

A on the *Fahari Bottlers* case to support his submission, and with that we find that the applicants have failed to show exceptional circumstances which would justify invoking the revisional powers of the court when the right of appeal with leave was or is open to them. Therefore the first ground of Mr D'Souza's preliminary objection succeeds.

C His second ground of objection is that the applicants' prayer that the case be transferred to another judge or to the commercial division of the High Court is baseless. This ground need not detain us, and it may be disposed of very quickly. As Mr D'Souza quite rightly observed, an application for revision presupposes there being in existence an order of the Lower Court. In the instant case, however, D the trial judge made no order respecting this aspect of the matter. He was not asked to disqualify himself from hearing the matter or to transfer the case to the commercial division, and he refused. Therefore, there can be no peg on which to hang a revision order of this Court, E as it were. That ground also succeeds. In the result and for the reasons we have endeavoured to set out above, we uphold Mr D'Souza's preliminary objection. Accordingly the application for revision is dismissed with costs.

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WILLIAM MREMA v. SAMSON KIVUYO

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Kisanga, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 56 OF 1996

(From the decision and order of the High Court of Tanzania at Arusha, Mroso, J., dated 25 July 1995, in Civil Appeal No. 29 of 1994)

Appeals – Second appeal to the High Court – Additional evidence taken by way of affidavit – Section 29 of the Magistrates' Courts Act 1984.

Natural justice – Right to cross examine a witness – Additional evidence by way of affidavit taken on appeal – Natural justice required an opportunity to cross examine the deponent.

Civil Practice and Procedure – Appeal – Additional evidence taken by way of affidavit on second appeal – appellant not afforded opportunity to cross-examine deponent – Whether High Court was wrong – Omission not occasioning injustice – Effect thereof – Rule 108 of the Court of Appeal Rules 1979.

On a second appeal the High Court called for additional evidence. Such evidence was given by the trial Primary Court magistrate in the form of an affidavit. The appellate judge did not give the appellant opportunity to cross-examine the deponent. On the evidence on record, together with the affidavit, the judge dismissed the appeal. The appellant appealed to the Court of Appeal, and the omission by the Judge to afford the appellant opportunity to cross-examine the Primary Court magistrate came for consideration.

Held: (i) Though there is no provision in the Magistrates' Courts Act for the right of cross-examination in relation to additional evidence taken on appeal, natural justice required the judge to give the appellant the opportunity to cross-examine the Primary Court magistrate;

- A (ii) The judge's errors did not however, affect the merits of the case and thus came within the purview of rule 108 of the Court Rules

Appeal dismissed

- B Statutory provisions referred to:

1. Appellate Jurisdiction Act 1979, section 5(2)(c)
2. Magistrates' Courts Act 1984, section 29
- C 3. Court of Appeal Rules 1979, rule 108

Mr Lundu, for the Respondent

JUDGMENT

- D (Dated 26 October 2000)

- E **Labuva, J.A.:** This is a third appeal. It arises from the decision of the High Court at Arusha in (PC) Civil Appeal Number 29 of 1994 (Mroso, J.) of 25 July 1995. It all started with a boundary disputed between the appellant and the respondent. That appellant unsuccessfully filed a suit against the respondent in Arusha Urban Primary Court. He appealed to the District Court, Arusha, and lost. He lodged a second appeal to the High Court where again he was unsuccessful. After hearing the parties on appeal, the learned judge on second appeal called for additional evidence of the trial Primary Court magistrate to clarify on the assessors who had taken part at the trial. This was prompted by the fact that it was indicated on record that at some stage the names of two assessors had been cancelled and substituted with two others thus giving the impression that two sets of assessors were used in the trial. The additional evidence was by way of an affidavit by the trial Primary Court magistrate. On the evidence on record together with the affidavit, the judge on second appeal dismissed the appeal.

