

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**(CORAM: MROSO, J.A., MUNUO, J.A. AND NSEKELA, J.A.)**

**CRIMINAL APPEAL NO. 17 OF 2002**

**BETWEEN**

MOSES MUHAGAMA LAURANCE ..... APPELLANT  
AND  
THE GOVERNMENT OF ZANZIBAR ..... RESPONDENT

(Appeal from the decision of the High Court  
for Zanzibar at Vuga)

(Dourado, J.)

Dated the 8<sup>th</sup> day of October, 2001

in

Criminal Appeal No. 7 of 2001  
-----

**J U D G M E N T**

**MROSO, J.A.**

The appellant was convicted by the Regional Magistrate at Vuga, Zanzibar of unlawful possession of a narcotic drug popularly known as "bhang"; contrary to sections 17(1) and 32(4) of Act No. 6 of 1986, as amended by Act No. 6 of 1991 of the Laws of Zanzibar. He was sentenced

to 15 years in an Education Center. His appeal to the High Court of Zanzibar was dismissed, hence his appeal to this Court. In this appeal the appellant was represented by Mr. A. Patel, learned advocate, and the Respondent Government of Zanzibar was represented by Mr. Abdulhakim Ameir, learned State Attorney. With the leave of the court, Mr. Patel filed an amended Memorandum of Appeal.

Mr. Patel filed four grounds of appeal. The first and second grounds were each argued separately while the third and fourth grounds were argued together. In the first ground it is complained that the trial (sic) judge erred in law and in fact in not declaring the proceedings, judgment and conviction by the trial court a nullity for the reason that the trial court did not inform the appellant of his right under section 162 of the Criminal Procedure Decree, Cap. 14 of the laws, to engage an advocate. The second ground of appeal is divided into paragraphs (a) (b) (c) and (d). In paragraph (a) the complaint is that the trial magistrate did not "take part in the proceedings" although he knew that the appellant was not

represented by an advocate. The complaint in paragraph (b) is that a P.C. Omar and other independent witnesses were not called by the prosecution and that, therefore, the trial court should have drawn an adverse inference from that failure on the part of the prosecution. In paragraph (c) it is complained that the bhang which was said to have been found in the possession of the appellant could have been "planted" on him or could have been tampered with between the time it was alleged to have been found on the appellant and its production in Court. Paragraph (d) appears to have been more of a submission than a ground of appeal. It reads - "the appellant had given a reasonable explanation of innocence in answer to the charge".

The third ground of appeal says that the "trial" (sic) judge should have held that the trial magistrate was wrong to sentence the appellant to 15 years in an Education Centre, that the sentence was unconstitutional, excessive and degrading. In the fourth ground it is said that the "trial (sic) judge erred in law and facts for not holding as illegal the

incarceration of the appellant in the Central Prison whereas, under Act No. 1 of 1980, he ought to have been sent to an Education Centre for correction of his behavior which centre at any rate, he said, was non-existent in Zanzibar.

The evidence which led to the conviction of the appellant was that on 16<sup>th</sup> September, 1998 seven police constables who included PW2 -P.C. Salum Rashid, PW3 - P.C. Ali and a P.C. Omar all from Ng'ambo Police Station were on patrol at a place known as Nyaruguso. They saw a group of people among whom was the appellant. It was said that the appellant immediately took to flight. He was chased and arrested by the police who had become curious why he had acted so suspiciously. P.C. Ali searched the appellant and in the front part of his underpants a packet in a blue plastic bag was found. In the bag there were 46 packets wrapped in khaki paper. The packets contained dried leaves which the police suspected to be bhang. The appellant was then taken to Ng'ambo Police Station and subsequently he was charged in court.

The substances which were said to have been found in the possession of the appellant were on 12<sup>th</sup> October, 1998 sent by PW4 - DC Shamna, to the Government Chemist for analysis to establish what they were. PW1 - Kazija Juma Hassan who worked in the Government Chemist Laboratory as a Government analyst said on 12/10/98 he received 46 packets which were wrapped in khaki paper and were in a plastic blue bag from a person he called PC Shamhuna with Force No. D. 9193. PW4 - DC Shamna is shown to have the same force number D. 9193. It is therefore possible PW1 did not get correctly the name of the detective constable who brought the samples. All the 46 packets together weighed 9.1443 grams.

