

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 84 OF 2020

(C/O Criminal Case No. 339 of 2019 Sumbawanga District Court)

(J. O. Ndira, RM)

PIUS S/O MOSES @ SIMTOWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

01 & 10/11/2021

JUDGMENT

Nkwabi, J.:

The appellant was arrested and prosecuted for trafficking of cannabis bhang contrary to section 15(A)(1) and 2(2)(c) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 3(e) (i) (a) of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017.

The prosecution called three witnesses who are police officers and tendered several documentary evidence to prove the charge that the accused person was arrested in possession of the alleged narcotic drugs. For no reason the

prosecution did not call the independent witness who is claimed to have signed on the certificate of seizure. The trial court was satisfied that the charge was proved beyond reasonable doubt, convicted and sentenced the appellant to pay fine of T.shs 5,000,000/= in default to serve a five years imprisonment term.

The appellant was dissatisfied with the conviction and sentence of the trial court. He lined up five grounds of appeal in this court as they appear in the petition of appeal to show that the case against him was not proved beyond reasonable doubt. During the hearing of the appeal, the Appellant appeared in person unrepresented. He prayed his grounds of appeal be adopted as his submission and find the appeal to have merit and acquit him.

The respondent, the Republic, was represented by Mr. John Kabengula, learned State Attorney who conceded the appeal. He explained that there are problems in the prosecution case. Three witnesses testified all being Police Officers. A certificate of seizure was tendered, but the independent witness was not called to testify. There is a serious doubt, he stressed.



PW2 claimed that the appellant had 320 pellets, but in the evidence were tendered 321, this creates doubt, Mr. Kabengula expressed. The doubt should be resolved in favour of the appellant, he insisted. He finally stated that he supported the appeal for the above reasons. He was of the view that it could be that when the appellant was arrested, the independent witness was not there.

The Appellant had nothing in rejoinder.

I have had an ample time to go through the judgment of the trial court as well as the proceedings thereof. Regrettably, the trial magistrate never attempted to consider the inconsistencies and contradictions and try to resolve them contrary to the well-established procedure in **Nyakisia v. R. [1971] HCD no. 195.** Duffus P., Spry v. P. & Lutta J. A. (E. A. C. A.), **Mohamed Said Matula vs. R. [1995] TLR 3** (CA) and **Amiri Mohamed v. R. [1994] TLR 138** (CAT). Had the trial magistrate considered the contradictions and inconsistencies he would have come to a different decision. The contradictions in respect of the number of the pellets alleged to have been seized, goes to the root of the matter and that cannot be seen as minor or ignored.



There is the failure to call the independent witness who is claimed to have witnessed the seizure who is a material witness in this case whereby this court is entitled to draw and adverse inference as per **Aziz Abdalla v. Republic [1991] TLR 71** (CAT)

"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution.

and **Chaali Kiama v. Republic [1979] LRT 54**

Discovery of the alleged bait money in the toilet by a police officer in the absence of a civilian called for the purpose of witnessing the search casts doubt as to whether the alleged bait money was not planted there.

In **Paulo Maduka & 4 others v Republic, Criminal Appeal No. 110 of 2007** where the Court after quoting section 38(3) of the Criminal Procedure Act on issuance of a receipt acknowledging the seizure of a thing, had these to say:

The appellants and independent witnesses would have put their signatures thereon and each retained a copy of the same. ...


The appellant, in this case, seems to have not been supplied with the receipt which recorded the alleged seized bhang. That is against the law. The police are enjoined to abide to the law.

For the above reasons, I allow the appeal as it has merits. I endorse the arguments of the learned State Attorney for the Respondent. I quash the conviction and set aside the sentence. The appellant is to be set free unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED at **SUMBAWANGA** this 10th day of November 2021.

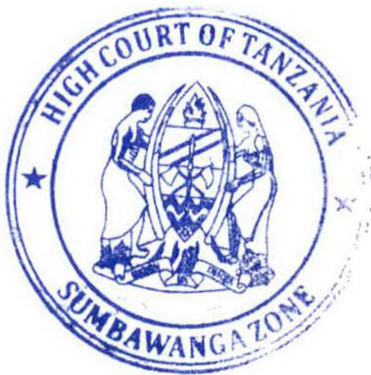




J. F. Nkwabi
Judge

Court: Judgment is delivered in open court via video conference this 10th day of November, 2021 in the presence of Ms. Safi Kashindi, learned State Attorney for the respondent and the appellant is present in person.

J. F. Nkwabi
Judge

Court: Right of appeal is explained.




J. F. Nkwabi
Judge
10/11/2021