IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 27 OF 2022

(Originating from Criminal Case No 113 of 2017 in the District Court of Kilwa at Masoko)

SAID KASIMU MBONDE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

24/8/2022 & 31/10/2022

LALTAIKA, J;

The appellant herein **SAID KASIMU MBONDE** was arraigned in the District Court of Kilwa at Kilwa Masoko charged with Cultivation of Prohibited Plants contrary to section 11(1)(a) of the **Drug Control and Enforcement Act No 5 of 2015.** When the charge was read over to the accused (now appellant) on 28/11/2017 he denied having committed the offence prompting the court to conduct a full trial to enable the prosecution to prove the case while according the accused an opportunity to prove his innocence.

The prosecution paraded a total of 6 witnesses and 3 exhibits. The defense case, on the other hand, had only one witness (DW1) the current appellant. The trial Magistrate Hon. G.P. Ngaeje, having been convinced that the prosecution had proved the case beyond reasonable doubt, convicted the appellant as charged and sentenced him to spend thirty (30) years in prison.

Dissatisfied with both conviction and sentence, the appellant has appealed to this court on the following grounds:

1. *That the trial court erred in law and fact to convict and sentence the appellant because the prosecution side failed to prove its case beyond reasonable doubt as required by law per section 3(2)(a) of The Evidence Act, 1967. Unfortunately, the trial court convicted and sentenced the appellant on the weakness of evidence of defense side*
2. *The trial magistrate erred in law and fact in convicting the appellant without considering the defense of appellant so as to comply with the requirement of section 235(1) of the Penal Code [Cap 20 2022]. It is clear that the trial court finding was arrived at without subjecting the evidence of both sides to an objective analysis and evaluation. See the stance and decision of the court in the case of KAIMU SAIDI vs REPUBLIC Criminal Appeal No 391 of 2019 (unreported) at Mtwara. The appellant was denied of his right of having his evidence properly considered by the Magistrate and the High Court Judge; this led to the miscarriage of justice as held in the case of HUSSEIN IDD and Others vs. Republic [1986] TLR 166.*

On the 25th day of March 2022, the appellant lodged four grounds of appeal as reproduced below:

1. *That the trial Magistrate erred in law by failing to comply with the requirements of section312(1) and (2) of the Criminal Procedure Act [Cap 20 R.E. 2002] when composing the judgement*

2. *The learned trial magistrate erred in law in relying on seizure certificate (exhibit P2) which was procured in contravention with the requirement of section 38(3) of the Criminal Procedure Act [CAP 20 RE 2002)*
3. *There was no proper chain of custody established that leaves no doubt on the tempering of the alleged "Bhangi" (exhibit P3). PW4's evidence was from the effect from 03/02/2017 there is uncleared doubts on where the alleged Exhibit p3 was from the date of seizure 10/01/2017 up to 03/02/2017 when it was tendered to the court as evidence. This doubt could be resolved for the benefit of the appellant*
4. *The learned magistrate erred in law and fact by convicting and sentencing the appellant while the prosecution side failed to prove their charge beyond any reasonable doubt as per section* ***3(2)(a) of the Evidence Act, 1967.*** *The prosecution side failed to explain to the court the amount quantity of the alleged bhangi seized from the appellant. The court was not taken to the farm alleged to have been planted the said prohibited plants so as to prove the fabricated allegations against the appellant.*

When the appeal was called on for hearing on the 24/8/2022, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, enjoyed the services of Mr. Enosh Gabriel Kigoryo, State Attorney. The appellant proposed that the learned lawyer submits first as that would make it easier for him to address the specific areas of the appeal in his rejoinder. The learned State Attorney had no objection to the proposal.

Responding to the first ground of appeal, Mr. Kigoryo asserted that on 9/1/2017 PW5 Police Officer in Charge of Kilwa was tipped of illegal possession of a firearm at Mtanda Village in Kilwa. On 10/1/2017 the appellant was arrested suspected of illegal possession of a firearm. According to PW5 they got hold of the firearm from the appellant but in the course of

further investigation they discovered that the appellant had a maize shamba (corn farm) in which he also cultivated bhangi.

