

TANZANIA / JUDGMENT

20170725 TZHC Mbeya

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TZHCDECIDED
25 July 2017

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il IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF MBEYA AT MBEYA CRIMINAL APPEAL NO. 37 OF 2017 (Originated from the District Court of
Kyela, Criminal Case No. 89 of 2016) SUNDAY Sf0 MWANGOTA APPELLANT
VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 1810712017 Date of Judgment: 2510712017 A.F.NGWALA, J.: The appellant Sunday Mwangota was convicted and sentenced to three (3) years imprisonment. He was also ordered to pay a fine of Tshs.500,000/= after being found guilty of the offence Being found in possession of Narcotic Drugs contrary to Section 12 (d) of the Drugs and Prevention of Illicit Trafficking of Drugs [Cap. 95 R. E.

20021. It was alleged that the appellant on the 11th day of August, 2016 at about 15:13 hours at Bondeni area within Kyela District Mbeya Region being unlawfully in possession of cannabis sativa commonly known as bhang weight to 300 grams valued Tshs.360,000/. Being dissatisfied with both conviction and sentence, he has lodged the present appeal. k. Page 1 of 7 The appellant moved this court with six (6) grounds of appeal. In the Petition of Appeal, he complains that the trial magistrate erred both in law and facts by convicting and sentencing him while the case against him was not proved to the required standard of proof in criminal cases. There was no evidence to prove that it was bhang which led to his conviction. The trial magistrate erred in law and facts by convicting him in the absence of seizure certificate showing that the said bhang was with the accused person during arrest and lastly that the trial magistrate erred in law and fact by failure to rule out whether the appellant had a case to answer or not after the closure of the prosecution case. During the hearing of this appeal, the appellant was unrepresented while the respondent Republic was represented by Miss Benadetha Thomas, the learned State Attorney. The appellant prayed for his grounds of appeal in the Petition of Appeal to be adopted. He insisted that the prosecution side did not prove its case. Miss Benadetha for the respondent did not support the appeal. She submitted that the charge against the appellant was proved to the required standard. She argued that PW1 and PW2 conducted a search in the appellant's house in which green leaves were found in the plastic bag and a search warrant was admitted in court as exhibit P1. The said green leaves were sent to the government

Chemist and the report was tendered by the investigation officer and it was admitted as exhibit P2. The learned State Attorney admitted that the said government chemist was not called during Page 2 of 7 I trial and that was a procedural irregularity, however that the appellant did not request such an expert to come and testify. She added that the failure or the nonappearance of the expert witness did not mean that the offence had not been committed as the appellant was found in possession of the said bhang. Miss Benadetha strongly submitted that the trial magistrate ruled out that the appellant had a case to answer after the closure of the prosecution. Lastly the learned counsel for the Republic argued that although the offence was committed on 11/08/2016 and the accused was charged under Section 12 (d) of Cap. 95, that was relevant law under the Drugs Control and Enforcement Act such an irregularity is curable. The case of Joseph Mapunda and Hamis Seleman v. Republic (2003) T. L. R. 366 was cited to substantiate this. She prayed this court to dismiss the appeal. Having heard the submission by both parties to this appeal, the only question that needs this court's determination is whether or not the prosecution evidence warranted the appellant's conviction. The appellant complains that the learned trial magistrate erred in law and facts by failure rule out on whether or not the appellant had a case to answer immediately after the closure of the prosecution case. The trial court's typed proceedings at page 10 it is indicated:- "This court passed through the evidence brought by the prosecution side and it has been found that the accused Page 3 of 7 person has the case to answer, Section 230 (1) of CPA C/W." It is clearly that the trial court ruled on a prima facie case, and the appellant was addressed and replied as follows:- "Accused: I will make defence under oath and I don't have any witness." The counsel for the respondent during her submissions introduced new thing that although the appellant was charged and convicted of the offence under a repealed Section of the law, yet the anomaly is curable as the current Act contains the same and identical words. This stand was also emphasized in the case of Joseph sb Mapunda and HamisSeleman v. Republic (2003) T. L. R. 366, in which the court held inter alia that:- "If the repealed Section under which an accused is charged is re-enacted in identical words in the current statute the irregularity is curable and the accused has not in any way been prejudiced by the irregularity." Upon perusal of the court record I have successfully found that there is exhibit PT, the seizure certificate. In the said certificate it indicates that 318.8g of the said cannabis sativa were seized from the appellant. In exhibit P2, the Government Chemist report indicates the quantity of 318. 8g which were sent to him for examination. But in the charge sheet it is indicated that 300g of bhang the appellant was found in possession of. This difference in quantity of bhang which is the subject of the appeal ought to have Page 4 of 7 been ascertained in order for the conviction of the appellant to be free of doubts. In criminal cases the prosecution side is duty bound to prove the charge leveled against the accused person. They do so by calling witnesses who will prove the accusations alleged in the charge sheet and not otherwise. In the instant appeal it is not known how the appellant was charged with different quantity of bhang while the exhibits tendered to prove the said charge had different quantity. This shows that the prosecution side was proving a charge which was not preferred in court. I hold so because of the evidence of PW1, PW3 and PW4

collectively told the trial court that they arrested the appellant and PW4 was the one who sent the said bhang to the government chemist. The charge indicates that it was prepared by the Police themselves and it seems they weighed it even before taking it to the government chemist, for undisclosed reasons the charge read contrary to the evidence adduced in court. Had the trial magistrate keenly observed this her verdict ought to have been differently or the inconsistency ought to have been addressed by her during analysis of the evidence. The appellant also complains that the learned trial court magistrate proceeded to convict and sentence him while the charge against him was not proved by a witness who could inform the court that exhibit P3 was nothing but a cannabis sativa or bhang as popularly termed. Upon perusal of the court record the PW4 was the one tendered exhibit PW3 the green leaves of cannabis sativa. Section 62 (1) (d) of the Evidence Act, [Cap. 6 R. E. 2002] reads:- Page 5 of 7 62-(1) oral evidence must, in all cases whatever, be direct, that is to say- (d) if it refers to an opinion or the grounds on which the opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds." This Section of the act as amended presupposes that if it the evidence of an opinion, such opinion must be produced in court by a person who gave such opinion. This Section was referred to by this court in the case of Zephania Kamata and Maria Zephania v. The Republic, Criminal Appeals Nos. 27 and 28 of 2005, HC at Bukoba (unreported), and the court held that:- "In the absence of the Agricultural Officer there is no any other evidence to establish that the uprooted plants were bhang. The investigator was not a proper person to tender such expert opinion..." This decision forms an inference that if such an expert was brought in court an accused person could be availed with an opportunity to cross examine such an expert. In the instant case the government chemist was not called in court to testify on how he or she discovered that the said green leaves were cannabis sativa or bhang as it was rightly held in the above case. In cases like this one an expert is important to be called by the prosecution side in order to clarify on his findings and to respond particular questions from the adverse party. This was not the case in the instant appeal. For this reason I am of the considered view that justice was not done on the part of the appellant. This court takes judicial notice that though Page 6 of 7 expert opinion• does not bind the courts, but in this case his evidence was significantly required for the interest of justice. As there was no other evidence to prove that the trial court that the said green leaves were cannabis sativa, then the appellant's conviction was not properly reached by the trial court. As this ground of appeal finalizes the appeal, I find no need to continue canvassing on other grounds of appeal. Accordingly I allow the appeal. The conviction, sentence and orders of the trial court are set aside. The appellant is to be released from custody forthwith unless otherwise held for other lawful course. Order Accordingly. *W A.F. Ngwala Judge 25/07/2017 Court: Right of Appeal to the Court of Appeal of Tanzania explained. I evklp A.F. Ngwala Judge 25/07/2017 Page 7 of 7

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Prepared on 14 October 2026 · Esheria