IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

KWARIKO, J.A., SEHEL , J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 58 OF 2022

OMARY SAID @ ATHUMANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Tanga District Registry at Tanga)

(Agatho, J)

dated the 23rd day of July, 2021

in

(DC) Criminal Appeal No. 34 of 2020

JUDGMENT OF THE COURT

11th & 13th May, 2022

MAIGE, J.A.

At the District Court of Tanga (the trial Court), the appellant was charged with the offence of trafficking in narcotic drugs c/s 15A (1) and (2) (c) of the Drug Control and Enforcement Act [CAP.95 R.E. 2019] (the DCEA). In accordance with the charge sheet, on 4th August, 2019 at Kiomoni area within District and City of Tanga, the appellant was found trafficking in a narcotic drugs to wit 7.15 kilograms of Catha Edulis 'Khat' commonly known as "*mirungi*". On trial, he was found guilty and

sentenced to thirty (30) years imprisonment. The position never changed in spite of his appeal to the High Court (the first appellate court). Once again aggrieved, the appellant has preferred a second appeal to the Court. In the memorandum of appeal, the appellant has raised seven grounds which in essence raise four complaints. **First,** the cautioned statement was illegally admitted. **Secondly,** there was no proper chain of the custody of the exhibits. **Thirdly,** the defence case was not considered. **Fourthly,** the case was not proved beyond reasonable doubt.

At the outset, we find it necessary to narrate albeit briefly the material facts culminating in this appeal. It all started on 4/08/2019 at around 20:00 hours. No. E. 6958 DC Innocent (PW1), a police officer working at the RCO's office, Tanga Region, was an in charge of the patrol which was being conducted within the Tanga town by the use of the police motor vehicle. Together with him in the process, there were No. H.66527 DC Amos (PW2), DC Walioba and Festo. While in patrol at Kiomoni area, a person riding a motorcycle in a high speed passed them. Suddenly, he got an accident and fell down. When PW1 and his colleagues approached him for assistance, they were surprised to see him running away. He was however apprehended by PW3 before he

proceeded further. Upon inspection of the bag he was in possession of, 21 bundles of items suspected to be *mirungi* were found therein. They were wrapped in newspapers. PW1 seized the motorcycle and the bag. He prepared a certificate of seizure which was filled in and signed by him and his fellow policemen (exhibit P1). The appellant signed too. The appellant together with the seized items were produced to Chumbageni Police Station. The 21 bundles together with the motorcycle were handed to F. 5522 DC Simon (PW4), the exhibit keeper.

PW4 testified that, he received, on the material date, 21 bundles of *mirungi* in a sulphate bag from PW1. Upon receipt, he kept them and recorded in exhibit register. He handed them over to DC Godlisten (PW45), the investigator on 13/8/2019.

PW5 testified that on 4/8/2019 and while the file was yet to be assigned to him for investigation, he recorded confessional statement of the appellant (exhibit P6). He said, when the file was assigned to him for investigation on 13/8/2019, he collected the alleged bundles of drugs from DC Sumai , the exhibit keeper. He packed and sealed them in the presence of the appellant. He filled in an inventory form (exhibit P3) and transmitted the alleged drugs to Jovitus Selestine Mukala (PW3), a

Government Chemist working with the Office of the Chief Government Chemist (CGC) at Tanga Zone.

PW3 testified that, having received the alleged drugs from PW5 on the date as afore mentioned, he weighed them and established that they had 7.15 kilograms. He then took samples from each of the bundles and, on 19/08/2019, transmitted them to CGC in Dar Es Salaam for laboratory examination. They were received on the same date by a receptionist. In the Mid-September, he testified further, he received the CGC's report (exhibit P2).

In his defence, the appellant testified as DW1 while his mother Hadija Ibrahim Hussein as DW2. In his testimony, the appellant denied to have been arrested at the scene of the crime. Instead, he claimed to have been arrested at the working offices of DW2, not in connection with the instant accusation, but for assaulting people. In his own words, the appellant testified as follows:

> *"The charge against me is not justified. I was not arrested with narcotic drugs called mirungi. I was arrested at Duga the working place of my mother. I was arrested not in possession of mirungi. Following my arrest, I was taken to Chumbageni*

Police Station. At the Station, I was accused for assaulting people with a machete-panga. I was remanded in the police custody for a week. Subsequently, I was bailed. I remained reporting at the police post. Later on the investigator of my case arraigned me in this court. Before he brought me to the court, he showed me mirungi. He informed me that the mirungi belonged to me. I refused the accusation. In this court the Charge of been found trafficking mirungi was read over to me. I denied the same. I am a bodaboda operator not mirungi dealer".

On her part, DW2 narrating on what she believed to have happened testified as follows:

"I remember in the said month to have received information from the colleagues of Omary Said Athuman that my son, the accused person got problems. I asked them about the problem. They said that he got accident. They further informed me that his motorcycle was seized by Police Officers and taken to Chumbageni and that he could come at home Omary Said Athuman. Few minutes, I saw Omary Said Athuman coming at my work-Duga (Ostaby guest). I saw him bleeding on his face and decided to go to Chumbageni to

trace for a motorcycle in question. At the post, I asked about the motorcycle and shown the same but I was kept in a police lock up. He used my mobile phone to trace my son. I was bailed on the next day. But before my release, I was informed that my son faced a charge of assaulting people with machetes. He was arrested and when on bail I kept offering food service at the post after one week, my son was bailed."

The trial court, in its judgment was persuaded by the evidence of PW1 and PW2 as supported by the documentary evidence in exhibits P1, P3, P5 and P6. It dismissed the appellant's defence that he was arrested at his mother's office in connection with assault related case, to be an afterthought. The reason being that it was not raised by way of cross examination. The defence testimony of PW2 was dismissed because she was not present when the appellant was being arrested. It finally convicted the appellant with the offence and sentenced him as we discussed above and hence the instant appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. Emmanuel Barigila, learned State Attorney, appeared

for the respondent. When afforded an opportunity to address the Court on the grounds of appeal, the appellant fully adopted the written submissions he filed earlier on and let the learned State Attorney begin by responding the grounds of appeal first. He nonetheless reserved his right of rejoinder should need arises.

On his part, Mr. Barigila made it clear right from the beginning that, he was supporting the appeal on account that the case against the appellant was not proved beyond reasonable doubt. The basis of his concession was that the CGC's report (exhibit P2) which is the only evidence establishing that the substances in question were narcotic drugs, is silent on the weight of the same. He submitted that since under section 15A (2) (c) of t the DCEA weight is an essential element of the offence, the omission to incorporate such element in exhibit P2 renders the case unproved. The oral account of PW3 on the measurement of the weight of the drugs, he submitted, cannot cure the anomaly since the findings was made before the alleged items being proved as narcotic drugs.

As the appeal was not resisted, there was no comment from the appellant aside from urging the Court to allow the appeal and set him free.

Though the appeal was not contested, we find it relevant to consider each of the complaints raised in the memorandum of appeal along with the learned State Attorney's submissions. We start with the third complaint that the defence evidence was not considered. We have examined the record and established that, the defence evidence was duly considered and dismissed for want of merit. The evidence of DW1 was dismissed as an afterthought on the basis that, when PW1 and PW2 were testifying on the arrest of the appellant and seizure of the suspected drugs, the appellant did not cross examine them. The defence evidence of DW2 was dismissed on account that she was not present when the appellant was being arrested. In the circumstance, we dismiss the third complaint.

We proceed with the first complaint as to admissibility of cautioned statement. It is questioned for being taken out of time. The cautioned statement was produced by PW5. This is the person who investigated the crime. In evidence, he just stated that he recorded the cautioned

statement on 4/8/2019. He does not say at what time. As that is not enough, the facts of the case which was disposed of during preliminary hearing is silent on whether the appellant confessed commission of the offence. Besides, the cautioned statement is not in the list of the exhibits. We noted also that, on cross examination, PW5 was questioned as to whether the cautioned statement was procured willingly. In the circumstance, there was no sufficient evidence to establish not only that the statement was procured timely but voluntarily as well. In the circumstance, we allow the ground and expunge the exhibit from the record. We have observed however that the conviction of the appellant was not solely based on the confessional statement.

We turn to the second ground as to proper chain of custody of the exhibits. The complaint by the appellant in his submissions is that, the chain of custody was not fully established. He assigned two main reasons. First, the prosecution evidence as to who was in the custody of the exhibit between PW4 and DC Simai is inconsistent. Second, the handling of exhibits from the date of seizure to the date of production of the same into evidence is not founded on documentation as the principle in **Paulo Maduka and Others v. R,** Criminal Appeal No. 110 of 2007 (unreported)

requires. That, he submitted, was caused mainly by non-compliance on the part of the prosecution of the procedure for sampling and storage set out in regulation the Drugs Control and Enforcement (General) Regulations, G.N. No. 173 of 2016(the regulation). We have scanned the record and satisfied ourselves in the first place that, the prosecution evidence lacked documentation of the proper chain of custody. That alone would have however not been the basis of our decision as we are aware of the settled principle of law that, in fit cases, the court may place reliance on the oral account to establish chain of custody provided that, the respective evidence is credible and probable. In this case, the appellant is quite right that even if we make use of this exceptional principle, yet the prosecution evidence on the chain of custody will remain extremely wanting. We shall explain.

The seizure of the substances in question was made by PW1 and PW2. Both of them claim that, from their hands, the respective exhibit was handed over to PW4 who according to them was the exhibit keeper. The question which cannot have a certain answer from the record is; in whose hand did the exhibit go after PW4. The evidence of PW4 suggests that it went to PW5, the investigator. It is this person who transmitted

the same to PW3. Surprisingly, PW5 does not trace it from PW4. His evidence suggests that he received the exhibit from DC Simai. The prosecution evidence is absolutely silent as where did DC Simai get the exhibit. DC Simai was unfortunately not produced as a witness.

As that is not enough, there is yet a breach of the chronological chain of custody from PW3 to the CGC for analysis in Dar es Salaam resulting into exhibit P2. PW3's evidence on this aspect is sweeping, if we can say. It cannot assist to establish how the exhibit traced its way from him to the said officer. For clarity, we reproduce his evidence on this aspect which appears at page 28 of the record of appeal hereunder, thus:

> *"On 19/8/2019 I transmitted the said sample to Dar es salaam and it was received by a receptionist at Dar es Salaam Chemist Laboratory. I then returned to Tanga waiting for a Chief Government Chemist Report over the sample"*

It cannot be clear from the above evidence how did the exhibit move from the unnamed receptionist to the Government Chemist who examined the exhibit. Therefore, the movements of the exhibit from PW3 to the receptionist and from the latter to the analyst who examined the same was neither supported by documentation nor oral account.

Besides, PW3 claims to have taken samples from each of the bundles. The rationale behind, it would appear to us, was to establish if each of the bundles constituted narcotic drugs. His evidence is silent on how each of the samples was packed. It is not known if the same were packed separately or together. The CGC's report however provides a general finding. It does not, as the prescribed form requires, make a finding for each of the samples. This offends the procedure under regulation 18(1) of the regulation which requires the sampling officer to draw one sample in duplicate from each package. On this, we are inspired by the following observation of the High Court, Corruption and Economic Crimes Division in the case of the **Republic v. Maulid s/o Hamis and Another**, Economic Case No. 3 of 2021 (unreported)

> *"The testimony of PW1 regarding how sampling and packing was done, make the situation even more worse. This is because PW1 had lumped together into one mass all samples taken from 94 small packing bags wrapped by gazette. This was irregular, the law requires the sampling officer to draw one sample in duplicate from each package and where it is found that drawing sample from individual package or container are unreasonably lengthy exercise then the package ought to be*

bunched in lots of 10 packages or containers, therefore two representative samples weighing the prescribed quantity of not less than 5 grms by way of bunching in lots of ten packages as provided in rules".

It has also to be noted that, while the suspected drugs were seized on 4/8/2019, it took about 19 days for them to be transmitted to Dar es Salaam for examination and 9 days to be submitted to PW3. This, coupled with the gaps in the chronological chain of custody above mentioned raise a reasonable doubt on the prosecution case.

In view of the above discussions, we hold that, the chain of custody of the exhibits was not properly established and thus creating a reasonable doubt on the prosecution case.

This now takes us to the last ground on whether the case was proved beyond reasonable doubt. The determination of the third complaint would have sufficed to answer the question negatively. However, we shall consider the learned State Attorney's submission on this aspect. The offence at issue is created under section 15A(2) (c) of the DCEA which provides as follows:

"15A-(1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals 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 shall be liable 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 traffics in-

(a) narcotic drugs, psychotropic substances weighing two hundred grams or below;

(b) precursor chemicals or substance with drug related effect weighing 100 litres or below in liquid form, or 100 kilogram or below in sold form;

(c) cannabis or khat weighing not more than fifty kilogram."

For the offence under the above provision to stand, it must be proved beyond reasonable doubt that **first,** the substances suspected to be drugs are as such. **Two**, the weight of the substance is not more than fifty kilograms. We agree with the learned State Attorney that the weight of the substance is crucial in establishing the offence in as much as it is

in determining the court jurisdiction. We also agree with him and indeed it is the law that, the weighing and analysis of substances suspected to be narcotic drugs is within the domain of the CGC. See for instance, in **Charo Said Kimilu v. R,** Criminal Appeal No. 111 of 2015 (unreported), where it was stated:

> *"Narcotic drugs or psychotropic substances should be submitted to the Government Chemist laboratory Agency for weighing and analysis before tendering it as evidence in court".*

In this case, the substances suspected to be drugs were in 21 bundles. They were submitted by PW5 to PW3 for examination. PW3 is a Government Chemist at the offices of the CGC Tanga Zone. We entertain no doubt that he was competent to weigh the substance. In his oral evidence, he told the trial court that, he weighed the substances before transmitting them to the CGC in Dar es Salaam for laboratory test. No report constituting the findings of the respective weighing was produced. The finding does feature out in the report of the Government Analyst in exhibit P2. Such a report is in law made under section 48A-(1) of the DCEA which provides:

"48A-(1) The Government Analyst to whom a sample of any narcotic drugs, psychotropic substance, precursor chemicals, controlled or any other substances suspected to have drug related effect has been submitted for test and analysis shall deliver to the person submitting it, a signed report in quadruplicate in the prescribed and forward one copy thereof to such authority as may be prescribed."

As we understand the above provision, the report in question has to be made in prescribed form. This is Form No. DCEA 009 which is found in the Second Schedule to the DCEA. Paragraph 2 (c) of the respective form requires particulars of weight or volume or litres as the case may be. Much as we understand that, under the circumstance of this case, measurement of weight could have not been done in Dar es Salaam as what were transmitted thereto were only extracted samples, yet the findings as to the weight of the exhibit was to form part of the report. Failure to incorporate the findings in exhibit P2 is a defect which considered together with the gaps in the chain custody of the exhibits portrayed herein affected the credibility of the prosecution case.

In our opinion, therefore, the case against the appellant was not proved beyond reasonable doubt. The appeal is thus with merit and it is accordingly allowed. We consequently quash the conviction and set aside the sentence. We order that the appellant be released forthwith from prison custody unless held there for some other lawful cause.

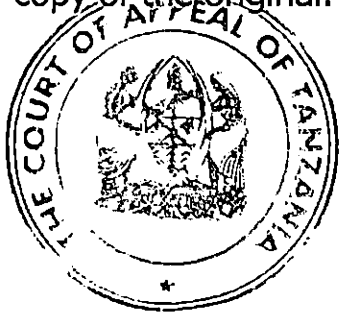
DATED at **TANGA** this day of 13th May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 13th day of May, 2022 in the presence of Mr. Omari Said @ Athumani, the Appellant in person and Mr. Emmanuel Barigila, State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL