IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., RUMANYIKA, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 649 OF 2021

EDWIN CHELEH SWEN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Masabo, J.)

dated the 20th day of October, 2021

in

HC Criminal Session Case No. 27 of 2016

.....

JUDGMENT OF THE COURT

22nd September 2023, & 17th April, 2024

KOROSSO, J.A.:

In this appeal, Edwin Cheleh Swen, the appellant, was arraigned in the High Court of Tanzania at Dar es Salaam and charged with the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 (The Drugs Act). The allegations against the appellant are that on 28/5/2012 at Julius Nyerere International Airport (JNIA) within Ilala District in Dar es Salaam Region, he was found trafficking in 1509.35 grams of heroin hydrochloride valued at Tshs. 67,920,750/=. The appellant denied the charges.

However, upon a full trial, the High Court convicted him as charged and sentenced him to serve 20 years imprisonment. It was further ordered that he pay a fine of Tshs. 203,762,250/=, being three-times the market value of the narcotic drugs being trafficked.

Before we proceed further in our deliberations, we find it pertinent to provide albeit briefly, the background giving rise to the instant appeal. The prosecution relied on eleven (11) witnesses to prove their case against the appellant, together with seven (7) exhibits. In defence, the appellant fronted only himself as a witness. He also tendered two (2) exhibits which were admitted as exhibits D1 and D2. It was the prosecution case that on 28/5/2012 at around 3.45 hours, at JNIA, Makole Bulugu (PW8), a police officer, apprehended the appellant during a follow-up of information from an informer that there was a person named Edwin Cheleh Swen involved in the trafficking of narcotic drugs who intended to travel that day using a Kenya Airways flight.

The follow-up by the police involved inspecting the names on each passport of those who passed the check-ins. Upon being informed of what he was suspected of, the appellant was taken to the police station at JNIA, and his body and luggage were searched to no avail, nothing being retrieved. Information on the results of the search reached Commissioner

Afred Nzowa, who ordered that the appellant remain under observation and his travel plans be curtailed. The appellant was thus moved to the Anti-Drug office at JNIA (ADU-JNIA) under the guard of PW8. When PW8 completed his shift, he handed over guarding the appellant to Inspector Siame (PW11). PW8 came back to the office on 29/5/2012 and took over the duty of guarding and observing the appellant. It was during this shift that the appellant sought to attend a call of nature, and PW8, summoned Fundisha Mayombola (PW9) and Valerian Mosha (PW7) to witness if and when the appellant was to defecate prohibited substances. The appellant was taken to a special toilet for that purpose and he defecated 35 pellets and then sometime later another 22 pellets suspected to contain narcotic drugs. The pellets were washed and placed in a black plastic bag and PW8 filled the observation form recording the number of defecated pellets and ensured the form was also signed by the witnesses PW7 and PW9 and the appellant, for each occurrence.

The observation of the appellant continued and on 30/5/2012 at 1.21 hours he defecated 8 pellets and then at 6:00 hours defecated 13 pellets as witnessed by PW7 and PW9. Thereafter, PW8 filled out an observation form and recorded the pellets defecated by the appellant including the date and time. The observation form was then signed by

PW7, PW9, the appellant and PW8. Later, PW8 stored all the defecated pellets at the ADU office at JNIA.

According to PW8, on 01/6/2012 the appellant defecated one pellet witnessed by Nicolaus Lugusi (PW6) and Fabian (who did not testify), who then signed the observation form together with the appellant and PW8. The pellet was stored at the ADU offices. When his shift ended, PW8 handed the duty to observe the appellant to PW11. PW11 testified that on 30/5/2012 at 9.00 hours while attending a call of nature the appellant defecated 8 pellets as witnessed by Reuben Mussa (PW10) and Hussein Nampambe (who did not testify). After cleaning them, they were put in a plastic bag and stored at ADU offices. The observation form was filled and signed by two witnesses, the appellant and PW11. On the same day at 12.00 hours, the appellant defecated 7 pellets witnessed by PW10 and one Masoud Ally (who did not testify) and at 16.00 hours, he excreted 4 pellets witnessed by Masoud Ally and Herman Gervas (PW4). Upon being cleaned they were put in a plastic bag and stored at ADU offices and the witnesses, the appellant and PW11 signed the observation form.

According to PW8 and PW11, each of them took the pellets defecated by the appellant during their shifts to ADU offices Headquarters and handed them to SP Neema Andrew Mwakagenda (PW3). PW3

acknowledged that on 30/5/2012 she received 78 pellets from PW8 and that later the same day was handed 18 pellets from PW11. On 01/6/2012, PW3 received one pellet from PW8. According to PW3, upon receipt of the pellets from PW8 and PW11, she recorded the number of the received pellets in the Register Book, put them in an envelope which she marked JNIA/IR/137/2012, and then stored the same in the exhibit room at ADU offices.

PW3 testified further that together with the pellets she also received various other items from PW8 including; a Liberian passport with the name of Edwin Cheleh Swen; one Kenya Airways ticket with the same name as in the passport, observation forms, and two mobile phones of Samsung and Blackberry brands. PW3 informed the trial court that she put the 97 pellets suspected to have narcotic drugs that she had received from PW8 and PW11 in an envelope that she marked JNIA/IR/136/2016, and then wrapped and sealed it with cello tape and signed. The session to pack and seal the received pellets and take them to the Government Chemist Office was witnessed by Zainabu Dua Maulana (PW5), Commissioner Godfrey Nzowa, the appellant and other police officers. The witnesses and PW3 signed on the envelope while the appellant refused to do so. Later, the sealed envelope was taken to the Chief Government

Chemist by PW3 accompanied by PW8 and D/SSgt Dacto (who did not testify). On arrival there, at the reception, the exhibit was labeled Lab. No. 360/2012. In the laboratory, PW3 and her team met Ziliwa Machibya (PW2) and handed him the exhibit to analyze. PW2 retrieved from the envelope he was handed, 97 pellets suspected to be narcotic drugs and proceeded to analyze them. PW2 analysis of the pellets handed to him by PW3 determined that they contained narcotic drugs in the form of heroin hydrochloride as also expounded in a report on the Analysis (exhibit P2). The 97 pellets were admitted as Exhibit P3. The appellant's passport and air ticket together with the observation forms drawn by PW8 and PW11 were admitted as Exhibits P5, P6, and P7 respectively. It is also on record that the narcotic drugs found in the defecated pellets were found to weigh 1509.35 grams and were valued at Tshs. 67,920,750/=, as adduced by Christopher Joseph Shekiondo (PW1) and revealed in the Certificate of Value, admitted as Exhibit P1.

As alluded to earlier, the appellant's defence was essentially a denial of the charge leveled against him and to raise the defence of *alibi*. He stated that on 25/5/2012, he was not arrested at JNIA since he had arrived in Tanzania on 22/5/2012 for holidays, and stayed at a Joel Hotel in Sinza area, Dar es Salaam. The appellant testified that on 25/5/2012

he was arrested by three police officers while in Sinza area and after his arrest he was taken to Central Police Station. At the police station, he claimed to have been searched and thereafter his passport, ticket, identity card, and hotel receipts were seized. He was subsequently locked up and alleged that he was not informed reasons for his arrest. The appellant was later arraigned and charged with the offence as stated earlier.

Upon conclusion of the trial, the appellant was convicted for the offence charged and sentenced as alluded to hereinabove. Aggrieved by the decision of the trial court, the appellant preferred an appeal to this Court fronting three memoranda of appeal with a total of 12 grounds of appeal which we shall not reproduce at this juncture for reasons to be revealed as we proceed in the determination of this appeal.

Suffice it to say, on the day of the hearing of this appeal, Mr. Kung'e Wabeya, learned advocate who represented the appellant informed us that, he was abandoning the supplementary memo of appeal filed on 30/8/2022 and grounds 3 and 8 of the memorandum of appeal filed on 21/3/2022. Therefore, the remaining grounds of appeal presented by the appellant for our consideration and determination, paraphrased are as follows:

In the memorandum of appeal filed on 21/3/2022:

1. *That the judgment of the trial court is not well-reasoned and the appellant was convicted for the offence charged on weak, contradictory and inconsistent evidence.*

2. *Failure of the trial court to remain impartial and independent during the proceedings and judgment which led to giving weight to inconsistent, incredible, contradictory, and unreliable evidence of PW2 which renders exhibit P2 and other related evidence improbable as a base for conviction.*

4. *The trial Judge misdirected himself by relying on the contradictory, hesitant and unreliable testimony of Zainab Dua Maulana (PW5) who could not prove that the exhibits packed at ADU offices were the same as those seized at JNIA having not witnessed the search and seizure of the same.*

5. *The trial Judge failed to observe and act upon doubtful storage, marking, sealing, and labeling of alleged pellets with the same shape, size, and colour rendering improbable identification of the same and with the probability of having been tampered with.*

6. *When imposing the sentence on the appellant, the trial court failed to consider the nine years and five months he had spent in custody before the trial hearing, despite his mitigation.*

7. *The trial court did not properly consider the principles of management of exhibit P2 having been contravened from the time of seizure at JNIA, storage at ADU offices at JNIA, ADU offices, the Chief Government Chemist Office and its handling by PW8, PW3 and PW 11 rendering there being non-compliance of the PGO for police officers.*

9. *The trial Judge misdirected himself by basing his determination on exhibit P2 which was obtained un-procedurally since the search and seizure were contrary to section 38(3) of the Criminal Procedure Act, Cap 20 (the CPA), section 3 of the Police Services Act and PGO 272.*

10. *The trial Judge failed to consider the extent of proof required by the prosecution to prove the case and the fact that the prosecution failed to prove the case beyond reasonable doubt.*

The supplementary memorandum of appeal filed on 11/9/2023 contained one ground of appeal which states:

1. *That the trial Judge's conviction and sentencing of the appellant was improper since it was based on misdirection upon admitting exhibit P1 which was not listed at the committal proceedings, a mandatory requirement provided under section 246 of the CPA and rule 8 of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016, GN 267 of 2016 (the CECD Procedure Rules).*

When called upon to amplify the appellant's grounds of appeal, Mr. Wabeya commenced his submissions by adopting the written statement on appeal filed by the appellant himself. He then informed us that he will begin to amplify the one ground in the supplementary memorandum of appeal filed on 11/9/2023 together with ground 6 found in the memorandum of appeal filed on 21/3/2023. Thereafter he will proceed to

amplify grounds 1, 2, 4, 5, 6, 7, 9 and 10 of the memorandum of appeal filed on 21/3/2022 in sequence.

Amplifying on alleged impropriety in the admission of Exhibit P3, the learned counsel for the appellant faulted the trial court for admitting it whilst it was not listed or discussed during the committal proceedings. He contended that this being the case Exhibit P3 be expunged for contravening section 246(2) of the CPA and rule 8(2) of the CECD Procedure Rules. He also implored us to take into account the fact that the charge, conviction and sentence meted to the appellant was essentially based on exhibit P3, therefore, if it will be expunged as prayed, then there would be nothing substantive to sustain the case against the appellant. He cited various cases where the Court upon finding that an exhibit was not mentioned in the committal proceedings, did expunge the relevant exhibit. These include; **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020; **Mussa Ramadhani Magae v. Republic**, Criminal Appeal No. 545 of 2021; and **Saidi Shaban Malikita v. Republic**, Criminal Appeal No. 523 of 2021 (all unreported), to cement his stance.

On ground 6, he argued that the sentence imposed on the appellant is faulty and contravenes section 172 (2) of the CPA, as the nine years

the appellant was in custody were not considered by the trial court. He cited decisions of this Court in **Uhuru Jacob Ichode v. Republic**, Criminal Appeal No 462 of 2016 and **Katinda Simbila @Ng'waninama v. Republic**, Criminal Appeal No. 15 of 2008 (both unreported) to augment his position. He contended that the cited cases discussed the importance of taking into account the time spent in custody when imposing sentences on accused persons.

In response, Mr. Saraji Ilboru and Ms. Veronica Matikila, learned Principal State Attorneys, assisted by Mr. Mutalemwa Kishenyi, Ms. Janethreza Kitaly, Ms. Angelina Chacha, and Ms. Lilian Rwetabura, learned Senior State Attorneys represented the respondent Republic. Ms. Kitaly, who was tasked to take the lead in submitting on ground 1 on the propriety of admissibility of Exhibit P3 contended that there was no irregularity in its admission as the law was fully applied. She argued that the trial court fully considered the test for admissibility of an exhibit and upon being satisfied with the relevance, materiality and competence of Exhibit P3 then proceeded to admit it. In reinforcing her stance, she cited the case of **Islem Shebe Islem v. Republic**, Criminal Appeal No. 187 of 2013.

Expounding further on the issue, Ms. Matikila argued that the trial court had considered the import of the decision in the case of **Islem Shebe Islem** (supra) but went on to assess whether non-compliance with section 246(2) of the CPA and rule 8(2) of the CECD Procedure Rules in any way prejudiced the rights of the appellant. In addition, Mr. Kishenyi implored the Court to deliberate on the import of section 289(4) of CPA, not in silo, but considering its rationale, which was to encourage the prosecution to bring in evidence, particularly physical evidence.

Regarding ground 6 which was a complaint on the sentence of 20 years imprisonment imposed on the appellant by the trial court for not having considered the time the appellant had stayed in custody, Ms. Rwetabura urged us to find the ground misconceived. She contended that taking into account that the maximum sentence for the convicted offence is life imprisonment, the sentence meted out is legal and it was imposed after the trial court had considered all the relevant factors. The learned Senior State Attorney contended that the trial court considered the seriousness of offence, mitigation, the circumstances that gave rise to the commission of the offence, and public policy. She argued that the time the appellant was in custody was also considered and cited the case of **Livinus Ozi Ochen v. Republic,** Criminal Appeal No. 13 of 2018

(unreported). She thus implored us to find the complaint to lack substance.

Mr. Wabeya's rejoinder on the complaints under scrutiny was brief and mostly a reiteration of his submission in chief. He contended that its admission into evidence was improper since it was not part of committal proceedings and that the fact that the list of exhibits discussed there just mentions physical exhibits, should not be considered to mean that exhibit P3 was referenced. He also urged us to find the case of **Islem Shebe Islam** (supra) to be distinguishable and not applicable to the instant case since the trial court did not address the provision of section 246(2) and Rule 8(2) of the CECD Procedure Rules and the consequence of non-compliance of the provisions. He urged us to find that exhibit P3 was illegally admitted and expunge it from the record. He asserted that the essence of section 246(2) of the CPA is to ensure a fair trial and that the appellant was entitled to know and understand the substance of the charge against him, to aid him in preparing his defence.

Having considered the rival submissions on the propriety of admissibility of exhibit P3 and the sentence imposed on the appellant, the critical issue for our determination is whether the complaints are merited.

In delving into the matter, our starting point will be to consider the law governing the complaints raised. Section 246 (2) of the CPA provides:

> *"246(2) Upon appearance of the accused person before it,* ***the subordinate court shall read and explain or cause to be read to the accused person*** *the information brought against him as well as the statements or* ***documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*** [emphasis added]

For economic offence, rule 8(2) of the EOCCA Rules addresses the same issue and states:

> *"8(2)- Upon appearance of the accused person before it, the district or a resident Magistrates'* ***court shall read and explain or cause to be read and explained to the accused person or if need be, interpreted in the language understood by him,*** *the Information brought against him as well as the statements or* ***documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*** [emphasis added]

It is important to state at this juncture that since the charges leveled against the appellant in the instant case were economic offence under the EOCCA, the proper provision to apply is rule 8(2) of the CECD Procedure Rules. Nevertheless, as observed in the case of **Remina Omary Abdul v. Republic** (supra) the provisions of rule 8(2) of CECD Procedure Rules are similar in content to that of section 246(2) of the CPA. In consequence, citing the CPA provision does not prejudice the rights of the parties in any way.

