

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 558 OF 2020

JUMA IDD@DUDE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Dodoma)**

(Mansoor, J.)

dated 5th day of August, 2020

in

Criminal Appeal No. 110 of 2019

.....

JUDGMENT OF THE COURT

29th April & 5th May, 2022.

FIKIRINI, J.A.:

The appellant was charged and convicted contrary to section 11 (1) (a) and (2) of the Drugs Control and Enforcement Act [No. 5 of 2015] (the Act), and sentenced to a statutory sentence of thirty (30) years, for unlawful cultivation of prohibited plants to wit 16 cannabis plants commonly known as bhangji (Cannabis Sativa) weighing 348 grams.

What led to the appellant's arraignment is that on 8th March, 2017 at about 17:40 hours, at Mnung'una village Msizi Ward Ilongelo Division

within the District and Region of Singida, the appellant was found cultivating the bhangi. He denied the charge, leading the prosecution to call a total of six (6) witnesses and tendered five (5) exhibits to prove its case. The defence case had only one witness.

It all started with a tip from an informer made to G. 6947 DC Selemani (PW5), that the appellant had been growing plants suspected to be bhangi. On the 8th March, 2016, G. 6974 DC Selemani (PW5) accompanied by Officer Commanding Criminal Investigation the District (OC-CID) - Assistant Superintend of Police (ASP) Masasi, and WP Stella left for the appellant's village. On arrival, they contacted the Village Authority among them Ramadhani Ismail (PW1), a Village chairman, Happyness Kilongola (PW2) the Village Executive Officer – of Mnung'una village, and Mustapha Hassan (PW3), Village chairman, and informed them the purpose of their visit. They together left for the appellant's house where they met the appellant and his mother Mwajuma Mohamed (PW4). At the house, PW5 asked the appellant to accompany them to the farm, to which he declined, but PW4 allowed the Police and those in their company to go to the farm which was about 10 meters away.

At the farm, they found maize planted, and in the middle, they found sixteen (16) plants of bhanghi. The appellant did not deny knowing the existence of the alleged bhanghi and admitted using it to gain strength. The bhanghi was uprooted in the presence of all those who accompanied PW5 to the farm, and a certificate of the seizure (exhibit P3) was prepared and signed by PW1, PW2, and the appellant. Later PW5 was assigned to investigate the case. As part of the investigation, he interrogated the appellant from which he recorded the appellant's cautioned statement (exhibit P1) on 10th March, 2017. PW4 the appellant's mother testified in court that his son who used to guard the farm warned her if she uprooted the plant he would beat her.

On 4th April, 2017, E. 5989 DC Alphonse (PW6) was handed the plants suspected to be bhanghi to take to the Government Chief Chemist (GCC) for investigation and examination by PW5. He testified to have handed the envelope on 5th April, 2017 to the GCC to one Justine Wanjala, who labeled the envelope with laboratory number 1072/2017. After almost two months, on 9th June, 2017 the GCC issued a report (exhibit P5) confirming the plants (suspected to be bhanghi) sent for examination to be so.

In his defence, the appellant (DW1) a sole witness on affirmation declined to have planted bhanghi though admitted to knowing its existence since the plants grew randomly on his farm. He also admitted that Police officers, and Village Authority went with him to the farm on 8th March, 2017. Later he was interrogated and his statement was recorded. Before the court, the appellant admitted using bhanghi which was growing on his farm, and that PW4 was aware of the plants. The appellant further admitted not being ready to disclose to anyone about the growing plant on his farm as he liked and used the product.

After hearing the prosecution witnesses, sole defence witness, and examining the exhibits, the trial magistrate was convinced that the case against the appellant has been proved to the required standard. The appellant was convicted and sentenced to thirty (30) years imprisonment. Aggrieved the appellant unsuccessful appealed to the High Court. Undeterred he preferred this appeal comprising of six (6) grounds namely:-

1. *That, the evidence from the Government Chemist was wrongly admitted since it was not tendered by the one who prepared it.*

2. *That, the appellant was convicted based on procedural irregularity.*
3. *That, the prosecution did not establish the chain of custody from the time of the arrest of the said exhibits up to when they were tendered in court.*
4. *That, the PF3 was wrongly received as it was not read out in court so as to enable the appellant to know its contents.*
5. *That, the appellant was convicted based on contradictory charge sheet and the Chemist report on the amount of cannabis sativa.*
6. *That, the case against the appellant was not proved to the required standard by law.*

On 29th April, 2022 when this appeal came on for hearing Juma Idd @Dude the appellant appeared in person unrepresented. The respondent Republic was represented by Ms. Judith John Mwakyusa, learned Senior State Attorney assisted by Ms. Bertha Benedict Kulwa, learned State Attorney.

Browsing through the grounds of appeal before inviting parties to address us, we raised concern on the 4th ground that the PF3 was

wrongly admitted and was not read out in court to enable the appellant to know its contents. When we invited the learned State Attorney, to address us on that first, she was of the view that since no such thing existed, she thus ignored the ground. The appellant had of course nothing to say being a layperson. As contended by the learned State Attorney, the position we support, since there was no issue or evidence led related to PF3, we find the ground as of no relevance to the present appeal, we, will therefore not address the issue in our judgment.

When the appellant was invited to address the Court on his grounds of appeal, he preferred for the respondent to go first, and he would have rejoin if need be. Ms. Kulwa learned State Attorney outright opposed the appeal and supported the conviction and the sentence meted out. The learned counsel started by addressing the 1st, 2nd, and 5th grounds of appeal together as they all touched on the exhibit P5, the GCC report, that the exhibit was wrongly admitted and the prohibited plants subject of investigation and examination at the GCC, its chain of custody was not established from the time of seizure to when tendered in court and that the amount of the bhangis in GCC report and that stated in the charge sheet varied. Ms. Kulwa in addressing the above grounds

contended that exhibit P5 was tendered by PW5 an investigator and custodian of the report, therefore the report was properly admitted as reflected at page 44 of the record of appeal. From the PW5's account, the prohibited plants weighed 348 grams, this assertion though differed from what exhibit P5 declared that the substance weighed 68.02, but the variation did not go to the root of the matter, contended the learned State Attorney. To buttress this proposition, the learned State Attorney cited the case of **Jibril Okash Ahmed v. R**, Criminal Appeal No. 331 of 2017 (unreported). Probed by us if the GCC officer was summoned as a witness, Ms. Kulwa affirmatively responded that there was no witness summoned from the GCC.

Elaborating on exhibit P5, the learned State Attorney contended that the GCC received one (1) envelope from PW6 on 5th April, 2017. PW5 apart from being an investigator and custodian of exhibit P5, was an arresting officer and the one who prepared a seizure certificate (exhibit P3) and handed the envelope to PW6 to take to the GCC. On a different note, the learned State Attorney honestly admitted that no reason was advanced as to why no one from the GCC was summoned to come and testify, even though the charge was on prohibited plants.

As for exhibit P2 – the 16 plants of bhangi (seedlings) as indicated at page 29 of the record of appeal, the learned State Attorney contended that the same was tendered without objection. However, she contended that the record is silent, on where the uprooted plants on 8th March, 2017 were kept and for how long or if they were entered into an exhibit register.

She equally submitted on exhibit P3-seizure certificate which she admitted was wrongly tendered and admitted as it was not read over in court. On this, she urged the Court to expunge the document.

The learned State Attorney was probed by us as to when was the charge sheet prepared. She responded that the charge sheet is usually prepared after receiving confirmation that the plant is prohibited one. And this is because the office of GCC was the only body authorized to determine whether the substance or plant is prohibited or not, therefore the report and account carries more weight, she stressed.

Concluding her submission, the learned State Attorney urged us to dismiss the appeal despite the few shortfalls in the prosecution case.

In rejoinder, the appellant contended that it was PW4 who took the Police to the farm and she pointed at the appellant as the culprit. He

also informed us that the farm belonged to the family. We inquired from him if that information was relayed to the trial court. He acknowledge saying so in his defence but the court trusted PW4's account more than his.

In this appeal, we have one crucial issue to determine which is whether the case against the appellant was proved beyond the required standard in law. In our endeavor to answer that, we will deal with grounds of appeal as argued by the learned State Attorney. Starting with the 1st, 2nd, and 5th grounds argued together.

The test of tendering the exhibit has been well elaborated in the case of **The DPP v. Mirzai Pirbakhshi@ Hadji and 3 Others**, Criminal Appeal No. 493 of 2016 (unreported), the case listed in the respondent's list of authorities. In that case, the Court held that:

"A possessor or a custodian or actual owner or alike are legally capable of tendering the intended exhibits in question provided he has knowledge of the thing in question."

In the present appeal PW5 was the arresting officer, the investigator, and custodian of exhibits and knew what the report contained, therefore

competent witness to tender the exhibit P5. The unfortunate thing is instead of PW5 tendering exhibit P5, it was the prosecutor who prayed to tender the report. The defence did not object to the admission of the GCC report and the same was admitted as exhibit P5 as seen at pages 31 and 32 of the record of appeal. The report was read over in court, but since it has been tainted in the process of admission the report is no longer of evidential value. This Court has stated time without number that not observing the proper procedure of who should tender the exhibit in court is fatal. There are a plethora of decisions on the subject such as **DPP v. Festo Emmanuel Msongaleli & Another v. R**, Criminal Appeal No. 62 of 2017, **Tizo Makazi v. R**, Criminal Appeal No. 532 of 2017, **Sospter Charles v. R**, Criminal Appeal No. 555 of 2016, **Thomas Ernest Msungu @Nyoka Mkenya v. R**, Criminal Appeal No. 78 of 2012, and **Frank Massawe v. R**, Criminal Appeal No. 302 of 2012 (all unreported). In all the above cited cases the Court held that the prosecutor is not a witness sworn to give evidence, he thus cannot assume the role of a witness. This position was clarified more succinctly in the case of **Thomas Ernest @Nyoka Mkenya** (supra) when the Court had this to say:-

" Under the general scheme of the Criminal Procedure Act.....particularly sections 95,96,97,98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect that was wrong because in the process the prosecutor was not the sort of in terms of section 98 (1) of the Criminal Procedure Act. As it is since the prosecutor was not a witness he could not be examined or cross-examined on the report."

The report unprocedurally admitted through the prosecutor as exhibit P5 is thus expunged from the record.

Besides, exhibit P5 another crucial evidence are exhibits P2 and P3. Exhibit P2 is the sixteen (16) uprooted bhangi plants. Following the search and seizure on 8th March, 2017, the record is silent on what transpired. Meanwhile, during the trial exhibit P3, was tendered through the prosecutor. In addition, the document was not read over to allow the appellant know the contents of the tendered document. The learned

State Attorney was candid to admit this in her submission. Like exhibit P5, the exhibit P3 likewise suffers the wrath of being expunged from the record.

And this takes us to another exhibit which also raises concern. Exhibit P2 becomes centre of controversy as its chain of custody is questionable. And this has featured as the 3rd ground of appeal. The chain of custody has to be demonstrated throughout the process from the seizure up to when it is tendered in court. The significance of the chain of custody is to give integrity to the exhibits involved to ensure reliability. Again this has been underscored in several cases. In the famous **Paulo Maduka & 4 Others v. R**, Criminal Appeal No. 100 of 2007 (unreported), elucidating the prominence of the chain of custody observed:-

"...the chronological documentation and/or paper trail, showing seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody.....is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected. It's very

transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.....”

See: **Saven Hamis & 2 Others v. R**, Criminal Appeal No. 99 of 2014 and **Zainabu Nassoro @ Zena v. R**, Criminal Appeal No. 348 of 2015 (both unreported). In the case of **Zainabu** (supra) the Court echoing its decision in **Paulo Maduka** (supra) stated that:-

“...to show to a reasonable possibility that the item that is finally exhibited in court as evidence has not been tampered with along its way to the court.”

Scrutiny of the record of appeal revealed that from 8th March, 2017 when exhibit P2 was seized in the presence of PW1, PW2, and PW3 by PW5, and exhibit P3 was established and duly signed by PW1 and PW2, the record is silent on how the exhibit was processed. There is no evidence, on whether PW5 kept the exhibit or handed it to someone else and where was it kept. Apart from those unanswered questions, PW5, in his evidence stated that sometime in March 2017, he prepared a letter addressed to the head of the Weights and Measures Agency requesting weight verification of exhibit P2. PW5 accompanied by the appellant

together attended the weight taking exercise at the Weights and Measures Agency office. Despite the account, still, PW5 does not reveal where he got exhibit P2 from and on his return, returned it to who.

In its letter dated 14th March, 2017 (exhibit P4), the agency reported exhibit P2 to weigh 348 grams. This was followed by PW5 parking exhibit P2 on 4th April, 2017 for sending to the GCC. PW6 was tasked with the obligation of taking the sealed envelope to the GCC office. He travel to Dar es Salaam on 5th April, 2017. The envelope was according to PW6 received by one Faustine Wanjala. The record is again, silent on how did PW6 travelled to Dar es Salaam and if the envelope sent with him had all the plants uprooted, or a sample, and if it is the sample who examined it, when and before who. Is what was taken to the GCC returned? If yes, when and handed to who. The chain of custody from when exhibit P2 was seized up to when it was tendered in court raises a lot of questions.

Failure to answer all these questions has muddled the chain of custody. In the case of **Mosses Muhagama Laurence v. The Government of Zanzibar**, Criminal Appeal No. 17 of 2002 (unreported), the Court faced with the same scenario stated:-

“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.....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 real doubt if the prosecution proved its case against the appellants to the required standard.”

Given the settled legal position above, we hold a firm opinion that the chain of custody of the plants suspected to be bhang is wanting.

After exhibit P1-cautioned statement, P2- 16 bhang plants, P3- seizure certificate, and P5-GCC report have been expunged from the record, the remaining evidence is so weak to sustain a conviction. It is difficult to ascertain if exhibit P2 uprooted from the appellant’s farm are prohibited plants commonly known as bhang (cannabis sativa) as alleged or not. This being the main ingredient in proving the offence brought contrary to section 11 (1) (a) and (2) of the Drugs Control and Enforcement Act No. 5 of 2015, we say the charge against the appellant that he was found unlawfully cultivating prohibited plants, was under the circumstances not proved.

In view of the discussion above, we find merit in this appeal. The conviction of the appellant and the sentence of imprisonment imposed are hereby quashed and set aside. The appellant is to be released forthwith from prison unless otherwise lawfully held.

DATED at DODOMA this 4th day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Judgment delivered this 5th day of May 2022 in the presence of the Appellant in person and Ms. Judith Mwakyusa, learned Senior State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



H. B. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL