IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 188 OF 2023
(Arising from the Jugdement of the District Court of Temeke at Temeke dated 28th June 2023 in Criminal Case No. 140 of 2022)

MAULID SHABANI SUNDI ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: 15th March 2024
Date of Judgement: 9th April 2024

MTEMBWA, J.:

In the District Court of Temeke, the Appellant was arraigned for the offence of unlawful Possession of prohibited plants contrary to ***section 11 (1) (d) of the Drugs Control and Enforcement Act, Cap 95 RE 2019***. I was alleged that, the Appellant, on 30th December 2021, at Mbande Rufu area within Temeke District in Dar es Salaam Region, was found in possession of prohibited Plants,

cannabis sativa commonly or known as Bhangi weighing 198.05 grams.

The accused pleaded not guilty to the charge. Consequently, the prosecution paraded seven (7) witnesses and tendered six (6) exhibits including the 320 pallets of prohibited Plants, cannabis sativa. The Appellant testified as DW1. He did not tender any exhibit. Having evaluated the evidence adduced during hearing, the trial court was satisfied that the Appellant committed the alleged crime and proceeded to convict him as charged. The trial Court then sentenced the Appellant to serve thirty (30) years imprisonment. Dissatisfied by both, the conviction and sentence, the Appellant has filed before this Court the following grounds of appeal;

1. *That, the learned trial magistrate erred in law and fact in convicting and sentencing the appellant based on the defective charge as the evidence on record was in variance with the particulars of the offence in respect of the offence he was charged with.*

2. *That, the learned trial magistrate erred in law and fact in convicting and sentencing the appellant based on exhibit P1, P2, P3 and Pw4 which were illegally and/or un-procedurally procured contrary to the provisions of section 38 (1)(2)(3) and 40 of the Criminal Procedure Act, (Cap. 20 RE 2022) the omission of renders the alleged exhibits a nullity (sic).*

3. *That, the learned trial magistrate erred in law and fact in convicting and sentencing the appellant based on the exhibit P2. (320 pellets of Bhangi) which were not recovered in the appellant's room the omission which cast doubt on the prosecution case.*

4. *That, the learned trial magistrate erred in law and fact in failing to observe that Pw2 and his team who conducted the said search were not inspected by the appellant before they entered in the house for conducting search.*

5. *That, the learned trial magistrate erred in law and fact in convicting and sentencing in a case which was not proved beyond all reasonable doubts by the prosecution against the appellant as required by law.*

Initially, this matter was presided over by Hon. Mwakapeje, J who has been reportedly to have been transferred to another duty station. It was therefore re-assigned to me on 8th January 2024 for final determination. By order of this Court dated 21st November 2023, parties were ordered to argue this Appeal by way of Written Submissions.

In the conduct of this appeal by way of written submissions, the Appellant argued for and on his behalf while Mr. Erick Kamala, the learned state attorney, argued for and on behalf of the Republic. The

Appellant opted to compress his grounds of appeal into one single ground of appeal as quoted below;

> *That, the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant in a case which was not proved beyond all reasonable doubts by the prosecution against the appellant as required by law.*

Stagging the floor to argue his appeal, the Appellant submitted that, the learned trial Magistrate erred in law and fact by convicting and sentencing him for the offence that was not proved to the required standards, that is, beyond reasonable doubts. He added that, the law mandates the prosecution to prove the charge beyond reasonable doubts in view of ***section 3 (2) (a) and 110 (1) (2) of the Evidence Act, Cap. 6 R.E 2022***. He cited the cases of ***Jonas Nkize Vs. Republic (1992) TLR 213*** and ***Joseph John Makune Vs. Republic (1986) TLR 44***.

The Appellant insisted that, the offence to which he was charged with was not proved to the requirement standards as in the first place, the purported search and seizure was illegally and or unprocedurally conducted. He added further that, neither the Said independent witness (PW6) nor the Police officers who conducted

search and seizure were inspected by him before entering his House. In the second place, that, since the room to which the alleged pallets were seized was dark, there was a need to explain the brightness of the light available at that material time. He then faulted, in the third place, failure by the prosecution to call the Appellant's children to testify in evidence.

