

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

CRIMINAL APPEAL CASE NO. 79 OF 2022

(Originating from the District Court of Mbeya, at Mbeya, in Criminal Case No. 53 of 2017)

YELA SALAMPO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last Order: 22.08.2022

Date of Judgment: 23.09.2022

Ebrahim, J.

In the District Court Mbeya, at Mbeya in Criminal Case No. 53 of 2017 the Appellant, YELA NSALAMPO was charged, convicted and sentenced for the offence of being found in cultivation of narcotic drugs contrary to section 11 (1) (a) and 12 (1) (a) (i) of the Drugs Control and Enforcement Act, No. 5 of 2015.

It was alleged in the charge sheet that on 23rd day of February, 2017 at Jojo area (Santilya) within Mbeya Rural District and Region of Mbeya the appellant was found in cultivation of Narcotic Drugs to wit, 270 plants of Cannabis Sativa. When the charge was read over to him, he pleaded not guilty. The case was fully heard and at the end the

appellant was convicted and sentenced to serve 30 years imprisonment. Aggrieved, he referred this appeal raising 6 grounds which can be conveniently reconstructed as follows:

1. That trial court erred in law and fact when the prosecution failed to tender official documents such as certificate of destruction to justify whether the said bhang was destructed after being uprooted.
2. That the lower court magistrate erred in law and facts when prosecution failed to clarify the ownership of the land alleged to be cultivated bhang. That no trail paper was tendered before the court during trial.
3. That the lower court magistrate erred in law and facts when prosecution side failed to prove whether the bhang was cultivated in the farm or in the forest.
4. That the lower court magistrate erred in law and facts to convict appellant while the prosecution side misdirected herself when failed to prove the allegations against the appellant contrary to section 110 (2) of the Evidence Act.
5. That the lower court magistrate erred in law and facts whereby prosecution side failed to tender caution statements of the

appellant of which this could make a clear on how the appellant admitted the allegation.

6. That the lower court magistrate erred in law and fact where the prosecution side failed to lead investigation conduct, taking into consideration the appellant was arrested on 17.02.2017 up to 23.02.2017 when he was taken to the said farm and forest from police station and disabled it to explain what matter contained in the days passes after being arrested.

At the hearing, the appellant appeared in person, unrepresented whereas the respondent appeared through Mr. Rwegira, learned Senior State Attorney. The appeal was argued orally.

The appellant prayed to adopt his grounds of appeal and the court to consider them.

On his part the learned State Attorney objected the appeal. Submitting regarding the 2nd and 3rd grounds of appeal he said that the prosecution through her witnesses adduced enough evidence that the appellant was involved in cultivating bhang. That PW4 an independent witness living in the area where the farm is situated was good a witness to prove the case. Also, the learned State Attorney submitted that PW4 witnessed the appellant showing his farm in which the bhang was

cultivated. According to him, the evidence of PW4 was collaborated by the evidence of PW3 (WEO) that the appellant orally confessed in dealing with cultivating the bhang.

The learned State Attorney further submitted that the appellant led PW1 and PW2 to his farm and the bhang plants were uprooted and destructed in his presence. It was the learned State Attorney's argument that the appellant gave oral confession as there was no evidence that he was coerced or threatened. He referred this court to the case of **Rashid Roman Nyerere vs Republic**. Criminal Appeal No. 105 of 2014 where it was held that oral confession in preliminary investigation can be used to form conviction. Thus, the absence of a written confession (cautioned statement) does not exonerate the appellant from the liability of cultivating bhang.

As to the 4th ground of appeal the learned State Attorney contended that PW5 (a government Chemist) proved that what was found in the appellant's farm was bhang. That PW5 also tendered exhibit PE3 as a documentary proof.

Submitting on the 1st and 5th grounds of appeal the learned State Attorney stated that the appellant signed the certificate for destruction

in the presence of the Magistrate and the same was tendered as exhibit PE2.

Regarding the 6th ground of appeal, the learned State Attorney argued that it was true that the appellant was arrested on 17.02.2017 and was taken to the farm on 23.02.2017. However, the delay did not prejudice the appellant as he was the one who decided to go with the police at the said farm. The learned State Attorney was of the view that entire appeal has no merits as the prosecution evidence was not shaken hence the appeal be dismissed.

In his rejoinder the appellant reiterated his prayer made prior.

Having considered appellant's grounds of appeal and the submissions by the learned State Attorney, I will start with ground 5 of the appeal. The appellant is complaining of the prosecution's failure to tender caution statement. I need not be laboured by this ground of appeal as my perusal of the record does not reveal any issue of cautioned statement which the trial court dealt with. My perusal however, noted that the appellant was mainly convicted on the witnesses' oral testimonies. Nonetheless, this being the first appellate court; I would proceed to reappraise the evidence so as to reach to own conclusion of

facts. The 5th ground of appeal therefore is dismissed for being untenable.

Before I consider the rest grounds of appeal which mostly relates to the prove of the case by the prosecution; I wish to recapitulate the principle of burden of proof in criminal cases. It is trite law and indeed elementary that **he who alleges has a burden of proof** as per **section 110 of the Evidence Act, Cap. 6 R.E 2022**. In criminal cases therefore the burden of proof lays to the prosecution and the standard of proof is beyond reasonable doubt.

In the case at hand, the appellant was charged with offence of being found in cultivation of narcotic drugs (cannabis sativa/bhang) contrary to **section 11 (1) (a) and 12 (1) (a) (i) of the Drugs Control and Enforcement Act**. The provisions of **section 11 (1) (a) of the Act** are couched thus, and I quote them for the sake of a readymade reference:

"Any person who cultivates any prohibited plant, commits an offence and upon conviction, shall be liable to imprisonment for a term of not less than thirty years."

In my view the evidence to be adduced in connection with the above offence should show that the plant at issue was indeed, bhang and they were indeed cultivated by the accused. In the instant case

however, going through the proceedings on record and the complaints by the appellant, it is undisputed that the plant found cultivated in the farm alleged to be of the appellant was real bhang. This was also proved by PW5 and exhibit PE3.

The dispute nonetheless, rests to the ownership of the farm in which the bhang was found cultivated. Indeed, the 2nd, 3rd, and 4th grounds of appeal are connected to that dispute.

The evidence adduced by the prosecution witnesses were to the effect that PW1 and PW2 (police officers) received the Appellant from the leaders of JOJO Village where the Appellant resided. According to PW3 (Ward Executive Officer), Villagers at JOJO were not pleased with the act of the Appellant of cultivating narcotic drugs. It was said that one of the villagers referred to as a good Samaritan informed PW3 about cultivation of bhang by the Appellant. PW3 was taken and shown the Appellant's farm. Then he reported the information to the police at Mbalizi and the District Commissioner.

Another evidence is that of PW4 (a Village Chairman). He told the trial court that he knows well the ownership of farms by his villagers. He then confirmed that the Appellant has used the farm for so long for cultivation of other crops such as maize. PW4 also said that in that farm

they found bhang alongside maize plants, the averment which was supported by PW3.

Like it was not enough, it is also in evidence (by all witnesses) that the Appellant took the police in the presence of other villagers and showed the same farm and admitted to cultivate the bhang which he said that he cultivated for his own use since it gave him strength/energy to cultivate other crops.

With that evidence, it is my considered position that no stone was left unturned. This is due to the fact that PW4 as a village chairman knew the appellant well and his long cultivation of the farm. Again, as correctly argued by the learned State Attorney, the Appellant took the police to show the farm and admitted to be the one who was cultivating it, is an oral confession which is legally admissible. See; **Rashid Roman Nyerere vs R.** (supra). **The Director of Public Prosecutions vs Nuru Mohamed Gulamrasul**, [1988] T.L.R. 82. Also, **Mohamed Manguku vs Republic**, Criminal Appeal No. 194 of 2004, (unreported) quoted in **Chamuriho Kirenge @ Chamuriho Julias vs Republic**, Criminal Appeal No. 597 of 2017 CAT at Mwanza (unreported) where the Court of Appeal insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to

him. In the instant case no evidence was adduced by the appellant if the admission he made in the presence of his PW1, PW2, PW3, PW4 and other villagers was influenced by any threat, coercion or promise. Thus, confession was freely made.

The appellant's defence that the bhang belonged to a person by the name of UPE, and that the case was made up; and the complaint in this appeal that the prosecution witnesses did not tender any document on the ownership of the land, in my concerted opinion was a mere struggle to exonerate himself from the liability which unfortunately could not hold water. This follows the fact that the appellant did not state if he had bad blood with any of the witnesses. When he was cross-examined he replied negatively that he had no grudge with any of the witnesses.

Before I conclude, I wish to comment on the 6th ground of appeal. The appellant complained that there was no plausible explanation made by the prosecution side as to why he was arrested on 17/02/2017 but was taken to show the farm on 23/02/2017. Frankly, I did not understand what was the point that the appellant wanted to enunciate. Nonetheless, my findings did not come across any law which provides for duration or time limit for the suspect to be taken to the crime scene. Further, the complaint would hold water if raised in relation with the

time of recording cautioned statement which is not an issue in this matter.

At the end result, the appellant's appeal fails. It is hereby dismissed.

Ordered accordingly.




R.A. Ebrahim
Judge

Mbeya

23.09.2022