IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 209 OF 2020

(Originating from Criminal Case No. 178 of 2019, District Court of Kibaha at Kibaha)

RAMADHANI ADAM @ KONDO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

27th July, 2022 & 28th September, 2022

MASABO, J.:-

At the District Court of Kibaha (the trial court), the appellant Ramadhani Adam @ Kondo was arraigned on the offence of trafficking in narcotic drugs c/s 15 A (1) and (2) of the **Drug Control and Enforcement Act**, No. 5 of 2015 as amended by the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017. It was alleged that, on 16th October, 2019 at Jamaika kwa Mathias within Kibaha District in Coast Region, the appellant was found trafficking in narcotic drugs to wit cannabis sativa weighing 122.16 grams.

To prove such offence, the prosecution summoned seven witnesses and produced five exhibits to establish that, the appellant was arrested by PW1 during his patrol within Kibaha. From oral testimonies of these witnesses and exhibits, it was established that, on the material day, PW1 and his fellow policemen while on patrol they became suspicious of illegal activities in the house PW2, one Thomas Komba. They went to the said house and while

there they searched a room occupied by the Appellant who was a tenant in the said house. During the search, they impounded a total of 122.16 grams of cannabis sativa (bhangi) which was hidden in a sulphate bag engrossed in a gazette. They filled a certificate of seizure and had it counter signed by the appellant and his landlord. Thereafter, they arrested him, took him to a police station. The impounded substance was examined by the Chief Government Chemist and found to be narcotic drugs. The appellant was thereafter charged. Convinced that the prosecution has managed to prove its case, the trial court entered a conviction against the appellant and sentenced him to serve thirty years in prison.

Aggrieved by the conviction and sentence, he has preferred this appeal advancing detailed 6 grounds of appeal which I will summarize as follows;

1. The trial magistrate erred in law and fact in holding that the prosecution proved its case beyond reasonable doubt;
2. The trial magistrate erred in law and fact in convicting the appellant without considering that the search and seizure was not properly conducted;
3. The trial magistrate erred in law and fact in convicting and sentencing the appellant without taking into account that a proper chain of custody was not established;
4. The trial magistrate grossly erred in law and fact in convicting the appellant by relying on exhibits tendered by a public prosecutor;

5. The trial magistrate erred in law and fact in convicting the appellant basing on Exhibit P1 and P4 which were not listed in the prosecution list of exhibits; and
6. The trial magistrate erred in law and fact in wrongly convicting by relying on planted cannabis sativa (bhangi).

During hearing of the appeal which was done by way of written submissions, the appellant appeared in person, unrepresented whereas the respondent, the Republic, was represented by Mr. Sofa Bimbiga, learned State Attorney.

Supporting the appeal, the appellant started with the 2nd ground and submitted that the search and seizure conducted was illegal as there was neither a search warrant nor an independent witness. He argued that PW2, the landlord, does not fit as an independent witness as his house was already under suspicions. He cited the decisions of the Court of Appeal in **Shaban Said Kindamba Vs Republic**, Criminal Appeal No. 390 of 2019 and **Joseph Charles Bundala Vs Republic**, Criminal Appeal No. 15 of 2020 to cement his assertion and prayed that the certificate of seizure be expunged.

On the 3rd ground of appeal, he submitted that, the chain of custody of the alleged seized cannabis sativa was not established. The record does not show where and to whom PW1 handed the exhibits after he seized them. Likewise, much as the record shows that PW3 received the exhibit from PW1 on 16/10/2019 and handed the same to PW5 on 18/10/2019 it is silent on where the exhibit was kept in between these dates. He proceeded that, the fact that PW3 testified to have received the seized exhibits from PW1 was

neither corroborated nor adhered to section 38 (3) of the **Criminal Procedure Act** [Cap 20, R.E. 2019] and Police General Order (PGO) No. 229.

The appellant further argued that, PW1, PW3 and PW5 ought to have a proper documentation in respect of search, seizure and movement of the seized items from the time of the arrest to their final disposal. To cement his argument, he referred the court to the case of **Paul Maduka and 4 Others Vs. Republic**, Criminal Appeal No. 110 of 2017 (unreported) where the Court of Appeal underscored the need for maintaining the chain of custody.

On the 4th ground of appeal, the appellant submitted that, it was the public prosecutor, not the witness who tendered the seized cannabis sativa which was admitted as exhibit P5. This was against the requirement of the law as by doing so the prosecutor prayed the role of a witness. He cited the decision of the Court of Appeal in **Frank Massawe Vs. Republic**, Criminal Appeal No. 302 of 2012 and the decision of this court in **Dominic Cornel Kombe and Another Vs. Republic**, Criminal Appeal No. 287 of 2018 (unreported) to buttress his argument that an exhibit tendered by a prosecutor is illegal and should be expunged from the record.