The Appellant noted further that, according to prosecution evidence, the alleged 320 pellet of Bhang were found in the reddish bag but the said reddish bag was never marked at the scene of the crime in the presence of PW6 and himself for proper establishment of the chain of custody. He also complained that, there was no labels on the said 320 pallets of Bhangi (Exhibit P2) to avoid tempering with them. He cited the case of ***Iluminatus Mkoka Vs. Republic (2003) TLR 245*** where it was observed that, improper or absence of a proper account on the chain of custody leave a possibility of the exhibits to be tempered with.

From the above observations, the Appellant was of the views that, there was no evidence that the 320 pellets of Bhang (Exhibit P2) were found in his possession. He cited the cases of ***Woolmington***

Vs. DPP (1935) (1935) AC 462 and ***DPP Vs. Stephen Gerald Sipuka, Criminal Appeal No. 373 of 2019***.

Lastly, the Appellant implored this Court to allow the Appeal and set aside the conviction and sentence imposed to him by the trial Court.

In reply, the learned State Attorney for the Republic supported both, the conviction and the sentence meted against the Appellant in view of ***section 11 (1) (d) of the Drugs Control and Enforcement Act (supra)***. Thereafter, the learned State Attorney argued on the condensed ground of appeal as hereunder.

On whether the independent witness (PW6) or the arresting police officer (PW2) were supposed to be inspected before the search, the leaned State Attorney submitted that, there was no such requitement either under ***Section 32 of the Drugs Control and Enforcement Act (supra)*** nor ***Section 41 of the Criminal Procedure Act, Cap 20, R.E 2022*** and as such, that, the allegations were misplaced.

On whether it was dark and that the light, intensity or brightness was not fully explained by prosecution witnesses, the learned State Attorney submitted that, the issue of intensity of light in

search and seizure is not of essential under ***Section 32 of the Drug Control and Enforcement Act (supra)*** nor ***Section 41 of the Criminal Procedure Act (supra).*** That, what was important is that, the search was conducted in the Appellant's premises in the presence of an independent witness (PW6) and as a result, 320 pellets of bhangs were found in his premises. And further, that, the Appellant himself signed the certificate of seizure (Exhibit PW-exhibit 4) acknowledging that the said pellets were found in his possession.

The learned State Attorney continued to note that, the police officer who conducted the search and seizure (PW2) explained on how the whole process was conducted under page 19 of the typed proceedings. That his testimonies, was supported by an independent witness (PW6) under page 33 thereof.

As to whether it was mandatory that the Appellant's children be brought to testify as witnesses, the learned State Attorney submitted that, there is no specific number of witnesses required to prove prosecution case and that, it is within the mandate of the prosecution to call witnesses whom they deem fit and sufficient to prove the case. He cited ***section 143 of the evidence Act (supra).*** As such, the

allegation by the Appellant was misconceived, the learned state attorney insisted.

As to whether the chain of custody was fully established, the learned State Attorney observed affirmatively that, the chain of custody was accordingly established by the prosecution witnesses. The learned State Attorney submitted in length further on how the chain of custody was established by prosecution evidence on records. That, according to an independent witness (PW6), he witnessed the 320 pellets of bhang being seized from the Appellant's house kept in the reddish bag. That, PW3 at page 24 of the proceedings testified to have received the accused together with the reddish bag containing the said pellets. He then handled the same to PW7 (exhibit keeper).

The learned State Attorney continued to note that, PW4 asked for the said reddish bag with 320 pallets of Bhangi from PW7 at the time of interrogation and remitted the same to him in the presence the Appellant. That, PW5 took the said reddish bag to the government Chemist for examination from PW7. That, after examination, PW5 returned the same to exhibit keeper (PW7). The learned State Attorney argued further that, according to PW7, the reddish bag contained 320 pallets of Bhangi in an envelope was remitted to him

after examination. He added that, the government chemist (PW1) testified to have received the said envelop from PW5 and having conducted examination, she sealed the envelope, signed, stamped and wrote a lab number on it.

The learned State Attorney was of the view that, considering the testimonies of the prosecution witnesses, the chain of custody was fully established. He implored this Court to find the allegations by the Appellant to be devoid of merit. He beseeched this Court to dismiss the Appeal.

Having considered the rival submissions by the parties, the issue for determination here is whether the offence of unlawful Possession of prohibited plant contrary to ***section 11 (1) (d) of the Drugs Control and Enforcement Act (supra)*** was proved by the prosecution to the required standards of the law, that is, beyond reasonable doubts.

In ***Ahmad Omari Vs. Republic, Criminal Appeal No. 154 of 2005, Court of Appeal of Tanzania at Mtwara (unreported),*** the court observed that, in a criminal case, the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt. This is in consonant with ***Section 3(2) (a) of the Evidence***

Act (supra). In the famous case of ***John Makolobela Kulwa Makolobela & Another*** *alias* ***Tanganyika Versus Republic (2002) TLR 296****,* the court noted;

> *A person is not guilty of a criminal offence simply because his defence in not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which established his guilty beyond reasonable doubts.*

Well, being the first appellate Court, it has a duty to re-evaluate the evidence on records and put it under critical scrutiny and come out with its own conclusion. In the case of ***Mapambano Michael @ Mayanga vs. Republic, Criminal Appeal no. 258 of 2015***, the court placed the special duty on the first appellate court as follows;

> *The duty of the first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court decision or maybe different altogether.*

From the records, the 320 pallets of Cannabis Sativa (Bhangi) were seized from the Appellant's House. According to PW2, on 30th December 2021, he was secretly informed that, the Appellant was selling prohibited plants known as Cannabis Sativa (Bhangi) (PW-Exhibit P2). Together with an independent witness (PW6), entered the

Appellant's House where the said 320 pallets were found in the room used by his children. Having arrested the Appellant and seized the said pallets, handled the same together with the suspect (Appellant) to PW3 who then handled the Pallets to PW7 (exhibits keeper).

According to PW7 (exhibits keeper), while at Mbagala Police Station, on 30th December 2021, PW3 handled to him 320 pallets of Cannabis Sativa (Bhangi) (PW-Exhibit P2) in a reddish bag. He counted them and having satisfied himself, he entered the same in PF No. 16 (Exhibits Register) ana labeled it as 881/2021. On 31st December 2021 at 08:15 Hours, PW4 asked for the pallets for sending them to the Government Chemist. He handled them to her. On the same day, at 14:20 Hours, PW5 come back with the pallets this time with Lab Number 3629/2021. PW7 continued to keep the pallets until further notice. That, on 24th January 2023, PW4 again took the pallets from PW7 for tendering them in Court as evidence. Since then, PW7 (Exhibit keeper) never saw the 320 pallets of Cannabis Sativa (Bhangi) again.

According to PW1 (Kaijunga Traiphone Drassy), on 31st December 2021, He received an envelope with 320 pallets of Cannabis Sativa (Bhangi) together with Form No. DC EA 001

requesting for the weight, type and effects of the drugs. He examined the pallets and found them to have Tetrahydrocamabinol (THC), the chemical substance found only in Bhangi. The pallets weighted 198.05 grams. From his testimonies, the said pallets together with the report were returned to PW5. He tendered the 320 pallets of Bhangi and was admitted as PW – Exhibit P2.

In her testimony at page 6 of the typed script of the Proceedings, PW4 (WP5527 D/CPL Getrude) corroborated the evidence of PW7 (exhibits keeper) that she asked the pallets from him for purposes of interrogation and she handled them back to him in the presence of the Appellant. She testified further that, on 31st December 2021 at 12:00 Hours, PW5 (WP7794 D/CPL Sarah) took the said pallets to the Government Chemist for examination. That, the same were handled back to her (PW5) who then handled the same back to PW7 (Jonas Maturu Mimbo – retired), the exhibits keeper.

PW5 (WP7794 D/CPL Sarah) testified at pages 29 to 30 of the typed script of the Proceedings that, on 31st December 2021, he took the 320 pallets of Bhangi to the Government Chemist for examination. PW5 testified further that she received the said Pallets from PW4 who

received the same from PW7 (exhibit keeper). That, after examination, he handled back the pallets to PW7.

From the above summaries of evidence, it is difficult to understand how PW – Exhibit P2 got into PW1's hands for tendering. As testified by PW7 (exhibit keeper), it was PW4 (WP5527 D/CPL Getrude) who took the said exhibit for purposes of sending the same to the Court on 24th January 2023. But then, the one who tendered the said exhibit is PW1 whose name can not be traced from the exhibit handling register. He was not the one who took the Pallets from PW7, the exhibit keeper.

PW4 (WP5527 D/CPL Getrude) did not testify to have handled PW – Exhibit P2 to PW1 for tendering in Court. Even PW1 himself did not testify to have received the said exhibit for tendering from ether PW4 or PW7 (exhibit keeper). In such circumstances, I wonder where did PW1 got the 320 pallets of Bhang for tendering. Such kind of explanation was supposed to be brought into records by either PW4 or PW1. Since the records reveal that, after examination by PW1, the said pallets were handled back to PW5 who then handled the same to PW7, there was a need to have an explanation on records on how the

said pallets got their way back to PW1 for the second time. To my surprise, the records are silent.

In the absence of such explanation, I cannot speculate that, what was tendered as PW – Exhibit P2 is the same exhibit (320 pallets of Bhangi) taken from PW7 by PW4. And if it was, I don't see the reason why PW1 remained silent on how the same moved to his hands for tendering. Such an explanation also could have served the day if so adduced by PW4. I therefore disagree with the learned State Attorney that, the chain of custody was fully established.

As such, it was therefore mandatory to establishe by evidence, whether by written document or oral account, a chain of custody of PW - Exhibit P2 to enable the Court to assess its authenticity. In ***Paul Maduka and 4 Others Vs Republic, Criminal Appeal No. 110 of 2007 Court of Appeal of Tanzania at Dodoma*****,** the court noted that;

> *The chain of custody requires that from the moment the evidence is collected, it very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*

In ***Chacha Jeremiah Murimi & Others Vs. Republic (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019),*** the Court observed that;

> *In order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence. There should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit. The chances of tampering in the Government Laboratory analysis should also be eliminated. Generally, there should be no vital missing link in handling the exhibit from the time it was seized in the hands of the suspect to the time of chemical analysis, until finally received as evidence in court after being satisfied that there was no meddling or tampering done in the whole process*.

However, I am mindful that, not every time the chain of custody is broken then, the exhibit is not received as evidence in Court. It depends with the kind or nature of the exhibit sought to be used as evidence. A line of deference must be drawn between properties or exhibits which can change hands easily and those which cannot or exhibits which can easily be tempered with and those which cannot.

In the case of ***Joseph Leonard Manyota v. Republic, Criminal Appeal No. 485 of 2015 (unreported),*** of which I fully subscribe to it, the appellant challenged the chain of custody of a motor cycle. In differentiating the chain of custody in respect of exhibits which can change hands easily and those which cannot, this Court stated;

> *it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case.*

The 320 pallets of Cannabis Sativa (Bhangi) are one of the plant leaves that can be easily tempered with. It is even difficulty to differentiate them from other plants leaves. In such circumstances, there was a need to have the chronological movement of the exhibit recorded either by writings or oral account to eliminate all possibilities of tempering with it.

In that stance, I hold the view that, the chain of custody in respect to PW – Exhibit P2 was not fully established by written document or oral account. It follows therefore that the said exhibit is hereby caught in a web of illegalities. I therefore proceed to expunge it from the records.

Having so observed, the question would be whether, having expunged PW Exhibit P2, the remaining evidences on records suffice to convict. Since the said exhibit was the heart and blood of the Charge, I see nothing warranting the conviction. Having so observed, I see no reason to discuss the grounds of appeal as raised in the Petition of appeal and condensed into one.

To that end, I allow the appeal for the reasons advanced above. The conviction and the sentence meted against the Appellant is hereby set aside. The Appellant is to be released from prison forthwith unless held for other lawful purposes.

I order accordingly.

Right of appeal fully explained.

DATED at **DAR ES SALAAM** this 9th April 2024.

H.S. MTEMBWA
JUDGE