IN THE HIGH COURT OF TANZANIA
AT MTWARA

APPELATE JURISDICTION

CRIMINAL APPEAL NO 70 OF 2006

(Original Kilwa D/Court Cr. Case No. 44/2006: Before S.G. Cleophas ESQ.)

BETROD WILBERT KIGODI.....APPELLANT

Versus

THE REPUBLIC .....RESONDENT

27/5/2008 & 9/6/2008

JUDGMENT

RWEYEMAMU, J.

The appellant **Betrod Wilbert Kigodi** was charged in Kilwa District Court (DC) Cr. Case 44/2006 of being in possession of Narcotic drug (bhang) c/s. 12 (d) (h) of the Drugs & Prevention of Illicit Traffic in Drugs Act 9/1995. He was tried, convicted and sentenced to serve 5 years imprisonment.

Briefly stated. the facts and evidence upon which the impugned decision was based are as follows: The prosecution's case was based on the testimony of two witnesses both policemen. According to **Pw**[1], he was on duty on 11/3/2006 (time not specified – but according to the charge sheet, the appellant was found in possession about 07.00hrs) when someone came and told them that a person had been apprehended for stealing, he went with his colleagues among them **Pw**[2] and found the accused/appellant standing with his father. On seeing them, he saw the appellant

take something from his pocket and hide it on the roof. He checked that item out and found that it was "a small bhangi tied with a small –inside a packet of cigarette". They showed it to the people around including the appellant's father. They arrested the appellant for that offence as well as that of stealing for which they were initially called in.

According to **Pw**[2], he was in the office on the morning of 11/3/2006, when they received information as described by **Pw**[I] from someone informing them that civilians had apprehended a thief who had stolen their table – that they needed the police. He went with **Pw**[I] and another policeman to the house of the appellant's father one Mzee kigodi. There were many people around. The witness's account of subsequent events is similar to that of **Pw**[I].

On that evidence the DC concluded and I quote:

> *The alleged Bhangi was tendered in court as exhibit therefore the prosecution has proved his case* ***and the accused person has failed to prove to the contrary that he was not found with the alleged Bhangi.*** *For these reasons the court convict the accused person as charged.* (Emphasis mine)

Dissatisfied with both conviction and sentence, the appellant filed a 10 ground Memorandum of Appeal (MA) and therein expressed his wish not to appear for the hearing. In the said grounds, though repetitive and inarticulately presented the appellant basically faults the DC for convicting him on insufficient evidence – emphasizing that the evidence of **Pw**[I] and **Pw**[2] was insufficient to prove possession on his part. The appellant also submits in the other grounds that the sentence was excessive and inappropriate, that since the offence has an alternative for fine in the circumstances described, the DC erred in passing a custodial sentence.

Substantially, the learned state attorney Ms. Shio concedes the point raised by the appellant with respect to conviction. Declining to support conviction, she submits that the prosecution case is not credible, being as it was, based on the evidence of only two witnesses–both of them policemen, when as per evidence the arrest was done in the presence of a crowd of people including the appellant's own further. According to her, the prosecution should have called in at least one neutral witness among those present at the time of arrest.

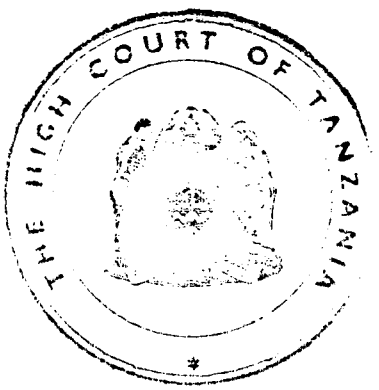
I agree with both parties in this case that in the circumstances of arrest of the appellant, the evidence adduced was insufficient. There is no law which prevents a court from relying on evidence of police officers only but I would state that what matters are the peculiar circumstances of each case. According to the evidence, there were many people including the father of the appellant when he was arrested, I find it curious and suspect that none of them was called to testify save the two policemen, even though the prosecution would have known that calling in a neutral witness would have strengthened their case. In the circumstances, it is hard to shake off the distinct feeling that this might have been a case of overzealous police officers anxious to secure a conviction.

Further, I also find it difficult to believe that the appellant who was apprehended with a crowd of people around, would have chosen to hide, and had the opportunity to hide the substance described by the two police witnesses after they had arrived.

Apart from the said reasons, I would still find the case not proved in view of the reasoning used by the DC magistrate, as indicated by the above emphasized portion of the judgment. The impression created by the sentence is that the court

shifted the burden of proof from the prosecution to the accused to prove that he was not in possession. Such is not the law of this country. In criminal cases the burden never shifts to the accused – so a court can not state that the accused has failed to prove…'The role of the accused remains 'to raise reasonable doubt'.

In view of my said decision regarding conviction, I will not deal with the interesting points raised with respect to sentence. In conclusion I find the appeal merited, set aside the appellant's conviction, quash his sentence and order the appellant's immediate release from custody unless otherwise lawfully held.



R.M. RWEYEMAMU
JUDGE
9/6/2008