

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO
CRIMINAL APPEAL NO. 41 OF 2022

(Originating from Criminal Case No. 165 of 2018 in the Resident Magistrate Court of Morogoro)

SHIDA OMARY @ SHOMARY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 14/9/2022

Judgement date on: 16/9/2022

NGWEMBE, J:

The appellant Shida Omary was arraigned in the District Court of Morogoro at Morogoro charged for trafficking illicit drugs contrary to section 15A (1) and (2)(c) of the Drug Control and Enforcement Act No. 15 of 2015 as amended by the written Laws (Miscellaneous Amendment) Act No. 3 of 2016. Facts of the case as per particulars of the charge sheet provide that, on 21st May, 2018 at Mwigole, Mwembesongo area within Municipality and District of Morogoro in Morogoro Region, did traffic in Narcotic Drugs, to wit; Cannabis Sativa commonly known as Bhangi



weighing 2.692 kilograms. The prosecution managed to prove the case, subsequently the trial court found the accused liable, hence convicted her and sentenced to ten (10) years imprisonment.

Soon thereafter, the appellant found her way to this court challenging both the conviction and sentence based on ten (10) grounds. However, on the hearing date of this appeal, the appellant being unrepresented, had nothing useful to assist the court on her appeal, rather relied solely on her grounds of appeal.

On the adversarial side, the Republic was represented by Emanuel Kahigi learned State Attorney who supported the appeal. That he perused all grounds of appeal, proceedings and the whole judgement of the trial court and found that, there were serious procedural irregularities committed by the trial court. To be precise he referred this court to the procedure adopted in tendering exhibits as per pages 18 – 20 of the proceeding. Unfortunate all exhibits were tendered by the prosecutor instead of witnesses as required by law.

Moreover, he rightly pointed out that a prosecutor is not a witness competent to tender exhibits. That the prosecutor cannot assume the role of a prosecutor as well as a witness. Therefore, upon expunging all exhibits, the remaining evidences are incapable to support the charge sheet and cannot constitute the offence of drug trafficking. As such the appeal may be allowed.

In this appeal I fully subscribe to the arguments advanced by the learned State Attorney. The legal requirements on who should tender



exhibits during trial, I think it is settled in our jurisdiction that, only witness can do so.

In the case of **Robinson Mwanjisi & 3 Others Vs. R [2003] T.L.R. 218**, the Court laid down the procedures of introducing and tendering exhibits in court. The law requires exhibits to be tendered by witnesses, so that they can be cross-examined by other side. The Court of Appeal insisted on this issue in the case of **Thomas Ernest Msungu @Nyoka Mkenya Vs. R, Criminal Appeal No 78 of 2012 (Unreported)** when held:-

"A prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect, that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the Criminal Procedure Act as it is, since the prosecutor was not a witness he could not be examined."

In respect to this appeal, it is apparent from the face of the record that all exhibits were tendered by the prosecutor. Those exhibits were not only key to establish and prove the accusations, but also were actually the sole evidences capable to find the accused liable on the offence charged. The respective exhibits are:- the accused caution statement (P1), 145 rollers of bhang (P2) and the report from the office of Government Chemist (P3). All those were tendered by the prosecutor, the same was recorded in pages 18 – 20 of the proceedings.



Since the prosecutor is not a witness, he could not be cross examined on those exhibits which he tendered. Therefore, he was not competent to tender them during trial. In so doing, it was contrary to the law and procedure as was alluded in the case of **Thomas Ernest Msungu @ Nyoka Mkenya (Supra)** where it was insisted that in tendering the exhibit, the prosecutor assumed dual role as a witness and a prosecutor contrary to law.

Witnesses take oath or affirmation before adducing their evidences; however, a prosecutor or advocate does not take oath for that purpose. In this point, the law is crystal clear that a Prosecutor is not a witness, hence he cannot be cross examined upon oath or affirmation. In that regard, exhibits P1, P2 and P3 are hereby expunged from the court records. Upon removing those exhibits, the remaining evidences cannot support the charge sheet, thus the whole trial lacks leg to stand.

What else this court can do? Unfortunately, the only remedy is to quash the whole proceedings of the trial court, as I hereby do. consequently order an immediate release of the appellant from prison unless lawfully held.

Order accordingly.



P.J. NGWEMBE

JUDGE

16/09/2022

Court: Judgment delivered at Morogoro in Chambers on this 16th day of September, 2022, **Before Hon. S. J. Kainda, DR** in the presence of the Appellant and in the presence of Mr. Emmanuel Kahigi learned State Attorney, for respondent.

SGD. HON. S.J. KAINDA
DEPUTY REGISTRAR
16/09/2022