The learned counsel for the appellant urged us to find that exhibit P3 was not listed or discussed at the committal proceedings in contravention of rule 8(2) of CECD Procedure Rules and section 246(2) of CPA. In contrast, the learned Senior State Attorneys implored us to find otherwise, that this was not the case, in that exhibit P3 was discussed at the committal proceedings. We are thus left to consider whether the admissibility of exhibit P3 was proper under the circumstances.

In a court of law, the basic rudiments of admissibility of evidence are its relevance, materiality, and competence. The general rule is that, unless it is barred by any rule or statute any evidence that is relevant, material and competent is admissible. On the flip side, any irrelevant evidence is inadmissible (See **DPP v. Shariff Mohamed @ Athumani**

and 6 Others, Criminal Appeal No. 74 of 2016 (unreported)). The discretion to decide on the admissibility of any evidence lies upon the trial court as guided by the relevant provisions of the Evidence Act, Cap 6 and the CPA.

In the instant case, exhibit P3 whose admissibility has been questioned, is what is referred to as real evidence. In that, it is the evidence whose characteristics are relevant and material and directly involved in some event in the case. It is the evidence that essentially founded the charge that faced the appellant in this case and led to his conviction and sentence. At this juncture the issue is not its competence or authentication, but whether it was discussed at the committal proceedings as required by section 246(2) of the CPA and rule 8(2) of the CECD Procedure Rules.

The Court had in various decisions pronounced the position of the law on the application of the above provisions of the law, including in **DPP v. Sharif Mohamed @Athuman and 6 Others**, (supra), **Masamba Musiba @ Musiba Masai Masamba v. Republic**, Criminal Appeal No. 138 of 2019 (unreported) and **Michael Maige v. Republic**, Criminal Appeal No. 222 of 2020 (both unreported), a position we fully subscribe

to. In **Masamba Musiba @ Musiba Masai Masamba** (supra), the Court observed that:

> *"It is borne out of the record of appeal that Exhibits PI, P2, P3 and P4 were not listed during committal proceedings as among the intended exhibits to be relied upon by the prosecution in the appellant's trial...The spirit behind such a requirement is to guarantee an accused person facing a homicide case a fair trial by affording him the opportunity to know and understand in advance the case for the prosecution for him to mount a meaningful defence..."*

In the instant appeal, the record of appeal shows that in the committal proceedings that were conducted on 3/6/2016, while physical exhibits were not discussed during the reading of statements of witnesses and documents whose substance was expected to be called at the trial, it is incorrect to say that the physical evidence (the narcotic drugs) were not mentioned during the committal proceedings. The record of appeal reveals this on page 80 stating:

> *"Exhibits in Documents*
>
> 1. *Report from Chief Government Chemist*
> 2. *Certificate of value of Narcotic Drug and Psychotropic Substances.*
> 3. *Observation form*

4. Cautioned Statement of the accused person

5. Accused Person's Passport No. L. 030963

6. Accused Person travel air ticket.

And Physical exhibits to be tendered during the triai.

Accused: My witnesses will be mentioned in due course.

Court: Section 247 of the CPA Cap 20 [R. E 2002] complied with.

Sgd ***Respicius E. Mwijage- PRM***

3/6/2016

Court*: The accused person is addressed on his rights in terms of section 249 of the CPA.*

Sgd ***Respicius E. Mwijage- PRM***

3/6/2016"

[emphasis added]

The Court proceeded to provide necessary orders for committal for trial before the High Court of the appellant under section 246(1) of the CPA. In the circumstances, since the appellant was made aware that physical exhibits will be tendered in court at the trial, we are thus of the firm view that he was duly informed and accorded an opportunity to know and understand in advance the substance of the case for the prosecution for him to mount an informed defence. Therefore, we agree with the learned Senior State Attorney that the ground is misconceived, since we

find that section 246(2) of the CPA and rule 8(2) of the CECD Procedure Rules were not overlooked.

On the complaint on the propriety of the sentence imposed on the appellant, in that when imposing the sentence against him the trial judge failed to consider the nine years and five months' he spent in custody in contravention of section 172 of the CPA. To cement his argument, the appellant's counsel cited cases such as **Ilole Shija v. Republic,** Criminal Case No. 357 of 2013, **Willy Wacosha v. Republic**, Criminal Appeal No. 7 of 2002 (both unreported) and **Uhuru Jackob Incode** (supra) that reiterate the need for judicial officers to take into consideration the mitigating circumstances when assessing sentence. The respondent's side resisted this arguing that the sentence imposed did consider the appellant's mitigation and duly assessed the sentence, especially taking into account that the maximum sentence for the convicted offence is life imprisonment.

Having considered the submissions from the contending counsel, we are constrained to address an important principle of sentencing, as held in **Mohamed Hatibu @Said v. Republic**, Criminal Appeal No. 11 of 2004 (unreported), where the Court observed that:

> *"It is a principle of sentencing that an appellate Court should not interfere with a sentence of a*

trial court merely because had the appellate been the trial court, it would impose a different sentence. In other words, an appellate Court can only interfere with a sentence of a trial court if it is obvious that the trial court had imposed an illegal sentence or had acted on a wrong principle."

