countered the appellant's submission. In responding to the grounds of appeal which she urged this court to dismiss in their entirety, Ms. Makoga grouped them in two groups. She firstly addressed grounds 1, 2, and 6 together, followed by grounds 3, 4, and 5 which she also considered separately. Concerning grounds 1, 2 and 6, it was Ms. Makoga's submission that, based on the case of **Malik George Ngendakumana vs. Republic** (Criminal Appeal 353 of 2014) [2015] TZCA

295 (24 February 2015), the prosecution proved the case against the accused person to the required standards.

She contended that, in the case brought before the trial court it was indeed the duty of the prosecutor to prove not only that the appellant was the one found in possession of the narcotics ("Bhangi") but also that what he was found in possession of was indeed such a prohibited plant commonly referred to as "Bhangi". She submitted that through the testimonies of Pw-1, Pw-2, and Pw-3 the evidence that the accused was found in possession of the prohibited plant was fully established as their evidence was sufficient to convict the accused (appellant), as these were credible witnesses.

It was a further submission that, the substance which the appellant was found in possession of was also indeed proved to be *Cannabis Sativa* (Bhangi). She submitted, therefore, that, grounds 1, 2, and 6 of the appeal are baseless and should be dismissed forthwith. As regards grounds 3, 4, and 5 of the appellant's grounds of appeal, it was Ms. Makoga's submission that, ground number 3 was also baseless given that, any objection must be anchored on the law and not otherwise.

She submitted, therefore, that since the objection which the appellant had raised before the trial court was not based on a point of law but was factual in nature, it was properly rejected by the trial court. To support her submission, Ms. Makoga relied on the case of **Ibrahim Abdallah vs**

Selemanihamisi (Civil Appeal 314 of 2020) [2022] TZCA 43 (21 February 2022).

Concerning ground number 4, Ms. Makoga also denounced it as lacking merit. She argued that the trial court did consider the defence case before passing its judgement thereon. She referred to this court the contents of the trial court's judgement on pages 20 through to 30 which shows that the trial court considered the defence case as well. As regards ground number 5 of the appellant's appeal, Ms. Makoga conceded that, the caution statement of the accused (appellant) was indeed taken in violation of section 50 (1) (a) of the Criminal Procedure Act, Cap. 20, R.E 2022.

She submitted, However, that, even if such caution statement is to be expunged from the record, the prosecution case will remain intactly proved because the remaining evidence would still be sufficient to convict. She urges this court to make a finding that the currently appeal has no merits and dismiss it in its entirety.

When the appellant was given opportunity to rejoin, he had nothing of substance to tell the court other than pressing for his release based on the grounds he had earlier raised before this court. I have considered the rival arguments from both sides. The key issue for me to address is whether this appeal has any merit in it to warrant a release of the appellant as he has tried to impress on this court. This being a first appeal, the law is well established:

the first appellate court can pretty much re-evaluate the existing evidence and arrive at its own conclusions.

See the cases of **Deemay Daat, Hawa Burbai & Nada Daati vs. The Republic**, Criminal Appeal No. 80 of 1994, (CA) (Arusha) (unreported), **Abdallah Makayule vs. Dunia Moshi**, Land Appeal No.175 0f 2018 (unreported) and **Jofrey s/o Emily Silungu vs. The Republic,** (DC) Criminal Appeal No. 74 OF 2023. As correctly submitted by Ms. Makoga, it is the duty of the prosecution to establish the guilty of the accused person beyond reasonable doubt.

In the case of **Malik George Ngendakumana vs. Republic** (supra), the Court of Appeal made it clear that the principle of law in any criminal case is in twofold:

> "One, to prove that the offence was committed and, two, that the accused person is the one who committed it."

In this present appeal, there is no doubt that on the 03rd day of April 2021 the appellant was apprehended by Police while at Mkamba Village, in Sumbawanga District, Rukwa region and on the 04th of April 2021 he faced charges of being found in unlawful possession of Cannabis Sativa (Bhangi).The testimonies of Pw-1, Pw-2, and Pw-3 who were eye witmesses, as well as **Exh.P-1** and **Exh.P-4** all of which form the basis of the trial court's conviction, do point to the fact that, it was right to convict the appellant.

Pw-2, for instance, was a mere ordinary person who was requested, while on his own business, to witness the search of the appellant's bag which he was found with. Pw-2 did even sign the seizure certificate, **(Exh.P-1**). In no way could it be argued that the appellant's charge was framed-up as he wants this court to believe. As such, I do agree with Ms. Makoga that grounds number 1, 2 and 6 of this appeal are with no merit. I see nothing substantial to make this court believe that the appellant was framed-up as he seems to argue.

