**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 94 OF 2021**

(*Appeal from the decision of the District Court of Kibaha at Kibaha passed by Hon. J. L. Mushi, RM dated on 09th March, 2021 in Criminal Case No. 24 of 2020*)

**JUMA SAID @ DOGO JANJA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**J U D G M E N T**

*14th & 21st December, 2022*

**MWANGA, J.**

In the District Court of Kibaha, the appellant Juma Said @ Dogo Janja was charged and convicted of trafficking in narcotic drugs contrary to Section 15A (1) (2) (c) of the Drugs Control and Enforcement Act, No. 5 of 2015. The prosecution produced seven witnesses and five exhibits.

The trial magistrate, while giving the verdict stated that; **One**, he had found no proof of malice on the prosecution side against the appellant to mount such a serious crime against him. **Two**, how was it

possible for the appellant who committed no wrong is attacked in the midnight by a group of people and implicate him with such serious crime. **Three**, the appellant failed to cross examine PW2 (arresting officer) on how he was arrested if at all he was arrested by a group of people and not PW2 and PW3. **Fourth**, that the prosecution had to established essential elements of the offence against the appellant, hence it had established the case beyond reasonable doubts. The appellant was therefore convicted and sentenced to 30 years imprisonment.

On appeal, the appellant filed a total of nine (9) grounds of appeal claiming that;

1. The learned trial Resident Magistrate erred in law and facts relying his decision on incurable irregularities in the proceedings and the judgment accordingly.
2. The learned trial Resident Magistrate erred in law and facts to convict the appellant relying on exhibits PE1, PE2, PE3, PE4, PE5, and PE6 which were illegally obtained as prescribed by law.
3. The learned trial Resident Magistrate erred in law and facts for failure to observe that there is no chain of custody in the prosecution evidence, nothing more.

4. The learned trial Resident Magistrate erred in law and facts for failure to observe that the prosecution failed to prove the case against the accused beyond any reasonable doubts.
5. The learned trial Resident Magistrate erred in law and facts by convicting the appellant while failed to determine that under section 40 of the Criminal Procedure Act, Cap. 20 R.E 2019 search may be executed between the hours of sunrise and sunset except with the leave of the court. That the said search not being emergence why was it conducted at night and without permission of the court and without proof that it was emergency search.
6. That the learned trial Resident Magistrate erred in law and facts by convicting the appellant relying on the discredited evidence of PW2 A/INSP Juma on unprocedural admission of certificate of seizure as exhibit PE3 and that the same evidence were given not under oath or affirmation contrary to Oaths and Statutory Declarations Act, Cap. 34 R,E. 2002.
7. That the learned trial Resident Magistrate erred in law and facts by convicting the appellant by relying on the statement of Adam Omary which was not tendered according to procedures.
    (i) that in tendering the statement the prosecutor assumed the role of a witness who is not capable of being cross

examined upon oath or affirmation in terms of Section 198 (1) of the Criminal Procedure Act, Cap 20 R.E 2019.

(ii) Under the general scheme of the Criminal Procedure Act, Cap. 2019 particularly Sections 95, 96,97,98 and 99 it is evident that the key duty of a prosecutor is to prosecute.

(iii) A prosecutor cannot assume the role of prosecutor and a witness at the same time.

(iv) The trial court erroneously ignored the objection of the appellant against statement of Adam Omari which was unprocedural tendered under Section 34B(a-f)

8. The learned trial Resident Magistrate erred in law and facts by convicting the appellant by relying merely on assertions of PW2 and PW3 which were full of contradictions.
9. The learned trial Resident Magistrate erred in law and facts by convicting the appellant relying on the discredited testimonies of PW2 and PW3.

The appeal was argued by way of written submission. On addressing issues relating to irregularity of procedures in the trial court proceedings, the learned counsel submitted that the charge sheet at the trial court was incurably defective for violating Sections

132 and 135 (f) of the Criminal Procedure Act, Cap. 20 R.E 2019 and the holding of the court in **Amiri Juma Shabani & Others Vs R,** Criminal Appeal No. 290 of 2015; CAT **(**Unreported).