(see also, **Elias Kifungo v. Republic**, Criminal Appeal No. 208 of 2010 (unreported))

Our perusal of the record of appeal on pages 222 and 223 has shown that the trial Judge considered the appellant's mitigation including the years the appellant had been in custody. She held:

"I have given due consideration to the antecedents and the mitigation factors submitted by the counsel. Much as it is true that the offence against which the accused is convicted for is serious and attracts a severe sentence, ***the nine years which the convict has already spent in custody*** *and the fact that there are no criminal records against him thus he is a first offender* ***calls for lenience.***" [emphasis added]

The trial court went on to convict the appellant to twenty years imprisonment, the minimum sentence for the convicted offence. The excerpt above plainly shows that the issue subject of his complaint was

considered. In those circumstances, we have no justification to interfere with the legally imposed sentence. Therefore, ground one of the supplementary memorandum of appeal and ground 6 of the substantive memorandum of appeal are unmerited.

The next appellant's grievance to address is the one faulting the trial court for not holding that the chain of custody of exhibit P3 was compromised. This complaint is engrained in grounds of appeal number 4, 5, and 7 which will be dealt with together. The grounds are amplified in the written statement by the appellant who contends that the trial court failed to consider the fact that the storage of the defecated pellets left a lot to be desired since there was no evidence of labeling or proper storage from the time it was alleged the appellant defecated them at JNIA. He argued that the anomaly should have led to a conclusion that at the time of their analysis or being tendered in court it was difficult to be properly identified as those allegedly defecated by the appellant at JNIA. He further contended that in the storage, management, and custody of the said pellets, there was a contravention of the PGOs. He also contended that there were inconsistencies and contradictions in the evidence of PW3, PW8 and PW11 who handled the pellets.

The learned counsel further challenged the evidence of PW8 and PW11 that after cleaning the defecated pellets at different intervals, each of them kept the excreted pellets in a plastic bag in the drawers found at ADU JNIA offices in the absence of evidence showing the same were labeled and sealed. He further questioned the session that involved packing the excreted pellets in preparation to take them for analysis at the Government Chemist Laboratory in the absence of evidence establishing the presence of the appellant. In addition, he also queried whether the identification of the pellets by PW3, PW4, PW6, PW7, PW8, PW9 and PW10 as the pellets excreted by the appellant was engrained with certainty since they had similar shape, colour, weight, and size, without any label. Discussing the observation forms, the learned counsel doubted the veracity in the flow of information therein and the independence of the so-called independent witnesses, contending that most of those called to witness when the appellant defecated the pellets were government officials. He cited the case of **Alberto Mendes v. Republic**, Criminal Appeal No. 413 of 2017 (unreported) to reinforce his stance.

The other concern raised by the appellant was the absence of the exhibit Register referred to by PW3, not having been tendered in evidence

to substantiate what was adduced by prosecution witnesses of having recorded the movement of the pellets from the time they were defecated, stored in the exhibit room at ADU headquarters offices, sent to the office of Government Chemist for analysis up to the time they were tendered as exhibit in court.

In the appellant's written statement, grounds 5 and 7 were addressed jointly and they challenge the sanctity of retrieved pellets. It is argued that the chain of custody was compromised for lack of proper storage and labeling from the time of seizure, storage at ADU JNIA and ADU offices Kurasini and that the testimonies of witnesses who dealt with the exhibits PW8, PW3, and PW11 revealed that the provisions of the PGO were not properly managed and stored. He thus implored us to find that in failing to tender the exhibit registers the prosecution failed to prove that the chain of custody of the defecated pellets was uncompromised and thus there was no case proved against the appellant.

On the grounds arguing that the chain of custody of the pellets (exhibit P3) had been compromised, Ms. Kitaly traversed through some of the prosecution witnesses who testified on this, starting with PW8 and PW11 who had taken custody of the 97 pellets upon being defecated by the appellant at different intervals when observing the appellant from

29/5/2012 to 1/6/2012 up to handing them over to PW3 who acknowledged it. The fact that both PW8 and PW11 had narrated how they had stored them while at ADU JNIA offices and PW3 upon receiving the pellets, labeled them with the case file number and stored them in the exhibit room. She contended further that when the appellant defecated the said pellets he was witnessed by independent witnesses who testified in court as PW6, PW7, PW9 and PW10. She alluded that the defecated pellets were recorded in the observation forms which were admitted as exhibit P7. Ms. Kitaly also stated that the 97 pellets having been packed in the presence of the appellant were received for analysis at the Government Chemist Office and labeled with Lab. No. 360/2012. After the lab analysis, PW2 handed back the sealed pellets to PW3 for custody and, remained thus until when opened at the trial, with PW2 recognizing the seal and signature he had put on the envelope containing the 97 pellets.

Regarding failure to adhere to the PGOs, the learned Senior State Attorney argued that PW8 and PW11 were the arresting officers who also witnessed the appellant defecating several pellets and that at the time, they were guarding and observing him and not conducting an investigation. Therefore, they were not bound by the procedures expounded in the PGOs. She contended that PW8 and PW11 did all the

needful to store and keep safe the seized pellets. She contended that as can be discerned from their testimonies, at each interval the appellant defecated pellets, it was duly recorded in the observation form, and signed by the witnesses and the appellant to verify the number of pellets defecated and the time and date. She cited the case of **Alberto Mendez** (supra) **and Marceline Koivogui v. Republic,** Criminal Appeal No. 469 of 2017 (unreported) to reinforce her argument that the chain of custody remained intact and was not compromised at any stage.

According to the Senior State Attorney, the independence of PW4, PW5, PW6 and PW9 should not be doubted just because they are government officials. She argued that the circumstances surrounding the commission of the offence charged should be taken into consideration, having regard to the fact that the incident occurred at JNIA where most of the people around the ADU JNIA offices are public officers and it is near impossible to get anyone else. She urged us to also take into account that when assessing evidence, the credibility and veracity of the witness are of paramount consideration as each witness is entitled to credence.

Ms. Kitaly further contended that since the evidence of the prosecution witnesses who had dealt with and witnessed the excretion of the 97 pellets were found by the trial court to be credible and reliable

whose evidence was consistent, the Court should thus not interfere otherwise since there is nothing to discredit the evidence or any discerned misdirection by the trial court in assessing thus. She thus prayed we dismiss the grounds challenging the sanctity of the chain of custody.

The rejoinder by the learned counsel for the appellant was in essence to reiterate his earlier submission that we find that the chain of custody was broken and thus find the ground meritorious and allow the appeal.

We have considered the rival submissions for grounds 4, 5 and 7 whose thrust is clearly whether or not the chain of custody of exhibit P3 was intact. It is now settled that the issue of the sanctity of the chain of custody revolves around prevailing circumstances for each case. There are circumstances where the oral evidence of witnesses is sufficient to prove the chain of custody without any paper trail especially where the substance grounding the case is related to things that are not easily transferred like the pellets in the present case (see, **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported)).

Indeed, the importance of having proper documentation of the movement of Exhibit P3 from the time of seizing the defecated pellets until they were handed to the PW2, the analyst at the Government Chemist Laboratory up to when it was finally admitted as an exhibit in

Court in line with the decision of the Court in **Paulo Maduka and 4 Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), a position which is in tandem with PGO No. 229 cannot be overemphasized. Moreover, upon a careful examination of the evidence before us, we are satisfied that the evidence shows that while under observation at ADU offices JNIA, being suspected of trafficking narcotic drugs the appellant defecated 97 pellets in total which were admitted as exhibit P3. The evidence of PW8 and PW11 clearly outlines this fact. The fact that the defecated pellets seized on the dates and time specified were thereafter washed, put in black bags, and stored in the office drawer by PW8 or PW11 who were the sole custodians of the same during their work shifts. We can deduce this as stated by PW8 on page 137 of the record of appeal that;

> *"I was the custodian of the said pellets. There was a special draw of which we keep the exhibits. I was the custodian of the draw keys..."*

PW8 further testified that after each incident of defecating pellets by the appellant, the verified number of pellets excreted was recorded in the observation form which was signed by each of those who witnessed, the appellant and himself. PW8's evidence on storage and handling of the defecated pellets is replicated by PW11, who also testified on the period

he was responsible for observing the appellant and the fact that on specified dates and times, the appellant defecated pellets in the presence of identified witnesses who also testified on the same. From the evidence on record, we have also gathered that PW8 and PW11 handed the pellets defecated during their period of observation to PW3. The said evidence was supported by PW3 who acknowledged that on 30/5/2012 she received 78 and 18 pellets from PW8 and PW11 respectively while on 01/6/2012, she received 1 pellet from PW8. The received pellets were then recorded in the Register Book, put in an envelope and labeled with the case number JNIA/IR/137/2012. The same was then stored in the exhibit room, then packed and sealed in the presence of Assistant Commissioner Nzowa, PW5, the appellant, and other police officers. The sealed pellets were then taken for analysis received by PW2, analysis done and then sent back to the ADU exhibit room for storage. According to PW3, no one can enter the exhibit room save for herself and the ADU In-charge, the only ones with the access keys to enter it and neither, could enter without the other key. The said pellets were kept in the exhibit room until when required to be tendered in court.

The concern raised by the appellant's counsel on the alleged doubtful sanctity of the chain of custody of exhibit P3 has been

considered, and mindful that there was no evidence of labeling of the excreted pellets at the JNIA ADU offices, however, taking the evidence as a whole, step by step, we are satisfied that the oral evidence of PW2 and PW3 established that the defecated pellets were kept in safe custody in the drawers at the ADU offices, and were at all time under the custody of either PW8 or PW11 and that before being handed over to PW3, without any space or risk of being compromised. Our finding is further reinforced by the fact that the observation forms signed by the witnesses, the appellant, PW8 or PW11 clearly show the number of pellets retrieved for each occurrence.

We have also taken cognizance of the fact that the credibility of the witnesses has been vouched for by the trial judge, and find nothing to lead us not to believe them. What guides us is our understanding that every witness is entitled to credence and to be believed as pronounced by the Court in **Goodluck Kyando v. Republic** [2006] TLR 363. Having noted the minor differences in the description of the pellets in terms of colour and size of the pellets, we agree with the findings of the trial Judge that the said differences are microscopic, ascribed to the passage of time, individual perception and understanding as observers or witnesses who were however consistent in describing them as oval in shape and of a size

similar to a thumb finger. Indeed, the said differences do not challenge the fact that it was the same pellets that were defecated by the appellant and analyzed by PW2. Therefore, having considered the appellant's concerns, and the cited cases, which we have found to be distinguishable given the different circumstances of the present case as highlighted, we are satisfied that the oral evidence of the prosecution witnesses established the sanctity of the chain of custody of the 97 pellets with no room for doubt. We thus find grounds 4, 5 and 7 to be unmeritorious.

In amplifying grounds 1, 2 and 9 of the memorandum of appeal, the learned counsel for the appellant first addressed the issue of propriety of exhibit P2, the report by the Government Chemist Analyst. He argued that it was erroneous for the trial court to rely on it as it was improperly admitted based on the fact that it is not a report, but a simple letter informing the prosecution what transpired in the laboratory on the exhibit sent for analysis. He argued that as an expert, it was expected that the analysis report by PW2 (exhibit P2) would contain detailed data to enable one to find it to be conclusive on the analysis undertaken. He cited the case of **DPP v. Shida Manyama @ Selemani Mahuba**, Criminal Appeal No. 385 of 2012 to underpin his contention. He urged us to find exhibit P2 not to be a scientific and expert report, and expunge it. The learned

counsel urged us to find the charge against the appellant unproven because exhibits P2 and P3 which found the charges deserve to be expunged for reasons stated and once they are expunged as prayed, the case for the prosecution will have no legs to stand on. He thus implored us to allow the appeal and quash the conviction and sentence.

Ms. Kitaly addressed the appellant's challenge regarding the authenticity and propriety of the report from the Government Chemist Laboratory (exhibit P2). She argued that exhibit P2 is a summary of the analysis and that this is clear when its contents are scrutinized. According to the learned Senior State Attorney, PW2 gave evidence from the first time he came into contact with the pellets which were sealed on arrival at the Government Chemist Laboratory, labeled with the lab number and his analysis and findings. He explained the procedures from the time exhibits are received, the process of conducting preliminary analysis and what is involved in the analysis of such exhibits including the confirmatory test taken afterwards. Ms. Kitaly, further submitted that PW2 was cross-examined and his evidence remained to be consistent and reliable. She contended that exhibit P2 was enough to establish that the 97 pellets seized from the appellant contained narcotic drugs, heroin hydrochloride. She argued that PW2's testimony in court did clarify the contents of exhibit

P2 apart from intelligently, consistently, and credibly responding to questions directed at him and leaving no room to doubt or discredit him as a professional in his field of work. She cited the case of **Livinus Ozia Ochen** (supra), and **Shida Manyama** (supra) to bolster her argument on the veracity of the analysis report and expert evidence. She implored us to find that exhibit P2 qualified to be an expert report.

Regarding the appellant's complaint found in ground 9 which faulted the admissibility of exhibit P2 and the search and seizure of the pellets, alleging it contravened with section 38 of the Drugs and Control Act, she contended that the ground is misconceived since there was no search, the pellets having been seized upon defecation. She thus urged us to find the grounds to lack merit and to dismiss them.

The appellant's counsel had nothing further to state in rejoinder on the addressed grounds except to reiterate what he had submitted in chief and the prayer that the grounds should be found meritorious and thus allowed.

The grounds under consideration, that is, grounds 1, 2 and 9 essentially fault the trial court's judgment for not being well reasoned and the appellant's conviction based on weak, contradictory, and inconsistent evidence, impropriety in relying upon and giving weight to exhibit P2

which was obtained un-procedurally given improper search and seizure procedures in contravention of section 38(3) of the CPA and section 3 of the Police Services Act and PGO 272. The respondent's side has urged us to find all these grounds unmeritorious and dismiss them while the appellant's side has implored us to find otherwise for reasons already presented herein.

We find it prudent to start with ground number 9 because we need not spend much time on it. The ground faults the admissibility of exhibit P2 alleging it was obtained in contravention of section 38(3) of the CPA and section 3 of the Police Services Act and PGO 272. The appellant contends that the search on the appellant was unprocedural since there was neither a search order nor seizure note since none was tendered into evidence and the search was not conducted as an emergency measure. He cited the case of **Ayubu Mfaume Kiboko and Another v. Republic,** Criminal Appeal No. 694 of 2020 (unreported) to reinforce his position. He thus argued that, since the search was unlawful, it should render exhibit P3 and the seizure certificate to have been seized unlawfully and thus improperly admitted.

Having gone through the record of appeal, from the evidence of PW8 it is apparent that the information leading to the arrest of the

appellant was received on 28/5/2016 at around 2.00 hours and he was arrested at 3.05 hours. In those circumstances, it leaves no doubt that the arrest was one that befits an emergency situation as envisaged under section 42(1)(a) and (b) of the CPA as stated in the case of **Malugu Chiboni @ Silvester Chibonji @Silvester Chibonji and Another v. Republic**, Criminal Appeal No. 8 of 2011, **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017 (both unreported) and **Marceline Koivogui** (supra). In the circumstances of this case, we subscribe to the observation of this Court in the case of **Slahi Maulid Jumanne v. Republic**, Criminal Appeal No. 292 of 2016 (unreported) when confronted with a situation in which no search was conducted in terms of section 38 of the CPA and it stated:

> *"In our view, however, we do not think that the absence of a search warrant would be a cause of concern in this matter as PW4 being a police officer as defined under the CPA was empowered to conduct a search in an emergency and seize any item so found without any warrant pursuant to the provisions of section 42 (1) of the CPA. We thus do not see any reason why the trial court could not rely on Exhibit P. 6 as a certificate of seizure along with Exhibit P.8 documenting the movement of the seized."*

We have found no reasons to fault the trial court in its reliance on the evidence of witnesses who narrated what transpired in the apprehension and search of the appellant. Evidence by witnesses who were found to be credible by the trial court. We thus hold that ground 9 is unmerited.

As to the 1st and 2nd grounds, that challenge the judgment of the trial court as not well reasoned and prosecution evidence as weak, contradictory, and inconsistent, and the evidence of PW2 as unreliable, suffice to say as the first appellate court, we are duty bound to re-evaluate the entire evidence and subjecting it to critical scrutiny and arrive at our own conclusion (see **Iddi Shaban @Almasi v. Republic**, Criminal Appeal No. 111 of 2006 (unreported).

The Court had occasion previously to address complaints of reliance on inconsistencies in prosecution evidence. In **Mohamed Said Matula v. Republic** [1995] T.L.R. 3, the Court stated that where the testimonies of witnesses contain inconsistencies and contradictions, the court must address such inconsistencies and try to resolve them where possible or else decide whether the same are only minor or whether they go to the root of the matter. In the present case, alleged inconsistencies in the testimonies of the colour of the pellets, a concern which we have already

dealt with and found it to be minor in tandem with the holding of the trial court. The complaint that there was contradictions on the evidence of witnesses on whether the appellant was placed before the X-ray machine, where PW8 stated that they did not conduct X-ray on the appellant while PW11 testified otherwise. Having considered the evidence of PW11 carefully, it is apparent that the contradiction was resolved as can be seen at page 169 of the record of appeal, when being cross-examined by the learned counsel for the appellant then, PW11 said that:

> *"After interrogating the suspect he told me that he had done and Xray. He told me that police officers took him for Xray and these were Inspector Makole. He told me in the course of interrogation. I never saw the Xray...".*

Therefore, PW8's statement on this matter was essentially not contradicted by PW11's evidence. Overall the appellant failed to show any material contradictions or inconsistencies in the prosecution evidence to move us to find in his favour and question the veracity of the prosecution evidence. If there any inconsistencies or contradictions they are minor, not going to the root of the case.

Regarding the complaint that the trial court Judgment lacked proper evaluation of evidence, having gone through the Judgment we agree with the learned Senior State Attorney that this complaint is misconceived.

Undoubtedly, under section 312(1) of the CPA, evaluation and consideration of the prosecution and defence evidence is an oblique essential ingredient of a judgment in a criminal case. Section 312(1) of the CPA provides:

> *"Every judgment under the provisions of section 311 shall except as otherwise expressly provided by this Act be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate, in the language of the Court and shall contain the point or points for determination the decision thereon and the reasons for the decision."*

The Court in **Amiri Mohamed v. Republic** (1994) T.L.R. 138 discussed the provision and observed that:

> *"Every magistrate or judge has got his or her own style of comprising a judgment, and what vitally matters is that the essential ingredients shall be there, and these include critical analysis of both the prosecution and the defence."*

We have gone through the Judgment in the record of appeal and find that the appellant's case was substantially summarized on pages 256-258 and the same for the respondent's case on pages 252-256, 258. The analysis and evaluation of evidence can be found on pages 258-270, where the trial Judge addressed the issues framed for determination of

the case one by one. We thus find nothing to fault the trial court finding it did to a large extent comply with section 312 of the CPA.

Regarding the 2nd ground of appeal that faults the trial court's reliance on PW2's evidence, we are guarded by the principle pronounced in **Goodluck Kyando case** (supra), on the fact that each witness is entitled to credence. A perusal of his evidence on pages 99-109 of the record of appeal, shows that he expounds being a chemist holding a Bachelor of Science with Education Degree in Chemistry and Biology obtained in 2002. Has obtained various other qualifications related to his work. He works with the Government Chemist Laboratory Agency (GCLA), was gazetted via GN No. 119 of 2010 and conducts laboratory tests of different exhibits including narcotic drugs, poisons, explosives, and others.

As argued by the learned Senior State Attorney, he gave fluid evidence and answered questions during examination in chief and cross-examination consistently. The trial court found PW2 to be an expert who possesses special knowledge, necessary skills, and expertise obtained from the training he underwent and experience and that his knowledge of narcotic drugs is well beyond that of an average person. She thus found

his evidence and report (exhibit P2) to be sufficient and reliable on the subject.

We have also noted that PW2's expertise was never questioned in Court nor was his report queried on its authenticity or relevance. The issue that the trial court had to determine was whether it was properly before the trial court and was subject to admissibility. We thus find nothing to move us to depart from the finding of the trial court on PW2's expertise and veracity of his evidence. For the foregoing, grounds 1, 2 and 9 are unmeritorious.

The last remaining ground is number 10, which faults the trial court for convicting the appellant where the prosecution did not prove their case to the standard required. The learned counsel for the appellant implored us to allow the appeal, quash the conviction, set aside the sentence and other related orders and set the appellant at liberty. Mr. Ilboru implored us to consider their submissions find the grievances by the appellant without merit and dismiss the appeal. Certainly, this need not take much of our time since relying on what has been discussed hereinabove, which addressed the evidence by both the prosecution and the defence found that the evidence of the prosecution witnesses to be reliable and credible and that all prosecution exhibits including P2, P3, P7 were properly

admitted, the defence evidence of the appellant presented at the trial including the *alibi* which was amply considered and deliberated by the trial court did not cast any doubts to the prosecution case. Therefore, this ground is unmeritorious.

All in all, for the foregoing, the appeal is unmerited. We accordingly dismiss it.

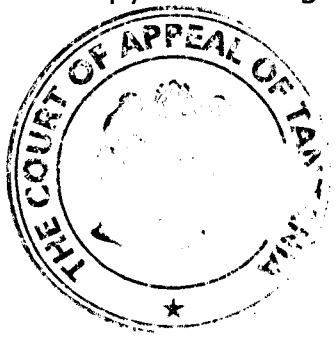
DATED at **DAR ES SALAAM** this 16th day of April, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of April, 2024 in the presence of Mr. Kung'e Wabeya, learned counsel for appellant, appellant who is connected via video facility from Ukonga Prison and Ms. Edith Mauya, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL