IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 288 OF 2021

HAMIS MUHIBU ABDALLAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Ngwembe, J.)

dated the 6th day of November, 2020
in
Criminal Appeal No. 55 of 2020

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JUDGMENT OF THE COURT

18th & 25th March, 2022

NDIKA, J.A.:

The High Court of Tanzania sitting at Mtwara (Ngwembe, J.) dismissed an appeal by the appellant, Hamisi Muhibu Abdallah, from the judgment of the District Court of Nanyumbu. In doing so, the High Court affirmed the appellant's convictions on two counts: one, unlawful cultivation of prohibited plants contrary to section 11 (1) (a) of the Drugs Control and Enforcement Act, Cap. 95 R.E. 2019 ("the DCEA"); and two, unlawful possession of prohibited plants contrary to section 11 (1) (d) of the DCEA. Also affirmed

were two concurrent mandatory sentences of thirty years' imprisonment on the two counts. Still being dissatisfied, the appellant now appeals.

It would be worthwhile to remark that the appellant was tried along with his younger brother, Dotto Muhibu Abdallah ("Dotto"), who was eventually acquitted by the trial court.

The prosecution built its case upon the evidence adduced by eight witnesses augmented by seven exhibits to establish, on the first count, that the appellant and Dotto, on 16th May, 2017, at or about 06:30 hours at Songambele Street in Mkumbaru village in Nanyumbu District in Mtwara Region, were found cultivating a prohibited plant called *cannabis sativa* commonly known as bhang. The accusation, on the second count, was that, the appellant and Dotto, at the same time and place, were found in possession of prohibited plants, to wit, 535 plants of *cannabis sativa* commonly known as bhang.

While leading a police contingent on a patrol on 16th May, 2017 at 05:30 hours, Assistant Superintendent of Police Severine Samwel Musonda (PW1), who was then the Officer Commanding Criminal Investigation Department (OC-CID), Nanyumbu District, had a tip from an informant that

the appellant was a dealer in bhang in Mkumbaru village. PW1 went with this contingent to the house of the appellant at the said village which they searched but nothing suspicious was retrieved. Before leaving the home, they walked to his nearby 2.5-acre farm, which they explored in the presence of, among others, the appellant, Dotto and an independent witness called Omary Hassan (PW3). They found 535 grown plants around two molehills suspected to be bhang, which, upon PW1's order, were all uprooted. PW1 filled out a seizure certificate (Exhibit P1) that he duly signed as the officer executing the search and had it countersigned by the appellant, Dotto, PW3, Mahamudu Ismail Napose (the Village Chairman) and Detective Constable Haji. The appellant and Dotto were immediately arrested and taken to the Police Station at Mangaka along with the seized plants, which were admitted in evidence collectively as Exhibit P2.

PW3 confirmed that he witnessed the uprooting of the plants from the appellant's farm, which he knew very well from the time the appellant cleared the bush and cultivated after acquiring it. He also adduced that the Village Chairman Napose led the search party to the farm after the appellant had shown it upon being asked. As stated by Police Officer No. G.3518

Detective Constable Masoud (PW6), Napose died before he testified at the trial. His death certificate was admitted in evidence as Exhibit P5 along with the statement he recorded at the Police Station (Exhibit P6) in terms of section 34B of the Evidence Act, Cap. 6 R.E. 2019. In that statement, he affirmed that he witnessed the search at the appellant's home and farm and that the plants in issue were uprooted from the farm. He also stated that it was the appellant who led the police contingent to the farm upon being required to do so.

Police Officer No. G.8126 Detective Constable Raphael (PW2) tendered a cautioned statement (Exhibit P3), recorded on 16th May, 2017 starting at 08:49 hours, by which the appellant allegedly confessed to cultivating bhang plants at his farm. The statement was admitted after the trial court had conducted an inquiry following the appellant's objection to its admissibility and ruled that it was voluntarily made by the appellant. Similarly, Police Officer No. F.1487 Detective Corporal Vincent (PW4) tendered a cautioned statement (Exhibit P4) allegedly made by Dotto on 16th May, 2017 at 09:00 hours.

At the police station, the seized plants were handed over on the same day by PW1 to Police Officer No. D.7531 Sergeant Ally (PW5). According to PW5, on 30th May, 2017, PW1 came over to the Exhibits Room and collected a sample from the seized plants for the purpose of forwarding it to the Government Chemist Laboratory Agency ("the GCLA") for chemical analysis. The appellant and Dotto were not there at the time, meaning that they did not witness the collection of the sample.

Victor Elisei Leonard (PW8), a technician working at the Southern Zone Office of the GCLA at Mtwara, adduced that, upon the request of the OC-CID Nanyumbu, he travelled to the Police Station at Nanyumbu on 25th May, 2017 where he was shown the seized 535 plants from which he extracted a sample of leaves. Having put the specimen in a brown envelope and sealed it, he took it to the GCLA Offices in Dar es Salaam where he handed it over to Elias Zakaria Mlima (PW7), a chemist, for chemical analysis. As per PW7's analysis report dated 27th July, 2017 (Exhibit P7), the sample was confirmed to be *cannabis sativa* commonly known as bhang.

In his testimony upon affirmation, the appellant flatly denied the accusation. While admitting that his house was searched by the police on

the fateful day and that nothing was retrieved therefrom, he denied that the farm from which the plants were uprooted was his property. He essentially adduced that the plants were actually uprooted from a farm, whose owner he did not know, which they passed by on the way to the police station. He charged that there was no proof, be it documentary or otherwise, that he owned the farm in issue. His younger brother (Dotto), also disassociated himself from the charge, saying that he had just arrived at his brother's home a day earlier as a guest and that he had nothing to do with the farm.

The trial court (Hon. G.A. Mwambapa – RM) held that it was common ground that the seized materials were prohibited plants based upon PW7's evidence supported by Exhibit P7. The learned trial magistrate found and held that the appellant was the owner of the farm and had knowledge or control of what was grown at the farm based on the following facts: one, that the appellant was the one who led the police to the farm. Two, that in the deceased Village Chairman's statement (Exhibit P6) it was stated that it was the appellant who led the search party to the farm in issue. Finally, that PW3, as an independent witness, confirmed the appellant's ownership of the farm, which he knew well. He considered the appellant's defence that the

farm was not his property but rejected it on the ground that it was peppered with outright lies whose effect was naturally to strengthen the prosecution case. On that basis, he found the appellant guilty of not only cultivating but also possessing *cannabis sativa* plant, a prohibited plant and sentenced him accordingly, as we hinted earlier.

The High Court, on the first appeal, upheld the trial court's findings of fact after dismissing five grounds of complaint. Accordingly, the court sustained the convictions and concurrent mandatory sentences.

This appeal is predicated on five grounds of appeal gelling into three complaints: one, that the search and seizure of the plants was illegal for contravening section 38 (1) and (3) of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA"); two, that Exhibits P1, P2 and P3 were admitted in evidence in violation of the procedure; and three, that the High Court erred in law for failing to hold that the trial court did not evaluate the defence, which was a non-compliance with sections 235 (1) and 312 (2) of the CPA.

At the hearing of the appeal, the appellant, who was self-represented, essentially pressed us to allow his appeal and rested his case having reserved his right to rejoin, if need be.

For the respondent, Ms. Ajuaye Bilishanga Zegeli, learned Principal State Attorney, initially supported the appeal. She began her submissions by reviewing the testimonies of PW1, PW5, PW7 and PW8 on the chain of custody of the seized plants. She argued that it was baffling that PW1 did not say where he took the seized plants even though the Exhibits Keeper (PW5) adduced that he received them from PW1 and stored them in the Exhibits Room. Coming to how the sample taken to the CGLA was extracted from the seized plants, Ms. Zegeli argued that the specimen was collected by PW8 in the absence of the appellant and his co-accused in breach of Regulation 16 (f) of the Drugs Control and Enforcement (General) Regulations, 2016, G.N. 173 of 2016. It was her contention that this omission affected the integrity of the sample because there was no assurance that it was actually extracted from the seized plants. She went on arguing that PW5 did not identify at the trial if Exhibit P2 was, indeed, the plants that he kept in the Exhibits Room. Citing the cases of **Peter Kabi & Another v. Republic**, Criminal Appeal No. 5 of 2020 and **Jabril Okash Ahmed v. Republic**, Criminal Appeal No. 331 of 2017 (both unreported), she submitted that the aforesaid shortfalls rendered the chain of custody of the seized plants irretrievably broken.

As regards the alleged illegality of the search and seizure of the plants, Ms. Zegeli initially submitted that PW1, being the OC-CID of Nanyumbu District, lawfully executed the search pursuant to section 38 (1) of the CPA as he was deemed, in terms of section 2 of the CPA, to be an officer in charge of a police station. However, she censured the police for conducting the search before sunrise in breach of the direction under section 40 of the CPA that every search warrant must be executed between the hours of the sunrise and sunset unless a requisite leave of the court is sought and obtained.

When probed by the Court on the weight of the cautioned statement (Exhibit P3) allegedly made by the appellant confessing to cultivating the prohibited plant in his farm, Ms. Zegeli argued that the statement was sufficiently incriminating on its own. At that point, she changed her tack and supported the appellant's conviction on the first count but not on the second count. However, she put in a rider, rightly so, that the trial court did not specifically base the convictions on Exhibit P3.

Coming to the admission of Exhibits P1, P2 and P3, Ms. Zegeli contended that nothing was amiss on the acceptance of the exhibits.

Regarding the alleged infraction of sections 235 (1) and 312 (2) of the CPA, she submitted that the appellant's defence was duly weighed by the trial court, as shown at pages 56 to 58 of the record of appeal, against the prosecution case but it was ultimately rejected. She added that the trial court's judgment was a duly considered and analytical endeavour containing all the prescribed ingredients of a judgment. She urged us to hold that it complied with section 312 (2) of the CPA. Accordingly, she moved us to dismiss the appeal.

In a brief but focused rejoinder, the appellant revisited the evidence on record and reiterated his defence that the plants (Exhibit P2) were not uprooted from his farm. He argued that PW3 did not live in Mkumbaru village and, therefore, he did not know if the farm in issue was his property. He finally reiterated that his appeal be allowed.

Ahead of determination of the appeal we are cognizant that, in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a series of decisions that followed, this Court held that in a second appeal taken on a point of law only in terms of section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, it can only evaluate the

evidence afresh where the courts below misapprehended the evidence or where there were misdirections or non-directions on the evidence – see also **D.R. Pandya v. R.** [1957] E.A. 336.

We have considered the grounds of appeal and reviewed the evidence on record in the light of the concurrent findings of the courts below and the contending submissions. We think that the sticking question is whether the charge against the appellant was proven beyond reasonable doubt.

We think it would be convenient to begin with the cautioned statement (Exhibit P3) attributed to the appellant. As rightly argued by Ms. Zegeli, the trial court did not base the appellant's convictions upon Exhibit P3. It is evident that both the trial court and the first appellate court did not evaluate nor make any finding on the value and weight to the statement given the circumstances of the case.

It should be recalled that when PW2 tendered Exhibit P3, allegedly recorded on 16th May, 2017 starting at 08:49 hours, the appellant objected to its admission on the ground that it was extracted from him through torture. By that statement, the appellant confessed to cultivating bhang plants at his farm. Faced with the objection, the trial court conducted an

inquiry into its voluntariness of the statement and came to the finding that it was voluntarily made by the appellant. Ultimately, it was admitted in evidence, as hinted earlier. However, in the eyes of the law the statement was rendered a retracted confession. The law regarding the value and weight of such a retracted or repudiated confessional statement has been well settled in East Africa. As a matter of prudence, a retracted or repudiated confession can be acted upon if it is corroborated. Indeed, in this regard, the Court stated in **Ali Salehe Msutu v. Republic** [1980] TLR 1 at page 4 thus:

> *"It has long been an established rule of practice in East Africa, including this country, that a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted."*

However, even though it is dangerous to rely upon a retracted or repudiated confessional statement in the absence of corroboration, the court could still act on it if it is convinced that it is true – see **Tuwamoi v. Uganda** [1967] EA 84; **Wanja Kanyoro Kamau v. Republic** [1965] EA 50; **Hatibu**

Gandhi and Others v. Republic [1996] TLR 12; and **Azizi Mohamed & Another v. Republic**, Criminal Appeal No. 15 of 2006 (unreported).

With the above standpoint in mind, we scrutinized Exhibit P3. It is evident that the appellant stated in it that between 2016 and 2017 he started bhang cultivation by growing such plants in his farm around two molehills. He went on narrating that around 05:00 hours on 16th May, 2017 certain police officers from Mangaka Police station came to his home, accompanied by the Mkumbaru Village Chairman, one Napose. They searched his house for prohibited drugs but they retrieved nothing suspicious. The rest of the statement reads in Swahili as follows:

> *"... ndipo tulipoanza kuzunguka maeneo mbalimbali ya shamba. Katika kuzunguka tuliona miche ya bhangi imeota kwenye kichuguu na sehemu mbalimbali za shamba. Askari hao walinihoji kuhusu bhangi, nikawaeleza kuwa ni mali yangu mwenyewe niliipanda kwa mikono yangu. Majira ya saa [12:00 asubuhi] askari hao walianza kung'oa miche yote ya bhangi na kisha waliihesabu na kutimia miche 535 ndipo walipoandika hati ya upekuzi ikionyesha hiyo miche ya bhangi na kisha nilisaini pamoja na*

mashahidi wote akiwemo Mwenyekiti wa Kijiji na askari polisi."

The above text loosely translates that, when the search party and the appellant walked to and inspected his farm nearby his home they found a number of bhang plants around two mounds and other parts. Upon being queried by the police at the scene, he admitted that the farm and the plants were his property. A total of 535 plants were subsequently uprooted by the police officers from the farm starting from 06:00 hours. The exercise ended with him appending his signature to a seizure certificate that was filled out, which was also countersigned by witnesses including Napose and the police officers present at the scene.

The above facts are evidently incriminating. That fact apart, we are satisfied that the statement contains so much detail beyond the appellant's cultivation of bhang that the police officer (PW2) who recorded it could not have imagined or concocted. Here we mean, for instance, the appellant's personal and family details. In our view, the statement contains nothing but the truth that the appellant was found growing bhang plants in his farm.

However, we hasten to say that the statement does not suggest that he was also found in possession of any bhang plants. For, the plants uprooted from his farm (Exhibit P2) constituted evidence of his cultivation of bhang, not his possession thereof. Put differently, Exhibit P2 did not answer to the charge on the second count. On this basis, we agree with Ms. Zegeli that the charge on the second count could not be established based on either Exhibit P6 or any other evidence on record.

At this point, it is judicious to ask whether the retracted confession was corroborated. Without any hesitation, we answer the question in the affirmative. Here we have in mind the apparently corroborative testimony of PW1 as well as the deceased Village Chairman's statement (Exhibit P6) that the appellant led the police to the farm in issue. Moreover, it is also striking that PW3, who witnessed the search as an independent witness, confirmed the appellant's ownership of the farm, which he knew well. He recalled watching the appellant clearing the bush and developing it into a farm some years previously. Finally, it is in the evidence of both PW1 and PW3 as well as Exhibit P6 that the appellant was found at the scene growing bhang plants and that a total of 535 plants were uprooted from the farm on the fateful

day. In our view, all this evidence sufficiently corroborated the retracted confession.

We have duly considered the appellant's defence that the farm was not his property. Having weighed it against the rest of the evidence on record particularly the retracted confession, we uphold the conclusion by the courts below that it did not cast any reasonable doubt to the prosecution case.

In view of the foregoing discussion, it is hardly necessary to consider and determine grounds of appeal questioning the legality of the search and seizure as well as admissibility of Exhibits P1, P2 and P3.

For the above reasons, we are satisfied that the guilt of the appellant on the first count, namely, unlawful cultivation of a prohibited plant contrary to section 11 (1) (a) of the DCEA, was proved beyond reasonable doubt. On the other hand, we find and hold that the charge on the second count, that is, unlawful possession of a prohibited plant contrary to section 11 (1) (d) of the DCEA, was not established. In the premises, we quash the appellant's conviction on the second count and set aside the corresponding sentence of thirty years' imprisonment. However, we uphold his conviction on the first

count together with the corresponding sentence of thirty years' imprisonment.

Save as stated above, the appeal stands dismissed.

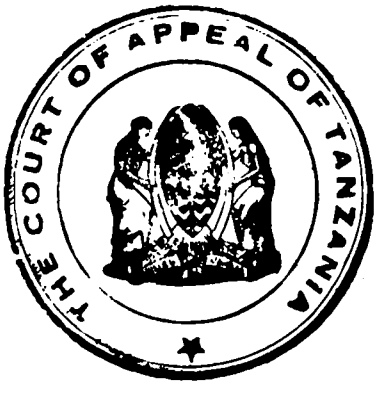
DATED at **MTWARA** this 24th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 25th day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Abdulrahman Msham, Senior State Attorney learned counsel for the respondent/Republic is hereby certified as a true copy of original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL