IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 4 OF 2022
(Originating from Criminal Case No. 952018 of the Resident Magistrates' Court of Bukoba)

SYLIVESTER PERATIA @ LUZYAO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

12th September & 16th September 2022

Kilekamajenga, J.

The appellant was arraigned in the Resident Magistrates' Court of Bukoba for the offence of unlawful possession of prohibited plants contrary to **section 11(1)(d) of the Drugs Control and Enforcement Act, No. 5 of 2015**. It was alleged that, on 1st November 2017, during night hours at Mutukula Village within Missenyi District in Kagera Region, the appellant was found in unlawful possession of twelve (12) kilograms of Narcotic drugs known as Cannabis Sativa (Bhangi). The prosecution evidence that led to the conviction and sentence of the appellant was as follows: PW1, the street chairman of Kateebe at Mtukula, received a phone call at around 20:00 - 21:00 hours from PC Ngulath and requested to go at the appellant's home. He found three police officers and two militiamen and a civilian. At that time, the appellant was under arrest. The appellant's house was opened and they found two bags suspected to possess the narcotic drugs. The appellant was later taken to the police station. PW2 (G.3448

DC Ngulath) testified that, he received a phone call from the OCS who told him to prepare a certificate of seizure. He accompanied the OCS to Kateebe area, a place which was popular for Narcotic drugs transaction. Upon arriving at the area, they surrounded the appellant's house and managed to arrest him. PW2 phoned the street chairman who responded within a while. They searched the appellant's house and found two bags of narcotic drugs. The OCS filled-in the certificate of seizure and marked the bags as KYK/R/1692 of 2017. During the trial, the two bags of narcotic drugs were tendered and admitted as exhibit P1. PW2 further took samples of the narcotic drugs to the office of the Chief Government Chemist who confirmed that the leaves were real narcotic drugs. PW2 also tendered the certificate of seizure which was admitted as exhibit P4.

In his defence, the appellant blamed the police officers for planting the case against him. He consistently denied selling the narcotic drugs.

Based on the prosecution evidence, the trial court convicted and finally sentenced the appellant to serve thirty (30) years in prison. Aggrieved with the decision of the trial court, the appellant appealed to this court with seven grounds of appeal as follows:

1. *That, the Hon. Magistrate erred in law and fact to reach the decision, conviction and sentence of the appellant relying on insufficient evidence.*

2. *That, the Hon, trial magistrate failed to observe the contradictions in the prosecution evidence.*
3. *That, the Hon. Trial magistrate failed to regard the importance and requirement of tendering in court the chain of custody record in order to prove whether the said bhangi existed.*
4. *The trial magistrate erred in law and fact when he failed to regard and consider the appellant's defense.*
5. *The Hon. Trial magistrate erred in law and fact as he failed to compel the prosecution side to prove the said allegations of the person who was said to be found smoking bhangi for it's the onus of the prosecution to prove those allegations.*
6. *The exhibits relied upon to convict and sentence the appellant, ie exhibit P1 and P2 were recorded and wrongly admitted in court as they failed to comply to the statutory provisions of section 30 and 32 of the CPA, Cap. 20 revision 2002.*
7. *The prosecution sided failed to prove the case at the required law standard that's to say, beyond reasonable doubt in such a way that the delation to bring the appellant in court at the prescribed time violated the mandatory provisions of section 30 and 32 of the Criminal Procedure Act, Cap. 20 RE 2002.*

The appellant appeared in person to fend the appeal while the learned Senior State Attorney, Mr. Emmanuel Luvinga appeared for the respondent, the Republic. The appellant, being a lay person and unrepresented, simply urged the court to consider his grounds of appeal. Mr. Luvinga, on the other hand, supported the appeal on the major reason that the prosecution case was not

proved to the standard that could sustain a conviction. He specifically pointed out the following weaknesses in the prosecution case. **First**, the prosecution failed to summon key witnesses in this case such as the OCS who witnessed the seizure of the narcotic drugs and the officer from the office of the Chief Government Chemist who examined the drugs. To bolster his argument, he referred the court to the case of **Bonifact Kundakila Tarimo v. Republic**, Criminal Appeal No. 350 of 2008 (unreported) which was quoted in the case of **Godfrey William @ Matiko and Another v. The Republic**, Criminal Appeal No. 134 of 2022. **Second**, the counsel argued that, as key witnesses were not summoned to testify, there is a missing link in the evidence; hence, the chain of custody of the drugs has been broken. The available evidence seems to suggest that, PW2 seized the drugs, handled them up to the end and investigated the case as well. Based on these two grounds, the counsel urged the court to allow the appeal.

Among the grounds of appeal advanced by the appellant, there are two key points for consideration. On the first ground, the appellant argued that the prosecution evidenced was insufficient to support a conviction. Also, on the seventh ground, the appellant argued that the prosecution case was not proved to the required standard. I find these two points related and also pertinent in the determination of this appeal. As already stated in the prosecution evidence, the

appellant was convicted based on the evidence of two witnesses and four exhibits. I am alive, proving a fact does not require a particular number of witnesses. See, **section 143 of the Evidence Act, Cap. 6 RE 2019**. Even the testimony of a single credible witness may be sufficient to ground a conviction. However, in the case at hand, PW1 witnessed the search of the appellant's house. The OCS, who also witnessed the seizure of the alleged drugs and filled-in the certificate of seizure, did not appear in court to testify. PW2 who witnessed the search tendered the certificate of seizure and all other exhibits including the report from the office of Government Chemist. It is very unfortunate that, even the officer from the Government Chemist who examined and verified that the alleged plant leaves were actually narcotic drugs was also not called to testify. What seems to be evident is, the whole prosecution evidence heavily relied on PW2. He arrested the appellant, phoned PW1, searched the appellant's house, seized the alleged drugs, referred the drugs for examination, investigated the case, received the report from the Government Chemist, testified in court and tendered all the exhibits. This being such a complex case that attracts a sentence of thirty years ought not be a one man's case. The chain of events and custody of the narcotic seems to have broken and the prosecution evidence seems to be loose and against the required standard in criminal cases. See, **section 3(2)(b) of the Evidence Act, Cap. 6 RE 2019.**

Furthermore, there is no cogent evidence to explain why the prosecution dropped the evidence of the OCS who witnessed the search and filled-in the certificate of seizure and the officer from the office of the Government Chemist who possessed expert's opinion on the contents of the narcotic drugs. In absence of clear explanation on the exclusion of such key witnesses, the court must draw an adverse inference as it was stated in the case of **Boniface Kundakira** (supra) thus:

> *'...it is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one.'*

In the case at hand, I find a missing link both in the prosecution evidence and in handling the drugs from the seizure, to the examination and back to court. The prosecution evidence seems to have been hinged on a single witness raising plausible suspicion on what the appellant seems to complain; that, the case was framed against him. For that reason therefore, I find merit in the appeal and hereby allow it. The appellant should be released from prison unless held for other lawful reasons. It is so ordered.

Dated at Bukoba this 16th September 2022

Ntemi N. Kilekamajenga
JUDGE
16/09/2022

Court:

Judgement delivered this 16th September 2022 in the presence of the learned State Attorney, Miss Evarista Kimaro and the appellant present in person. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
JUDGE
16/09/2022