

TANZANIA / JUDGMENT

Judgement Criminal Appeal No

COURT
TANZLIIDECIDED
1 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT MOSHI CRIMINAL APPEAL NO. 20501 OF 2024 (C/F Criminal Case No. 65 of 2023 in the District Court of Siha at Siha) EDWARD RAMADHANI MFINANGA.....APPELLANT
VERSUS REPUBLIC.....RESPONDENT

JUDGEMENT

4th & 25th November 2024 MONGELLA, J. The appellant herein was arraigned before the District Court of Siha at Siha (hereinafter, the trial Court) on two counts being: trafficking in narcotics drugs under Section 15 A (1) and (2)(c) of the Drugs Control and Enforcement Act [Cap 95 R.E 2022] and unlawful possession of traditional liquor under Section 30 of Traditional Liquors Control of Distillation Act [Cap 384 RE 2002]. The particulars of the offences were to effect that: on 22.05.2023 at Ormeli village within Siha district in Kilimanjaro region, the appellant was found in unlawful possession of 450 grams of cannabis sativa commonly known as “bhang” and 0.8 litres of traditional liquor known as “gongo.” Page 1 of 19 The appellant denied both counts. To prove its case, the prosecution paraded 6 witnesses and tendered 9 exhibits. The prosecution’s evidence was as follows: on the material day of 22.05.2023, PW2, PW6 and one Corporal (CPL) Abillah, all police officers, were in patrol. PW2 was informed that the appellant was selling drugs. Together, the three officers headed to the appellant’s home at Ormelili. Upon arrival, they found the appellant outside and informed him that they had received information that he was dealing in drugs. The appellant closed his door and immediately started to ran away. PW6 and CPL Abillah ran after him and successfully apprehended him. PW4, the then Chairman of Ormelili village, was called to the scene whereby he was informed by the police that they intended to search the appellant’s home as they received information that he was dealing in drugs and “gongo”. In the said search, 136 rolls of what was suspected to be “bhang” was found in the appellant’s bedroom. In his outdoors kitchen, 200mls bottles of what they suspected to be “gongo” was found. A seizure certificate (Exhibit P4) was duly filled and signed upon seizing the said items. The appellant and exhibits were then taken to Sanya Juu Police station. At the station, a case file was opened and the exhibits were handed to PW1, the exhibit keeper, who labelled and stored them. On 15.06.2023, the 136 rolls suspected to be “bhang” were retrieved from the exhibit room by PW3 and taken to Arusha Government Chemist Office. PW5 received the exhibits, extracted a sample and handed the exhibits over to PW3 for safe return. Upon testing the Page 2 of 19 sample, PW5, the Government Chemist, found the sample being “bhang”. He prepared an analysis report and sent

the same to the OC- CID of Siha. These transactions were evidenced by exhibit register excerpt admitted as Exhibit P1; a chain of custody form was admitted as Exhibit P5; the hand over forms between PW1 and PW3 were admitted as Exhibit P6 and P8; a sample receipt notification was admitted as Exhibit P7 and the analysis report issued by PW5 was admitted as Exhibit P9. The 136 rolls of bhang were admitted as Exhibit P2, while the “gongo” was admitted as exhibit P3. In defence, the appellant testified solely. He simply denied committing the offence. His version was that the case had been fabricated against him by one of his three wives whom he did not reside with. He however, did not state the motive behind the alleged wife fabricating the case against him. The trial court found the charge proved beyond reasonable doubt and proceeded to convict him. Following the conviction, he was sentenced to 5 years in prison. Aggrieved by the said conviction and sentence, the appellant has preferred this appeal on the following grounds:

1. That, the learned trial Magistrate grossly erred both in law and fact in finding and holding that, the appellant was found in unlawful possession of the alleged narcotic drugs to wit 136 rolls of bhang. Page 3 of 19
2. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that the said search in the Appellant's premises was illegally executed, as there was no search warrant sought and issued to allow execution of the said search as the same was not an emergency as PW2 had prior information concerning what he went to do.
3. That, the learned trial Magistrate grossly erred both in law and fact in relying upon Exh. P1 (Exhibit Register) and Exh.P2 (the 136 rolls of bhang) to convict the Appellant on the charged offence, despite the said Exhibits being un-procedurally tendered and admitted in evidence as exhibits as the same were not cleared for admission.
4. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, the chain of custody of the said retrieved 136 rolls of bhang was irretrievably broken.
5. That, the learned trial Magistrate grossly erred both in law and fact in using weak, contradictory and incredible evidence from prosecution witnesses as a basis of the Appellant's conviction.
6. That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable Page 4 of 19 doubt against the Appellant and to the required standard by the law. (sic) The appeal proceeded by written submissions whereby the appellant was unrepresented while the respondent was represented by Mr. Ramadhani A. Kajembe, learned State Attorney. The appellant generally submitted on his grounds of appeal. He alleged that the Hon. trial Magistrate failed to note that the prosecution evidence was coupled with doubts on whether he was found in possession of the 136 rolls of bhang. He alleged that the trial Magistrate relied solely on the evidence of PW2, PW4 and PW6 who allegedly participated in the search and seizure. He challenged the evidence of the said witnesses as being improbable and inconceivable to a reasonable minded person. Expounding on that, he averred that PW2 did not specifically mention at which part of the appellant's bedroom the 136 rolls of bhang and

the bottles of “gongo” were found. In addition, he faulted the prosecution evidence for being contradictory. Explaining the alleged contradictions, he contended that while PW4 stated that the 136 rolls of bhang were found near the bed and in the children shed or store outside and that the bottles of “gongo” were found in the appellant’s bedroom; PW6 stated that the said rolls were found below the appellant’s bed and the four bottles of “gongo” were found in the kitchen. In the circumstances, the appellant had the stance that the reliability of Page 5 of 19 the prosecution witnesses had doubts. He invited the Court to employ the wisdom in the case of Omary Abdul vs. Republic, Criminal Appeal No. 189 of 2020 to resolve the shortfalls he pointed out. The appellant further faulted the search at his home alleging that the same was illegal for absence of a search warrant. He contended that according to the testimonies of PW2 and PW6, the search was not an emergency one as the police had prior information on. To substantiate his assertion, he referred the testimony of PW2 who he alleged to have testified to being informed on the Appellant’s dealings in drugs and thereafter calling his fellow police officers and headed to conduct the search and seized items at his place. He further challenged PW2 and PW6 for failure to testify on what prevented them from obtaining a search warrant to authorise their entry into his residence as prescribed under Section 38 (1) of the Criminal Procedure Act [Cap 20. R.E 2022] and P.G.O 226(1)(a)(b)(c) and (2) (a). Citing the case of Director of Public Prosecutions vs. Doreen John Mlemba (Criminal Appeal 359 of 2019) [2021] TZCA 482 (14 September 2021) TANZLII, the appellant further faulted PW2 and PW6 for not being officers in charge of any police station. He averred that PW2 was a police officer at Sanya Juu police station and the operational officer in charge of Sanya Juu police station. With regard to PW6 he contended that PW6 worked at general duty department at the same police station. In the premises, he contended that none of them were qualified to conduct the Page 6 of 19 search without a search warrant. He thus prayed for the search warrant to be declared illegally conducted. The appellant further challenged exhibits P1 and P2 for being admitted without being cleared for admission. He complained to have raised an objection against tendering the said exhibits, but the Hon. trial Magistrate proceeded to admit the exhibits without determining the alleged objection. He claimed that the Hon. Magistrate even failed to accord the prosecutor an opportunity to reply to the objection and eventually making a ruling thereto. Referring to Arobogast Augustino @ Shayo and 2 Others vs. Republic (Consolidated Criminal Appeals No. 24 of 2022) [2023] TZHC 16788 (18 April 2023) TANZLII, he asked this Court to expunge the exhibits for being admitted contrary to the procedure. Concluding, the appellant was of the view that when the two exhibits are expunged from the record, there would be no any evidence to sustain the conviction against him. He therefore prayed for his appeal to be allowed, conviction quashed, sentence set aside and he be set at liberty. The appeal did not go unopposed. Submitting in reply, Mr. Kajembe commenced with noting that the appellant only submitted on three out of six grounds of appeal he advanced. Addressing the 1st ground, he averred that the same was unfounded. He alleged that the Criminal Procedure Act has defined a police officer in charge of a police station to mean and include any officer superior in ranks to an officer in charge of a police station. In that respect, he argued Page 7 of 19 that since PW2 testified to have been an operations officer of

Siha and an Assistant Superintendent (ASP) in rank, he had a rank higher than that the officer in charge of the police station rendering him legally qualified to conduct the search. With regard to the alleged contradictions on the place the 136 rolls of bhang were found, Mr. Kajembe countered that even though there were different testimonies on where the “gongo” was found, the appellant was not convicted for being found in possession of liquor as the charge thereof was not proved. With regard to the position the 136 rolls of bhang were found, he saw no contradiction in the testimony of PW2, PW4 and PW6 arguing that all of them testified that the same were found in the appellant’s bedroom. Addressing the argument concerning errors in admission of exhibits P1 and P2, Mr. Kajembe conceded to the claim. He submitted that indeed the trial court erred as it gave the appellant the right to object to the admission of the exhibits, but did not accord the same right to the respondent and thereafter proceeded to admit the exhibits without addressing the objection. However, finding the error not prejudicial to the appellant, he contended that the appellant’s point of objection was mere denial of the place where the exhibits were found, but at the same time confirmed that the exhibits were found at his home premises. Mr. Kajembe further argued that the appellant’s objection was not in the ambit of the law, but rather on facts. In the circumstances, he added that even if the trial court had heard the parties on the Page 8 of 19 objection, it would still admit the exhibits. In his stance, the omission did not prejudice the parties and that it could be rectified under Section 388 of the Criminal Procedure Act. He fortified his averments with the case of Stanley Murithi Mesut’a vs. Republic (Criminal Appeal No. 144 of 2019) [2021] TZCA 688 (22 November 2021) TANZLII. Further, citing the case of Safari Anthony @ Mtelemko and Another vs. Republic (Criminal Appeal No. 403 of 2022) [2023] TZCA 17768 (23 October 2023) TANZLII; Mr. Kajembe challenged that the appellant ought to have shown how the omission by the trial court to grant the prosecution the opportunity to reply on his objection and the failure by the trial court to issue a ruling thereof occasioned him injustice. The 4th, 5th and 6th grounds were collectively addressed. They all concern complaint on maintenance of chain of custody. On this, Mr. Kajembe was convinced that the chain of custody was intact in consideration of the evidence on record. He specifically referred the evidence of PW1, the exhibits keeper, PW2 who seized the 136 rolls, PW3 who took the rolls to PW5 who examined the same and returned them to PW1 who brought them to the Court. He had the stance that the testimonies of these witnesses proved that the items seized at the appellant’s premises were actually what was brought as evidence before the trial court. Mr. Kajembe further disputed the appellant’s assertion that the charge was unproved and that the evidence was weak and Page 9 of 19 contradictory. He insisted that the prosecution succeeded to prove that the 136 rolls were in fact found at the appellant’s premises and they were identified as bhang by PW5. He finalized his submissions by praying for the appeal to be dismissed for lacking merit. I have accorded the rival submissions of both parties due consideration. Considering the submission by the appellant, I find that he did not submit on the 1st ground. Instead, he went forth to submit on the 2nd ground whereby he faulted the search and seizure conducted at his residence for absence of a search warrant and also for not being conducted by a police officer in charge of a police station. Mr. Kajembe challenged that assertion arguing that PW2’s status supersedes

that of an officer in charge rendering him qualified to conduct the search. No doubt, there was no evidence suggesting that the search conducted was an emergency one. In fact, on the contrary, it appears that PW2 did receive information that the appellant was dealing in drugs. Although PW6 alleged that they were in patrol, PW2 never mentioned such fact. In the circumstances, I find no any justification provided on proceeding without a search warrant being issued. The circumstances of the search were not those of emergency. The referred provisions in this matter which are Section 38(1) of the Criminal Procedure Act and PGO 226 apply to the present circumstances. I find it pertinent to reproduce the two Page 10 of 19 provisions for ease of reference. Section 38(1) of the Criminal Procedure Act reads: 38.- (1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