On 28<sup>th</sup> April, 1999 Kazija Hassan issued a Certificate of Analysis regarding the samples he had received from the police. It said that the samples were bhang because they contained what he called "cannabinol". He sealed the samples and handed them together with the Certificate of Analysis to

DC Shamna. Both the samples and the Certificate were produced at the trial of the appellant as exhibits.

Before the trial magistrate the appellant gave evidence on oath denying he was ever found in possession of the bhang. He had been sitting with colleagues when one out of a group of policemen on patrol picked him and took him to Ng'ambo Police Station. At the police station police counted 40 packets containing bhang and alleged that they belonged to him (appellant). His protests were not heeded and on the following day he was charged in court with the offence of which he was later convicted.

In his appeal to the High Court his advocate, the same Mr. Patel, filed 12 grounds of appeal. Some of those grounds contained complaints which are similar to the ones before this Court. For example, there were the complaints that the appellant ought to have been informed of his right under section 162 of the Criminal Procedure Decree to be defended by an advocate and that such a right is also provided in the

Zanzibar constitution; that the trial magistrate "ought to have taken part in the proceedings", considering that the appellant was undefended. It was also complained that P.C. Omar ought to have been called as a witness by the prosecution and that the court should draw an adverse inference against the prosecution for the failure to call P.C. Omar. Alternatively, the court should have acted under S. 138 (1) of the Criminal Procedure Decree, Cap. 14 to summon that witness. The issue that "the alleged Exhibit Bhang" could have been tampered with, that the appellant had given a reasonable explanation to justify his acquittal and that the sentence which was meted out on the appellant was excessive and unconstitutional were also raised. Finally, it was also complained that there is in fact no "Chuo cha Mafunzo" to which the appellant as a convicted person could have been sent.

The High Court, Dourado, J., very briefly dealt with the appeal. In a two-page judgment he dismissed the appeal. There was no discussion at all of the merits or otherwise of the grounds of the appeal. The quick conclusion was that the

(prosecution) case had been proved beyond a reasonable doubt. Regarding the sentence the learned judge of the first appellate court said that it was the minimum under the law and it was not unconstitutional. On the complaint that a "Chuo cha Mafunzo" did not exist, the High Court said; -

"Regarding Mr. Patel's submissions that the accused was not sent to Prison but to an Educational Institution, S.32 of Act No. 6/1991 provides that an accused shall on conviction be sent to an Educational Centre"

The High Court then as already mentioned dismissed the appeal. Before we discuss the grounds of appeal as presented and argued before us, we wish to observe that in the quotation which we just made above the learned High Court judge imputed to Mr. Patel the exact opposite of what he had submitted before him. Mr. Patel was not agitating for his client to be sent to prison but to a true Chuo cha Mafunzo,

which, according to Mr. Patel, did not exist, and that instead his client had been sent to a prison contrary to law. That was also his complaint before us. Now to the grounds of appeal.

As already pointed out earlier in this judgment the first ground was that the trial was a nullity because the trial court did not inform the appellant of his right to be defended by an advocate.

We think that Mr. Patel has misconstrued section 162 of the Criminal Procedure Decree. The section reads as follows; -

“162. In the absence of any provision in any other law to the contrary, any person accused before any criminal court and against whom proceedings are instituted under this Decree in any such court may of right be defended by an advocate.”

In our considered view, the section merely declares the right of a person who is charged in any criminal court to be defended by an advocate where he chooses to have such services. It does not impose an obligation on the court to inform an accused person that he has such right. As was rightly argued by the learned State Attorney, where the Decree imposes such a duty or obligation on the court it says so explicitly. Examples can be found in section 175 and 178. In section 175(1) a duty is placed on the court to state the substance of the charge to an accused person and in section 178(1) the court is required again to explain the substance of the charge to the accused person if it finds that a *prima facie* case had been established by the prosecution. The court is also required to inform the accused of his right to give evidence on oath and to call witnesses or other evidence in his defence or give a defence not oath and to call witnesses as well.

