

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MTWARA AT MTWARA CRIMINAL APPEAL NO. 20176 OF 2024 (Arising from the decision of the
District Court of Masasi at Masasi in Criminal Case No. 103 of 2023) DIBLO YUSUPH
LILEMBO..... APPELLANT VERSUS THE REPUBLIC
RESPONDENT

JUDGMENT

25th August & 24th October 2024 MPAZE, J.; The appellant, Diblo Yusuph Lilembo, was charged in
the Masasi District Court facing one count of drug trafficking, contrary to section 15A

- (1) and (2)(c) of the Drugs Control and Enforcement Act [Cap.95 R.E.2019], as amended by the
Miscellaneous Amendments (No. 5) Act No. 9 of 2021. It was alleged in the charge sheet that
on 4th October, 2021 at Mpili Village within Masasi District, Mtwara Region, Diblo Yusuph
Lilembo trafficked narcotic drugs, namely cannabis sativa Cbhangi weighing 65.88
kilograms, using a motorcycle, make FEKON, with Registration No. MC 579 BMW, an
allegation to which the appellant pleaded not guilty. 1 According to the trial court records,
six prosecution witnesses appeared to support the charge, namely; ASP Pachal Nathan
Kumburu (PW1), Mohamed Ahmadi Said (PW2), D/CPL Hamuduni (PW3), D/CPL Yegela
(PW4), SGT Audifast (PW5), and Eliamini Ismail Mkenga (PW6). In their testimonies, the
prosecution claimed that on 4th December, 2021 at approximately 00:00 hrs, PW2 (VEO),
along with others, were stationed at the entrance gate of Mpili Village to inspect and ensure
that cashew nuts were not being smuggled out to another village. While conducting this
operation, the appellant allegedly arrived on a motorcycle carrying five bags. Upon
inspection, PW2 suspected the bags contained dried leaves, believed to be narcotic drugs,
specifically cannabis sativa, commonly known as bhangi. PW1, was allegedly called to the
scene. Upon his arrival, he reportedly found the appellant, arrested him, and placed him
under custody. A seizure certificate was filled out and signed by the witnesses present at the
scene, including the appellant. It was further claimed that the appellant, along with the five
'vi!oba\ one bag, and the motorcycle, were taken to Masasi Police Station for further action.
During the hearing, PW1 prayed to tender five 'vi!oba, one bag, and a motorcycle with
Registration No. BMW, red in color, make FEKON. The 2 appellant raised no objection to this
prayer, and as a result, all the items were admitted as exhibit and collectively marked as

Exhibit PL PW1 further sought the admission of Certificate of Seizure (Form DCEA 003) and the Chain of Custody Form. Again, the appellant did not object, and these documents were accordingly admitted into evidence and collectively marked as Exhibit P2. It was further stated that the cannabis sativa was later weighed and analyzed by PW6, who confirmed that the dried leaves were, in fact, narcotic drugs, cannabis sativa, commonly known as bhang'i' In his defence, the appellant vehemently denied the allegations against him. He stated that he was arrested by members of the Tanzania People's Defence Force (JWTZ). According to him, they searched him, and upon finding that he did not have any identification, they began assaulting him and forced him into their vehicle along with his motorcycle. The appellant further claimed that his face was covered, and he was unaware of where he was being taken. However, he later found himself at Masasi Police Station, where he was informed of the charges related to the possession of cannabis sativa, which he adamantly denied. The trial magistrate thoroughly evaluated and considered the evidence presented by both the prosecution and the defence. In the end, the magistrate found the appellant guilty of the offence as charged. 3 Consequently, the appellant was convicted and sentenced to thirty years of imprisonment. Dissatisfied with both the conviction and sentence, the appellant has now appealed to this court, contesting the trial court's findings. To express his dissatisfaction, the appellant lodged a petition of appeal consisting of nine grounds. In essence, the appellant's main grievance is that the trial magistrate wrongfully convicted and sentenced him for drug trafficking, despite the prosecution's failure to prove the case against him beyond reasonable doubt. Having carefully scrutinized all the grounds of appeal and considered the submissions from both parties, I have identified that only one ground of appeal is sufficient to dispose of this matter without the need to address the remaining grounds. This is ground five, in which the appellant challenges the procedure followed in admitting Exhibits P1 and P2, asserting that it was improper. On her part, Ms. Florence Mbamba, the State Attorney, concurred with the appellant's complaint, acknowledging that the procedure for admitting Exhibits P1 and P2 was not properly followed. She therefore requested that the court expunge the two exhibits from the record. 4 However, she further argued that, even with the exhibits expunged, there remains sufficient evidence specifically oral testimony that supports the conviction and proves the appellant was found in possession of cannabis sativa. To strengthen her argument, Ms. Florence referred to the case of Abbas Kondo Gede v. R, (Criminal Appeal No. 472 of 2017)

[2022] TZCA 391 (12 August 2020). At this juncture, I find it prudent to pause and examine whether, if Exhibits P1 and P2 are expunged from the record, there would still be sufficient evidence to sustain the conviction of the appellant. To address this issue, it is essential to first examine the exhibits under scrutiny. As previously mentioned, Exhibit P1 consists of the five 'viloba' one bag, and a motorcycle, while Exhibit P2 includes the Certificate of Seizure, the DCEA 003 Form, and the Chain of Custody Form. Starting with Exhibit P2, the court record reveals that after these documentary exhibits were admitted, their contents were not read out as required by the procedural rules. As a result, it is clear that the proper procedure was not followed, rendering these exhibits inadmissible. Consequently,

I proceed to expunge Exhibit P2 from the record, as requested by the State Attorney. Turning to Exhibit P1, which comprises the five 'viloba' one bag, and a motorcycle, the record is silent regarding the contents of the five 5 Wb^a'and the additional bag. There is no indication that these bags were ever opened in court to reveal their contents, nor was any foundation laid prior to their admission as exhibits. Furthermore, no proper identification of these items was made. Given these procedural shortcomings, it is evident that the admission of Exhibit P1 was equally flawed. Accordingly, like Exhibit P2, Exhibit P1 is also expunged from the record. With Exhibits P1 and P2 expunged, the key question now is whether the remaining evidence can still sustain the appellant's conviction. The State Attorney argues that the oral testimony is sufficient to uphold the conviction, citing the case of Abbas Kondo Gede in support of this contention. After reviewing the Abbas Kondo Gede case, I noted that in that matter, the appellant was charged with trafficking 77 pellets of narcotic drugs, cocaine hydrochloride, under section 16(l)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap. 95 R.E.2002]. In the Abbas Kondo Gede case, what was expunged from the record was the testimony of PW7, which had been taken without following the proper procedure, as well as the Observation Form (Exhibit P6) that he had tendered. However, the 77 pellets of narcotic drugs found in the appellants possession were never expunged. 6 The appellant's main complaint was the absence of documentary evidence to prove the chain of custody, claiming a break in that chain. The court addressed this issue in detail, emphasizing that the chain of custody can be established not only through documentary evidence but also through credible oral testimony. Ah excerpt from the judgment stated; '...From the foregoing deliberation concerning the chain of custody, we state with certainty that even in the absence of a paper trail documenting how the pellets were seized, handled, controlled, stored, and transferred, the ora! evidence sufficiently established that the chain of custody was not broken. Even without the evidence of PW7 and Exhibit P6, which we have excluded from the trial court's record, we are satisfied that the remaining evidence on record suffices. We are convinced that the handling of the pellets was not interfered with and that there was no tampering, as alleged by the appellant.' In this case, the court discussed the issue of the chain of custody for the 77 pellets of narcotic drugs. Despite the absence of documents such as the Observation Form, Certificate of Seizure, and Exhibit Register showing the movement of the 77 pellets, the court found that the oral evidence sufficiently proved the chain of custody. The witnesses' oral testimony was deemed credible and reliable, and the court concluded that the chain of custody had not been broken, even without documentary 7 evidence. As a result, the court upheld the conviction based on the oral testimony. Applying this rationale to the present case, had Exhibit P2 alone (the Certificate of Seizure and Chain of Custody Form) been expunged, I could have relied on oral testimony regarding the appellant's possession of cannabis sativa. However, in this case, the cannabis sativa itself was never tendered as an exhibit. What was tendered as evidence were only five 'viloba'f one bag, and one motorcycle. The records do not clarify whether the bags were opened or whether their contents were identified in court Therefore, the absence of the actual cannabis sativa as an exhibit raises significant doubt

as to whether the appellant was indeed found in possession of cannabis sativa. Given this situation, after expunging Exhibits P1 and P2, I am not convinced that the remaining evidence is sufficient to sustain the appellant's conviction. Even if Exhibit P1 had not been expunged, it would still be difficult to uphold the conviction because the cannabis sativa alleged to have been in the appellant's possession was never properly tendered as an exhibit. In conclusion, I find that this ground of appeal alone is sufficient to dispose of the entire appeal. Therefore, I will not address the remaining 8 grounds. The appeal is hereby allowed, the conviction and sentence imposed on the appellant are quashed, and he is to be released from prison immediately unless lawfully held on other grounds. It is so ordered. Court: Judgment is delivered today in the presence of Ms. Florence Mbamba, the learned State Attorney for the Republic and the appellant. M. B. Mpaze Judge 24/10/2024 9

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