

TANZANIA / JUDGMENT

MOHAMED ABDUL

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM CRIMINAL APPEAL NO. 7250 OF 2024 (Originating from Criminal Case No. 322 of 2022 before the District Court of Ilala at Kinyerezi [Hon. J.L Mushi-SRM] dated 7th December 2024.) BETWEEN MOHAMED ALLY ABDUL..... APPELLANT VERSUS THE REPUBLIC RESPONDENT JUDGMENT ON APPEAL 26/11/2024 & 03/12/2024 S.M. MAGHIMBI.3: The appellant, Mohamed Ally Abdul, together with one Denis Sebastian Simba, who is not a party to this appeal, were both arraigned before the District Court of Ilala at Kinyerezi for the offence of trafficking in narcotic drugs contrary to section ISA (1) and (2)(c) of the Drugs Control and Enforcement Act, Cap. 95 R.E 2019 as amended by the Written Laws Miscellaneous Act No. 5 of 2021. They were accused of trafficking narcotic drug named Cannabis Sativa commonly known as "bhangr on 09/01/2023 at Julius Nyerere International Airport (JNIA) within Ilala District in Dar es salaam Region. Upon being produced in court, they were granted bail and following being out on bail, the said Denis Simba absconded bail and the prosecution prayed to proceed in his absence under section 226 of the Criminal Procedure Act, Cap. 20 R.E 2022. After a full trial, the appellant was convicted and sentence to serve thirty (30) years imprisonment. Before going into the determination of the merits or otherwise of this appeal, it is pertinent that a brief background of the matter is narrated. Essentially, it all started as a promise from Denis Sebastian Simba/ the accused to the 2nd accused/appellant herein that he is preparing a safari to take him to Dubai for medical treatment following an eye complication. The expenses were to be covered by some people who are doing that as sadaka. The appellant accepted the promise, the accused proceeded with arrangements of the necessary documents such as passports, tickets and visa for the appellant's travel. On the fateful day, the accused went to the appellant's home at Magomeni and the two started their journey to the airport. Whilst they were at the airport, the appellant testified that the accused was communicating with some people through his mobile phone and suddenly a car arrived with some luggages. It was the appellant's defence that the accused gave him four (4) bags to take them with to the departure area. He took the luggage to the screening area and when the said luggages were scanned, PW5 revealed that they contained old leaves presumably to be "bhangras retrieved therefrom. The bags were taken to the offices and PW1 and PW2 confirmed the samples placed before their offices to be "bhangr". During the arrest, the accused was arrested with 5.09 kg of the alleged "bhangr" and the appellant was arrested with 10.49 kg. PW3 prepared a certificate of seizure which was signed by him, PW6 and the appellant and thereafter, the appellant's statement was recorded by PW8. In the said statement, the appellant admitted to have

committed the offence. He was then arraigned in court and accordingly charged. At the end of the trial, the trial court was satisfied that the prosecution proved its case against the 1st accused and the appellant beyond reasonable doubt. They were therefore convicted as charged and sentenced to thirty

(30) years imprisonment, hence, the present appeal on the following grounds:

1. That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no cogent and coherent evidence from the prosecution that showed and proved that the appellant had any knowledge on what was contained in the alleged bags.
2. That, the learned trial magistrate erred in law and fact in convicting the appellant when there was no cogent and coherent evidence that showed and prove the common intention to commit the offence between the appellant and the 1st accused person.
3. That, the learned trial magistrate erred in law and fact in convicting the appellant based on suspicion when the principle of law is clear that however suspicion is grave cannot be the basis of conviction in criminal cases.
4. That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution evidence adduced in court was insufficient of proof to the standard required by law in criminal cases.
5. That, the learned trial magistrate erred in law and fact in ignoring and/or disregarding the defence evidence which raised a reasonable doubt in the prosecution case without assigning any strong reasons of disbelieving the appellant's defence evidence the omission which occasioned a miscarriage of justice on the appellant. On those grounds, it was the appellant's prayer that this Court finds this appeal to have merit and allow it to sail through, hence quash the appellant's conviction, set aside the sentence and release the appellant from the Prison. Hearing of the appeal was by way of written submissions. At the very outset, and pursuant to the order of this court dated 24th day of September, 2024, it was directed that the respondent, after being served with the proceedings, should reply to the appellant through written submissions and the same was acted accordingly. In his submission to support the appeal, the appellant submitted that, during the investigation and trial, he stated that the bags which were found with the alleged "bhangi" were the properties of the accused who was taking him to hospital at Dubai for eye treatment. He alleged to have had no knowledge of what was contained in the said bags seeking refuge from the situation by citing the case of Song Lei vs DPP and DPP vs Xiao Shaodan & Others, Consolidated Criminal Appeals No. 16A of 2016 and 16 of 2017(Unreported). The appellant submitted further that since his defence was not proved false by any prosecution witness, he beseeched this court to accept and believe it as credible. To fortify his argument, he has cited the decision of Goodluck Kyando vs R (2006) TLR 363. He therefore implored this court to allow his appeal, quash the conviction and set aside the sentence and release him from prison. In reply, the respondent consolidated the 1st, 3rd and 4th grounds of appeal and argued them in tandem. Their submission was that on the material day when PW5 was on duty at his station, JNIA,

he saw six (6) bags passing into the machine which reflected the abnormal colour and pieces which were inside those bags. Upon such discovery, the accused and the appellant admitted to own such bags. A search was then mounted in the presence of the independent witness, PW6 and it exposed the said old leaves to be "bhangr. The same was reported to police which led to their arrest, however, PW5 identified the appellant to be the one who was found in possession of the said luggages containing old leaves suspected to be "bhangr'. The respondent submitted further that the cautioned statement of the appellant procured by PW8, evidenced that he was interrogated and admitted to have committed the said offence. To back up their position, they placed reliance in the case of Makubi Dogani vs Ngodongo Maganga, Civil Appeal No. 78/2019. The respondent went on submitting that the appellant cannot exonerate himself from the alleged offence by uttering that he had no knowledge on what was contained in the said bags. That by him signing the said certificate of seizure, It tantamount to his actual possession of those old leaves. Expounding further the respondent submitted that the trial court considered the appellant defence and analysed it comparing to the prosecution evidence. They cemented that, the appellant saying that he had no knowledge of what was contained in the said bags is unjustifiable as there were some of his items including a passport and an air ticket. Regarding the 2nd ground of appeal, the respondent contended that the act of the accused and the appellant planning to travel together, going to the same place, on the same date and time, while carrying the said "bhangr" Nas a proof to show that they all had a common intention to commit the offence charged. It is their assertion that the prosecution well proved their case beyond all reasonable doubts and urged the court to dismiss this appeal for being non-meritorious. Having gone through the written submission of both parties and revisited the grounds of appeal herein, I find that it is not disputed that when PW5 was on duty exercising his duties (among others scanning and screening of passenger's luggage's through the machine). That PW5 found the appellant in actual possession of the luggages containing alleged narcotic drugs commonly known as "bhangr The appellant and the absconded first accused intended to traffic the drugs from Dar es salaam to Dubai, see exhibit PE13. Section ISA of the Drug Control and Enforcement Act, Cap. 95 R.E 2019 as amended by the Written Laws Miscellaneous Act No. 5 of 2021 it stipulates that: (1) Any person who trafficks in narcotic drugs, psychotropic substances or iiiegaiiy deais or diverts precursor chemicalis or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shaiibe iiabie to imprisonment for a term of thirty years.

- (2) For purposes of this section, a person commits an offence under subsection (1) if such person trafficks in—
- (c) cannabis or khat weighing not more than one hundred kilograms. From the above excerpt, it is crystal clear that trafficking of narcotic drugs including cannabis sativa commonly known as "bhangr is strictly prohibited by the law. The question remains whether the appellant and the other accused not a party to this appeal were found attempting to traffic the said drugs. The exhibits Passport and Air ticket of the 2nd accused admitted as EXPE 12

collectively show that on the incident date, the accused was at the Julius Nyerere International Airport travelling to Dubai. As submitted by the respondent, it is irrefutable that PW3 and PW7 did search the appellant's bags and found them with "bhangr. This was also supported by the independent witness that was there at the time of search. Subsequent to that search, the appellant appended his signature on the seizure for the 2nd accused, EXP13 in the presence of independent witness, PW6, acknowledging the search and seizure of the said "bhangr as highlighted in exhibit PE13. Lastly, the said exhibit PE13 was neither cross examined nor was it objected by the appellant during the trial to shaken its evidential value. It was stated in the case of Nyerere Nyague vs Republic, (Criminal Appeal No. 67 of 2010)[2012] TZCA 103 (21 May, 2012)TanzLII that: "...5 party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and wiii be estopped from asking the trial court to disbelieve what the witness said". Equally, the Court of Appeal of Tanzania in the above decision went on amplifying that: "As matter of genera! principle, an appellate court cannot allow matters not taken or pleaded and decided in the court(s) beiw to be raised on appeal."Emphasis is mine Conversely, the appellant ground that he had no knowledge of the said "bhangi"be\ng in his luggages has been proved to the contrary by the prosecution evidence The appellant also raised an argument that since his defence was not proved false by any prosecution witness this court should accept and believe it's credence. With respect, I vehemently disassociate with the appellant on that point. According to the law, the issue of knowledge on the part of the assailant(the appellant) is immaterial in the circumstances of this case, hence, baseless. As precisely submitted by the respondent, there were appellant's items in the said luggages such as passport and air ticket, it implied that the appellant had knowledge of the said "bhangHn his bags as one of the items contained therein. In the case of Athumani Mohamed Nyanyi @ Ismail Adamu & 2 Others vs Republic, (Criminal Appeal No. 624 of 2021)[2024] TZCA 444(11 June, 2024)TanzLII the Court of Appeal of Tanzania echoed that: "...h/s confessional statement(Exhibit P6)showing that, he and the appellant had the knowiedae that the drugs are stored there. The totality of the two facts therefore, will show that the appellants had the control and interest in the drugs. They cannot run away from it (See; Moses Charies Deo vs R, [1987]TLR134 and Nurdin Akasha vs R, Criminal Appeal No. 190 of1994[1995] TZCA 46(23 October, 1995) TanzLII)."Emphasis underlined. Lastly, the appellant has argued that the trial magistrate erred in law and fact in convicting him when there was no cogent and coherent evidence from the prosecution that showed and proved the common intention of them committing the said offence. I am at one with the respondent that the act of the appellant planning to travel together with the accused, going to the same place, on the same date and time, carrying the same bags containing "bhangi" was a proof to show that all of them had common intention to commit the offence of trafficking in narcotic drugs. 10 I am aware that the accused should not be convicted by the weakness of his defence, as weakness In the defence cannot become the strength of the prosecution, rather It is the strength of the prosecution case independent of accused defence that warrants a conviction. However, accused defence is rather used to disprove the allegations against him and establish their innocence, essentially by providing a counter-narrative to the prosecution's already adduced

evidence. In the case at hand, the prosecution evidence as shown above established the arrest of the appellant with his colleague en-route to Dubai and that their bags contained Bhangi. In defence the appellant threw the burden to Denis Simba who jumped bail and was not present during trial. His alleged that he was going for eye treatment. Therefore, in my view, the same was an afterthought and this evidence could not shake the prosecution evidence. As said earlier, the prosecution case established beyond reasonable doubt that the appellant and his friend at the Airport attempting to traffic drugs. From those findings, I find the appeal to be lacking in merits and it is hereby dismissed. Dated at Dar es salaam this 10th day of December, 2024. S.M.tlAGHIMBI o . -c. C" JUDGE 11 4e ^

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