Mr. Patel has contended that the right to be defended by an advocate goes with the right to be informed by the court of

that right. He cited the case of Thomas Mjengi V.R. [1992]TLR 157 in which Mwalusanya, J., as he then was, held that the right to legal representation implies the right to be informed of that right and that failure to inform an accused person of that right rendered a trial a nullity. But judge Mwalusanya was not discussing the right to legal representation in general. He was discussing section 310 of the Criminal Procedure Act, 1985 (Tanzania Mainland) read together with section 3 of the Legal Aid [Criminal Proceedings] Act No. 21 of 1969. Section 3 of Act No. 21 of 1969 gave power to a certifying authority to direct that free legal aid be provided to indigent accused persons who face criminal charges in court. Section 310 of the Criminal Procedure Act, 1985 reads;

“310. Any person accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court, subject always to the provisions of any rules of

court made by the High Court under powers conferred by Article 26 of the Tanganyika Order in Council, 1920.”

By reading section 310 of the Criminal Procedure Act, 1985 together with section 3 of Act No. 21 of 1969 the judge was emphasizing the right to free legal aid to an indigent accused person. That was why he said of Mr. Kifunda, a State Attorney who represented the Republic in the Mjengi case;

“Counsel for the Republic Mr. Kifunda was candid enough to concede that a poor accused person has a statutory right to be provided with free legal aid and to be informed of that right by the court. He said that right stems from the purposeful construction of S.310 of the CPA as read in the light of S.3 of the Act No. 21/1969. [our emphasis].”

So, in the Mjengi case the High Court had in mind indigent appellants and, in fact, acting under section 3 of the Legal Aid (Criminal Proceedings) Act. No. 21 of 1969 the judge assigned an advocate to provide the appellant before him free legal services in prosecuting their appeal. To conclude his argument on the need for free legal aid to poor accused persons, the judge said; -

“That is why I held that the statutory right to legal representation is contained in S.310 of the CPA No. 9 of 1985 as interpreted in the light of international human rights stands (sic) and norms as above adumbrated. In short S.310 of the CPA should be interpreted to mean that those who can afford to pay have a right to legal representation; and those who cannot afford to pay (i.e. who are poor) have an equal right to free legal aid paid for by the state, as provided in the Legal Aid (Criminal Proceedings) Act. No.

21/1969. That right includes the right to be informed of that right by the trial court."

We understand judge Mwalusanya to be saying that the poor who are entitled to free legal aid should be informed by the court that they have such a right.

The appellant in this appeal did not claim to be indigent and, therefore, in need of free legal aid. In fact he engaged an advocate in both the High Court and in this Court. We do not think, therefore, that the omission by the trial court to inform him that he had a right to engage an advocate, if he wanted to, had the effect of nullifying the whole trial. We dismiss that ground of appeal.

Regarding the second ground of appeal we are satisfied that the trial court observed the statutory requirements in the conduct of the trial. We could not find any indications that the trial magistrate failed to provide necessary protection to

the appellant in the course of the trial as to deserve censure. We would at any rate agree with Mr. Patel that, as a general proposition, a judge or magistrate must not preside on a trial like a football match referee but must ensure that an unrepresented party is not bullied by an advocate for the other party and that he is guided by the court to present his case as fully as possible, without the court appearing to lose its impartiality .

We find the complaint that one P.C. Omar should have been called by the prosecution unnecessary. The policeman was mentioned as simply one of the seven police officers who were on patrol when the appellant was arrested. There is no particular reason why the prosecution should have called him as their witness if they felt that he would not add any material evidence to their case. Nor do we think that there was reason for the trial court to call him as a court witness. The appellant did not intimate to the court that P.C. Omar should be called as a witness.

Mr. Patel argued at some length that there was a possibility that the contents of the 46 packets which were found by the government chemist to be bhang could have been tampered with between the time they were said to have been found on the appellant and when they were tendered in court as exhibits.

Really the time between the analysis by the Government Chemist and the production of the packets as exhibits in court is not all that important when the question of tampering is considered. The really crucial time was between the seizure of the packets by the police at Nyaruguso and the analysis of the contents by PW1-Kazija Hassan. If there was tampering during that period then PW1 may have analysed something other than what was found on the appellant. There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government chemist of what was believed to have been found on the appellant.

Both PW2 - P.C. Salum Rashid and PW3 -P.C. Ali said that when the 46 packets in Khaki wrappers were opened they were found to contain dried leaves which they believed were bhang. From that evidence it is obvious that the packets could be easily opened for the contents to be exposed. When the packets in the blue plastic bag were taken to the police station the evidence is silent on who received them and, whoever received them, what he did with them, or where he kept them. So, for thirteen days up to 29<sup>th</sup> September, 1998 when PW4 -DC Shamna was instructed to investigate the case nothing is known about the condition of the packets. PW4 was given by an undisclosed clerk what he called "the exhibit of this case" and at an unknown time and date he sealed it and sent it to the government chemist, PW1 - Kazija Hassan, on 12<sup>th</sup> October, 1998. This was a period of twenty six (26) days after 46 packets of suspected bhang were found on the appellant.

PW1 said the packets weighed 9.1443 grams but it is not known what the 46 packets seized from the appellant weighed.

What is being said here is that there is no assurance that the substances which were found on the appellant were the same ones which PW4-DC Shamna was handed by the anonymous clerk on 29<sup>th</sup> September, 1998 and which he sealed on an undisclosed date between 29<sup>th</sup> September and 12<sup>th</sup> October, 1998 when he took them to the PW1 - Kazija Hassan. The possibility that there may have been tampering with the contents of the 46 khaki packets when they were lying at Ng'ambo Police Station cannot be ruled out. Mr. Patel, therefore, cannot be said to be raising baseless concerns when he raised the issue that there may have been tampering with what was said to have been seized from the appellant.

Even after samples were received in the Government Laboratory a period of over six months elapsed before PW1 could issue the certificate of analysis to the effect that the packets contained bhang. It is not certain if the analysis was done soon after the packets were received from DC Shamna or whether it was done on 28<sup>th</sup> April, 1999 when the certificate

was issued. The chances of tampering in the Government Laboratory before analysis was done is also not eliminated.

We think the vital missing link in the handling of the samples from the time they were taken to the police station to the time of chemical analysis has created a real doubt if the prosecution proved its case against the appellant to the required standard.

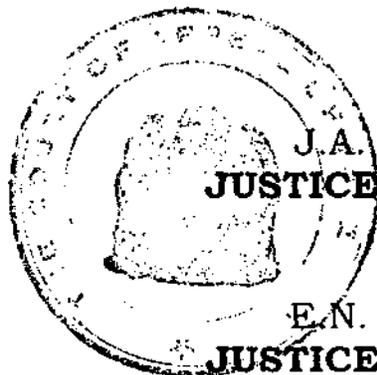
Unfortunately, the High Court, as a first appellate court, did not subject the evidence to critical evaluation. Had it done so it would have come to the obvious conclusion that a reasonable doubt existed and that the appellant was to be given the benefit of that doubt. The result would have been to allow the appeal.

In view of the conclusion we have reached it is unnecessary for us to discuss whether the sentence of 15 years, which was the statutory minimum, if the conviction were sound, was unconstitutional. We also observe that

ground 4 in the memorandum of appeal was in any case unnecessary because the trial magistrate sentenced the appellant to be sent to one of what are known as Education Centres, as required by law. If we had upheld the conviction we would not criticize the trial magistrate for sentencing the appellant as he did. Whether those Education Centres are in truth not educational but are penal prisons as contended by Mr. Patel, cannot be blamed on the trial court. If it is in fact an issue as to what in reality those institutions are, then it should be directed to the appropriate authorities for remedial legal or administrative action.

It should now be clear that the appeal must be allowed. The decisions of the two lower courts are quashed the conviction and sentence of fifteen years in an Education Centre are set aside. The appellant is to be set free forthwith unless he is being held for some other lawful cause.

DATED at ZANZIBAR this 31<sup>st</sup> day of October, 2003.



J.A. MROSO  
**JUSTICE OF APPEAL**

E.N. MUNUO  
**JUSTICE OF APPEAL**

H.R. NSEKELA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

F.L.K. Wambali,  
**DEPUTY REGISTRAR**