- (a) anything with respect to which an offence has been committed;
 - (b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;
 - (c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.
- (2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue to the authority, the grounds on which it was issued and the result of any search made under it to a magistrate. PGO 226 provides: “7- The entry and search of premises shall only be affected, either: - Page 11 of 19
- (a) on the authority of a warrant of search; or
 - (b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant;
 - (c) under no circumstances private premises may police enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.
2. (a) Whenever an O/C (Officer In-charge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigation officer considers it necessary to enter private premises in order to take possession of any article or thing by which; or in respect of which; an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.” The two provisions were better explained in the case of *Ndila Lugata vs. Republic* (Criminal Appeal No 207 of 2021) 2023 TZCA 17926 (12 December 2023) where the Court of Appeal stated: “The important takeaway that we discern from the

foregoing excerpts is that search into a suspect's private premises and possession of any article or Page 12 of 19 thing therefrom must either be carried out by the police officer in charge of a police station or, where it is practically impossible for him to do so, then the officer to whom such responsibility is delegated must be misused with a search warrant or order." The Court further referred the case of Doreen John Mlemba (supra) whereby such position was amplified. In the said case, the Court of Appeal stated: "In other words, all things being equal, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38

- (1) of the CPA and PGO No. 226 paragraphs 2(a) quoted above". According to Section 2 of the Criminal Procedure Act, the police officer in charge of a police station is described to include: "...any officer superior in rank to an officer in charge of a police station and also includes, when the officer in charge of the police station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to that officer and is above the rank of constable or, when the Minister for the time being, responsible for home affairs so directs, any police officer so present;" PW2 is recorded in the proceedings to be an Assistant Superintendent (ASP). An ASP is a police officer next in rank to a police officer in charge. The rank is also higher than that of a Page 13 of 19 Constable. In that regard, owing the explanation advanced in Ndila Lugata vs. Republic (supra); PW2 was rightfully representing the Police Officer in charge of the station, thus had mandate to hold the search without a search warrant. The 2nd ground is thus without merit. With regard to the 3rd ground as to Exhibits P1 and P2 being un-procedurally tendered and admitted; upon observing the appellant's submissions, I observe he is clearly not faulting the tendering process, but rather the admission process. This is because he raised an objection challenging the admission of the said exhibits however, the trial court never accorded the other party the right to reply to the objection. The trial court also did not produce any decision on the said objection. Instead, the trial Magistrate proceeded to admit the two exhibits. Upon observing the trial court record, I find the appellant's claim vivid therein. It is evident that the two errors were occasioned, a fact also acknowledged by Mr. Kajembe. The contest between the parties is therefore on whether the omission has the effect of warranting the exhibits to be expunged from the record as alleged by the appellant; or whether the omission can be cured under Section 388 of the Criminal Procedure Act as alleged by Mr. Kajembe. For ease of reference, Section 388 provides: "Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, Page 14 of 19 omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable." This Court being the appellate Court, is endowed with the responsibility to observe whether the failure to observe the procedural

requirement occasioned miscarriage of justice on the party complaining. See, Stanley Murithi (supra) in which it was stated: “...the other principle of law is that where there is failure or omission to comply with a procedural requirement in the course of trial, the question the appellate court should ask itself, before it can nullify or impeach the proceedings, is whether such failure or omission occasioned a miscarriage of justice on the part of the party complaining.” The burden to prove that a procedural irregularity occasioned injustice lies on the person alleging the same. See, Safari Anthony Mtelemko (supra). It is well reflected on records that the appellant raised an objection when PW1 was tendering exhibits P1, P2 and P3. The objection was to the effect that the items were not retrieved from his house, but found outside his home. While indeed an adverse party has the right to object the admission of a document, such objection ought to be on a pure point of law. The appellant’s objection was in no way a point of law. It is because of this reason that I hold the view that the appellant was not Page 15 of 19 prejudiced with the omission by the trial court. The appellant himself failed to establish in what way he was prejudiced by the error made by the Hon. trial Magistrate. As such, the provisions of Section 388 of the Criminal Procedure Act can be invoked to cure the anomaly. By this observation, the 3rd ground is also found without merit. The 4th, 5th and 6th grounds collectively address the question of evidence. They all question whether the charge was proved beyond reasonable doubt. In that respect, I shall determine them collectively. The appellant made no any submission with respect to his claim on broken chain of custody. On the other hand, Mr. Kajembe did averring that it was well established. The law is settled on the necessity of establishing the chain of custody. The Court of Appeal in Paulo Maduka & Others vs. Republic (Criminal Appeal 110 of

2007) [2009] TZCA 69 (28 October 2009) TANZLII, stated: “The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.” Page 16 of 19 During hearing, the prosecution paraded 6 witnesses. According to the testimony of PW2 and PW6; PW2 in company of PW6 and one Corporal Abillah went to the appellant’s home following information given to PW2. Upon arrival, the appellant was informed of the purpose of the visit whereby he responded by closing his door and running away. PW6 and Corporal Abillah ran after him and caught him. PW4, the village chairman, was called to witness the search. He arrived at the appellant’s home and witnessed 136 rolls of bhang being found near the appellant’s bed, a fact well stated by PW4 and PW6. The traditional liquor was allegedly found outside his house, a fact stated by PW4 and PW6. I do note that the appellant raised concerns on contradiction as to where the items were found. However, I am of the stance that the mere statement by PW2 that the bhang was found in the appellant’s bedroom without specification of the exact location was not fatal. This is because, still the said bhang was

found in the appellant's bedroom and seized. Concerning PW2's claim on the traditional liquor being found in the room, I agree with him that this was a contradiction in comparison with PW4 and PW6's testimonies that the same was found outside the house. However, I find this claim irrelevant in the appeal at hand because the charge on being found in possession of traditional liquor was found unproved by the trial court and is not a subject of this appeal. Page 17 of 19 The evidence on record further shows that upon being found in possession of the 136 rolls of bhang and the traditional liquor, the items were duly seized as reflected in the Certificate of Seizure (exhibit P4). Eventually, the appellant was taken to Sanya Juu Police station whereby a case file was opened and the exhibits handed over to PW1. This is reflected by the relevant excerpt in the exhibit Register (Exhibit P1), as well as, the hand over Form (Exhibit P5). On 15.06.2023, PW3 was instructed to send the exhibits to the Government Chemist office at Arusha. The hand over between him and PW1 was evidenced by a hand over Form (Exhibit P6), a sample receipt notification Form GCLA1 (Exhibit P7) was duly filled whereby PW5, the Government Chemist marked the exhibit as the receiving official. Upon a sample being extracted, the 136 Rolls of what was alleged to be bhang were then handed to PW3 who took the same back to PW1, a transaction evidenced by a hand over Form (Exhibit P8). Eventually, PW5 analysed the samples and prepared an analytical report which was then sent to the OC-CID of Siha. The report stated that the sample was found to be bhang indicating the 136 rolls seized from the appellant were indeed bhang. It was after the said process that this matter was brought to court whereby PW1 tendered the 136 rolls as Exhibit P2. With the above observation from the evidence adduced by the prosecution witnesses, I am of the finding that the chain of custody was well intact. The objective in Paul Maduka (supra) was well met Page 18 of 19 as the chain shows the history of Exhibit P2 from its seizure to the same being brought before the trial court. Further, the appellant's evidence did not raise any reasonable doubts as to Exhibit P2 being seized from his home. In fact, apart from denying dealing in drugs and "gongo", he claimed he was framed by one of his wives, whom he did not live with. He insinuated that the drugs and the liquor were planted by said wife at his home. He however, did not show the motive behind his wife doing that or how the act could be possibly done by the alleged wife. In foregoing observations, I find that the case against the appellant was proved beyond reasonable doubt. Consequently, I sustain his conviction and sentence as meted by the trial court. The appeal is dismissed for want of merit. Dated and delivered at Moshi on this 25th day of November, 2024. X L. M. MONGELLA JUDGE Signed by: L. M. MONGELLA Page 19 of 19

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/322589/source_file/1460b33fde453862/Judgement-Criminal_Appeal_No._20501_of_2024_Edward_Ramadhani_Mfinanga_vs_Republic.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/edward-ramadhani-mfinanga-v-republic-narcoticsoffences-tanzlii-2024--6a3ea52d3b1caa9129826dd6

Prepared on 14 October 2026 · Esheria