IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 41 OF 2020

(Appeal from the Judgment of the District Court of Nyamagana at Mwanza (Sumaye, SRM) dated 10th of February, 2020, in Criminal Case No. 200 of 2019)

MABERE SAIMONI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

18th April, & 9th July, 2020

ISMAIL, J.

Mabere Saimon, the appellant herein, was charged and convicted of trafficking narcotic drugs contrary to the provisions of section 15A (1) and (2) (c) of the Drug Control and Enforcement Act No. 5 of 2015 as amended by Act No. 15 of 2017. He was alleged to have committed the said offence at Mkuyuni area within Nyamagana District in Mwanza, where he was found in unlawful possession of 326 grams of the narcotic drug commonly known as bhang.

On conviction, the trial court sentenced the appellant to a statutory sentence of 30 years' imprisonment.

The facts giving rise to this appeal are not difficult to discern. They roll back to the morning of 27th November, 2019, when the police got a tip off that the appellant was dealing in drugs (bhang). The police officer went to the scene of the crime where he arrested the appellant, while the rest of the people, believed to be his friends, eluded the police. The appellant was searched and was found to be in the possession of 90 rolls of bhang which were seized. The appellant was conveyed to the police station where he recorded a cautioned statement in which he confessed that he deals in narcotic drugs (bhang), and that in this he was found with 90 rolls of the bhang. He was arraigned in court and the trial proceedings found him guilty. He was convicted. He was also sentenced to lengthy jail term.

The conviction and sentence imposed did not go well with the appellant, hence the decision to appeal against both, the conviction and sentence. The petition of appeal has four grounds, paraphrased as follows:

1. ***THAT,*** *the trial court erred in law and in fact by relying on a contradictory evidence adduced by the prosecution on where the appellant was arrested between Igoma and Mkuyuni.*
2. ***THAT*** *the trial court erred in law to base its conviction on the certificate of seizure in the absence of a search warrant.*
3. ***THAT*** *the chain of custody of the seized narcotic drugs was not established.*
4. ***THAT*** *the trial court erred in law by imposing a sentence of 30 years' imprisonment while the narcotic drugs allegedly found in his possession fell under section 15A (2) (c) and not section 15A (2) (a) of the Drug Control Enforcement (Amendment Act) Act, 2017.*

Hearing of the appeal was conducted virtually through an audio tele-conference that saw the appellant fend for himself, unrepresented, as the respondent was represented by Ms. Gisela Alex, learned State Attorney. With nothing useful to add to his grounds of appeal, the appellant urged the Court to consider them and acquit him of the charges levelled.

Ms. Alex began her submission by supporting the conviction and sentence passed by the trial court. In respect of ground one of the appeal, she submitted that the ground is baseless. She referred to page 6 of the typed proceedings in which one of the prosecution witnesses testified that the appellant was arrested at his house in Mkuyuni. This, she contended, tallies with particulars of the accused which show that he was a resident of

Mkuyuni. While conceding that the testimony of PW3 does not say that the appellant was arrested in Igoma, she urged this Court to interpret the phrase ***"I was at the area"*** to mean he was in Mkuyuni. Expounding further, Ms. Alex submitted that what makes her believe that the appellant was arrested in Mkuyuni is the certificate of seizure. She concluded her argument on this ground by submitting that it is possible that the appellant may have been arrested near his home.

With respect to the second ground, the contention held by Ms. Alex is that the complaint by the appellant is baseless as a search warrant is usually embodied in a certificate of seizure. She argued that even assuming that the search warrant was not there, there is no dispute that the appellant was found with narcotics and that such absence does not render the seizure illegal. Ms. Alex argued further that, the fact that the appellant did not challenge this during trial means that the contention, at this stage, is a mere afterthought. In any case, no injustice was occasioned, as a result. On this she referred the Court to the decision of ***Eliabariki v. Republic***, CAT-Criminal Appeal No. 321 of 2016 (unreported). She urged the Court to dismiss this ground of appeal.

Submitting on ground three, the learned counsel for the respondent contended that chain of custody had been established through PW1, the

arresting officer, on how he seized the exhibit, marked it and sent to the station, after which it was taken to the government chemist (exhibit P4). Ms. Alex further argued that the government chemist testified that the seized item was a narcotic drug (exhibit P5). She contended that the chain of custody was unbroken and established.

On ground four, the learned counsel submitted that this ground is equally baseless in view of section 9 of the of the Drug Control Enforcement (Amendment Act) Act, 2017. Under the amended Act, the sentence is 30 years' imprisonment.

Submitting on the variance on the dates between 27th November, 2019 and 28th November, 2019, the learned counsel contended this is a mere typo as the arrest was effected on 27th November, 2019. With respect to exhibit P3, Ms. Alex submitted that the same was recorded on 27th November, 2019. She chose to leave it to the Court to decide on the variance of the dates, contending, however, that these are trifling mistakes since the evidence that he was arrested with is enough to sustain the conviction.

In rejoinder, the appellant maintained that he was not found with anything on 27th November, 2019. He prayed that the appeal be allowed.

From these submission the point for determination by this Court is whether the appeal carries any merit that may be the basis for allowing the appeal.

The contention by the appellant in the first ground is that the testimony adduced by the prosecution is contradictory especially with respect to the place and date on which the appellant was arrested. This view is strongly opposed by the counsel for the respondent who is of the firm view that the testimony of PW1 settled the issue when he testified, at page 6 of the proceedings, that the appellant was arrested in his house in Mkuyuni. She contends that by saying "I was at the area", PW4 meant that he was in Mkuyuni. The testimony of PW1 is to the effect that the appellant was arrested at his home which is known to be in Mkuyuni. Then there is a testimony of PW4 which is found at page 11 and it is to the effect that:

> *"Residence (sic) of Igoma a business man, I have a shop. On 28/11/2019 at 07:00 hrs, I was at area (sic), at the morning I remember I saw the police man in the process to arrest the accused who was running I also arrested in the accused person (sic). We find (sic) the accused with a small bag, and we searched it the police find (sic) the accused with bhangi. I remember the accused is before the court."*

From the testimony of PW4, the impression is that the appellant was arrested at Igoma where PW4 operates a shop and when he was at the time of the appellant's arrest. This is at variance with the testimony of PW1 whose testimony is to the effect that the appellant was arrested while at his home at Mkuyuni. Then there is a question of when exactly the accused was arrested. Whereas PW1 testified, at page 5 of the proceedings, that he arrested the appellant on 27th November, 2019, PW4's testimony is that the appellant's arrest was effected on 28th November, 2019. It is further gathered that exhibit P3 was filled on 27th November, 2019, connoting that the appellant was arrested on that date. These two witnesses testified on the same event of arrest of the appellant albeit on two different dates. This leaves one to struggle to know which of the two sets of testimony carries exactness and which one does not. The set of facts narrated by each of these witnesses is variant and disharmonious with one another.

The contention by the appellant is that the variances in the testimony are actually a contradiction and he urges the Court to use it as the basis for allowing his appeal. Let me start by stating that law is quite settled, that contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. Errors of observation, memory failure due to passage of time, panic and horror are

considered to be of trifling effect and those are to be ignored (see ***Sylivester Stephano v. Republic***, CAT-Criminal Appeal No. 527 of 2016 (Arusha-unreported). In ***Luziro s/o Sichone v. Republic***, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."***

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in ***Dickson Elia Nsamba Shapurata & Another v. Republic***, CAT - Criminal Appeal No. 92 of 2007 (unreported) in which the learned Justices quoted the passage in ***Sarkar's Code of Civil Procedure Code***. It was held as follows:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.* ***Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."***

In ***Mukami w/o Wankyo v. Republic*** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. See also: ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012.

Looking at the contradictions raised by the appellant, I am tempted to hold that they are, by their very own nature, ones that are so fundamental that they affect the central story. They corrode the credibility of the prosecution's case which was built on the evidence of these two witnesses who are also said to have searched and seized exhibit P1, the subject matter of the trial proceedings. I am not persuaded by the respondent's attempted suasion that a certificate of seizure, exhibit P2, can form the basis of ascertaining, with precision, that the appellant was arrested IN Mkuyuni on the particular date. I find nothing meritorious in this contention, and I hold that the appellant's argument on this ground resonating and powerful. I allow this ground of appeal.

The appellant's gravamen of contention in ground two is that the prosecution tendered exhibit P2, a certificate of seizure, which was not accompanied by a search warrant. He holds the view that absence of the search warrant invalidates the admissibility of exhibit P2. Discerning from the proceedings, the appellant was arrested by PW1 while he was at his

home, meaning that a search that found him with the narcotics was conducted in his house. Information on how and where the search that finally recovered exhibit P1 was carried out was not given out. But, if we assume that recovery of exhibit P1 was done after the search which is ordinarily the case, then the search ought to have complied with the requirements of the law that guides on the matter.

Section 38 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2019 provides as hereunder:

> *"If a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*
>
> *(a) N/A*
>
> *(b) Anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
>
> *(c) N/A*
>
> *And the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be."*

The cited provision ought to be read together with the provisions of the Police General Order No. 226, made under section 7 (2) of the Police Force and Auxiliary Services Act, Cap.322, which is to the effect that:

> *"Item 17 (b) The services of a local leader or two independent witnesses who should be present throughout the search, should be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."*
>
> *"Item 18: On completion of the search, a search report will be made out at the scene, giving details of all articles seized, a copy of which shall be handed to the occupier."*

My dispassionate review of the trial proceedings does not give me anything that would bring the impression that any of such imperative requirements of the law was conformed to. It follows that seizure of exhibit P1, as evidenced by exhibit P2, was done in violation of the requirements of the cited provisions and the omission casts a serious doubt if the exhibit P1 was recovered from the appellant and through a seizure that is known in law.

In underscoring the unfailing requirement of conforming to the requirements of the law, the Court of Appeal held as follows, in ***Frank***

Michael alias Msangi v. Republic, CAT-Criminal Appeal No. 323 of 2013 (Mwanza-unreported):

> *"The owner of the house and the civilian witnesses who were lined up to witness the search did not accompany PW6 when he walked back into the house to discover the black bag. It is beyond question that the civilian witnesses were not engaged in the search on the ceiling roof which was, apparently, an exercise conducted exclusively by the police.... In the situation at hand, we cannot overrule the possibility that the contents of the black bag might have been fraudulently planted."*

Picking up from where it left in ***Frank Michael alias Msangi,*** the superior Court held in ***Sylivester Stephano*** (supra), that a search conducted in suspicious circumstances is not a search that can be relied upon to found a conviction.

See also: ***Adriano Agondo v. Republic,*** CAT-Criminal Appeal No. 29 of 2012 (unreported); ***Mustafa Darajani v. Republic***, CAT-Criminal Appeal No. 277 of 2008 (Iringa-unreported); and ***Ridhiki Buruhani v. Republic***, (HC) DC Criminal Appeal No. 40 of 2011 (Songea-unreported).

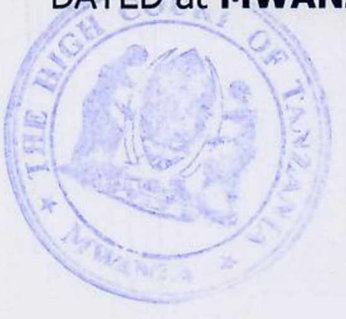
In view of the foregoing, I agree with the appellant's contention that, owing to the irregular recovery of exhibit P1, it cannot be said that exhibit

P2 is clothed with any semblance of legitimacy that can be used to support the charge against the appellant. I allow this ground of appeal.

On account of these two grounds of appeal, this appeal succeeds. Consequently, the decision of the trial court is hereby reversed, conviction and sentence set aside and set the appellant free, immediately, unless held on some lawful reasons.

I so order.

DATED at **MWANZA** this 9th day of July, 2020.



M.K. ISMAIL

JUDGE

Date: 09/07/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present in person

Respondent: Ms. Gisela Alex, State Attorney

B/C: B. France

Court:

Judgment delivered in chamber in the presence of the appellant in person, Ms. Gisela Alex, State Attorney for the respondent, and in the presence of Ms. Beatrice B/C, this 09th day of July, 2020.

M. K. Ismail

JUDGE

At Mwanza

09th July, 2020