Regarding the 5th ground of appeal, he submitted that, exhibit P1, the Government Chemist report and exhibit P4, the exhibit register book, were improperly tendered and admitted in evidence. He invited this court to expunge them as they were not listed as exhibits in the memorandum of facts adopted before the court.

Lastly, on the 1st and 6th grounds of appeal, the appellant submitted that, the case against him was never proved to the required standard as the prosecution failed to reach the threshold of proof beyond reasonable doubt as held in the case of **Jonas Nkize Vs. Republic** [1992] TLR 213. He prayed that appeal be allowed, the conviction and sentence be quashed, set aside and this court set him at liberty.

In reply, Mr. Bimbiga, learned State Attorney consolidated the 1st, 2nd and 6th grounds of appeal and submitted that the case against the appellant was proved beyond reasonable doubt. PW1 arrested the appellant after conducting a search which complied with all the legal requirements and which proceeded in the presence of an independent witness, PW2, who was the appellant's landlord. And, after the seizure of the exhibit, the chain of custody was unbroken as PW1 handed over the seized exhibit to PW3 who gave it to PW5 who was the exhibit keeper. The later, handed them to PW4 who took them to PW7 for analysis. Thereafter, the exhibit was returned into the exhibit room and remained there until the day it was tendered in court as exhibit. Hence, the chain of custody was never broken.

To support her argument, she cited the case of **Chacha Jeremiah Murimi and Others Vs. Republic**, Criminal Appeal No. 551 of 2015 (unreported) where the Court of Appeal held that, not every exhibit must be subjected to documentation. What matters is the credibility of witnesses and each case

should be decided based on the prevailing circumstances. In conclusion, she prayed that these three grounds be dismissed.

On the 2nd ground regarding search, Ms. Bimbiga argued that, search and seizure was thoroughly done by PW1 during his patrol in the presence of PW2 who was an independent witness. She argued that, since it was an emergency search there was no need of a search warrant. The learned State attorney further argued in respect of the 4th ground of appeal that, exhibit P1, the Government Chemist report was tendered during preliminary hearing following the appellants admission that the said exhibit was taken to the government chemist for analysis. Besides, PW7, the Government Chemist identified and read the said exhibit during his testimony. In that regard, if the appellant had any objections he would have done so during trial. The fact that he never questioned it draws an inference that he accepted such evidence as held in the case of **Damian Ruhele Vs. Republic**, Criminal Appeal No. 501 of 2007 (unreported).

As to the 5th ground, Ms. Bimbiga submitted that, exhibit P4 was never mentioned during preliminary hearing as section 192 (6) of the CPA does not require mentioning of exhibits during preliminary hearing. Be it as it may, the same did not prejudice any of the appellant's rights and he did not contest its admissibility during trial. He finally insisted that the case against the appellant was proved to the required standard as per section 110 of the Evidence Act [Cap 6, R.E. 2019].

I have considered the parties' submission as well as the trial court's proceeding and judgment. The core issue for determination is whether the case against the appellant was proved on the required standard. Answering this question requires me to examine the grounds of appeal. I will start with the 2nd, and 3rd grounds separately and, thereafter, proceed to the 4th and 5th which will be argued jointly. The 1st and 6th grounds of appeal will similarly be argued jointly.

The 2nd ground of appeal is in respect of search and seizure. A police officer is authorised by law to enter and search in any premise, vessel, vehicle or land and seize anything which is connected with an offence. It is trite that the exercise of this function should only procced upon obtaining a warrant of search save on emergencies in which case, the search may proceed without a warrant under section 42(1)(b)(i) and (ii) of the Criminal Procedure Act. The rationale behind this requirement is as stated in the case of **Badiru Mussa Hanogi Vs. Republic,** Criminal Appeal No. 118 of 2020 (unreported) where the Court of Appeal stated thus;

> "In our view, the meticulous controls provided for under the CPA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies, seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania. It is also an attempt to ensure that unscrupulous officers charged with the mandate to investigate crimes do not plant items relating to criminal acts in people's private premises in fulfilling their undisclosed ill-motives."

In the present case, the search leading to the impounding cannabis sativa (exhibit P5) and the appellant's arrest was conducted at night and without a warrant of search. The question to be answered, therefore, is whether there was an emergency justifying the conduct of search without a warrant. The learned State Attorney has argued that, the search was an emergency and legally tenable a point which has been sternly contested by the appellant. Unfortunately, the learned State Attorney's averment is not reflected in the court record. From the evidence, it was simply stated that on the fateful day, PW1 and his fellow policemen while on patrol suspected that there were illegal activities in PW2's house. They went to the house, conducted the search and arrested the appellant. Since the record is silent on why the warrant was not sought/obtained, it is looks as if the court was made to assume that it was impossible for PW1 and his colleagues to obtain the warrant and that the search was an emergency hence properly conducted in the eyes of law.

