IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 666 OF 2020

WATSON DANIEL MWAKASEGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania at Mbeya)

(Utamwa, J.)

dated the 30th day of September, 2020

in

Criminal Sessions Case No. 110 of 2016

.....

JUDGMENT OF THE COURT

5th & 13th December, 2023.

KITUSI, J.A.:

Watson Daniel Mwakasege, the appellant was charged with trafficking in narcotic drugs in violation of section 15 (1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015, it being alleged that he was found trafficking 147.5 Kgs of cannabis sativa, a specie of drugs.

According to the prosecution, it happened like this: ASP Msaki (PW2) was the OC -CID for Mbarali District during the times material to this case.

On 2/3/2016 at around 7:00 P.M he received a call from the RCO of Mbeya giving him a tip that a truck with Reg. No. T. 272 BWZ and trailer No. 244 CLQ travelling from Mbeya to Dar es Salaam was carrying bhang. The RCO instructed PW2 to stop and search it when it reached at Igawa area within Mbarali District.

PW2 drove his personal vehicle to Igawa, having instructed D/Sgt Benjamin (PW4) to join him. PW2 and PW4 found the truck at a parking zone and wanted to know who its driver was, whereupon the appellant got forward. A quick search in the truck by PW4 confirmed that there were, in that truck, 5 bags full of substances suspected to be bhang. The appellant was placed under restraint despite, according to PW4, pleading with him not to book him for the offence. PW2 drove in front of the truck towards the police station while PW4 drove in the truck with the appellant. There is evidence by PW4 that somewhere on the way the appellant asked him to stop PW2 so that he could find heart to exercise discretion in his favour and drop the looming charges. But no amount of pleading would have PW2 yield.

When the appellant's truck reached the police station, Assistant Inspector Dickson (PW3) conducted a formal search and seizure in the presence of a civilian known as Aaron Osiah Mwakitenga PW5. PW3, PW5

and the appellant signed the seizure certificate documenting that 5 bags of bhang had been retrieved from the truck. After that, PW3 handed over the 5 bags containing the contraband to the exhibit keeper, CPL Mohamed (PW6), having marked them A, A_1, A_2, A_3 and A_4. On receipt of the bags, PW6 marked each bag with the case number RUJ/IR/378/2016. The truck was also treated as an item to be handed to PW6. At the trial, PW2, PW3, PW4 and PW6 described the truck as bearing Reg. No. T 272 BWZ with its trailer No. T 244 CLQ. However, PW3 conceded that the certificate of seizure wrongly describes the cabin as bearing Reg. No. T. 273 instead of T. 272. He explained it by saying it was a dark night and the plate number had a crack, so he did not have a correct view of the number. The appellant has raised this issue in the instant appeal as it shall be manifested in due course.

On 8/3/2016 upon PW2's instruction, PW6 handed over to him the bags of bhang for him to submit them to the office of the Chief Government Chemist (CGC). One Faustine John Wanjala (PW1) a chemist working at the office of CGC confirmed receiving the bags bearing the marks that had been referred to by PW3 and PW6. He ran the scientific tests and confirmed the substances in the five bags as being narcotic drugs measuring 147.5 Kgs.

The prosecution's case is that the narcotic drugs were retrieved from the truck that was being driven and controlled by the appellant because even when interrogated by D/Sgt Omary Mohamed (PW7), he confessed to that fact. His cautioned statement was admitted as exhibit P5 after a trial within a trial had established that the appellant made it voluntarily.

In defence however, the appellant not only denied being found in possession of the 5 bags containing the suspected substances, but he also disowned the truck and the cautioned statement alleging that he signed it under duress. He stated further that he was not at the alleged scene of crime on 2/3/2016 because on that date he was at his home at Ilolo area in Mbeya. Further, the appellant testified that he got into the hands of the police when he went to Rujewa police station on 3/3/2016 to follow up on a case involving a friend of his known as Lyimo. It was a surprise to him, said the appellant, that he was booked for being in possession of bhang found in a truck which he knew nothing about.

The learned trial Judge upon his evaluation of the evidence was satisfied with the credibility of the seizure and search right from the arrest of the appellant by PW2 and PW4 at Igawa to the formal search and seizure by PW3 at police station. He was equally satisfied that the chain of custody

of the contraband from PW3 to Pw6, the store keeper and later to PW2 who submitted the substances to PW1 was at no time broken, up to the time of tendering them as exhibit P1. He acknowledged the fact that in cases such as **Illuminatus Mkoki v. Republic** [2003] T.L.R 245 and **Paulo Maduka v. Republic** Criminal Appeal No. 110 of 2007 (unreported), the Court insisted on paper trail to prove chain of custody. However, he agreed with the learned State Attorney that chain of custody may be proved through oral evidence as decided in the cases cited by her; **Marceline Kaivogui v. Republic**, Criminal Appeal No. 469 of 2017 and **Khamis Said Bakari v. Republic**, Criminal Appeal No. 359 of 2017 (both unreported). The learned Judge attached a lot of evidential value to the cautioned statement, referring to details which, in his opinion, would not have been known by the police if the appellant had not disclosed them to PW7.

The learned defence counsel, Mr. Mwakolo challenged the Submission Form for not complying with the law, but the learned Judge considered the argument to be of minimal value. Since this aspect has also been raised before us, we shall refer to it at an appropriate time.

In the end, the trial court found the appellant guilty, convicted him for the charged offence and sentenced him to 20 years in jail. This appeal challenges the conviction and sentence.

Still acting for the accused, now appellant, Mr. Mwakolo has raised 7 grounds of appeal to fault the decision of the High Court. The learned counsel submitted in general terms addressing whether the prosecution had proved the case beyond reasonable doubt. In implementing his scheme, Mr. Mwakolo addressed four key issues namely; the propriety of the charge, chain of custody, contradictions in the prosecution evidence, particularly in the description of the truck and the value to be attached to the cautioned statement. The respondent Republic went along with that scheme, and we have no doubt that the appeal turns on our determination of those issues. Although there were four State Attorneys led by Ms. Revina Tibilengwa, learned Principal State Attorney, it was Ms. Mwajabu Tengeneza, learned Senior State Attorney who actually argued the appeal, opposing it. There were also Ms. Veronica Mtafya and Mr. Emmanuel Bashome, both learned State Attorneys, to assist.

We shall begin with the issue of charge sheet which raises the issue; whether a charge of trafficking drugs is proper when it does not refer to a

specific act which is alleged to have been committed by the accused. Mr. Mwakolo referred to section 2 of the Act which defines what trafficking is, and argued that it is so wide that if the charge laid under section 15 of the Act is not specific, it has the potential of denying the accused the right to know which of the several acts constituting trafficking, is he alleged to have committed. Mr. Mwakolo further submitted that, the defect in omitting to disclose sufficient particulars in the charge sheet such as that the appellant was conveying the drugs in the truck, may not be cured even by section 388 of the Criminal Procedure Act (CPA). He also brought about the aspect of variance between the evidence and the charge, arguing that, if the prosecution led the evidence of PW2 to PW8 to prove the charged offence whose particulars were insufficient, it means that there was variance between that evidence and the charge. He cited the case of **Thabit Bakari v. Republic**, Criminal Appeal No. 73 of 2019 (unreported) in which the conviction was quashed because of variance between the charge and evidence.

In response, Ms. Tengeneza submitted that the mode of trafficking is explained in the evidence, and dismissed the complaint by the appellant's counsel as lacking merit. She further argued that the context in which the

case of **Thabit Bakari** (supra) was decided is different from this case because in that case the charge was for theft of a motor tricycle but the evidence led by the prosecution alleged theft of a motorcycle.

In our determination of this ground of appeal, we wish to draw a distinction between this case on the one hand and charges such as of rape under the Penal Code and conveying illegal immigrants under the Immigration Act, on the other. The need to specify the category of rape for instance, is necessitated by the fact that the ingredients of the offences falling under that part, notably age, consent or the number of perpetrators, create distinct species of rape. There are just so many cases on this point that we do not need to refer to any. Similarly, in immigration cases under the Immigration Act Cap 54, for instance, section 46 creates the offence of smuggling immigrants by setting out categories with several ingredients and modes. It provides

> *"**46** -(1) A person who –*
>
> *(a) Smuggles immigrants;*
>
> *(b) Hosts illegal immigrants;*
>
> *(c) Transports illegal immigrants;*
>
> *(d) Finances, organizes or, aids the smuggling of immigrants;*

(e) Facilitates in any way the smuggling of immigrants into the United Republic or to a foreign country;

(f) Commits any fraudulent act or makes any false representation by conduct, statement or otherwise, for the purpose of entering into, remaining in or departing from, or facilitating or assisting the entrance into reside in or departing from the United Republic; or

(g) Transports any prohibited immigrants within the United Republic of Tanzania, commits an offence and on conviction, is liable to a fine not less than twenty million shillings or imprisonment for a term of twenty years."
[Emphasis added]

The case of **Christopher Steven Kikwa v. Republic,** Criminal Appeal No.126 of 2020 (unreported), demonstrates the need for a charge preferred under section 46 (1) of the Immigration Act to cite the specific mode as well as the relevant sub section specifying the particulars.

However, unlike in the two instances referred to above, the ingredients of the offence of trafficking in narcotic drugs under section 15 of the Act are the same even if the alleged modes differ, because the modes referred to in

the definition provision do not, under section 15 of the Act, create separate offences with distinct sub-sections. The learned trial judge addressed the nature of the charge under section 15 of the Act, the relevant part of which reads:-

> *"The offence can be committed under different circumstances. According to the particulars of the offence in the charge at issue, the prosecution evidence and the final submissions by the learned SSA, the accused is said to have committed the offence by conveyancing or transporting the drugs or bhang".*

We see no fault in the above view taken by learned Judge. We also agree with Ms. Tengeneza that the evidence detailed the mode of trafficking. This ground has no merit in our view, and it stands dismissed.

Next for consideration is the issue of chain of custody. It is in the course of arguing this ground that Mr. Mwakolo also attacked the Submission Form, an argument we had earlier promised to resolve. The learned counsel raised two other issues. The first is that after the search and seizure, PW3 or anyone else should have prepared an inventory in compliance with section 36 (2) of the Act. However, on this point, we agree with Ms. Tengeneza that

section 36 (2) applies to perishable items which cannot be preserved, therefore it is inapplicable to this case which involves substances which are not perishable. We dismiss this complaint for being misconceived. The second complaint raised under the ground of appeal on chain of custody, is that the evidence of PW3 and PW6 does not show that they, at any point in time, weighed the suspected narcotics. According to Mr. Mwakolo, this omission rendered the chain of custody suspect. Ms. Tengeneza submitted that it was not the duty of PW3 to weigh the substances and he left that duty to the CGC which is the relevant authority.

With respect, we agree with the learned Senior State Attorney once again. We have previously held that weighing of drugs requires special tools which are owned and kept by the CGC offices only. In **Lilian Jesus Fortes v. Republic** Criminal Appeal No. 151 of 2018 (unreported), after referring to section 16 of the Act requiring counting or weighing the seized drugs, we stated :-

> *"The above provision does not, in our view, impose on the police a duty to prepare an accurate report as to the weight of drugs seized by them, because it requires them to weigh "where it is possible" and that the weight may be gross or net. We therefore go*

along with Ms. Kitaly in her submission that the office of the CGC is the one which has the means and mandate to make accurate measurements of weight".

The last complaint under this ground of appeal is that the Submission Form that was admitted as exhibit P2 was wrongly prepared because it does not indicate the number of items. Mr. Mwakolo submitted that exhibit P2 is a prescribed form which ought to be completed as indicated, and that failure to do so affected the credibility of the submission to the CGC. On the other hand, Ms. Tengeneza submitted referring to the testimony of PW2 that, in submitting the seized bags his interest was not to determine anything other than the nature of the contents thereof. She further submitted that there is oral evidence of PW3 that he seized 5 bags and that of PW6 that he received and kept 5 bags in his store. There is also evidence of PW1 that he received 5 bags from PW2. The learned Senior State Attorney concluded by submitting that the appellant was not prejudiced by the omission.

First of all, we agree with the learned Judge that chain of custody may be proved otherwise than by documentation. See **Kadiria Kimaro v. Republic,** Criminal Appeal No 301 of 2017 (unreported). We also agree with him that the evidence of PW1, PW2, PW3 and PW6 sufficiently draws a clear

route describing how the alleged drugs moved from PW3 who searched and seized; then to PW6 the storekeeper, followed by handing over to PW2 who submitted them to PW1 of the CGC office. We hasten to add that although the column indicating the number of items should have been completed on exhibit P2, that omission per se does not render the testimonies of the four witnesses referred to above worthless for, every witness is entitled to credence unless there is reason to hold otherwise. No reasons have been cited to persuade us to disbelieve PW1, PW2, PW3 and PW6.

We now turn to the complaint revolving around contradictions in the testimonies of prosecution witnesses particularly regarding the description of the truck alleged to have been conveying the contraband. We have earlier referred to the evidence by the prosecution witnesses on the registration numbers and that only PW3 was the odd one out. However, we note that it is the seizure certificate which had one of the numbers wrongly recorded. PW3 explained that it was at night and that he could not clearly make out the number because of a crack.

Mr. Mwakolo submitted that the contradiction goes to the root of the case and cited the case of **Toyidoto Kisima v. Republic**, Criminal Appeal No. 525 of 2021 (unreported) in urging us to uphold him.

In resolving this alleged contradiction we are tempted to also consider the appellant's defence totally disowning the truck. In our considered view, the alleged contradictions are neither here nor there because they are minor. Besides, PW3's explanation makes sense to us so there is no point in capitalizing on this triviality.

We decline the invitation to be distracted by less significant arguments and on the contrary, we see this as a case which, in the Republic of the Philippines, would be treated almost as a *buy - bust operation*, because upon a tip, the appellant in this case was caught red handed. In the case of **People of the Philippines v. Garry de la Cruz Y dela Cruz** (G.R. No. 185717 of June 8 : 2011) which we find to be of persuasive value, the Supreme Court held;

> *"A buy – bust operation is "a form of entrapment, in which the violator is caught in flagrante delicto and the police officers conducting the operation are not only authorized but duty-bound to apprehend the violator and to search him for anything that may have been part of or used in the commission of the crime."*

Similarly in this case, the evidence of PW2 and PW4 shows that they went to Igawa area upon being instructed to do so by the RCO. On arrival

they found the suspected truck at the parking lot. They made an initial search of that truck in the nick of time, and detected the presence of 5 bags full of what came to be identified as bhang. Appellant's total denial disowning the truck is, in our view, hollow, and cannot displace the strong prosecution case. The evidence places the appellant at the scene of crime, so his allegation that he was arrested in the course of an innocent follow up of his friend's case, is nothing but a wild goose chase.

For the reasons we have shown above, we dismiss the complaint that the prosecution did not prove the chain of custody of the narcotic drugs. It has no merit.

The last complaint is on the validity of the cautioned statement. Mr. Mwakolo attacked it because it does not indicate the offence with which the appellant was being charged. He drew our attention to the statement showing that the appellant was being charged with "Prevention and combating of narcotic drugs" which does not exist and submitted that this wrong reference to a nonexistent offence marred the cautioned statement.

With respect, we agree with the submission of Ms. Tengeneza who referred to the same cautioned statement where the appellant demonstrated

his awareness that he was being charged with being in possession of narcotic drugs.

In addition, we agree with the learned Judge that the cautioned statement supplied implicating details which could only have come from the appellant.

Consequently, we dismiss this ground as well as the entire appeal.

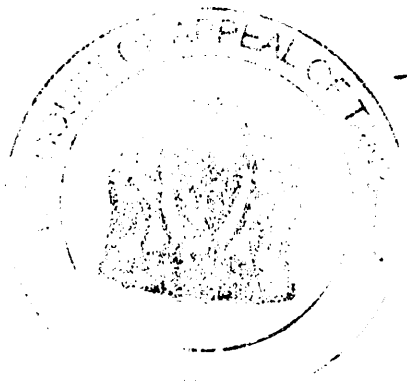
DATED at **MBEYA** this 13th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of Mr. Simon Mwakolo, learned counsel for the Appellant and Mr. Stephen Rusibamayila, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL