

TANZANIA / JUDGMENT

SHILINDE JUDGMENT

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DECIDED
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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
CRIMINAL APPEAL NO. 20049 OF 2024 (Appeal from the decision of the District Court of Ilala at
Kinyerezi (Before Hon. G.E. NKWERA - SRM) dated on the 29th day of May 2024 in Criminal Case
No. 160 of 2023) DEOGRATIUS SHILINDE.....APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

12th&26th February 2025 MWANGA, J. Before the District Court of Ilala at Kinyerezi, the
appellant, Deogratus Shilinde, was arraigned with one count of trafficking Narcotics Drugs
contrary to Section 15 A (1) and (2) (c) of the Drugs Control and Enforcement Act, Cap. 95 [R.E
2019] as amended by the Written Laws Miscellaneous Amend Act No. 5 of 2021. The allegations by
the prosecution are that, on the 4th day of April 2023, at Muheza Street in the Kariakoo area
within Ilala District in Dar es Salaam Region, the appellant was found trafficking in Narcotic
Drugs, namely cannabis Sativa, commonly known as Bhangi, weighing 1.09 kilogram. 1
According to the prosecution, on 04/04/2023, while on patrol, PW5 F9350 Coplo Kisiga and other
police officers were informed by a secret informer that someone was having bhangi. They then
went to the place of the scene, and PW5 arrested the accused person, Deogratus Shilinde.
Afterward, PW5 called independent witness Abdulrazaq Mbwana, where they searched the
appellant, who had bhangi in the basket, 21 pulls, and two pallets. PW5 issued a certificate of
seizure (exhibit P4) to be signed by the independent witness and accused person. He then took
the accused person with the exhibit to Msimbazi police station, where he handled the appellant
to the person in charge, RCO. On 08/04/2023 around 01:33, PW2-E2630 Seargent Joston, a police
officer from Msimbazi center and custodian of exhibits, was handled one basket black and white
in color; inside it there were 21 pulls of Bhangi and two pellets. He said, the same was handled to
him by one Kapilima (police). PW2, registered the exhibit in PF16 and gave it No 199/2023. On
14/4/2023, around 09:00 am, the exhibit was handed to DC Isaya, who took it to the government
chemist, PW1, Daudi Jacob Ngassa, who registered the exhibit by giving lab No HQ 023/00848. He
also weighed the exhibit, and it was 1.09kg. According to PW1, after opening it, he found 21 pulls
and two pellets suspected to be Bhangi. After that, he 2 discovered that the pulls and pallets were
bhangi. Conducted a confirmatory test and ruled that the leaves had THC Chemical available in a
Bhangi plant only; he closed the exhibit and returned it to DC Isaya on 14/4/2023. Thus, on the
same date, the exhibits were returned at 04:30 pm to PW2. According to PW2, when returned to

him, it was closed in a government seal and had IR MC/IR/2022/2023, where Pw2 continued to store it until 13/11/2023, when the exhibit was taken to the trial court. During the trial, the appellant flatly denied the allegations raised against him. He alleges that he was arrested at Kariakoo at the football pitch of Benjamin Mkapa Sec School due to the conflicts between fans and the teams that were playing. Later on, he was accused of trafficking narcotic drugs. Despite his total denial of not knowing the incident, yet at the end of the trial, the trial court found the prosecution had proved the count of trafficking narcotic drugs against him beyond reasonable doubt. Consequently, the trial court convicted him and awarded him a sentence of thirty years imprisonment. Discontented, and in a bid to restore his innocence and liberty, the appellant appealed to this Court and invited the Court to quash his conviction, set aside the sentence, and order his release from prison in 3 consideration of six grounds as presented in the memorandum of appeal. The grounds of appeal may be paraphrased as follows;

1. That the trial magistrate erred in law and fact by convicting the appellant based on the findings of PW1, whose competency was not established prior to the admission of his evidence.
2. That the trial magistrate erred in law and fact by convicting the appellant based on Exh.P1 and P2, which were procured illegally.
3. That the trial magistrate erred in law and fact by convicting the appellant based on the testimonies PW2, PW4, and PW5, whose competency was not established prior to the admission of their evidence and which were contradictory.
4. That the learned trial magistrate erred in law and fact by convicting the appellant while the chain of custody was broken.
5. The trial magistrate erred in law and fact by not drawing adverse inferences against the prosecution for failing to summon the informer and Kapilima to tender evidence before the court.
6. That the trial magistrate erred in law and fact to convict the appellant while the prosecution case was not proved beyond reasonable doubt When the appeal was scheduled for hearing, the appellant appeared in person while the respondent had a representation of Ms. Phoibe Magiri. The appeal was disposed of by way of written submission. In their submissions, the appellant and respondent submitted to the ground of appeal in seriatim. Nevertheless, looking at the appellant's grounds of 4 appeal, they all revolve around one ground: the prosecution case was not proved to the hilt as the chain of custody was broken, the prosecution did not call material witnesses, exhibits P1 and P2 were wrongly produced, and the witnesses did not establish their competence before testifying. Thus, to better determine this appeal, I will deal with this main ground whereby I will start by discussing the issue of chain of custody, which features in-ground no 4, and the issue of failure to call important witnesses. Then, if need be, I will cover the remaining aspects. In a broken chain of custody, the appellant submitted that Pw5, who arrested the appellant with the exhibit, as claimed, never stated to whom he gave/handed the exhibit when he brought the accused and exhibit

P1 at Msimbazi Police Station. He said Pw4 Sargent Catherine claimed to have received the exhibit from Pw5 on 04.04.2023 and registered it in the exhibit register. Still, she remained with the exhibit personally, the reasons known for herself until 08.04.2023 when she handled the exhibit to the custodian. He was questioning whether there was no custodian in the station for the 4 days before the exhibit was brought to that station. And why did PW4 remain with the exhibit personally for 4 days? Where did she store it? From 04.04.2023 to 08.04.2023? Why didn't she give it a number or mark to differentiate it from other exhibits? 5 He argued that PW4 contradicts and lies when she says she gave the exhibit to Coplo Johnstone on 08.04.2023. However, on page 2 of the Judgment, Pw2 (Sargent Joston) claims to have received the exhibit from Kapilima (Police). He questioned who PW4 handled the exhibit: Coplo Johnstone or Sargent Joston. In his view, there might be a high possibility of this exhibit being tempered and the case to have been fabricated against the (appellant). He implored the court to allow this ground of appeal. Regarding the failure to call material witnesses, the appellant submitted that the prosecution did not summon the informer and Kapilima to tender evidence before the court. He contended that as per records, in Judgement, it is clear enough that PW2 (Sargent Johnston) was handed the exhibit by Kapilima (Police). He argued that it was neither explained where Kapilima got the exhibit from nor who this Kapilima is, though he is claimed to be a Police Officer as stated by PW2. According to the applicant, he should have been called to testify in court and explain where he got or received exhibit P1, which is the root exhibit that has led to the appellant's conviction. To buttress his position, he cited the case of Boniface Kundakira Tarimo v. R Criminal Appeal No. 350 of 2008 (unreported) to the court. 6 He implores the court to be guided by the above authority, find this ground meritorious, and allow it to sail through. In response, Ms. Magiri submitted that the chain of custody is not broken. She submitted that PW5 arrested narcotic drugs, and after his arrest, it was demonstrated very clearly how the exhibit was handled over to PW4's first CRO officer, who kept them in safe custody for four days and the delay in sending them immediately to the exhibit room is explained by PW4 that it occurred because the person who kept the key to the exhibit room had traveled. She took them to the exhibit keeper after he had returned. She maintained that the exhibits were not tempered at any stage of investigation prior to the tendering them to the trial court. She insisted that the movement of the exhibit, as narrated by the prosecution witnesses, was handled with great care, and the contradictions pointed out by the appellant were minor. They did not go to the root of the case. As well stated in the case of Paulo Maduka and four others vs. Republic, Criminal Appeal No 110 of 2007, and Zainab Nassor@Zena v.The Republic, Criminal Appeal No 348 of 2015, the underlying rationale for ascertaining a chain of custody is to show a reasonable possibility that the item that is finally exhibited in court as evidence has not been tampered with along its way to the court. In 7 winding up, she submitted that the evidence adduced reasonably established the exhibit was not tempered and that the chain was intact. Regarding the failure to call material witnesses, she submitted that in section 143 of the Evidence Act Cap 6[RE 2022], no particular number of witnesses is required to prove an inevitable fact. She submitted that the evidence on record sufficiently demonstrated that the appellant was arrested in possession of the narcotic drugs. Thus, the

prosecution discharged her duty to prove beyond a reasonable doubt. In a short rejoinder, it was the appellant's submission that the counsel was misleading the court. He submitted that the informer was said to be the source of the case. They were, therefore, a material witness to inform the court how they came to know the incident in issue. Concerning Mr. Kapilima, he said he was the one who sent the Exhibit. P1 to Pw2; hence, he was a material witness to tell the court where he got the Exhibit. P1 and when and how he handed it to Pw2. He insisted that this scenario alone is doubtful, showing that this exhibit might have been tampered. I have considered the rival submission by both parties, the main issue being whether the chain of custody for the narcotics (Exhibit was appropriately preserved. According to established law, the integrity of the 8 chain of custody is crucial in ensuring that the evidence presented in court is the same as what was initially seized during the operation. Thus, the same has to be demonstrated throughout the process, from the seizure to when it is tendered in court. The idea behind recording the chain of custody is to establish that the alleged evidence is, in fact, related to the suspected crime rather than, for instance, having been planted fraudulently to make someone guilty. The significance of the chain of custody is to give integrity to the exhibits involved to ensure reliability. The same has been underscored in numerous cases, including DPP vs. Stephen Gerald Sipuka, Criminal Appeal No. 373 of 2019, and Paulo Maduka and Four Others vs. Republic, Criminal Appeal No. 110 of 2007 (unreported), Jason Pascal and Another vs. Republic, Criminal Appeal No. 615 of 2020, Juma Idd @ Dube vs. Republic, Criminal Appeal No. 558 of 2020, Jibril Okash Ahmed vs. Republic, Criminal Appeal No. 331 of 2017, Wallenstein Alvales Sant vs. Republic, Criminal Appeal No. 68 of 2019, Saven Hamis & 2 Others v. R, Criminal Appeal No. 99 of 2014, and Zainabu Nassoro @ Zena v. R, Criminal Appeal No. 348 of 2015 (all unreported). In these cases, the Court of Appeal emphasized the prosecution's responsibility to prove that the exhibits were correctly handled from the 9 time of seizure until their presentation in court, ensuring there was no tampering or loss of evidence. The court also highlighted that this could be established either through a paper trail, oral testimony from witnesses, or a combination of both methods. With that knowledge in mind, I will now revert to observing whether the chain of custody was broken as claimed by the appellant in this case. My Scrutiny of the record reveals that on 04/04/2023, when exhibit P1 was seized in the presence of PW5 F.9350 Colpo Kisiga, exhibit P4, the seizure certificate was duly signed by PW6, PW5, and the accused person. Nevertheless, the record is silent on how the exhibit was processed. This is because PW5 never stated whether he kept the exhibit or handed it to someone else and where it was kept from 04/04/2023 to 08/04/2023. The records reveal further that PW4, WP 4167 Sargent Catherine, on 04/04/2023, received exhibit P1 from PW5, registered the same, and remained with it in a room at RCO's office until 08/04/2023, where the same was handled to PW2. This witness did not explain who dealt with the exhibit to PW2. Apart from those unanswered questions, PW2 Sergeant Jaston, the exhibit keeper, stated in his evidence that sometime on 8/4/2023 around 01:33 pm, he handled exhibit P1 (one basket black and white). Inside it, 10 there were 21 pulls of bhang and two pallets. According to him, the exhibit was handled to him by Kapilima police. The immediate question is, where did Kapilima get the said exhibit, where and when did he keep the same,

and how did he hand it to Pw2? Worse still, Kapilima was not called to answer those questions. In my view, the chain of custody from when exhibit P1 was seized to when it was tendered in court raises many questions. Failure to answer all these questions has muddled the chain of custody. The vital missing link in the handling of exhibit P1 from the time it was seized to the time it was handled to PW2 has created real doubt if the prosecution proved its case against the appellants to the required standard, and that doubt had to be solved by one Kapilima. The failure of the prosecution to call such an important witness without explanation would have prompted the trial court to draw an adverse inference against the prosecution. In the case of Boniface Kundakira Tarimo v. Republic (supra), when considering a similar matter, the Court stated that: - "...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 ." 11 The above-noted contradictions were material and prejudicial to the prosecution case, which led this court to believe that the chain of custody was broken. Given the settled legal position above, I firmly believe that the chain of custody of exhibit P1 Bhangi is wanting. Thus, the appellant's complaint is merited, and I accordingly allow this ground of appeal. So far, I see no need to consider the remaining grounds of appeal as that will depend on an academic exercise, which I am not prepared to do. In the upshot, the appeal is allowed. I, therefore, proceed to quash the conviction, set aside the sentence of thirty years imprisonment, and order the appellant to be released from prison forthwith unless otherwise lawfully held. It is so ordered accordingly. H.R.MWANGA. JUDGE 26/02/2025 COURT: Judgment delivered at Dar es Salaam in chambers this 26th February 2025 in the presence of Appellant in person and Phoibe Maghiri, learned State Attorney for the Respondent. 12 H.R. MWANGA. JUDGE 26/02/2025 13

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