- I The appellant was dissatisfied, he has appealed to this Court. The points of law certified in terms of section 5(2)(c) of the Appellate

A Jurisdiction Act 1979 were; first, whether the appellate High Court had power in law to take additional evidence and secondly, the propriety of the learned judge's omission to afford the appellant an opportunity to cross examine the deponent of the affidavit, the Primary Court magistrate. B

At the hearing of the appeal the appellant appeared in person while the respondent was represented by Mr Lundu, learned counsel. In the memorandum of appeal the two points certified by the High Court are raised. The appellant did not have anything of substance to add to the memorandum of appeal apart from his lengthy vasculating repetition of matters which are otherwise not relevant and proper for the court to consider in this, a third appeal. With regard to the first ground of complaint, namely that it was wrong for the High Court to take additional evidence by way of affidavit Mr Lundu countered that the High Court has such powers under section 29 of the Magistrates' Courts Act 1984. Since the law allows the High Court to take such additional evidence on appeal, Mr Lundu said, the appellant's complaint in ground one is without merit. We agree with Mr Lundu that the High Court has power in appropriate cases to take additional evidence. Section 29 of the Magistrates' Courts Act 1984 in part provides: C D E

F In the exercise of its appellate jurisdiction under this Part, the High Court shall have power:

- (a) to take or to order some other Court to take and certify additional evidence and

G In this case, as provided under this section, the learned judge in exercise of the appellate jurisdiction of the High Court took the additional evidence of the trial Primary Court magistrate for purposes of ascertaining the assessors who sat with the magistrate at the trial. The trial magistrate in her affidavit confirmed that she sat throughout the trial with the same set of assessors. Not only that, the learned judge examined the record of the trial and was satisfied that the signatures of the assessors for the date complained against, are similar to those shown in respect of other dates for the trial. We also have H I

A had the opportunity to glance through the record, and we are like
 the learned judge satisfied that the signatures of the assessors for
 the date 4 February 1994 are similar to the signatures of the assessors
 B by the learned judge showed that the same set of assessors sat with
 the trial magistrate throughout the trial such evidence to our minds
 was neither prejudicial to the appellant nor was it further evidence
 C in proof of the case. It was additional evidence for the purpose of
 enabling the learned judge to satisfy himself that the procedure followed
 by the trial magistrate was correct. In the circumstances, we are
 satisfied that the learned judge properly exercised the powers vested
 D in the High Court in exercise of its appellate jurisdiction in taking
 the additional evidence of the trial magistrate to ascertain the assessors
 who sat with the trial magistrate.

Next we shall deal with ground two. Here, the appellant's complaint
 is that he was not given the opportunity to cross examine the trial
 E magistrate in her additional evidence. That if he was given the opportunity,
 he would have been in a position to question the trial magistrate
 why the names of the assessors Yusuf Ally and Kohole Koreka were
 initially entered in the coram for 4 February 1994 but were cancelled
 F in substitution for Loi Loticia and Bakari Lwavi. The appellant adamantly
 maintained that failure to afford him to opportunity to examine the
 magistrate occasioned an injustice and prejudice against him. In response
 to this submission Mr Lundu took the view that section 29 of the
 G Magistrates' Courts Act Number 2 of 1989, does not provide for
 the right to cross examination. However, as a matter of natural justice,
 Mr Lundu conceded and we think correctly so that the learned judge
 should have given the appellant such an opportunity. Even then, Mr
 Lundu concluded, the breach of the rules of natural justice in this
 H case was not prejudicial to the appellant. From our reading the provisions
 of section 29 of the Magistrates' Court Act 1984, there is no provision
 for the right of cross examination of the giver of the additional evidence
 taken. However, as matter of natural justice, we think it was erroneous
 I on the part of the learned judge not to give the appellant the opportunity

to cross examine the magistrate on the matter. Despite this error,
 we do not think that the appellant was in anyway prejudiced.

From the additional evidence namely, what the magistrate stated
 to the judge and her affidavit, the established fact was that the trial
 magistrate conducted the trial throughout with the aid of the same
 assessors. In that situation, we agree with the appellant that it was
 improper for the learned judge not to accord him the opportunity to
 be heard on the additional evidence, it is nevertheless to be heard
 C on the additional evidence, it is nevertheless our settled view that
 no injustice was occasioned to the appellant. As a matter of fact, we
 think in the circumstances of the case, error on the part of the learned
 judge comes within the purview of rule 108 of the Court Rules. It
 was an error which arose in the High Court in the course of hearing
 D the appeal. Rule 108 provides to the effect that the decision of the
 High Court shall not be revised or substantially varied by the court
 on appeal on account of any error or irregularity not affecting the
 merits of the case. In this case, the omission complained of was,
 E we think, an immaterial error which did not affect the merits of the
 case, and so, rule 10 comes into play. In the event, for the foregoing
 reasons, we find no merit in the appeal. It is dismissed with costs.

**A JOHN s/o MAKOLOBELA KULWA MAKOLOBELA
AND ERIC JUMA alias TANGANYIKA v. REPUBLIC**

**B HIGH COURT OF TANZANIA
AT MWANZA
(Mroso, J.)**

C CRIMINAL APPEAL No. 62 OF 2000

(From the District Court of Geita District at Geita, in Original Criminal Case No. 127 of 1999, LNB Ngovungo, Esq, DM)

D Criminal Law – Defence case – Inconsistence in the defence case – Accused persons jointly prosecuted giving conflicting defences – Whether inconsistence in their defences is an incriminating factor.

E Criminal Law – Burden of proof – Weakness of defence case – Whether an accused may be convicted on the weakness of his defence.

Evidence – Witnesses for the prosecution stating that they smelled bhang – Whether the statement by the witness is sufficient to support conviction.

F The three appellants were jointly and together prosecuted in the District Court of Geita for unlawful possession of *cannabis sativa* contrary to, and they were convicted on the grounds, among others, that they gave conflicting accounts. The Trial Court also found the prosecution evidence to be watertight as the witnesses testified that they smelled bhang and they found the appellants smoking bhang. On appeal:

G Held: (i) The fact that the appellants gave different defences is not an incriminating factor; since they were not found together at the time of their arrest, it is not surprising that their respective accounts differed;

H (ii) A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt.

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(iii) A person who says that a substance is *cannabis sativa* has at least to tell the court how he was able to know that the substance was what he claimed it was.

Appeal allowed

Statutory provision referred to:

1. Drugs and Prevention of Illicit Traffic in Drugs Act Number 9 of 1995, section 12(d)

Appellants unpresented

JUDGMENT

(Dated 1 November 2000)

Mroso, J.: Three appeals, namely Criminal Appeals Numbers 62 of 2000, 63 of 2000 and 64 of 2000 in which John Makolobela, Kulwa Makolobela and Eric Juma *alias* Tanganyika are the respective appellants, were consolidated for hearing and also consolidated in this judgment. When I heard the appeals on 13 October 2000 I allowed them and reserved reasons which I now endeavour to give.

The three appellants were jointly and together prosecuted in the District Court of Geita for unlawful possession of *cannabis sativa* contrary to section 12(d) of the Drugs and Prevention of Illicit Traffic in Drugs Act Number 9 of 1995. They were found guilty and convicted and each was sentenced to seven years imprisonment. Aggrieved by the conviction and sentence, they have appealed to the High Court.

The allegation against them was that on 24 April 1999 at 01:00 hours they were jointly and together found in unlawful possession of 5 grams of *cannabis sativa* (bhanga). Two prosecution witnesses gave brief evidence at the trial. PW1 – page C Mohamed, told the Trial Court that at about 01.00 hours while on patrol duty together with page C Ndalaha and a member of the Sungu Sungu militia “smelt bhang”, the smell coming from an uncompleted building. On going in they found the three appellants sitting and smoking bhang. The