In my considered view, this approach was wrong. From the rationale above explained and the fact that search without warrant is permissible in exceptional circumstances, it was incumbent for the prosecution to disclose the reasons why the warrant was dispensed with. From the record, it is unclear whether PW1 had a clue of the alleged criminal activity and if not, what made him and colleagues suspect that there were criminal activities in the said house/room. In the absence of such clarity and full disclosure, I find it unsafe to assume, as proposed by the learned State Attorney that, there was an emergency justifying the conduct of search without a warrant.

Regarding the requirement for an independent witness, just as the requirement for warrant of search, this too is aimed at preventing abuse of powers by the search machineries. In the present case, PW1 stated that, after conducting the search, he prepared a certificate of seizure and have it counter signed by the appellant and PW2 who was described as an independent party. Whereas the presence of this witness at the scene is uncontroverted, his independence is arguable. In the respondent's view, PW2 was independent but, for the appellant, it has been passionately argued that he was not. Having assessed the evidence in the light of this contending view, I am inclined to agree with the appellant that PW2's independence was questionable as he had an interest to protect. Being the landlord, it is obvious that he would do whatever it takes to ensure that the house which earns him rent is not tainted as one that habours narcotic drugs and he is not personally, in his capacity as landlord, implicated for the narcotic drugs. In the foregoing, I am of the considered view that the search and seizure was flawed. Accordingly, this ground is found to have merit and is allowed.

The 3rd ground is on chain of custody. For an exhibit to be relied upon in grounding a conviction against an accused, its chain of custody must be intact meaning that the chronology of event from the time of its seizure to when it is tendered in court as exhibit has to be satisfactorily established so as to eliminate the danger of the exhibit been tampered and to ensure that the alleged evidence is in fact related to the alleged crime in which it is

being tendered. The chain of custody can be established through a chronological documentation or paper trail as established in the case of **Paul Maduka Vs. R,** (supra) or by parading witnesses as held in the case of **Chalo Saidi Kimilu & Others Vs. R,** Criminal Appeal No. 11 of 2015, CAT Tanga (unreported).

In the present case the proof of chain of custody was by parading of witnesses through whom it was established that the seizure of the exhibit on 16/10/2019, PW1 surrendered it to PW3. On 18/10/2019 PW3 handed the exhibit to CPL Mwanvita, PW5 for storage. On 22/10/2020 PW6, DC Sarah, collected the same and passed it over to CPL Ombeni who took the exhibit to PW7 for analysis and returned it to the exhibits' storage room. From the chronology of these events, the alleged gap can be easily spotted as the evidence is silent on the whereabouts of the exhibits between 16/10/2019 and 18/10/2019. PW3 did not disclose how he stored the exhibit from 16/10/2019 when it was entrusted on him by PW1 to 18/10/2019 when he passed it over to PW5 for custody. Under the circumstances, I have no hesitation in holding that there was a breakdown of the chain of custody. Accordingly, the 3rd ground of appeal passes and is upheld.

On the fourth ground of appeal, the appellant has challenged the tendering of exhibit by the public prosecutor. From the trial court's proceedings, it is true that exhibit P1, the Government Chemist Report and exhibit P5, the cannabis sativa drugs were tendered by public prosecutors. Whereas there

may be no problem with the Government Chemist Report as it was admitted during preliminary hearing after the accussed admitted its existence hence non contentious, it was lucidly wrong for the prosecutor to tender the cannabis sativa (Exhibit P5) during trial. The law is very well settled that only a witness can tender exhibits during trial. A prosecutor cannot tender exhibit. By tendering the exhibit the prosecutor assumed the role of a witness and consequently offended the law (see **Thomas Ernest Musungu @ Nyoka Mkenya V R** (supra)). In the circumstances, the 4th ground of appeal is allowed and Exhibit P5 is consequently expunged from the records.

Having expunged Exhibit P5 from the record the question that follows is whether the remaining prosecution evidence can sustain the conviction. The answer is in negative. In the absence of the seized drugs as evidence, the prosecution case flops. This brings me to the last two grounds on whether the case against the appellant was proved to the required standard. In criminal law, the burden rests upon the prosecution to prove the case against the accussed person and the standard of proof required is proof beyond reasonable doubt. It is not upon the accused to prove his/her innocence. Having expunged the cannabis sativa from the record and in the view of the anomalies in the search and chain of custody, it is my respectful view that the case against the accussed was not proved to the required standard to warrant his conviction and sentence.

This appeal is therefore meritorious and I allow it by quashing and setting aside the conviction and sentence. The appellant is to be released from

custody immediately unless lawfully held for other lawful reasons. It is so ordered.

Dated at Dar es Salaam this 28th day of September 2022.

9/28/2022

X 

Signed by: J.L.MASABO

J.L. MASABO

JUDGE

28/09/2022