The learned State Attorney averred further that PW1 (police officer who arrested the appellant) PW2 and PW3 (local government leaders) witnessed the farm where the prohibited plants were cultivated. According to PW3 and PW2, asserted Mr. Kigoryo, the farm was owned by the appellant and that the argument that the appellant never owned the farm was not raised during trial.

It is Mr. Kigoryo's submission that according to PW3 the bhangi was destroyed (slashed down) in the presence of the appellant. Mr. Kigoryo averred that PW1 had testified that upon interrogating the appellant he agreed that the farm belonged to him, but he did not know who had planted the bhangi therein.

Mr. Kigoryo emphasized that the appellant did not cross examine on the same and that failure to cross examine on the material evidence like that suggested that the accused had admitted the truth of that fact. To support his contention, Mr. Kigoryo referred this court to the case of **Emanuel Saguda Sulukuka and Another v. R.** Crim App. 422B of 201 in which the Court of Appeal quoted a foreign case of **Browne v. Dunn (1893) 6R.67, HL** as here under

> *"It was held in that decision, a decision not to cross examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate."*

It is Mr. Kigoryo's submission that available evidence indicates that PW6 had taken a sample of Exhibit P3 (bhangi) to the Government Chemist (PW4) and it was discovered that the plant found in the appellant's farm was narcotic drug known as *cannabis sativa* commonly referred to as bhangi. The learned State Attorney averred that the same was corroborate by the report of the government chemist that was admitted in court as Exhibit "P1".

Going through the entire record of the trial court, Mr. Kigoryo reasoned, nowhere does it show that PW2 and PW3 had quarreled or any how differed with the appellant before. The logic is, reasoned Mr. Kigoryo further, there is no way PW2 and PW3 (local leaders) could collude with a police officer just to get the appellant into trouble. The learned State Attorney averred that a similar situation was dealt with by the Court of Appeal of Tanzania in the case of **Rashidi Ally v. R.** [1987] TLR 97 where the Apex Court stated:

> *"It is inconceivable that PW1 and PW2 could, for no apparent reason, collude with police to frame up evidence against the accused as the accused seemed to suggest. There is no evidence that the two witnesses were in bad term or had quarrel with the accused before the incident."*

To that end, Mr. Kigoryo opined, the evidence adduced was sufficient to prove the allegation levelled against the appellant. Sounding more of a moralist than a lawyer, Mr. Kigoryo insisted that according to the evidence, the accused had cultivated a whole acre of bhangi which was a very serious crime hence the court was justified to sentence him as charged. The learned State Attorney prayed that the first ground of appeal is dismissed for lack of merit.

On the second ground, the learned State Attorney clarified that the appellant's complaint is that the trial court did not consider his defense contrary **to section 235(1) of the Criminal Procedure Act Cap 20 RE 2019**: It is Mr. Kigoryo's submission that going through the records as depicted on page 5 of the judgement of the lower court (last para) the court had stated that the accused person's defense that he was simply surprised to find himself charged with the offence had no merit. The learned State Attorney averred further that the same (defense of the appellant) was swallowed up by strong evidence of the prosecution witnesses.

Mr. Kigoryo asserted that in the **Abdallah's case** (supra) the Court of Appeal found that the trial court had considered the defense evidence and proceeded to dismiss the appeal. Mr. Kigoryo concluded his submission on the first two original grounds of appeal by praying that this court, pursuant to the dictates of justice considers that the appeal is without merit because not every doubt is a reasonable doubt.

Moving on to the additional grounds of appeal alluded to earlier, Mr. Kigoryo stated that there were four additional grounds of appeal but the first was like the second in the petition of appeal and the fourth was like the first in the petition of appeal although he the appellant had expounded on lack of indication of the quantity of the bhangi in the charge sheet and also in the evidence.

With that introduction, Mr. Kigoryo started off with the fourth additional ground. It is the learned State Attorney's submission that it is not a legal requirement on farming of the prohibited plants to show the quantity.

He cited **Section 11(1) of the Drugs Control and Enforcement Act** asserting that the same only requires proof of cultivation of the prohibited plant. He emphasized that the size does not matter because even growing just a single prohibited plant is offensive to the law and therefore legally prohibited.

It is Mr. Kigoryo's submission that although there was no case law so far expounding on the provision, the elements of the offence are spelled out by the law and the same is obvious: it prohibits cultivation of the prohibited plants.

On the appellant's complaint that the court did not see the farm, the learned State Attorney averred that inability of the court to visit the locus in quo did not affect the case. The trial court, reasoned Mr. Kigoryo, had established the offence through the testimony of the witnesses. Mr. Kigoryo averred that as per the case he cited earlier namely that of **Hamis Muhibu Abdalla** (supra) it is enough to establish commission of an offence through witnesses if the court finds them credible. Mr. Kigoryo prayed that grounds of appeal be dismissed.

Responding to the second and third additional grounds of appeal jointly, the learned State Attorney clarified that the appellant's complaint was that there was no receipt issued pursuant to **section 38(3) of the Criminal Procedure Act Cap 20 RE 2019**. The appellant also asserts, Mr. Kigoryo argued, that there was no proper chain of custody as far as the exhibit's movement from the police to the government chemist and to the court was concerned. With regards to receipts, Mr. Kigoryo averred, PW2 and PW3's

presence was enough to prove that the exhibit was found under the custody of the appellant. Their oral evidence, averred the learned State Attorney further, was weightier than documentary evidence in the form of a receipt. It is Mr. Kigoryo's submission that a seizure certificate is one of the documents to demonstrate compliance to the chain of custody. However, argued Mr. Kigoryo, even in the absence of such a document, oral evidence is sufficient to establish the chain of custody. In the instant matter, averred the learned State Attorney, the evidence of PW5, PW1 and PW6 as well as that of PW4 (Government Chemist) all indicate how the exhibit was handled since oral testimony to establish a chain of custody was considered and approved by the Court of Appeal in the case of **Jumanne Mpini @Kambilombilo and Another v. R.** Crim Appeal 195 of 2020 (July 2021) CAT, Kigoma (unreported).

The learned State Attorney emphasized that the evidence of PW1, PW2, PW3 and PW4 who witnessed how the subject matter was seized from the appellant's residence and how the certificate of seizure was filled was sufficient evidence even if it was oral evidence and not documentary evidence.

Emphasizing on the weight of oral evidence, Mr. Kigoryo averred that the Court of Appeal on page 4 **of Abdalla's case** (supra) stated that

> *"Oral evidence, if worthy of credit like in the circumstances obtained in the present case is sufficient without documentary evidence to prove a fact or title. Thus, where a fact may be proved by oral evidence, it is not necessary that the documentary evidence must supplement that evidence as this is the other method of proving a fact."*

In the instant case, averred Mr. Kigoryo, oral evidence was sufficient to prove the facts. He thus prayed this court to dismiss the second and third grounds of appeal and hence the entire appeal for lack of merit.

In rejoinder, the appellant stated that on 10/1/2017 around 18:00 he was arrested at Somanga Area, Lindi suspected of possessing an illegal firearm Make Rifle. The appellant narrated that he was then taken to Kilwa Masoko Central Police Station and on 14/1/2017 he was arraigned in court charged with illegal possession of a firearm he was convicted and sentenced as charged. On 28/11/2017 he was charged with a second offence namely illegal cultivation of bhangi.

It is the appellant's submission that the charge he was facing was illegal possession of a Firearm. The issue of cultivating Bhangi came later almost 10 months after he was arrested. The appellant averred further that he prayed the trial court to go with him to the purported farm where he had cultivated bhangi to no avail. The appellant averred further that he prayed the court to summon an officer from the prison to testify whether at any point in time he escaped from jail to go and cultivate bhangi, but the court refused as well.

It is the appellant's insistence that the charge against him was fabricated. He reiterated that in 2017 he was jailed for 2 years for illegal possession of a firearm but before completion of the 2 years he was charged with illegal cultivation of bhangi and was sentenced to 30 years in prison. He concluded by a prayer that this court allows his appeal and sets him free.

Having dispassionately considered submissions by both sides, I find it very difficult to accept that the prosecution case has been established at the required standards without unfairness on the side of the appellant. The first ground of appeal namely lack of proof beyond reasonable doubt is sufficient, in my opinion to decide the aftermath of the appeal. The next paragraphs substantiate.

In an often-cited United Kingdom case of **DPP v. Woolmington [1935] AC 462** it was held that the expression burden of proof entails two different concepts: "legal burden of proof" and "evidential burden." On the legal part of the burden, it is disturbing to think that the appellant was charged with illegal cultivation of the prohibited plant ten months after he had been in jail for another offence and no reason whatsoever was given for such a delay.

On the evidentiary aspect of the burden of proof, the appellant has made his point very logically that he had been in jail all along and no proof whatsoever was made indicating that he at some point escaped from jail to engage in cultivation of the bhangi in his purported farm hundreds of miles away. The learned state attorney tried to sound like a moralist to convince me that one acre of bhangi was too huge to allow the appellant to go unpunished. Unfortunately, as much as I agree that even a small amount of bhangi is sufficient to warrant penal measures, the argument advanced is not convincing. One cannot be in jail and at the same time engage in cultivation of prohibited plants in a corn farm far away. That argument defeats logic. I am not prepared to accept it as it leaves a lot of holes unfilled

in the prosecution case to the extent of lowering the standards set up by law namely proof beyond reasonable doubt.

Another equally poor argument advanced by counsel for the respondent is that the appellant had no misunderstanding with the local leaders who had come to testify in the trial court on his corn farm that doubled as a hidden farm for bhangi. With all due respect, the appellant had been consistent that the so called local leaders were strangers to him and that they came from a totally different area and barely knew his full name. It was upon the prosecution to prove the appellant (then accused) wrong on this aspect that touches upon credibility of witnesses.

Before I pen off, I am inclined to provide albeit in passing that the offence of illegal possession of a firearm with which the appellant was successfully charged, convicted and sentenced is as serious as cultivation of prohibited plants. While for the former the appellant was sentenced to merely two years imprisonment term, the latter attracted 30 years of jail. It is possible that the prosecution thought the two years sentence meted to the appellant for illegal possession of a firearm was not sufficient rehabilitation to make a law abiding citizen out of the appellant.

In any case, it was improper for the prosecution to unearth its previous records just to find out if any pending investigation could be speed tracked to get the appellant to spend more time in jail. Unfortunately, that is not how courts of justice in this country operate. The burden of proof required to prove criminal allegations is the same whether the accused is a habitual offender or a wannabe. In the instant case, the prosecution thought

conviction on illegal possession of a firearm somehow makes it easier to connect the appellant with his other past offences. No please, our criminal justice system does not operate that way.

In the upshot, I allow this appeal. I hereby quash the proceedings of the lower court. I set aside the sentence of 30 years imprisonment. Consequently, I order that the appellant **SAID KASIMU MBONDE** be released from prison forthwith unless he is held for any other lawful course.

It is so ordered.

E.I. LALTAIKA

JUDGE

31/10/2022

Court

This judgement is delivered on this 31st day of October 2022 under my hand and the seal of this court in the presence of Mr. Enosh Gabriel Kigoryo State Attorney and the appellant who has appeared unrepresented.

E.I. LALTAIKA

JUDGE

31/10/2022

Court

The right to appeal to the Court of Appeal of Tanzania is duly explained.

E.I. LALTAIKA

JUDGE

31/10/2022