As regards the 3rd ground of appeal, I also agree with the learned State Attorney that it does not have merits. It is, indeed, a fact that, when **Exh.P-1** was sought to be tendered in court the accused (appellant herein) objected to its admissibility. The reason he offered was that he does not know it. That reasoning of the appellant was not based on any legal grounds to warrant it being received as valid. In fact, as I look at **Exh.P-1**, it does indicate that the appellant did even sign it as well as Pw-1 and Pw-2.

As correctly argued by Ms. Makoga, any objection worth being entertained must be based on a point of law and not just a mere factual ground. The case **of Ibrahim Abdallah** (supra) is clear on that. In the present appeal, the trial court did consider the objection and disregarded it along those lines. Such a disregard of it was, in my view, warranted since nothing legally substantial was raised by the appellant before the trial court to

warrant a rejection of **Exh.P-1.** Consequently, I quite agree with the learned State Attorney that, the third ground lacks merit as well.

As regards the fourth ground of appeal, the appellant's argument is that the trial court did not consider the weight of the defence case. In principle what the appellant is raising here is that the trial court did not consider his defence and, hence, the weight thereof. Was that the case in this appeal? Essentially, when it comes to evaluating the weight of any evidence properly on record; an appellate court is in just as good a position as the trial court. The case of **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012) is clear on that point.

In the case of **Exim Bank Tanzania Limited vs. Sai Energy & Logistics Services Limited** (Commercial Appeal No.2 of 2022) [2023] TZHCComD 380 (27 November 2023), this court stated as well that:

> "it is an established principle of law supported by a host of authorities that before any court arrives at a conclusive or decisive end of the case before it, and hence rendering its judgment, it must have considered the evidence of both parties to the case, evaluated the same, and offer its reasoned judgment of it."

Such a trite legal position was also stated clearly and aptly by the Court of Appeal in the case **Leonard Mwanashoka Criminal Appeal No. 226 of**

2014 (unreported), cited in **Yasini S/O Mwakapala vs. The Republic**, Criminal Appeal No. 13 of 2012 (unreported) where the Court had the following to say:

> "It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

I have looked at the judgement of the trial court. I do not agree with the appellant that the defence case was not looked at or analysed by the trial court when it was rendering its decision. On the contrary, the trial court did analyse, not only the prosecution evidence, but also the defence case. As such, the fourth ground of appeal is with no merit and should be disregarded.

Finally, is ground number 5 of the appellant's memorandum of appeal. The appellant has raised an issue that the trial court was biased as it relied on a caution statement which had violated the law. Although Ms. Makoga conceded indeed that the caution statement violated section 50 (1) (a) of the Criminal Procedure Act, Cap.20 R.E 2022, that does not mean that the court was biased.

Essentially, an unbiased or impartial decision making is a crucial part of any dispute resolution process. In the case of **Metropolitan Properties -vs-Lannon** (1968)3 All ER 304, the famous English Judge, Lord Denning once held a view that:

> "In considering whether there was a real likelihood of bias.... the court looks at the impression which would be given to other people ... what right minded persons would think."

In my view, I do not think that the trial court's reliance on a caution statement obtained in violation of the procedural requirements of section 50 (1) (a) of the CPA would make any reasonable person to conclude that the trial court was biased as the appellant alleges. But as Ms. Makoga conceded, the caution statement was indeed obtained in violation of section 50 (1) (a) of the Act. The section provides for a maximum of four for interviewing a person who is in restraint in respect of an offence.

In the case of **Joseph Mkumbwa & Another vs. Republic** (Criminal Appeal 94 of 2007) [2011] TZCA 118 (23 June 2011), the Court of Appeal clarified as to when the four hours are to be counted. The Court was of the view that, a person is deemed to be taken under restraint when he is arrested in respect of an offence, and that is when the basic period commences.

In the present appeal, the time taken to interview the appellant was six hours and no proof that section 51 of the Act was complied with. It is clear

therefore that, such a caution statement was made in contravention of the law and should be expunged from the record. But will such have any effect on the appeal?

While this court finds merit in the fifth ground of appeal, the caution statement was not decisive evidence or factor in determining whether the accused (appellant) was guilt or not. The testimony of Pw-1, Pw-2, and Pw-3 as well as **Exh.P-1** and **Exh.P-2** were all sufficient to secure conviction. For that reason, even if the fifth ground has merit, still this appeal will fail as the rest of the grounds of appeal lack merit and the fifth ground of appeal cannot on its own sufficiently overturn the conviction and sentence meted out on the appellant.

In the upshot of all that, this appeal is hereby dismissed as the learned trial magistrate was right in finding the appellant guilty of the offence as charged. The appellant's conviction and sentence were, therefore, appropriate.

It is so ordered.

DATED ON THIS 24TH DAY OF APRIL 2024

.....

DEO JOHN NANGELA

JUDGE