

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. 8817 OF 2024 (Originating from the District Court
of Newala at Newala, in Criminal Case No. 15/2023) HUSSEIN SALUMU
KANUNGA..... APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT

JUDGMENT

1st June, 2024 & 1st July, 2024 MPAZE, J.: Yazidu Abdallah Namongo, Salum Lezile Mmole @ Mavoko, and Hamda Abdul Lyanga were arraigned before the Newala District Court on 6th March, 2023 charged with trafficking in narcotic drugs contrary to Section 15A(1) and (2)(b) of the Drugs Control and Enforcement Act [No. 95 of 2019]. When the charge sheet and particulars of the offence were read over and explained to the accused persons, they equally pleaded not guilty. As is customary when the accused denies the charges, it is the prosecution's responsibility to call witnesses to prove their case. ⁱ The case proceeded, and on 8th June, 2023 the charge sheet was substituted under Section 234 of the Criminal Procedure Act, Cap 20 R.E 2022, by adding a fourth accused, Hussein Salum Kununga, the appellant. At the time of this amendment, three prosecution witnesses had already testified. After the substituted charge was read over and explained to all the accused persons, they all pleaded not guilty. This led the prosecution to pray the court to recall the witnesses who had already testified so that the newly added accused (the appellant) could hear the substance of their testimonies and proceed with cross-examination. The records reveal that these witnesses were recalled. Despite the recall, there is a ground of appeal regarding complaints that when PW1 appeared in court, his testimony was not read out. Instead, what appears to have been read in court by PW1 is Exhibit P2, while Exhibit P1 was only shown to the fourth accused. In addition to this complaint, there are other grievances which I will resolve altogether when determining the merit of this appeal. Although all four accused were charged with this offence, ultimately, it was only the fourth accused who was found guilty, convicted, and sentenced. This conviction and sentence did not sit well with the appellant, prompting him to appeal to this court on five grounds; 2

1. That the trial court erred in law and fact by convicting and sentencing the appellant while the prosecution failed to prove the case beyond a reasonable doubt.

2. That the trial court erred in law and fact by convicting and sentencing the appellant relying on the evidence of co-accused.
3. That the trial court erred in law and fact by convicting and sentencing the appellant based on Exhibit P1, namely cannabis, while there was no proof of the chain of custody and the Occurrence Book for the same exhibit as it was obtained from the accused.
4. That the trial court erred in law and fact by convicting and sentencing the appellant while disregarding the defence evidence.
5. That the trial court erred in law and fact by convicting and sentencing the appellant based on a caution statement (Exhibit P5) which was improperly obtained and applied without corroboration. When the appeal was called for hearing, the Republic was represented by Ms. Florence Mbamba, a learned state attorney, while the appellant enjoyed the service of two learned advocates, Mr. Reinary Songea and Mr. Issa Chiputula. Before I proceed to discuss the grounds of appeal, I find it necessary, albeit briefly, to outline the evidence that led to the appellant's conviction and sentence to 29 years and 11 months' imprisonment. 3 The evidence, as seen in the trial court record, indicates that on 1st March, 2023 at about 06:00 hours, ASP Edwin Vicent (PW1) received information from an informer that a bag suspected to contain cannabis sativa was loaded on an IBRA bus heading to Dar es Salaam from Newala. Upon receiving this information, PW1, accompanied by G5599 D/CPL Bashiru (PW2), went to Kitangiri bus station. While there, the IBRA bus arrived, and they observed the 1st and 2nd accused unloading a bag from the bus. They apprehended them and inquired about the owner of the bag. The accused stated that the owner was left in Newala and had instructed them to bring the bag and hand it over to the bus conductor of Mahuta. Upon questioning the Mahuta bus conductor, who denied any knowledge of the bag, they retained the accused and sought witnesses to witness the opening of the bag. They managed to find Ally Mohamed Said (PW3), who witnessed the opening of the bag. Among other items, they found dried leaves suspected to be cannabis sativa. Following this discovery, the accused were taken to Newala Police Station. Abdallah Mustapha Kimuja (PW4), a government chemist, conducted an analysis of the suspected cannabis sativa and confirmed that the dry leaves contained in the bag submitted by D/CPL Alawe (PW7) to do analysis were unquestionably cannabis sativa. 4 D/CPL Daudi (PW5), the Exhibit Keeper, explained that he received the bag suspected to contain cannabis sativa on 1st March, 2023 from PW1. He stored it until 2nd March, 2023 when he handed it over to PW7, who then took it to the chemist. Later that same evening, it was returned and continued to be kept in the exhibit room. PW5 continued to keep the Exhibit until 25th April, 2023 when he handed it over to CPL Issaya to take to the court. G3166 DC Hamadi (PW6) took the caution statement of the 4th accused on 31st May, 2023 in which according to him the accused (appellant) confessed to committing the offence. According to the records, the Exhibits tendered by the prosecution and admitted as Exhibits were; a bag (Exhibit P1), Certificate of Seizure (Exhibit P2), Analytical Report DCEA 009 (Exhibit P3), Submission Form DCEA 001 (Exhibit P4), and the Caution Statement of the 4th accused (Exhibit P5). This prosecution evidence led the

trial court to find that all four accused had a case to answer. The 1st to 3rd accused defended themselves without calling any witnesses, while the 4th accused defended himself and called one witness. In their defence, all accused persons denied committing the offence. The 1st and 2nd accused stated that the bag was given to them by the 5 appellant to hand over to the conductor of the Mahuta bus, and they did not know its contents. The 3rd accused explained that the appellant had asked him to receive the bag from the 2nd accused and she also claimed ignorance of the bag's contents. On his part, the 4th accused denied any involvement in the commission of the offence and also denied giving the bag(Exhibit P1) to the 1st and 2nd accused. Based on this evidence, the trial court was convinced that the prosecution had proven their case beyond a reasonable doubt against the 4th accused. But they failed to prove the case against the 1st, 2nd, and 3rd accused persons, who were acquitted, while the appellant was sentenced to 29 years and 11 months' imprisonment. In addressing the grounds of appeal, Mr. Songea, starting with the first ground, argued that the case against the appellant was not proven beyond a reasonable doubt, highlighting the following deficiencies in the prosecution's case; Firstly, referring to the typed proceedings of the trial court, he noted that PW1 was recalled after the 4th accused was added to the case. The 4th accused did not read PW1's testimony, which had been given before he was joined in the case. I find this complaint should not detain me, because after going through the handwritten proceedings on page 68, the evidence of PW1 6 was read. Below is what the records on page 68 of the handwritten proceedings reveal; PROSECUTION CASE CONTINUES 'ASP Edwin Vicent John, Haya, 47 years, Christian, Police officer resident of kitangiri, Sworn: Court: The entire testimony of PW1 is read aloud and afresh in court. Exhibit P1 is shown to the 4th accused. Exhibit P2 is read over in court afresh by PW1 Signature SRM 4-7-2023 Looking at the typed proceedings which the appellant advocate was referring to, they miss the words 'The entire testimony of PW1 is read aloud and afresh in court. The omission of these words in the typed proceedings, I consider to be an oversight by the typist for failing to type them, thus I find this claim to be baseless as the procedure of reading the evidence of PW1 after being recalled was adhered to. In addition to this complaint, another grievance in this ground was that despite the appellant being convicted, there was no evidence showing the appellant was found in possession of cannabis sativa. He 7 argued that even the certificate of seizure did not indicate that the appellant was found with anything, citing the case of Sophia Joseph Kimaro v. Republic, Criminal Appeal No. 152 of 2019, to support this point. Another complaint concerning this ground is that the court failed to allow the advocate for the appellant to cross-examine the co-accused and instead allowed the appellant himself to ask questions while he had legal representation. Mr. Songea argued that this was incorrect as it denied the appellant his right to legal representation, arguing that what transpired was not cross-examination but merely questions from the appellant to the co-accused which according to him was not proper. Mr. Songea added that there was no direct evidence proving the offence against the appellant. He explored that the evidence from the co-accused, which the trial court relied on to convict the appellant, did not substantiate the charge. The counsel added that if the appellant had indeed given the bag to the 1st and 2nd accused, they should have shown a receipt for the bag. He also said,

that given the evidence of phone communication between DW2 and the appellant, the phone number used for communication should have been provided in order to prove the communication between them. 8 Still on this point, Mr. Chiputula noted that, according to the proceedings of 25th April, 2023 the cannabis sativa itself was never been tendered; instead, what was tendered on that day was a bag and this is what the appellant was shown when PW1 was recalled. Given this, he insisted that the prosecution side failed to prove their case to the standard required against the appellant. In response to this ground, Ms. Florence state attorney argued that the offence against the appellant was proven beyond a reasonable doubt. She submitted that while the appellant was not found in actual possession of the cannabis sativa, this does not mean he was not involved in the commission of the offence. Referring to section 5 of the Penal Code, which defines constructive possession, she argued that the appellant was found under constructive possession as he had knowledge of the said bag and its contents. She further contended that DW1, DW2, and DW3 all stated that the appellant was the owner of the bag containing cannabis sativa. The state attorney alleged that the appellant failed to challenge the testimony of his co-accused regarding his ownership of Exhibit P1 and his acquaintance with DW1 and DW2, all of this according to her shows that the appellant knew and was involved in the commission of the offence. 9 Regarding the claim that the appellant's advocate was denied the right to cross-examine the co-accused, Ms. Florence argued that this claim is baseless. If the advocate was present, he had the ability to request the court to conduct the cross-examination. However, the records do not indicate that such a request was made or that the opportunity was denied. Regarding the absence of a receipt or the phone number used by the appellant to communicate with his co-accused, Ms. Florence contended that this claim is also baseless since an oral account is sufficient to prove the case if the credibility of the witnesses is considered. She supported this point by referencing the case of Goodluck Kyando v. R

[2006] TLR 366. Addressing the claim that the cannabis sativa was not tendered, Ms. Florence vehemently denied this allegation, arguing that the cannabis sativa was indeed tendered. She referred to the evidence of PW1, who laid the foundation for Exhibit P1 before it was tendered and also pointed to the testimonies of PW4, PW5 and PW7. Each of these witnesses according to her was able to describe and identify the cannabis sativa in court, indicating that it was tendered as Exhibit. Having examined this ground thoroughly, I find it necessary to resolve it first as if it will be addressed affirmatively, would potentially dispose of the entire appeal. As the ground pertains to answering the 10 question of whether the prosecution proved their case beyond a reasonable doubt. As submitted by the appellant's advocates, and with which I agree, it is the duty of the prosecution to prove their case beyond a reasonable doubt. This duty never shifts to the accused person unless there is a specific legal requirement under certain circumstances that places a burden of proof on the accused. However, even then, the standard of proof for the accused is not beyond a reasonable doubt; the duty to prove beyond a reasonable doubt always remains with the prosecution. In the charge faced by the appellant, to determine whether the offence against the accused was proven beyond a reasonable doubt, the prosecution

needed to establish the following;

1. That, the accused was trafficking narcotic drugs, known as cannabis sativa.
2. , the substance contained in the dry leaves was a narcotic drug, specifically cannabis sativa, and
3. That, the chain of custody was well maintained. Before addressing the question as to whether the appellant was trafficking narcotic drugs known as cannabis sativa, I found it prudent first to consider the complaint that the cannabis sativa itself was never tendered as an Exhibit. ii To satisfy myself whether the same was tendered or not, I had to examine and reevaluate the records of the trial court and see what had transpired as the first appellate court normally does. Upon evaluating the records specifically on the page complained that is page 9 of the typed proceedings, the court observed, before PW1 tendered Exhibit Pl, testified as follows; '...After that, I took all the accused and brought to police station of Newaia for further steps. I can identify the bag, it is big, if opened there is a sulphate bag covered with white sole tape. This is the bag though when seized it has no nylon covering it as it appears now. 1 pray to produce this bag in court to be received in evidence. Sgn: I. M Softer Senior Resident Magistrate 25-04-2023 1st accused person: I object I have no reason. 2nd accused person: I have no objection. 3d accused person: I object. Sgn: I. M Setter Senior Resident Magistrate 25-04-2023 12 Order: The 1st and 3d accused have objected the reception of the exhibit without advancing any reason hence their objection is unfounded the 2nd accused has no objection. On that account, the bag said to have/contain Bhangi is admitted and mark exhibit Pl' I have decided to record in detail what transpired on the day Exhibit Pl was tendered and received as Exhibit so that I can be in a better position to determine whether the said cannabis sativa was truly tendered as an Exhibit or not as claimed by counsel for the appellant. To resolve the issue, I will be guided by the question: Based on what has transpired in the said record, can it undoubtedly be said that the cannabis sativa was tendered as an Exhibit? After examining this evidence and what was prayed to be admitted as Exhibit, I am uncertain as to whether the item tendered was cannabis sativa or the bag containing the substance of cannabis sativa. I say this because before an Exhibit is tendered, it must be cleared before being admitted as an Exhibit. Once cleared, and given that in this case, the bag was merely a carrier, it should have been opened to reveal the contents, showing the bhangi and other items to the accused and the court. However, the record is silent on whether this was done. 13 Even when looking at the trial magistrate's order of admitting the Exhibit, it was stated, 'On that account, the bag said to have/contain bhangi is admitted and mark as Exhibit Pl. This raises the question of how the trial magistrate could ascertain that the bag contained bhangi when it was not opened and its contents were not shown to the accused and the court for confirmation. Furthermore, the testimonies of PW2 and PW3, when they appeared in court to give their evidence, only identified the bag without confirming its contents. For example, PW2 stated, 'This is the bag we seized during the incident; it has a sulphate bag inside lined up with nylon,' while PW3 said, 'I can identify the bag by its colour, which is mostly red and appearance; this is the bag.'

Both of these witnesses only identified the bag and not the cannabis sativa. Based on this it can be noted that what was tendered was just the bag. In contrast to the previous three witnesses, PW4, being a government chemist who conducted the analysis to determine the contents of the bag as contained bhangi, in identifying the bag, stated, '...inside the bag, there are dry leaves in 'kiroba,' which is tied with a tape having the seal of GCLA. I have seen all the marks/particulars I have mentioned; inside the kiroba, there are leaves of bhang.' 14 Likewise, PW5 the Exhibit Keeper when identifying Exhibit P1 had this to say 'This is the exhibit I received,... this is the white kiroba, and this is bhanginside kiroba.' PW7, who took the Exhibit for analysis, identified the Exhibit in court and, among other things, stated, '...this is kiroba sealed with tapes, inside kiroba there are dry leaves which were verified by the chemist to be drugs known as bhangi.' The state attorney, in his argument, emphasized that with this evidence, the court should find out that the cannabis sativa was tendered and received as an Exhibit. I have hesitated to agree that cannabis sativa was received as an Exhibit. As I stated earlier, what was received was a bag that was not opened to reveal the 'kirobd mentioned by PW4, PW5, and PW7, which was said to contain bhangi. This 'kirobd was neither shown nor opened to confirm its presence inside the bag. It should be noted that the offence facing the accused was trafficking narcotic drugs commonly known as bhangi. To prove this, it was necessary for the bhangi to be tendered and shown to the accused so they could confirm whether it was indeed the bhangi they were found with. 15 In the case of *Dauson Athanaz v. R* [2016] TLR 165, where the appellant was convicted of cattle theft and the prosecution failed to tender the cattle as an Exhibit, the Court of Appeal stated: "In our settled minds, it was crucial for the prosecution to tender the allegedly recovered heads of catt/e as evidence in the circumstances of this case because they were a crucial link to the oral evidence that was given and could afford a strong impact in the case. As Ray Moses, an American jurist, once said, "Seeing is believing. We believe things when we see them with our own eyes, or rather one picture is worth a thousand words"... we do not hesitate to agree with him.' Applying the principle to the case at hand, that since the offence the appellant was facing was trafficking narcotic drugs. Therefore, the alleged cannabis sativa was crucial to be tendered in order to establish the offence of trafficking narcotic drugs against the appellant. The procedure for tendering and admission of Exhibits is well explained in the Exhibit Management Guidelines, 2020 paragraph 2.4.2, of the Guidelines outlines the conditions precedent before tendering an exhibit as follows; 16 ' Before admitting an exhibit, the court must observe legal requirements for its admissibility. The witness must point out specific identification marks, brand or trade name, or other peculiar features in relation to the exhibit to be tendered.' These conditions are also found in the case of *R v. Sheriff Mohamed @Athuman & 6 Others*, Criminal Appeal No. 74 of 2016 CAT. Based on what has been stated in the Sheriff's Mohamed case and as directed in the Exhibit Management Guidelines, I expected to find in the proceedings the evidence that would convince me that the Bhangi was tendered as an Exhibit. Besides PW1 describing the bag as being large, which I believe there are many large bags, he should have at least described, for example, its colour, type, and any other marks. Regarding the marks, I expected that since PW1 was the one who brought the accused and the Exhibit to the police, he would have

explained what mark he placed on the Exhibit to distinguish it from other Exhibits. Other details I expected to see include;

1. What would be found inside the bag once opened, describing its contents. 17
2. After this explanation, the bag would have been shown to PW1 to identify the marks he described.
3. The bag would then be opened to reveal its contents for identification by PW1, as he had explained.
4. After this identification, PW1 would request the court to admit the same as Exhibit.
5. The court, after receiving this request, would give the accused a chance to raise any objections.
6. If any objections were raised, the court would record them and allow the prosecution to respond, followed by any rejoinder from the objecting party. The court would then decide whether to sustain or overrule the objection. Looking at the record of 25th April, 2023 despite PW1 stating, 'this is the bag I seized, he did not say that once opened, it would be found to have contained the dry leaves suspected to be cannabis sativa. Instead, he said that once opened, there would be a sulphate bag covered with white sole tape. With this evidence, can it be really said that cannabis sativa was tendered? The answer to this question will be in the negative. Given that the cannabis sativa was not tendered as an Exhibit, which would have led the court to determine whether the appellant was trafficking narcotic drugs or not, I cannot continue to address that 18 question or any other grounds of appeal as this ground alone is sufficient to dispose of the entire appeal. Based on this, I find that the prosecution side has failed to prove their case beyond the required standard. I therefore allow the appeal quashed and set aside the conviction and sentence imposed on the appellant by the trial court, consequently, I order that the appellant be released immediately from custody unless lawfully held. M.B Mpaze Judge Court:-Judgement is delivered today in the presence of Ms. Florence Mbamba learned state attorney for the Republic and Mr. Ahyadu Nanyohe learned advocate for the appellant and the appellant. M.B Mpaze Judge 15/7/2024 19

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