IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 83 OF 2021

(Originating from Criminal Case No. 32 of 2020 of Mwanga District Court at Mwanga)

DAUDI S/O RAMADHANI @ MASEWE ..... APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

21/6/2022 & 26/7/2022

SIMFUKWE, J.

The appellant Daudi S/O Ramadhani @ Masewe was convicted before Mwanga District Court with the offence of Unlawful trafficking of narcotic drugs contrary to **Section 15A (1) and (2)(c) of the Drugs Control and Enforcement Act No. 5 of 2015** as amended by **section 9 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017.**

It was alleged by the prosecution before the trial court that on 03rd day of February 2020 at about 16:30 hrs at Kifaru village within Mwanga District in Kilimanjaro Region, the appellant was found in unlawful

possession of 4.75 kgs of narcotic drugs khat commonly known as Mirungi.

The trial court sentenced the appellant to thirty years imprisonment.

The appellant was aggrieved; he preferred this appeal on the following grounds: -

1. *That the prosecution case relied on the testimony of police officers alone and that made it unreliable and unsafe to found (sic0 conviction.*
2. *That the trial magistrate erred in law and in fact to rely on uncorroborated evidence of certificate of seizure (exhibit P1) which was not witnessed by independent civilian which would allay tears of planting evidence against him.*
3. *That the trial court erred in law and fact by prosecutor read fact that appellant arrested when ridden a motorcycle MC 744 CBU make KINGLION tied luggage -sulphate bag with 104 envelopes with fresh leaves suspected to be mirungi while PW1 testified that accused arrested when sited beside the river selling mirungi. (sic)*
4. *That, the learned trial magistrate erred in law and fact to enter conviction of the appellant while offence was not proved beyond reasonable doubt.*
5. *That, the learned trial magistrate erred in law and fact for convicting the appellant despite the failure by prosecution to abide with the principles governing chain of custody.*

During the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Mr. Rweyemamu the learned State Attorney. The appeal was argued by way of written submssions.

Supporting the first ground of appeal, the appellant submitted among other things that despite the fact that incident occurred during day time at 16:30 hrs and witnessed by the public, but the prosecution side did not summon any of them as witnesses. He said, that raised some doubts which the trial court ought to have addressed and give the appellant benefit of doubts.

On the second ground, the appellant referred the case of **Shabani Said Kindamba v. R, Criminal Appeal No. 390 of 2019 (CAT),** in which it was held that:

> *"A witness to a search must be respectable person of that locality....an independent witness to a search must be credible the whole exercise would be rendered suspect."*

The appellant was of the opinion that the person who gave information to the police could have been called as a witness to prove that the appellant was arrested with exhibit P1 and handled to PW2 who was a custodian of exhibit room.

The appellant also challenged the fact that the offence was committed on 03/2/2020 but the exhibit was taken to the Government Chemist Laboratory On 12/2/2020 without any explanation why the exhibit stayed for so long. He said that the same raise doubts on part of the appellant. He cited the case of **Director of Public Prosecution vs Shiraz Mohamed Sharif [2006] T.L.R 427** in which the Court of Appeal held that the fact the seized drugs were for about five days not accounted for and not explanation was given by the prosecution witness is not minor irregularity and therefore the case was not proved beyond reasonable doubts.

Arguing the third ground of appeal, the appellant submitted that at page 9 of the procedings the prosecution said that on 03/2/2020 police officers were on patrol at Kifaru village when they stopped a motorcycle with registration number **MC 744 CBU** make Kinglion which was ridden by the accused person. That the appellant had a luggage tied on the back of the motorcycle. He was searched and found with leaves suspected to be narcotic drugs commonly known as mirungi.

It was submitted further by the appellant that facts stated during the preliminary hearing differs with the evidence of PW1. He supported his point by citing **section 3 (2) (a) of the Evidence Act, Cap 6 R.E 2019** which is to the effect that in criminal matters a fact is said to be proved when the court is satisfied that the prosecution has proven beyond reasonable doubts that such facts exists. Meaning that the guilt of the accused person must be established beyond reasonable doubts. He insisted that the burden of proof always lies on the prosecution except where any statute provides otherwise.

It was stated further by the appellant that evidence of the prosecution was to the effect that the appellant was found seated beside the river selling Mirungi while facts narrated during the preliminary hearing show that the appellant was arrested while riding a motorcycle which was never produced before the court as exhibit. He commented that the contradiction creates doubts on prosecution case.

On the 4th and 5th grounds of appeal, the appellant reiterated the fact that evidence adduced by prosecution contradicts with facts narrated during the preliminary hearing. The authenticity of the motorcycle was also questioned by the appellant on the reason that PW1 failed to describe the said motorcycle.

On the strength of his arguments and authorities, the appellant prayed that his appeal should be allowed by quashing the decision of Mwanga District court and order his release from prison.

The learned State Attorney briefly submitted orally that they had not filed their reply submission because they support the appeal.

I have carefully examined the trial court's record, the grounds of appeal and the written submission of the appellant. The issue for determination is *whether this appeal has merit.*

The learned State Attorney supported the appeal in its entirety. As a cardinal principle of criminal cases the onus of proof lies on the prosecution. **Section 112 of the Evidence Act, Cap 6 R.E 2022** provides that:

> *"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lies on any other person."*

In this matter, the trial of the appellant proceeded ex parte on the reason that he was at large. Thus, the appellant did not have an opportunity to raise reasonable doubts on part of the respondent as required by law. On the third ground of appeal, the appellant pointed out that facts narrated by the prosecution during the preliminary hearing contradicted with evidence of PW1 who alleged that they found the appellant beside the river selling Mirungi. The proceedings of the trial court, show that evidence on part of prosecution was contradictory. In the preliminary hearing it was alleged that the appellant was arrested while riding a motorcycle with registration No. MC 744 CBU make Kinglion.

In the case of **Jeremiah Shemweta v. R. [1985] T.L.R 228** it was held that:

"The ratio decidendi of the Bundala case is, therefore, to the effect that non-compliance with section 171 (1) of the Criminal Procedure Code notwithstanding the appeal Court still has to decide whether the record of proceedings contains sufficient material for the determination of the appeal on its merits. It is towards this goal that I now direct my mind. In doing so ***I am guided by the principle of law that sitting as the first appellate Court in this matter it is incumbent on me to treat the evidence adduced in the case as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expect in order to ascertain if the conviction is justified and supported by the evidence."***

Emphasis added

Likewise in this case, my scrutiny of evidence on the trial court's record confirmed the above noted discrepancy in respect of the place where the appellant was arrested which seriously raises reasonable doubts on part of prosecution as rightly submitted by the appellant. I am of considered opinion that the discrepancy goes to the root of the case, thus, the same cannot be ignored. The case of **Alex Ndendya vs R, Criminal Appeal No.207 of 2018, (CAT)** is relevant.

Apart from the above discrepancy which was raised on the third ground of appeal, also, I have noted that the appellant was arrested two months after delivery of judgment. The proceedings dated 28/10/2021 reveal that the learned trial Senior Resident Magistrate did not comply to the distates of **section 226 (2) of the Criminal Procedure Act, Cap 20 R.E 2019** which provides that:

"226 (2) Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that

his absence was from causes over which he had no control and that he had a probable defence on the merit."

What has been directed in the above quoted provision, was not complied with by the learned trial Magistrate after the accused had stated that:

"Accused: I had an accident."

The trial magistrate did not rule out whether the statement of the accused amounted to a defence on the merit or not. He proceeded to sentence the appellant to thirty years imprisonment. Although the anomaly was not included in the grounds of appeal, invoking my revisionary powers I find non-compliance to **section 226 (2)** (supra) to be fatal.

Therefore, on the basis of the discrepancy noted on the third ground of appeal and non-compliance of **section 226 (2) of the CPA,** I find this appeal has merit. In the event, conviction of the trial court is quashed and sentence of thirty years imprisonment is set aside accordingly. The appellant should be set free immediately, unless held for other lawful reasons.

Order accordingly.

Dated and delivered at Moshi this 26th day of July, 2022.

S. H. SIMFUKWE

JUDGE

26/7/2022