According to the learned counsel, the authorities cited provides for the contents of the charge sheet; that it shall be sufficient if it contains a statement of the specific offence and other particulars giving reasonable information as to the nature of the offence charged. It shall also be sufficient to describe any place, time, thing matter, act or omission of any kind to which is necessary to refer in any charge.

On the basis of such defects, the learned counsel argued that the appellant shall be released from the prison and no need for retrial for that matter. In support of his argument, he cited the authority in **Ezekiel Kwihuya Vs Republic,** Criminal Appeal No. 228 of 2019 (CAT) (Unreported) where it was held that when the charge sheet is held incurably defective the question of retrial does not arise.

Again, the learned counsel made reference on page 7 and 8 of typed proceedings that the trial magistrate failed to explain to the accused person between disputed and undisputed facts. According to the learned counsel, that was a clear violation of S. 192 (3) of the Criminal Procedure Act and the same renders the judgment null and void. The

argument was supported by the authority in **MT 7479 Sgt Benjamin Holela Vs R[**1992] **TLR at page 121** and **Republic Vs Francis Lijenga,** Criminal Revision No. 03 of 2019 CAT whereby in the two cases the court emphasized on the mandatory requirements of reading over and explaining to the accused memorandum of matters agreed when conducting a preliminary hearing.

It was further contended that, the trial court contravened S. 170 (2) of the Criminal Procedure Act, Cap. 20 R.E 2022 by convicting and sentencing the appellant to 30 years imprisonment for the offence which do not follow under minimum sentence and without the same being confirmed by the High Court Judge. It was her argument that since the Magistrate was not a senior Resident Magistrate such sentence ought to be confirmed by a High Court Judge.

On the issue of admissibility of exhibits, it was submitted that the prosecution exhibits P1, P2, P3, P4 and P5 were not admitted according to law. The irregularities advanced were that; **One**, there is no indication whether PW3 identified the exhibits P4 and P5 before the same were admitted as exhibits. **Two**, it is silent whether PW3 gave description or features of exhibits P4 and P5 before the trial court during its admission into exhibits. **Three**, there is no record as to whether the

trial court granted prayer of the republic that PW3 be given exhibit P4 and P5 for identification. **Four**, the record does not indicate if the appellant was given exhibit P4 and P5 for observation before the objection or not, hence the trial court would not have rendered that the appellant had no objection on Exhibit P4.

Again, the record shows that the appellant objected admission of Exhibit P5 but nothing on record showing that he was given a chance to make rejoinder in that exhibit. Another contention was that the there is no records that the admitted exhibits (P4 and 5) were read out after admission (not cleared after admission).

In support of his submission, the learned counsel cited the case of **Bakari Ahmad @ Nakamo & Another Vs R,** Criminal Appeal No. 74 of 2019 (Unreported) at page 13 it was held that the law is clear that failure to read the contents of an exhibit after its admission in evidence is an incurable irregularity as it violates the accused rights to a fair trial and whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it can be read out.

The leaned counsel further submitted that the authority in **Shaban Hamis Vs R,** Criminal Appeal No. 146A of 2017 CAT (Unreported) the

court held that where the exhibit is not properly admitted and the resultant effect is to expunge it from the record. Further authority was submitted in **Hai District Counsel & Another Vs Kilempu Kimoka Laizer & others**, Civil Appeal No. 110 of 2018 CAT (Unreported) at page 7 where the court held that failure to afford the appellant right to make rejoinder submissions amounted to denying them the right to be heard. And since that is a fundamental right, it had the effect of vitiating the proceedings because it offended the principle of natural justice.

The learned counsel further attacked the trial court proceedings at page 17 that no record shown that the appellant was supplied with a copy of notice for the prosecution to rely on the statement of **Adam Omari** under Section 34B of the evidence Act, Cap 6 R.E 2022. The learned counsel cited the authority in **DPP Vs Ophant Monyancha [1985**[ TLR 127 where it was held that in order for a statement to be admissible under Section 34B (2) of the Evidence Act, all the conditions laid down in all the paragraphs, that is from (a) to (f) of the subsection must be met, otherwise it is correct to reject the admission of such statement.

It was further argued that how the appellant in this appeal could have known the existence exhibit P5 (statement of Adam Omari and exhibit P5 exhibit registrar) in absence of such notice.

It was the learned counsel contention that under such deficiencies the trial court would not have arrived at a conclusion that the appellant had no objection on the exhibits tendered.

It was another set of counsel submission that, Section 210 (3) of the Criminal Procedure Act was not complied with. And the trial magistrate failed to resolve contradictions and inconsistencies on the following areas;

**First**, PW1 told the trial court that on 27th December, 2021 he was given 20 Ketes and some leaves of bhangi from D/C Salehe while PW4. CPL Salehe told the trial court that on 27th December, 2019 he sent to the chief government chemist exhibit of bhangi.

**Second**, A/Insp Juma told the trial court that on 09/12/2019 seized 20 kete of bhangi and some leaves of bhang and handled to PC Yusuf at Kibaha Police Station at CRO while PW3 D/CPL Ibrahim witnessed that on 09/12/2019 seized one kete of bhangi and handled at Kibaha police station at CRO to one police officer. PW5 CPL Julius told the trial court

that he received from PC Yusuf one pull of bhangi and 20 kete of bhangi on 09/12/2019 while PW6 – D/CPL Yusuf told the trial court that on 09/12/2014 he was given exhibit of bhangi from PW2 and he surrendered to him that bhangi- exhibit.

It was argued further such contradictions on the evidence of PW1, PW2, PW3, PW4, PW5 WP6 and PW7 ought not to warrant conviction of the appellant by the trial court. In support of his contention, the learned counsel cited the authority in **Mohamed Said Matula Vs R [1995] TLR 3** where it was held that the court has a duty to decide whether the inconsistences and contradictions are only minor of whether the same goes to the roots of the matter. The cases of; **Jeremiah Shemmeta Vs R [1985] TLR 226** and **DPP Vs Bahati John Mahenge & Others,** Criminal Appeal No. 3 of 2015 (Unreported) and **Michael Haishi Vs R** [1992] TLR 92 and **Shabani Hamisi Vs R,** Criminal Appeal No. 146 of 2017 were cited to the effect that description in the various accounts of the story by the prosecution witnesses give rise to some reasonable doubt about the guilty of the appellant.

Another set of procedural irregularities was directed to the lack of search warrant, That the search was illegally conducted. The learned counsel supported his contention in the authority in **Shabani Said**

**Kindamba VR,** Criminal Appeal No. 390 of 2019 (Unreported) and **Samwel Kibundali Mgaya Vs R**, Criminal Appeal No. 180 of 2020 (Unreported).

Furthermore, the learned counsel alleged that there was no chain of custody on the evidence of the prosecution. That no any prosecution witness adduced evidence that exhibit PE1 contained any special mark at the scene. Again, no evidence that the appellant and independent witness participated in the process of sealing an exhibit before it was submitted to the government chemists. It was further argued that D/CPL Moshi was given exhibit of bhangi by PW7 to present in court but he did not witness the same before the court to cement the same. Additionally, no any evidence addressed as to where that CRO kept the exhibits and no evidence to show if the exhibit room was locked with key and who had the keys in all those days before it was handed to the custodian of the exhibit. It was the submission that, security of exhibit PE1 was in doubts.

Moreover, there was no evidence as to who gave exhibit P1 to PW4 D/C Salehe in order to submit it to the chief government chemists. The learned counsel supported his argument by citing the authorities in **Zainab nassoro @ Zena Vs R,** Criminal Appeal No. 348 of 2015

**(Unreported) and DPP Vs Stephen Gerald Sipuka** where the court of appeal held that chain of custody must not be broken down; there are must be a link between what was seized, what was analysed and what was tendered in court. Date and time of handing over is also important.

The issue of chain of custody was connected to various authorities such as **DPP V Shiraz Mohamed Sharif [2008]** TLR 427, **DPP V Shariff Mohamed @ Athuman & others**, Civil Appeal No. 74 of 2016 CAT (Unrepoted, **illuminatus Mkoka Vs R** [2005] 245, **Chukwudi Denis Okechukwu & others Vs R,** Criminal Appeal No. 507 of 2015 CAT (Unreported), **DPP Vs Stephene Gerald Sipuka Paulo Maduka & Others Vs R**, Criminal Appeal No 110 of 2007 CAT (Unreported).

In conclusion to his submission, the learned counsel submitted that the burden is on the prosecution side to prove the case beyond reasonable doubt as it was stated in the case of **Mwita & others Vs R,** [1971] HCD 54 and **Jonas Nkiza Vs R** [1992] TLR 213. According to the learned counsel, the appellant duty is simply required to raise reasonable doubts in the mind of magistrate and no more.

To the end, the learned counsel prayed that the appeal be allowed, quash the conviction and set aside the sentence of the trial court and acquit the appellant accordingly.

Per contra, the learned State Attorney opposed the appeal in its entirety. In her five pages of submission; **One**, it is true that no proper trail was tendered but chain of custody was well elaborated by police officers who testified in court. She referred the oral evidence of PW2 (arresting officer) who passed exhibit PE1 to PW6 (police officer on duty) who also passed the same to PW5 (police officer who was also on duty after PW5 finished his shift who also again passed the same to PW7 (police officer who recorded the exhibit in the exhibit register that was admitted as exhibit P5.

It was her submission further that, PW3 took exhibit P1 from PW7 and passed it over to PW4 who sent the exhibit to the Chief Government Chemist where it was attended by PW1.The learned State Attorney argued that after the analysis of the exhibit in question, it was returned back to PW4 then to PW7 until the same was taken by CPL Moshi and tendered in court by PW1.

In cementing her position, the cases of **Petro Kito Kinangai Vs R**, Criminal Appeal No. 565 of 2017(Unreported) and **Paulo Maduka & others VR**, Criminal Appeal No. 110 of 2007 (Unreported) were cited for that matter.

Again, that principle governing chain of custody will be relaxed whenever an item involved is one that cannot change hands easily. The case of **Jabril Okash Ahmed Vs Republic,** Criminal Appeal No. 331 of 2017; CAT (Unreported) was referred that in cases relating to items that cannot change hands easily and therefore not easy to temper with chain of custody would be relaxed. It was submitted that, bhangi being a category of items that cannot change hands easily, thus cannot be easily altered, swapped or tempered with hence the chain of custody was intact.

It was her contention further that, PW2 gave unsworn testimony, however the same was corroborated. The learned State Attorney cited the case of **Vumi Liapenda Mushi Vs R,** Criminal Appeal No. 377 of 2018; CAT (Unreported in support of his submission on that point.

Coming to the admissibility of statement Adam Omari under Section 34B, the learned State Attorney argued that such statement was tendered by PW3 according to law. It her view that the prosecution gave notice to the trial court.

On account of procedural irregularities cited by the leaned counsel for the appellant, it was her arguments that, no irregularities occasioned to vitiate proceedings, conviction and sentence. Further that, exhibit P1,

P2, P3, P4 and P5 were tendered and admitted accordingly to the laid legal procedures, including the admissibility of statement of the witness who cannot appear to testify in court as per Section 34B (1) and (2) and (e) of the evidence Act.

In respect of allegations that search was conducted contrary to the law, the learned State Attorney replied that search against the appellant was an emergence search since to the police were on patrol and upon receiving the information about involvement of the appellant in committing the crime of dealing in narcotic drugs they had to arrests the appellant directly and the search was conducted in accordance with Section 42 (1) (b) (1) and (11) of the Criminal Procedure Act. The case of Nyerere **Nyague Vs Republic,** Criminal Appeal No. 67 of 2010 (Unreported) was cited to the effect that not every contravention of the provisions of the Criminal Procedure Act, automatically leads to the exclusion of the evidence in question.

In her conclusion, it was submitted that the case against the appellant was proved beyond reasonable doubt and that contradictions pointed in the evidence of PW2 and PW3 are minor to the extent of not prejudiced the appellant, hence the same cannot vitiate the proceedings, conviction and sentence. The case of **Dickson Elia Nsamba**

**Shapwata & another Vs R**, Criminal Appeal No. 92 of 2007 (Unreported) was cited in support of her contention. It was the learned State Attorney argument that such contractions do not go to the roots of the case and did not prejudice the appellant who was found with bhangi, exhibit P1 and P5 which were tendered and admitted without objection from the appellant. Ultimately, the learned State Attorney prayed to the court to dismiss the appeal in its entirety and uphold the conviction and sentence imposed to the appellant by the trial court.

I have gone through the evidence on record and submission of the parties and have found credence on the evidence of prosecution case on the following main areas: -

**First**, no procedural irregularities in the chargesheet. The chargesheet against the appellant clearly provides for the date of the incident which was 09/12/2019, place where the incident took place which was "kwa Mathias area Kibaha District in coast Region and the thing or subject matter of the crime committed which was 20 ketes and leaves of bhangi weighing 121.1 grams.

It further indicated the name of the appellant Juma Said @ Dogo Janja and that he was found in unlawful possession of narcotic drugs to wit; cannabis sativa commonly known as bhangi. Under the

circumstances, the law and authorities cited by the learned counsel for the appellant worked well in favour of the prosecution.

**Second**, search being conducted to the appellant without a search warrant. It was the prosecution evidence at the trial that the information about the appellant possessing narcotic drugs were received while on patrol during the night. The appellant argued to the contrary that despite the same being conducted during the night, the same required a search warrant. I am in agreement with the learned State Attorney that it such was an emergence search which fall under Section 41(1) (b) (i) and (iii) of the Criminal Procedure Act.

The section allows a police officer to conduct search where he has reason to believe that such search is made under the circumstance of such seriousness and urgency as may be required and justify immediate search without the authority of an order of a court or of a warrant issued under this part. In the circumstances, I find that the search was conducted according to law.

**Third,** the chain of custody was not an issue to discredit the evidence of the prosecution. The prosecution witnesses explained the sequence of custody, control and transfer of exhibit PE1 from the moment it was seized at the crime scene to the point of being tendered

and admitted in court as exhibit. The proceedings of the trial court show that PW1 a government chemist received exhibit PE1 from police No. 1830 D/C Salehe when sealed with plastic envelop in which inside there were 20 ketes and bhangi leaves.

The said exhibit was registered with office No. 3968/2019. PW1 gave the exhibit back to D/C Salehe when sealed with seal name GCLA. Looking at page 13 of the typed proceedings, PW1 tendered the exhibit and the accused was recorded saying 'I don't have the objection'. It appears from the record that, before PW1 tendered the exhibit in court some descriptions of the said exhibit were given. The nature of the exhibit being physical exhibit, it goes without saying that the said exhibit was admitted according to law.

On the same page 13, the investigation report dated 30/01/2020 named "DCEA 009 report" was admitted as exhibit PE2 and the same was read out in court after admission. At page 14, it was stated that "exhibit PE2 read before the court in the presence of both parties." The court proceeded to state at page 14 that Section 210 (3) of Criminal Procedure Act was complied with.

The police officers who arrested the appellant were at Kibaha kwa Mathias at around 01:00 pm on patrol using a car with No. PT 3610.

Upon receiving information about the possession of narcotic drugs by the appellant they picked Adamu Omari who was the appellant's neighbour and accompanied to the house of the appellant.

They found the appellant in possession of 20 ketes and bhangi leaves. Certificate of seizure was prepared and signed by both parties. Thereafter, they went straight to Mji mdogo Kibaha police station accompanied the appellant, exhibits and certificate of seizure.

The conditions for storage were explained by the prosecution witnesses. The evidence on record shows that, exhibit PE1 was taken to chief government chemist for analyses and examination and it was well packed, registered, labelled and handed by the prosecution witnesses who testified in court.

After examination, the exhibit PE1 was returned in a manner could not be tempered, interfered with until it was produced in court. The appellant pointe out no any discrepancies neither at the trial court nor even in appeal showing that the chain of custody was broken at some point. The prosecution adduced sufficiency evidence to establish that Exhibit PE1 presented at the trial court is the same exhibit that was in possession or taken from the appellant. In the circumstances, the record speaks by itself that there were a clear link or chain of custody

with respect to exhibit PE1 when the same was collected at the scene of crime to the point it was tendered in court.

**Fourth,** with reference to admissibility of exhibits, at page 16, PW2 tendered certificate of seizure dated 09/12/2019 as exhibit PE3 and the appellant did not object it. The same was read over before the court after admission in the presence of both parties. The typed proceedings at page 16, PW2 identified the exhibit PE1 which the appellant was arrested with.

PW3 tendered exhibit PE5, being the statement of Adam Omari under S. 34 (B) of TEA. The appellant herein seems to be challenging procedures adopted to tender and admit such statement. It was his argument that no notice was produced the law requires. However, I have scrutinised the records and found out that on 28/08/2020 the prosecution put to the attention of the court that the statement of Adam Omari who cannot be found, his statement shall be tendered under S. 34 (B) of TEA. On the same day, at page 17 of the typed proceedings, the trial court ordered the statement of the said witness to be supplied to the appellant to read it before it was tendered in evidence.

On 14/09/2020 PW3 tendered exhibit PE5, being statement of the said Adam Omari. It is my considered view that from 28/08/2020 up to

14/09/2020 the appellant knew that the statement of Adam Omari would be tendered. There is no concern raised by the appellant that the said statement was not supplied for him to read it as the court directed. Therefore, the statement was admitted according to Section 34B of TEA.

It is on record that Exhibits PE1, PE2, PE3, PE4, PE5 and PE6 were tendered and the appellant did not object them and the same were read out after its admission. Most importantly, the prosecution witnesses provided some glimpse on the exhibits to be tendered before the same were admitted as exhibits in court. It is without doubt that before the appellant stating that he did not have objection, he already knew the nature of the exhibit to be tendered by the prosecution. He therefore cannot be heard to say that there was violation of the admission procedures.

In view of the above, exhibits PE1, PE2, and PE3, PE4 and PE5 were admitted accordingly to law. The same is reflected in pages 13, 14, 16 and 21 of the typed proceedings. Likewise, the cautioned statement of the appellant was tendered and admitted as exhibit. The appellant did not object it and the same was read out to the parties after admission.

**Fifth,** the learned counsel for the applicant attacked evidence of the prosecution on the basis of the same being contradictory and

inconsistencies. The same appears in page 19 of the typed proceedings where PW3 stated that they found the appellant with one kete of bhangi. That he went to custodian of the exhibits, took it and gave it to CPL Swalehe who brought it to the National Chemist Laboratory. PW4, D/CPL Salehe took the exhibit PE1 to the chief government chemist who received it, sketched it and found it was 121.61 grams. He was then given back the bhangi after the sample was taken and took it back to the police station. The evidence of PW5 D/CPL Julius was that he received exhibit PE1 (bhangi 1 puli and 20 ketes) from P/C Yusuf. PW6 D/C Yusuf who labelled the exhibit, stated that, he received 1 pelet of bhangi and 20 ketes. PW7 stated that while he was at exhibit room he received 20 ketes and some leaves of bhangi. He registered them and he was the one who tendered the register took and the appellant did not object. The register was marked PE5 and the same was read out after admission.

I hasten to state that contradictions and inconsistences by PW1 & PW2 on one hand and evidence of PW3 PW5 on the other hand do not go to the root of the case. I agree with the learned State Attorney that such contradictions and or inconsistences did not prejudice the appellant. As nightly held in the case of **Dickson Elia samba**

**Shapwata & Another Vs R,** Criminal Appeal No. 92 of 2007 (Unreported) minor contradictions, inconsistences and discrepancies among the witness do not corrode the prosecution case.

Sixth, convicting and sentencing the appellant to 30 years imprisonment does not require confirmation by the High Court Judge. Section 2 of the Drugs Control and Enforcement Act, No. 5 of 2015 defines court to mean subordinate court and high court. For charges preferred under Section 15A another mentioned provisions the subordinate court has exclusive jurisdiction, including sentencing of the accused person without the same being confirmed by the High court judge.

The rest of the offences preferred under sections 15,16 or 23 exclusively dealt with by the High court. It was the argument by the learned counsel that; since the Magistrate presided over this matter at the trial court was not a senior Resident Magistrate such sentence ought to be confirmed by a High Court Judge. I decline to agree with his observation.

In the above analysis, I have found that the appeal is without merits. It is hereby dismissed. Conviction and sentence of the trial court against the appellant is upheld.

It is so ordered

**H. R. MWANGA**

**JUDGE**

**20/12/2022**

**COURT:** Judgement delivered in Chambers this 20nd day of December, 2022 in the presence of the learned counsel for the appellant and the appellant in person and learned State Attorney for the respondent.

**H.R MWANGA**

**JUDGE**

**2O/12/2022**