IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 265 OF 2017

(Originating from The District Court of Ulanga at Mahenge, Criminal Case No 99 Of 2015 Before: Hon. M.J Mahumbuka– DRM Dated 23th March, 2016)

JUMA SAKALA NDOFO---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Last order date: 8th June, 2018
Judgment date: 21st June,2018

MLYAMBINA, J.

Before the District Court of Ulanga at Mahenge, the appellant was convicted of unlawful possession of Bhang contrary to Section 16(1) (a) of the Drug and Prevention of Illicit Traffic in Drug Act Cap 95 (R.E.2002) and sentenced to serve a term of ten (10) years in jail. Being dissatisfied with the conviction and sentence, the appellant lodged this appeal on four grounds namely; -

1. That, the appellant did not commit the offence charged. That, the trial Magistrate erred in law and fact in convicting

the appellant merely holding that the appellant was fo possession of Bhang without any forensic evidence from Government Chemists Bureau to prove the same in compliance with mandatory requirements of the law.

2. That, the trial Magistrate erred in fact and in law by convicting and sentencing the appellant without the prosecution side proving the case beyond reasonable doubt.
3. That, the trial Court judgment was procured illegally as the appellant was convicted and sentenced in his absence and upon apprehension, he was not given time to show cause while he was at large in compliance with the mandatory requirement of the law.

WHEREFORE, the appellant prayed this appeal be allowed, conviction be quashed, sentence be set aside, order for forfeiture of the motor cycle be set aside and set the appellant at liberty.

Apart from the afore grounds of appeal, the appellant lodged other 7 supplementary grounds of appeal, to wit; -

1. That, the trial Court judgment is defective for it does not specify Section of the Penal Code to convict the appellant as required by law.
2. That, a trial judgment did not contain factual and legal points for determination in evaluating and analyzing of the evidence in record in order to determine its worth credibility and

significance by using legal standard of admissibility burden and standard of proof and weight of the evidence both prosecution and defence case.

3. That, a trial Court erred in law and in fact to convict the appellant on illegality of procedure when the court marked Section 210 (3) of the Criminal Procedure Act (Cap 20 R.E.2002) was compiled while the appellant was not informed if he is entitled to have his evidence to be read over to him. As the result, the defective has caused some answers of cross examination been not recorded.
4. That, the trial Court erred in law to convict the appellant on irregularity when the court denied the appellant to furnish with complainant statements and that of the witness named in the memorandum of facts and documentary exhibits to be used as evidence in court.
5. That, the trial Court erred in law and in fact to convict the appellant based on exhibit (Bange) to which was not examined by the Government Chemists to prove the charge.
6. That, the trial court erred in law and in facts to convict the appellant on his absentia without been given an opportunity to be heard or to show cause why he was not attending in the court session.
7. That, the trial Court erred in law and in fact to convict the appellant based on exhibit marked Bhange to which the

appellant was not seized to be found with. Therefore, the prosecution did not prove the case beyond reasonable doubt.

WHEREFORE, the appellant prayed to this Hon. Court that the appeal be allowed, quash the conviction, sentence of 10 years imprisonment and an order of return the motor cycle to the appellant and set the appellant at liberty.

In his oral submission, the appellant was of contention that his four grounds of appeal be adopted and be considered so that the conviction and 10 years sentence be quashed and be set aside. That the appellant be set at liberty so that he can join his family.

The appellant submitted that, he was convicted and sentenced in his absentia. That, the appellant was not given a right to defend himself. The appellant was of submission that he rides a motor cycle "bodaboda". It was the contention of the appellant that he was given luggage but he did not examine it. The appellant did not know if it was Bhang. The appellant told the Court that he was hired to send it to the village known as Minepa Lupilo in Ifakara.

The appellant prayed the conviction be set aside and his motorcycle continue be forfeited.

In reply, Veronica Matikira learned State Attorney conceded with the appeal on the following reasons. The appellant has brought a

total 11 grounds of appeal. The learned state Attorney categorized the grounds of appeal into two. The first one is the jurisdiction of the Court which vitiates everything. The learned State Attorney maintained that, from the charge sheet the accused was charged to be in unlawful possession of bhang contrary to Section 16 (1) (a) of the Drug and Prevention of Illicit Drug Act Cap 95 (R.E.2002).

In view of the learned State Attorney, Section 2 of the same act, it is the definition/ interpretation section. It defines a court as Courts in respect of offences under section 12; and 12 (d) means the subordinates courts and in respect of offences under section 16, 17, 18, 19, 20, 21, 22, and 23 means the High Court. From that provision, it is clear that the accused was charged by the Court which had no jurisdiction to try the matter. For the court to lack jurisdiction means trials judgment, convictions and sentences were a nullity.

The learned State Attorney stated that, there are a lot of procedural illegularities in this matter. First of all, if one assumes that the Court had jurisdiction, the accused was supposed to plead guilty but from page 1 of the proceedings the accused never pleaded guilty, even he was not asked to plead guilty. That is contrary to Section 228 of the Criminal Procedure Act.

The learned State Attorney was of further submission that, from the proceedings it appears the accused person was not around. At

page 6 for instance it was reported the accused was sick. That, after three adjournments the prosecutor prayed to proceed *ex-parte* in the absence of the accused. After the accused was convicted, it is mandatory he was supposed to be taken back to the court to be informed of what transpired in his absence and for him to adduce reasons of his absence (if any) before the Court could confirm the conviction or set aside the conviction and the accused be allowed to give his defence. That is the requirement as per Section 226 (2) of the Criminal Procedure Act.

The learned State Attorney commented on a charge sheet to the effect that the charge was on possession of Bhang which is narcotic. One of the elements which needed be proved by the prosecution is that the seized substance was narcotic. But from the evidence, it is clear that the substances were not taken to Chief Government Chemists Laboratory Agency for analysis to confirm weight and type of drugs involved. Failure to do so, in view of the State Attorney, it was also detrimental to the prosecution case.

The State Attorney stated that the prosecution side never even proved chain of custody of the substances. The learned State Attorney was of further view that, even the judgment did not meet the requirement of Section 312 of the Criminal Procedure Act. Thus, there are no issues/ points of determination, nor reasoning and no law applied to convict the accused.

The learned State Attorney was of opinion that the court had no jurisdiction to try the matter, even if it had jurisdiction, in view of the learned State Attorney, the prosecution never proved the case beyond reasonable doubts and there are several illegularities on the court side.

The learned State Attorney winded her submission by telling the Court that she noted the Court ordered the substances be destroyed, then, if the Court will order for trial *denovo*, it won't help. As regards forfeiture, the Court has no jurisdiction. The learned State Attorney therefore asked the Court to order the motor cycle be returned to the appellant.

In rejoinder, the appellant prayed his motor cycle be returned.

In disposing this appeal, I will **first,** commence by looking unto the elements of the unlawful possession of Bhang offence. When deciding the case on unlawful possession, the court of Appeal had this to say in **Moses Charles Deo versus the Republic [1987] TLR 134; -**

> "..... *for a person to be found to have had possession, actual or constructive of goods,* ***it must be proved either that he was aware of their presence and that he exercised some control over them, or that the goods came, albeit in his absence, at his invitation and arrangement****. But it*

is also true that mere possession sometimes denotes knowledge and control" (Emphasis added)

From the afore quoted authority, the important elements are existence of *knowledge and control of the property*. As correctly explained by the appellant in his submission, the appellant was given luggage but he did not examine it. The appellant did not know if it was Bhang.

It follows therefore that the appellant in this case was not found in unlawful possession of bhang because it was out of his knowledge. The records reveal that the prosecution side never proved as required by the law that the appellant was aware of carrying narcotic drug.

Second, even if true the appellant had carried drug, it is only Chief Government Chemists Laboratory Agency who could prove with certainty after analysis that it was drug, its weight and type of drugs involved. It follows therefore that the appellant was convicted basing on mere suspicions which is not the basis of criminal conviction. In the case of **Jonas Bulai vs the Republic, Criminal Appeal No. 49 of 2006 (un-reported) the Court of Appeal of Tanzania** while facing the similar issue, it held; -

"The appellants conviction was predicated upon speculations, hearsay and suspicions. It is now trite law that

a suspicion however strong cannot be a basis of a criminal conviction..."

Third, the proceedings of the trial Court reveal that the appellant herein was not heard. The matter was heard ex-parte. As correctly submitted by the learned State Attorney, in terms of Section 226 (2) of the Criminal Procedure Act Cap 20 (R.E. 2002) after conviction, the appellant ought to have been taken back to the court to be informed of what transpired in his absence and for him to adduce reasons of his absence (if any) before the Court could confirm the conviction or set aside the conviction and the accused be allowed to give his defence. By not doing so, the appellant was denied of his right to be heard. In the case of **Dishon John Mtaita vs The Director of Public Prosecutions, Criminal Appeal No. 132 of 2004 Court of Appeal of Tanzania (un-reported)** held; -

"A denial of the right to be heard in any proceedings would definitely vitiate the proceedings..."

Fourth, the question of jurisdiction, section 2 of the the Drug and Prevention of Illicit Traffic in Drug Act Cap 95 (R.E.2002) entitled the High Court only to try cases involving unlawful possession of Bhang contrary to Section 16 (1) (a) of such law. The appellant herein was charged of unlawfully possessing 40 Kilograms of

Bhang, the offence of which ought to have tried by the High Court only.

Fifth, as properly argued by the learned State Attorney, the records show that the appellant was neither asked to plead guilty nor did he plead guilty. Section 228 of the Criminal Procedure Act Cap 20 clearly requires in a mandatory term that the accused shall be asked whether he admits or denies the truth of the charge. Therefore, the omission by the Court to have asked the accused to plead guilty was in violation of the law afore stated.

In view of foregoing, the conviction of the appellant was therefore arrived at without sufficient evidence and jurisdiction. It cannot be left to stand. I set aside the conviction, sentence and orders for forfeiting his motorcycle. The accused must be set free immediately unless otherwise lawfully held. His seized motorcycle which was forfeited should be restored to him without any condition. Appeal allowed.

Y. J. Mlyambina

Judge

21/06/2018

Dated and delivered this 21th day of June, 2018 in the presence of the appellant in person and learned State Attorney Veronica for the respondent.

Y. J. Mlyambina

Judge

21/06/2018