IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 274 OF 2019

CHRISTIAN UGBECHI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es salaam)

(Matupa, J.)

dated the 21st day of June, 2019
in
Economic Case No. 02 of 2019
.....

JUDGMENT OF THE COURT

14th September, & 23rd December, 2021

LEVIRA, J.A.:

The appellant, Christian Ugbechi was aggrieved by the decision of the High Court of Tanzania, Corruption and Economic Crimes Division (Matupa, J.) (the trial court) in Economic Case No. 02 of 2019 dated 21st June, 2019. The trial court sentenced the appellant to serve thirty (30) years in prison having convicted him of trafficking in narcotic drugs contrary to section 15 (1) (a) of the Drug Control and Enforcement Act No. 5 of 2015 (the DCEA) read together with Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act, Cap 200 RE 2002 (now R.E. 2019) (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. According to the

particulars of the offence, on 28th January, 2018 (the material day) at Julius Nyerere International Airport (JNIA) within Ilala District in Dar es Salaam Region, the appellant trafficked in narcotic drugs namely Heroin Hydrochloride weighing 947.57 grams.

The brief background giving rise to the present appeal according to the record of appeal is that, on the material day the appellant was at JNIA carrying his luggage ready to fly to Vienna via Addis Ababa. However, he did not fulfil his plans as his journey was blocked at the departure lounge when he was suspected by police officers; No. 1782 D/Cpl Peter (PW2) who was in company of two others.

According to PW2, when he questioned the appellant, he appeared nervous and thus he required the appellant to follow him at the police station where they met the OC CID one Inspector Dickson Crispin Haule (PW8). PW2 informed PW8 that the appellant appeared nervous when they approached him. Upon that information, PW8 arranged a search of the appellant's bag which was witnessed by witnesses from other departments found in the airport; to wit, Manumbu from Tanzania Revenue Authority (TRA), Bahati Kapesa (PW7) from Immigration and Alex from Swissport. From the appellant's bag, they retrieved 56 pellets suspected to contain narcotic drugs which were kept in black socks. The said pellets were seized together with other items including money in USD

currency and three mobile phones. A seizure certificate was issued. Thereafter, the appellant's cautioned statement (exhibit P 21) was recorded by Insp. Idrissa Musoke (PW5) in which he confessed to have committed the offence. The pellets and other items seized from the appellant were handed over to police officer No. E. 370 D/C Jesias Hombo (PW3), a custodian of exhibits for safe custody.

Whilst under observation, on 29th to 30th January, 2018, the appellant defecated 23 pellets making a total of 79 pellets seized from him. On 1st February, 2018 PW3 packed the pellets in the presence of the appellant and other independent witnesses and sent them to the Government Chemist for examination. According to the examination report (exhibit P2), those pellets contained Heroin Hydrochloride. The above formed the basis as to why the appellant was arraigned before the trial court facing the charge of trafficking in narcotic drugs. He pleaded not guilty to the charge and to prove it, the prosecution paraded eleven (11) witnesses and tendered twenty-one (21) exhibits.

On the defence side, the appellant was a sole witness and he tendered two (2) exhibits. In his defence, he made a general denial to the effect that, he was not found in possession of the alleged narcotic drugs and that he did not know where they came from. Upon a full trial, the appellant was convicted and sentenced in the manner stated

hereinabove. He was aggrieved by both the conviction and sentence, hence the present appeal comprising nineteen (19) grounds. For convenience, in determining this appeal, we shall capture the substance of the complaint of a given ground of appeal and dispose of the grounds without reproducing them as hereunder.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Mr. Apimaki Patrick Mabrouk, learned Senior State Attorney assisted by Ms. Estazia Wilson, learned State Attorney.

The appeal was argued by both, Mr. Mabrouk and Ms. Wilson. On the one hand, Ms. Wilson argued the 1st, 2nd, 3rd, 6th, 15th, 16th, 17th, 18th and 19th grounds of appeal; Mr. Mabrouk on the other hand submitted on the 4th, 5th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th grounds of appeal.

In the first ground of appeal, the appellant faults the decision of the trial court that exhibits P1 (Form No. DCEA 001 in respect of JNIA/IR/13/2018) and P3 (the parcel of envelopes containing pellets) were given due weight to ground his conviction despite being tendered by Yohana Goshashi, a Government Chemist (PW1) without laying foundation on how those exhibits landed into his hands from the custodian (PW3) on the day of tendering them. Expounding on this

ground, he referred us to page 40 of the record of appeal where PW1 stated that he took samples from the 79 pellets for confirmatory test and returned the exhibits to PW3 having repacked them in the same package which was used when they were sent to him and from there PW1 ceased to be the custodian of the said parcel (exhibits). In the circumstances, he argued, the description and state of the exhibits given by PW1 cannot stand at all after years he had sealed and handed them over to PW3 for safe custody.

In reply Ms. Wilson opposed the appellant's contention, she submitted that PW1 was a credible witness. She referred us to page 40 of the record of appeal where PW1 recognised exhibit P1 by his name written in the form and handwriting and exhibit P3 by investigation number JNIA/IR/13/2018, seal and stamp. She went on submitting that the description given by PW1 was sufficient and he was thus competent to tender them because he had the knowledge of them. To bolster her argument, she cited the case of **DPP v. Mirzai Pirbakhshi @ Hadji and 3 others,** Criminal Appeal No. 493 of 2016 (unreported). Ms. Wislon concluded by submitting that the first ground of appeal has no merit and urged us to dismiss it.

In determining whether PW1 was a credible witness, we are guided by the settled position that every witness is entitled to credence unless there are sound reasons suggesting the contrary preposition - see **Goodluck Kyando v. Republic** [2006] T.L.R 369. We have perused the record of appeal particularly, from page 38 to page 58 where PW1's evidence was recorded. Basically, he testified on how he received a parcel of samples which were kept in a khaki envelope which was written names of persons and case No. JNIA/IR/13/2018 directed to the Government Chemist Laboratory by PW3. The said parcel was registered with Laboratory Registration No. 327/2018. It contained six envelopes with pellets carrying various weight together with Form No. DCEA 001 requesting him to conduct an identification test to those pellets. During trial, the said Form No. DCEA 001 in respect of JNIA/IR/13/2018 was admitted and marked exhibit P1 and the parcel of samples was also admitted and marked exhibit P3. We take note that PW1 was never cross examined by the appellant on how those exhibits landed into his hands until they were tendered in court. His credibility was not shaken in that respect. We have held in our previous decisions, times without number, that failure to cross examine a witness on an important aspect depicts the acceptance of the truth of that testimony – see: **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 (unreported)

cited in **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (also unreported) and **George Maili Kemboge v. Republic,** Criminal Appeal No. 327 of 2013 (unreported).

In addition, PW1's ability to recognize the exhibits by the colour of the envelope, contents, number of the Form (CDEA 001), his signature, handwriting and his name shows that he had sufficient knowledge of the exhibits which he tendered notwithstanding the fact that, the counsel for the appellant attempted to object to the tendering of exhibit P1 - see **The Director of Public Prosecutions v. Kristina Biskasevskaja,** Criminal Appeal No. 76 of 2016 and **Anania Clavery Betela v. Republic,** Criminal Appeal No. 355 of 2017 (both unreported). In the circumstances, we agree with Ms. Wilson and hold that since PW1 had sufficient prior knowledge of both exhibits which he tendered, he was a credible and competent witness to tender both, exhibits P1 and P3. The first ground of appeal has no merit and in our considered view, it has been raised as an afterthought. Consequently, we dismiss it.

The appellant's complaint in the second ground of appeal is that the trial judge misdirected himself to hold that separate envelopes containing different quantities of pellets were admitted in evidence as exhibits P3 (a) to (f) contrary to what the record of appeal bears. The gist of appellant's

complaint in this ground which is also a point for our determination is that exhibit P3 was tendered and admitted without categorization in alphabet of the envelopes found in the parcel which was received by PW1 from PW3. He made reference to page 53 of the record of appeal where, when PW1 opened the said parcel (exhibit P3), he identified the envelopes which were in there as exhibit 1, exhibit 2, exhibit 3, exhibit 4, exhibit 5 and exhibit 6. He went further to state that the envelop which was referred to by the trial judge as exhibit P3 (d) which if is taken to be the fourth envelop, contained 6 pellets and its weight was not 79.8 grams as noted by the judge. For this shortcoming, the appellant prayed that we should find the decision of the trial court erroneously reached.

Ms. Wilson conceded to the fact that exhibit P3 (a) – (f) does not appear in the record of appeal and the envelops found in exhibit P3 were not recorded in the order referred to by the trial judge in the judgement. However, she submitted, it is not true as complained by the appellant that the said exhibits were not admitted in evidence. She referred us to the original record of appeal where she argued, those exhibits were admitted and the weight accorded to each of them is stated therein. She added that the alphabets (a) – (f) which appear in the judgment was just a clerical error which does not go to the root of the matter.

Our starting point in determining this ground is on the long well settled principle that, not every procedural omission or error can vitiate the proceedings, some of them may be glossed over unless there is a prejudice to the parties - see **Tongeni Naata v. Republic** [1991] T.L.R 54 and **Yanga Omari Yanga v. Republic**, Criminal Appeal No. 132 of 2021 (unreported). In the current case, there is no dispute that exhibit P3 was a big Khaki envelope containing other six small envelopes, exhibits 1, 2, 3, 4, 5 and 6 in which a total of 79 pellets in uneven distribution were kept and the same were referred to as a parcel at page 53 of the record of appeal. For clarity, the trial court marked it as follows:

"Court: *The parcel is admitted and marked as exhibit P3".*

However, we take note that at pages 64, 73, 77, 113 and 282 of the record of appeal, the trial judge referred to exhibit P3 as exhibit P3 (a) or P3 (a) to (f) while making specific reference to small envelopes found in that exhibit which were identified by PW1 as exhibits 1 to 6 as indicated above. Much as we may agree with the appellant and Ms. Wilson's concession that, the record of appeal does not bear the alphabets referred to in lieu of numbers by the trial judge, we are not convinced that such reference prejudiced the appellant in any way. We say so because at the end of the day, the parties understood that

reference was made to exhibit P3 in which the components were referred to alphabetically interchangeably as well as numerically. Besides, the appellant understood so and that is why at page 8 of his written submissions he stated as follows:

> *"Even if we allow ourselves to follow the judge on his manner of classification, we will soon get lost on the way* ***because P3 (d) which meant, we guess, to be the fourth envelope,*** *[does] not weigh 79.8 grams as the judge wrote." [Emphasis added].*

As it can be deduced from the above excerpt, the appellant being fully aware of what the trial judge was referring to, he raised an argument that exhibit P3 (d) did not weigh 79.8 grams. Now whether that was the weight of exhibit P3 (d) should not take much of our time because ultimately, the appellant was convicted based on the total weight of the components of exhibit P3 stated in the information and proved by PW1 to be 947.57 grams. For clarity, at page 40 of the record of appeal, PW1 testified that the weight of exhibit No. 4 which is referred to as P3 (d) is 70.81 grams and not 79.81 grams as in our view, inadvertently stated by the trial judge at page 282 of the record of appeal. It is our finding that, although there was incorrect reference to the exhibit P3, the

same did not occasion prejudice to the appellant. Generally, this ground of appeal is unmerited and it is hereby dismissed.

In the third ground of appeal, the appellant faults the trial judge for holding that he was found trafficking in 947.57 grams of Heroin Hydrochloride based on exhibits P3 (a to f) and exhibit P2 while PW1 did not quantify the weight of Heroin Hydrochloride found in exhibit P3 collectively as the same contained four different substances as indicated in exhibit P2 (the Investigation Report titled "*Taarifa ya Uchunguzi wa Maabara ya Serikali Form No. DCE 009 dated 15th February, 2018*").

In her reply submission, Ms. Wilson submitted that it is true that the appellant was charged with and convicted of trafficking in Heroin Hydrochloride weighing 947.57 grams. She went on to submit that section 2 of the DCEA has been broadly interpreted by the Court and narcotic drugs is defined to mean specified substances including Heroin Hydrochloride. Thus, it was her argument that since the substance (exhibit P3) contained Heroin Hydrochloride, the appellant's complaint that the amount of it was not stated is immaterial. She cited the case of **Abas Kondo Gede v. Republic,** Criminal Appeal No. 472 of 2017 (unreported) to back up her argument.

Having considered the rival arguments by the parties, we now proceed to determine whether the trial judge erred in holding that the appellant was found trafficking in narcotic drugs weighing 947.57 grams of Heroin Hydrochloride. We agree with the appellant that exhibit P3 contained four different components which were stated in PW1's testimonial account and also indicated in exhibit P2 found at page 230 of the record of appeal; they include; Heroin Hydrochloride, Metronidazole, Paracetamol and Papaverine.

As submitted by Ms. Wilson, the appellant was charged with trafficking in Narcotic Drugs which is defined under section 2 of the DCEA to mean: *"any substance specified in the First Schedule or anything that contains any substance specified in that First Schedule to this Act."*

We visited the First Schedule of that Act and observed that Heroin Hydrochloride is not provided for, instead, the law provides for Heroin Diacetyl Morphine. When cross-examined by the counsel of the appellant regarding the test he conducted to the samples, at page 57 of the record of appeal, PW1 stated as follows:

> *"In my colour test I used selenium and sulphuric acid. The test would show* ***morphine*** *and other derivatives. The presence of green colour indicated the presence of Heroin Hydrochloride that is why I did not mention any*

other antibiotics and other chemical derivatives of Heroin, including ***morphine,*** *cordine acetylonedeio,* ***acetyl morphine****. The preliminary test was not conclusive test. The process of confirmatory test notes out the presence of the other substances."*

[Emphasis added]

It is therefore apparent that since the test conducted by PW1 proved that the 79 pellets which the appellant was found trafficking in contained Heroin Acetyl Morphine, they fall squarely under the First Schedule to the DCEA as per section 2 of the said Act. Therefore, since exhibit P3 contained substances of total weight of 947.57, the weight of Heroin Hydrochloride cannot be treated separately in terms of section 2 of the DCEA as the appellant would wish. Having so stated, we agree with the finding of the trial court in respect of the weight of Heroin Hydrochloride which the appellant was found trafficking in. The third ground of appeal is as well without merit and it fails.

The appellant's claim in the fourth ground of appeal is that the trial judge misdirected himself when assigned weight to PW1's evidence who was an unreliable witness as he denied recording statement (exhibit D1) which was read during committal proceedings. Responding to this ground of appeal, Mr. Mabrouk submitted that the appellant's complaint is unfounded because PW1 admitted at page 56 of the record of appeal that

the said statement was his and it was read in terms of section 289 (1) of the Criminal Procedure Act, Cap. 20 [R.E. 2019] (the CPA). We thus need to find out whether PW1 was an unreliable witness. Our perusal of the record of appeal reveals that PW1 testified on how he received exhibit P3 from PW3, weighed it and thereafter conducted both preliminary and confirmatory tests which eventually showed that all 79 pellets (exhibit P3) contained Heroin Hydrochloride, Metronidazole, Paracetamol and Papaverine. Thereafter, he prepared a report which, among other things, indicated that Heroin Hydrochloride is among the drugs which when used by a human being causes drug dependence and mental disorder. We further noted that PW1's oral account and his report (exhibit P2) tally with the substance of his statement (exhibit D1). However, we take note that when PW1 was cross-examined by the counsel for the appellant at page 56 of the record of appeal regarding exhibit DI, had this to say:

> ***"Xxd Mr. Mutobesya, Advocate***
> *The police officer came to my office with a statement and advised me that it was from my previous report and asked me to sign it. This statement was signed by me, I did not make it. Of course my name appears on the statement, I am referred to a portion of that statement. It shows that after receiving it I gave it laboratory number 357/2018. I cannot tender the exhibit as evidence*

because it was written by a police officer not myself.

State Attorney

The witness refuses to admit the statement.

Court to the witness: *It is true that I signed the statement and it is mine. I have no objection to having the statement admitted only to the extent that I signed it.*

Order

The statement of the witness is admitted as "Exhibit D1"

Sgd: S. B. M. G. Matupa
Judge
20/3/2019."

From the above excerpt, we take further note that exhibit D1 was tendered during cross examination and for that matter it was not part of prosecution case. The counsel for the appellant prayed for the same to be admitted as defence exhibit so as to shake credibility of prosecution evidence adduced by PW1. As we have stated above, the contents of exhibit D1 despite being denounced by PW1 save for his appended signature were not different from his oral account and report (exhibit P2). We therefore find that PW1 was a credible witness and even if we have to expunge exhibit D1 as advised by the learned State Attorney, the credibility of PW1 will, as we hereby find, remain intact. Through the evidence of PW1 the prosecution proved that the 79 pellets found in

possession of the appellant trafficking in, were narcotic drugs. Our thorough perusal of the record of appeal reveals that in cross examination, most questions asked by the counsel for the appellant were on what PW1 was instructed to do and how the tests were conducted and the use of papaverine as one of the contents discovered in the pellets sent to the Government Chemist for testing. In the circumstances, we have no justifiable reason to fault the trial Judge for giving weight to PW1's evidence. The issue we have raised is answered in the affirmative that PW1 was a reliable witness and thus the fourth ground of appeal is without merit, we dismiss it.

In the fifth ground of appeal, the appellant is complaining that the learned trial judge erred to convict him based on oral evidence of unreliable PW1 who did not properly identify exhibit P3 (a) before tendering it in evidence. The appellant's argument hinges on the fact, that PW1 failed to mention that the pellets were wrapped in black socks and that they were numbered. He thus prayed that the evidence of PW1 be disregarded. In opposition, Mr. Mabrouk argued that, this ground is baseless because at pages 42 and 53 of the record of appeal PW1 identified the pellets. He went on arguing that the omission to mention black socks which was among the identifying features does not justify the conclusion that PW1 failed to identify exhibit P3 as alleged by the

appellant. He concluded by submitting that, PW1 identified the pellets which were discovered to contain narcotic drugs and thus prayed for this ground to be dismissed.

On admissibility of exhibits in courts of law, the law is well established that a witness seeking to tender any evidence must first lay a foundation by identifying it. In the current case, PW1 is faulted by the appellant for failure to testify that the pellets were wrapped in the black socks. We should pause and ask whether failure to mention black socks amounted to non-identification in the circumstances of the present case. Certainly not! We agree with Mr. Mabrouk that the black socks was not the only identifying feature. At page 42 of the record of appeal PW1 was recorded stating as follows:

> *"If I am shown the envelope which contained the pellets I will recognize, it contains a reference number of the police JNIA/IR/13/2018 it has my signature and seal and stamp of the Government Chemist Office. The small envelopes were sealed and signed by myself they are Khaki envelopes. The powder in the pellets was wrapped with a nylon paper. The powder is white. Here before me is the envelope I am referring to. It is numbered 357/2018. The investigation*

number JNIA/13/2018. The envelope also contains the seal put on it and the stamp I fixed on the seal. I can open it."

Having identified the envelope, at page 53 he went on to state:

"The envelope contains exhibit 1, exhibit 2, exhibit 3, exhibit 4, exhibit 5 and exhibit 6. Exhibit 1 has 56 pellets, exhibit 2 has 3 pellets, exhibit 3 had 9 pellets, exhibit 4 has 6 pellets, exhibit 5 has 4 pellets and exhibit 6 has one pellet. The envelopes are Khaki. They are all sealed and signed by myself. The individual envelopes contain pellets wrapped in nylon paper. I made an incision on each pellet to obtain samples. The contents are white powder. Before me is the parcel which, with the permission of the court, I pray to open it."

The above excerpts bear evidence that PW1 identified exhibit P3 before tendering it. We are satisfied therefore that the identification he made was sufficient even without mentioning the socks which were used to wrap the pellets in. This is due to the fact that basically, according to PW1 the pellets were wrapped in a nylon material and were kept in the envelope. We agree with Mr. Mabrouk that the socks were not the only identifying feature. In any case, we do not find any kind of prejudice on

the part of the appellant by such failure. We understand that the appellant is doubting the credibility of PW1 on that omission due to the fact that the evidence on record also reveals that 56 pellets were also wrapped in the socks as testified by PW3 at page 69 of the record of appeal. Nevertheless, having considered the identification made by PW1 as it appears above, we are firm that the inconsistence was minor and did not shake the credibility of PW1 because he was able to prove that the pellets which were wrapped in a nylon material were narcotic drugs. The record is very clear that even the 56 pellets were wrapped in a nylon then kept in or wrapped in the socks. This ground of appeal has no merit; thus, it fails.

In the sixth ground of appeal, the main complaint is that exhibits P4, P6, P7 and P8 were not read out after being admitted in evidence. Therefore, according to the appellant, the learned trial judge misdirected himself in law and fact to ground conviction based on those exhibits. Responding on this ground, Ms. Wilson argued that it is not true that all those exhibits were not read out after being admitted as alleged by the appellant except exhibit P6 (air ticket). She thus prayed for only exhibit P6 to be expunged from the record. However, she argued that even if exhibit P6 is expunged from the record the Court should consider the oral account of PW2 who tendered it and find that the appellant was traveling

and the air ticket was seized from him as was in the case of **Zakaria Jackson Magayo v. Republic,** Criminal Appeal No. 13 of 2018 (unreported) where the Court relied on oral account after expunging the post-mortem report (exhibit P1) to conclude that the deceased died an unnatural death. Finally, Ms. Wilson urged us to find that this ground of appeal holds no water and implored us to dismiss it.

We have thoroughly gone through the record and we need not labour much on whether those exhibits (P4, P6, P7 and P8) were read out after being admitted in evidence and what are the consequences. We agree with the learned State Attorney that all exhibits were read out except exhibit P6. This exhibit was tendered by PW2 and admitted after the objection from the counsel for the appellant being overruled at page 64 of the record of appeal but it was not read out thereafter. We find merit in this ground of appeal to the extent that exhibit P6 was not read after being admitted in evidence. As a result, we expunge it from the record. However, despite expunging that exhibit from the record, we still think that the oral account of PW2 satisfactorily proved that appellant was prepared to travel with Ethiopian Airlines from JNIA. This fact was also corroborated by the evidence of PW8 at page 100 of the record of appeal. Therefore, except for exhibit P6 which we have expunged, we do not find merit in the sixth ground of appeal and hence we dismiss it.

The appellant's contention in the seventh ground of appeal is that the trial judge erred in law and fact to convict him relying on unreliable oral evidence of PW2 who arrested him illegally contrary to the DCEA without assessing the circumstances; that he was arrested after passing the scanning point heading to checking-in point. As a result, his arrest creates doubt as to whether he really possessed the alleged pellets, he argued. It was his argument that if at all he was arrested at the departure area as alleged by PW2, why then he was not detected at the screening machine at the main entrance into the main Airport building? According to the appellant, PW2's story leading to his arrest is too good to be true. More so because, the prosecution did not call the officers who might have attended him at the screening machine to ascertain how he might have passed through the screening machine with the alleged narcotic drugs undetected.

Mr. Mabrouk opposed the appellant's arguments. He submitted that the appellant was legally arrested by PW2. According to him, PW2 exercised his powers of arrest properly in terms of section 32 (3) of the DCEA; the powers which are also provided for under section 10 (1) of the CPA. For this reason, the learned counsel implored us to find this ground of appeal baseless and consequently dismiss it.

We now move to determine whether the appellant was illegally arrested on the material day and whether PW2 was a credible witness. Section 32 (3) of the DCEA provides that:

> *"The provision of any law in force in the United Republic in relation to the general powers and duties of investigation, arrest, search and seizure by* ***officers of the police,*** *customs officer and any other person having powers of arrest, shall apply to this Act."* [Emphasis added].

In the light of the above provision, PW2 being a police officer working with the Criminal Investigation Department Drug Control as it can be seen at page 58 of the record of appeal, had the power of search and seizure. The circumstances under which a police officer may arrest, search and seize any property, vary from one case to another and, therefore, there are no limitations on arrest when a police officer has reasons to suspect the commission of the offence as provided for under section 10 (1) of the CPA cited by Mr. Mabrouk. It reads:

> *"10 – (1) where from the information received or in any other way a police officer* ***has reason to suspect*** *the commission of an offence or to apprehend a breach of the peace he shall, where necessary, proceed in*

person to the place to investigate the fact and circumstances of the case and to ***take such measures as may be necessary for discovery and arrest of the offender*** *where the offence is one for which he may arrest without warrant."* [Emphasis added].

It is apparent on the record of appeal that the appellant was arrested and searched by PW2 having been seen nervous and being suspected. Part of PW2's evidence at page 59 of the record of appeal speaks louder as follows:

"On the 28th January, 2018 I was on duty at JNIA. While there I saw one passenger. I was in company of two police officers. It was 2.15 pm. That was a departure area. I approached the passenger and introduced myself to him. The passenger was carrying a bag. ***I questioned him, he appeared nervous.*** *I asked him to follow me to the police station... we asked him his name, he was speaking English.... we started inspection on the body (person) of the accused person. He did not have anything of interest. We also inspected his luggage, which was a bag. There were only his clothes, in one of his trousers, jeans, we saw a packet which was a ball wrapped in black*

> *socks. We asked him what was it.* ***He only bowed down.*** *We opened the stuff, we retrieved pellets, they were a size of a finger. They were fifty-six in number. The package was black in colour."* [Emphasis added].

Having testified in chief, PW2 was cross-examined by the counsel for the appellant from page 65 through 66 of the record of appeal. It is our observation that he was not questioned on why he suspected the appellant or why the officers who attended him at the screening did not see the alleged narcotic drugs or why they were not called to testify. We thus find that PW2's credibility was not shaken in this regard.

Besides, in terms of section 48 (2) of the DCEA an arresting officer is not prevented from suspecting and arresting any person simply because he has crossed the screening point. After all, being not found in possession of illegal substances during screening process is not a bar from further screening and search if a reason to do so arises. With this remark, we find the seventh ground of appeal devoid of merits and thus we hereby dismiss the same.

In the eighth ground of appeal the appellant is claiming that the trial judge erred in law and fact in believing that the prosecution witnesses identified the pellets which they witnessed the appellant

emitting from his abdomen, while they failed to specifically identify what they saw at the scene of the crime as they were neither labelled at the scene nor at the CGC office.

In response, Mr. Mabrouk opposed the appellant's claim as he submitted that the prosecution witnesses identified the 23 pellets defecated by the appellant. In particular, PW5 identified 3 pellets by number, colour of the envelope and that they were in nylon papers at page 84 of the record of appeal. He submitted further that PW6 (Daud Msuya) witnessed when the appellant was defecating and he identified, 3, 6, 9 and 4 pellets from page 112 to 113 of the record of appeal by numbers and envelopes in which they were kept. Generally, it was his submission that, all the pellets were properly identified by prosecution witnesses and thus argued that this ground has no merit.

We have carefully considered the rival arguments by the parties in this ground of appeal. The issue calling for our determination is whether during trial the prosecution witnesses were able to identify the 23 pellets allegedly defecated by the appellant. We wish to state at the outset that, much as we may agree with the appellant that the said pellets were not labelled one after the other at the scene of crime, labelling was not the sole identification factor in the circumstances of this case. There is plenty

of evidence on record to prove that the 23 pellets were defecated by the appellant and were identified by the prosecution witnesses, as correctly in our view, argued by Mr. Mabrouk. To appreciate our observation, we find it apposite to state that at each step of retrieving, the pellets were packed in the respective envelopes according to the order of defecation; meaning, time and number of pellets were recorded. The observation forms and seizure certificates were filled accordingly in the presence of independent witnesses who appended their signatures as well as the appellant.

At page 80 of the record of appeal, PW5 testified that on 29th January, 2018 the appellant defecated 3 pellets under his observation and in the presence of two other independent witnesses. He filled in an observation form wherein he wrote the name of the appellant, date, time of defecation and names of witnesses who witnessed the defecation. Thereafter, they all signed and the appellant also signed the form. Apart from the observation form, the seizure certificate of those 3 pellets was also signed and thumb printed by the appellant against his signature. The observation form was admitted as exhibit P9 and the certificate of seizure as exhibit P10.

It is on record that when PW5's shift was over, another officer came to take over the office and this was none but Inspector Duncan (PW11). PW5 handed over to PW11 the office, appellant and a khaki envelope containing 3 pellets which were of the size of a thumb, wrapped with a nylon transparent paper defecated by the appellant. Also, PW5 handed over to him a certificate of seizure in respect of the three (3) pellets seized from the appellant, the observation form and the handing over certificate (Exhibit P11).

Under PW11's observation, the appellant defecated nine (9) pellets, as usual, in the presence of witnesses. PW11 kept the said pellets in a khaki envelope, filled certificate of seizure and observation form, he signed it and the appellant also signed and affixed his thumb print. When his time was out, PW11 handed the appellant pellets (3+9), seizure certificates and handing over forms to Inspector Robert Paul Manjenga (PW10). In his evidence PW10 observed the appellant defecating three times. At first, he defecated 4 pellets followed by 6 pellets and later 1 pellet which were kept in different khaki envelopes. The same procedure of filling seizure certificates and observation forms was followed and the appellant signed them together with other witnesses. Finally, PW10 handed over all the pellets (23 in total) to the exhibit keeper (PW3) as it can be seen at page 116 of the record of appeal. At page 67 of the record

the exhibit keeper confirmed that he received the said pellets from PW10 together with observation forms, seizure certificates and handing over certificates which they both signed.

During trial PW5, PW11 and PW10 were able to identify the 23 pellets by appearance, khaki envelopes in which they were kept, handing over certificates, observation forms and seizure certificates. On his part, PW3 at page 70 of the record of appeal identified a handing over certificate of 23 pellets he received from PW10 by his signature and the signature of PW10. The said certificate was tendered during trial and there was no objection from the appellant. It was admitted as exhibit P8.

We have also thoroughly gone through the evidence of PW5, PW10, PW11 and PW6 who witnessed defecation and we wish to note that, those witnesses were not cross-examined on the fact that the appellant defecated the pellets. Generally, cross-examination centred on the place where the pellets were kept after being defecated, colour, size and number of pellets. In other word it remained to be an established fact that the appellant defecated the 23 pellets which later were identified by the involved prosecution witnesses during trial. With this remark, we find the eighth ground of appeal unmerited and it is dismissed.

In the ninth ground of appeal, the appellant's complaint is that, Issa Omari (PW4) who allegedly witnessed packing of pellets into individual envelopes failed to give details of quantities, size and colour of pellets in each envelope during trial, thus, he argued that the trial court erred in law and fact to convict the appellant believing his testimony.

In reply, Mr. Mabrouk submitted that, PW4 explained clearly that he saw the pellets and that he was able to identify them. He referred us to pages 75 and 76 of the record of appeal where PW4 testified to that effect. He added that other prosecution witnesses like PW2, PW7 and PW8 identified those pellets as well. According to him, the variation of colour stated by those witnesses did not go to the root of the matter. He cited the case of **Chukwudi Denis Okechukwu & 3 Others v. Republic,** Criminal Appeal No. 507 of 2015 (unreported) in supporting his argument.

The issue for our determination in this ground is whether PW4 identified the pellets allegedly seized from the appellant. We have gone through the record of appeal particularly at pages 75 to 78 where PW4's evidence is found and we are unable to agree with the appellant's claim. At page 75, PW4 testified to the effect that he was given five envelopes which contained narcotic drugs to sign. He confirmed that the said envelopes contained twenty-three (23) pellets and that they were the size

of his thumb and white in colour. He was able to identify the envelopes during trial. The following is an extract from his evidence found at pages 75 and 76 of the record of appeal:

> *"I was given five envelopes. They were twenty-three pellets. I do not remember how many pellets each envelope contained.... I confirmed that they were indeed twenty three pallets. Yes I signed the envelopes. .... I saw the pellets at the office of afande Josias. They were of the size of my thumb (he has a thin thumb) they were wrapped in white paper. It was Khaki in colour ... They were (the pellets) white in colour. If I see the six envelopes, I will recognize them. I wrote my name on the envelopes. Apart from my name, I also signed the envelopes.*
>
> *Here before me is the envelope into which the small envelops were placed. Here is my name and signature."*

The above excerpt clears the doubt that, PW4 mentioned the quantity of pellets he witnessed to be twenty-three, the size was of his thumb and that they were white in colour. We thus find the assertion by the appellant, that PW4 failed to give details of the pellets to be devoid of merit. We note that apart from a mere claim that PW4 failed to give

details of the seizes of the pellets, the appellant has not advanced any cogent reason for disbelieving the evidence of PW4. In the circumstance we find that PW4 remained to be a credible witness - see **Goodluck Kyando case** (supra). Consequently, the ninth ground of appeal fails. We dismiss the ninth ground of appeal as well.

The appellant's claim in the tenth ground of appeal is that PW5 was not a reliable witness because he failed to identify the disputed pellets; specifically, those in exhibit P3 (a) (56 pellets) as they were neither labeled nor numbered after being seized. Mr. Mabrouk opposed the appellant's claim. He submitted that PW5 was the one who handled the 56 pellets which were retrieved from the appellant by PW2. He referred us to pages 79 and 86 of the record of appeal where it is clearly shown that PW5 received the pellets which he identified in the presence of PW2 and PW3. Thus, he argued, this ground of appeal has no merits.

The appellant's challenge against exhibit P3 (a), the 56 pellets seized at the Airport, is that they were not labeled and thus it became difficult for PW5 to identify them. To put the record clear, we wish to observe that exhibit P3 (a) which are the 56 pellets, were seized from the appellant by PW2 who immediately thereafter filled a certificate of seizure which he signed together with independent witnesses and the appellant. In his evidence, PW2 stated that, the seized pellets were kept in the khaki

envelope which he marked and wrote the names of witnesses on it including PW5 and the appellant as it can be seen at page 60 of the record of appeal. Further, at page 79 of the record of appeal, PW5 stated that the items (including 56 pellets) which he took from PW2, were handed over to PW3 in the presence of PW2 and that there was a handing over certificate between them. At page 84 of the record, PW5 stated that he handed over the exhibit (56 pellets) to the exhibit keeper and that he was able to recognize it by his name, signature, rank and date; and the name and rank of PW3. In our considered view, although each pellet was not labeled separately, the labeling of the envelope containing them was sufficient and PW5 was able to recognize that exhibit during trial. We thus find the appellant's claim in this ground without basis and we dismiss it.

Regarding the eleventh ground of appeal, it was the appellant's complaint that the objections against admission of exhibits P7 and P9 were overruled and the ruling regarding their authenticity was reserved; therefore, according to him, it was wrong for the High Court to rely on them to ground his conviction. In his reply to this ground of appeal, Mr. Mabrouk submitted that exhibit P7 was a handing over certificate for the 56 pellets which were seized from the appellant. When the same was tendered before the court, it was objected to by the counsel for the

appellant. However, the objection was overruled and the said certificate was admitted as an exhibit at page 70 of the record of appeal. He added that the Judge relied on authenticity of that exhibit having considered that the witness who tendered it (PW3) was the maker of that document.

As regards exhibit P9, the observation form in respect of 3 pellets prepared by PW5 who witnessed the appellant while defecating the same, Mr. Mabrouk admitted that when that form was about to be tendered it was objected by the counsel for the appellant. However, the trial Judge overruled the objection but he reserved the reasons which he gave in the Judgment at page 299 of the record of appeal. The Judge explained that the said document was authentic as it was signed by the appellant and it demonstrated the movement of drugs seized from the appellant. Therefore, Mr. Mabrouk urged us to find that this ground of appeal has no merit.

We are invited by the appellant to examine whether the trial Judge was right to hold that exhibits P7 and P9 were authentic. As introduced above, those documents were handing over certificate and observation form respectively. The aim of filling in those documents is to ensure the chronological movement of exhibits and to minimize the risk of being tampered with. In the current case, exhibit P7 was prepared to certify that PW3 who was the exhibit keeper received 56 pellets from PW5. Both

witnesses signed it and the same was tendered during trial by the custodian of exhibits to prove that he received them. Likewise exhibit P9, the observation form was tendered by an eye witness who saw the appellant defecating three pellets. The said form was signed by all the eye witnesses together with the appellant himself who apart from signing, he thumb printed it against his signature.

It is our considered view that, since the documents under consideration were signed or endorsed by the witnesses, that alone sufficed to show that they were authentic; particularly, as nowhere in the record of appeal the signatures appearing on those documents were challenged. In the circumstances, we do not find any reason why we should fault the trial Judge for holding that those documents were authentic and relying on them in his decision to ground a conviction. We agree with Mr. Mabrouk that this ground has no merit; as a result, we dismiss it.

The appellant's complaint in the twelfth ground of appeal is that exhibits P9 and P12 (observation forms) were drafted in Swahili language, a language which he does not understand and thus he signed them without knowing their contents. The counsel for the respondent conceded to this ground of appeal to the extent that indeed, the said forms were written in Swahili language. However, he submitted, they were translated

in English and the appellant accepted the translation, understood the contents and eventually signed them. He thus concluded that, this ground of appeal is without merit.

We need not take much time discussing whether the forms were written in Swahili or not because this is a fact. What is important is whether the appellant understood their contents before signing them. Being a Nigerian, there is a possibility that, the appellant was not conversant with Swahili language. However, in the present case, it is glaring on record that although the forms were written in Swahili, the appellant was made aware of their contents before signing them as we observe at page 87 of the record of appeal where upon cross examination, PW5 responded as follows:

> *"The observation form is written in Kiswahili. The form shows that the accused signed and certified it in Kiswahili.* ***I translated it to him and explained the contents of the form in English.*** *He understood the contents that is why he agreed to sign it. The flow of the record in the form does not show that I translated it to the accused, but the truth is that he did not object my translation."* [Emphasis added].

The excerpt above clears the doubt that the appellant signed the forms after having been made aware of the contents. In our considered

opinion, since the credibility of PW5's evidence in this regard was not challenged during trial, we have no justifiable reason to fault the trial Judge for relying on those exhibits in his decision. Generally, we find this ground of appeal unmerited. We thus dismiss it.

In the thirteenth ground of appeal, the appellant is challenging the competence of PW6 in tendering exhibits P12, P13 and P14, the observation forms. His argument was based on the claim that PW6 did not lay a foundation on how he came across those exhibits and that he never signed them at the scene of crime but later thereafter. In his response Mr. Mabrouk argued that it is not true that PW6 did not lay foundation before tendering those exhibits. He went on arguing that exhibit P12 is the observation form No. DCEA 004 dated 29th January, 2018 which was filled in respect of 6 pellets, Exhibit P13 is also an observation form No. DCEA 004 of the same date in respect of 4 pellets and Exhibit P14 is the observation form No. DCEA 004 of the same date. These forms were signed by PW6 as a witness who saw the appellant defecating those pellets and he laid foundation according to identification mark before tendering them. Therefore, he argued, PW6 was a competent witness to tender them. He referred us to the decision of the Court in **The DPP v. Mirzai Pirbakhshi @ Hadji and 30 Others,** Criminal Appeal No. 493 of 2016 (unreported) to bolster his argument.

Finally, Mr. Mabrouk urged us to find that this ground has no merit and dismiss it.

The questions as to whether PW6 was a competent witness to tender those exhibits and whether he laid foundation before tendering them, need not detain us much. The law is settled that, the test of tendering exhibit is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly – see **The DPP v. Mirzai Pirbakhshi @ Hadji** (Supra).

It is also a settled position that, a witness is said to have laid a proper foundation of his competence to tender an exhibit upon establishing his familiarity and ability of identifying the item in question – see **Deus Josias Kilala @ Deo v. Republic,** Criminal Appeal No. 191 of 2018 (unreported).

The record of appeal at pages 91 to 93 is very clear on how PW6 participated as a witness when the appellant was defecating the pellets and signed observation forms (exhibits P12, P13 and P14). It is also on record that before tendering those exhibits, PW6 laid a foundation on how he knew those exhibits by showing his signature, form number, date and time the appellant defecated the pellets. He went further mentioning other witnesses who were present while the appellant was defecating and also appended their signatures together with the appellant. Therefore, in

that regard, he qualified as a competent witness as per cite cited above. In the circumstances, having thoroughly perused the record of appeal, we find no merit in this ground of appeal. Consequently, it is dismissed.

Next is the complaint in the fourteenth ground of appeal that, there was a contradiction in the evidence of PW1, PW2, PW4, PW7, PW9 and PW11 in respect of the colour of the pellets, to be either white, milky, cream or greenish. According to the appellant, following the contradictions, the prosecution evidence did not support the conviction.

Mr. Mabrouk replied on this ground of appeal by submitting that, the same has no merit because not every discrepancy in the prosecution case will cause the case to flop as it was decided in the case of **Chukwudi Denis Okechukwu** (Supra).

We have respectfully considered the appellant's claim in this ground of appeal. Admittedly, those prosecution witnesses mentioned by the appellant gave varying account in respect of the colour of the pellets seized from the appellant. For instance, PW2 at page 64 and PW4 at page 76 said the pellets were white in colour, whereas, PW7 at page 96 and PW9 at page 113 said they were milky in colour. However, the law is well settled that it is not every contradiction or discrepancy in evidence is material or goes to the root of the matter. In **Said Ally v. Republic,**

Criminal Appeal No. 249 of 2008 (unreported) cited in the case of **Chukwudi Denis Okechukwu's** case (Supra), it was held that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

In the light of the above position of the law, we wish to observe that the evidence of the identifying prosecution witnesses on that aspect aimed at establishing that, they saw the pellets retrieved from the appellant. The ability to see and identify what one has seen differs from one person to another due to various reasons including scientific ones. No wonder people who went to visit the scene of crime together gave different account of what they saw.

In the same vein, looking at the contradiction stated by the appellant in comparison with the coherence of prosecution evidence in regard to what was retrieved from the appellant which eventually was proved to be narcotic drug, we find that the issue of colour alone was a minor contradiction which did not go to the root of the matter. The pellets being white, cream or milky in colour is insignificant over the whole evidence on record. They are pellets, anyway. Moreover, the colours cream, milky and white are closely related, it is different if one witness

mentioned that the pellets were red or black. Therefore, this ground of appeal fails.

We now proceed to consider the fifteenth ground of appeal where the appellant's complaint is that, the trial judge erred in law and fact to convict him based on unreliable oral evidence of PW2 and exhibit P4 (certificate of seizure of 56 pellets) thus failing to notice that the seizure was unprocedurally conducted contrary to Regulations 15 and 16 of the Drugs Control and Enforcement (General) Regulations, 2016 - GN. 173 of 2016.

In reply, Ms. Wilson submitted that when PW2 was testifying he gave a credible account on how he arrested and conducted search on the appellant's bag; wherein, 56 pellets were retrieved and the certificate of seizure was signed to that effect. She went on to submit that the certificate of seizure was signed by, among others, the appellant. According to her, the appellant's complaint that no photographs of seizure of exhibits P4 cannot stand. She referred us to page 59 of the record of appeal where PW2 testified that the appellant was carrying a bag as he approached him, upon questioning him, he appeared nervous. PW2 asked the appellant to follow him to the police station where he was searched and 56 pellets were retrieved from his bag. Ms. Wilson was firm that, documentation will not always be required to prove movement of exhibits

and thus the evidence of PW2, PW7 and PW8 sufficiently proved how the exhibit was handled. She supported her argument with the decision of the Court in **Abas Kondo Gede** (supra).

In addition, she argued that it was not necessary for the appellant's bag to be tendered as exhibit in the circumstances of this case because the evidence of prosecution witnesses who witnessed recovery of the 56 pellets proved that, the said pellets were recovered from his bag. To support her argument, she cited the cases of **Livinus Uzo Chime Ajana** and **Abas Kondo Gede** (supra) and urged us to dismiss this ground of appeal.

The question to be addressed by the Court in this ground of appeal is whether seizure of exhibit P4 was procedurally conducted. If the answer will be in the negative, we should determine whether the breach is fatal. As observed above, the appellant's complaint is based on Regulations 15 and 16 of GN. 173 of 2016. Those provisions provide for the procedure of storage after seizure of substances allegedly to be narcotic drugs from suspects. They require the seizing officer to prepare an inventory of narcotic drug showing description and quantity; mode of packing and country of origin. Apart from that, they also require the seizing officer, not later than 48 hours, to prepare a report of the seized substance and deliver it to the authority. The authorized officer in charge

is as well required to number and weigh the packages and sizes of containers.

Admittedly, the record of appeal does not contain documentary proof of that procedure, the essence of which is to ensure proper chain of custody of seized substance alleged to be narcotic drugs. Nevertheless, we agree with Ms. Wilson that it is now settled position that chain of custody or movement of exhibits can as well be established or proved by a witness's oral account, see – **Huang Qin & Another v. Republic,** Criminal Appeal No. 173 of 2018 (unreported). In the current case, PW2, PW3, PW5, PW7 and PW8 in our view, sufficiently demonstrated the nature, number and movement of the substances suspected to be narcotic drug (exhibit P4). The evidence of PW2 was corroborated by that of PW7, PW5, PW8 and PW3. It is on record at page 60 that exhibit P4 was filled by PW2, it was signed by independent witnesses, Andrew Manumbu, PW7, PW8 and PW2. The said certificate was tendered during trial by PW2 and the only objection was on its authenticity as the counsel for the appellant claimed that it had no stamp on it and that it was not tendered by an executing officer. The objections were overruled and the certificate of seizure was admitted in evidence as exhibit P4. We are satisfied that there was no tampering of exhibit retrieved from the

appellant and exhibit P4 was properly admitted. In general, we do not find merit in this ground of appeal. Accordingly, we dismiss it.

In the sixteenth ground of appeal, the appellant faults the trial judge for misdirecting himself to hold that the cautioned statement (Exhibit P. 21) was procured as per law, while in fact, it was illegally recorded and unprocedurally admitted in evidence. In particular, the appellant claimed that the trial within trial was unprocedurally conducted as PW5 was not renamed to be *"PW1"* and was not sworn in during that process. Hence, the trial judge reached at erroneous decision.

Ms. Wilson readily conceded to this ground of appeal. She elaborated that the trial court conducted an "Inquiry" before admitting the appellant's cautioned statement and "PW5" who wanted to tender it was not sworn in contrary to the law which requires every witness to be sworn. According to her, non-swearing of PW5" rendered the cautioned statement unprocedurally admitted. Following that irregularity, she urged us to expunge the appellant's cautioned statement from the record. Besides, she submitted, the remaining evidence on record is sufficient and thus prayed for the Court to take into consideration the oral account of PW5 in the main case. To support her prayer, she cited the case of **Zakaria Jackson Magayo** (supra).

The question as to whether the appellant's cautioned statement was unprocedurally admitted can easily be answered. It is on record that, when PW5 was about to tender it in evidence, the appellant objected to the tendering of the said statement. Section 48 (4) of the DCEA provides that:

> *"Where any objection is made against the admission of evidence on the ground that the evidence was obtained in contravention with the provisions of the Act or any other written law the court is enjoined to admit the evidence* ***unless having regard to all circumstances in which the evidence was obtained****, it is satisfied that the admission of the evidence would have adverse effect on the fairness of the proceedings."* [Emphasis added].

In determining the circumstances in which the cautioned statement of the appellant was obtained, the trial judge conducted an "inquiry". We note that the above quoted provision does not provide for the procedure to be followed, whether to conduct an inquiry or trial within trial. However, common practice is that under the circumstances the trial court was required to conduct trial within trial where all the procedures in conducting trial are to be observed including the court to take sworn evidence of witnesses, see – **Nyerere Nyague v. Republic,** Criminal

Appeal No. 67 of 2010 and **Twaha Ally & 5 Others v. Republic,** Criminal Appeal No. 78 of 2004 (both unreported).

We agree with the appellant that, it was not proper for the trial court to name "PW5" in the same way as he was named in the main trial and to take his evidence without oath. Since he was the first to testify in the so called "INQUIRY", he was supposed to be named *"PW1".* Notwithstanding this irregularity, we do not think that misnaming alone could have greatly affected the appellant together with the heading "INQUIRY" instead of "trial within trial". We say so because having perused the record thoroughly, we discovered that what the learned trial judge did was exactly what was supposed to be done in a trial within trial. The only problem which was also conceded by Mr. Wilson is that "PW5" was not sworn before recording his evidence. As a result, there was contravention of section 198 of the CPA which is couched in mandatory language that evidence must be given on oath, see – **Peter Pinus & Another v. Republic,** Criminal Appeal No. 10 of 2016 (unreported). At page 133 of the record of appeal, PW5 was recalled to testify and at page 135 he prayed to tender the appellant's cautioned statement but it was objected by the counsel for the appellant. Therefore, the trial court conducted what it referred to as inquiry. We shall let the record speak for itself:

"INQUIRY

AD PW5 continues on voluntariness of the statement

When I interrogated the accused person the place was quite ....."

It is clear from the excerpt above that, PW5 was not sworn contrary to the requirements of section 4 of the Oaths and Statutory Declaration Act, Cap 34 R.E. 2019, which requires witnesses either to be sworn or affirmed before giving their evidence be it in court or before tribunals. Failure to do so renders unsworn evidence without evidential value – see **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017 (unreported). We agree with both parties that the evidence of PW5 recorded under "INQUIRY" is without evidential value and the same is expunged from the record. However, as prayed by Ms. Wilson, the oral account of PW5 in the main case remains intact. Having so stated, we find this ground of appeal meritorious and we allow it.

In the seventeenth ground of appeal, the appellant claimed that PW3 was not a credible witness because he failed to state how he handled exhibit P3 collectively in all the stages until when the exhibit was tendered in court.

In reply to this ground of appeal, Ms. Wilson submitted that PW3 was a custodian of exhibits and he gave credible and reliable evidence at

page 67 of the record of appeal on how he received the envelope from PW5 and there was handling certificate which was tendered as exhibit P7, and received from PW10 exhibit P8. Apart from that, he also testified on how he packed the pellets sent to the Government Chemist at page 68 of the record, how he took them back from the Government Chemist, how they were identified, how he witnessed preliminary test, how they were packed and returned to him at page 69 of the record of appeal. In addition, she submitted that PW3 kept the exhibits in safe custody from when they were seized up to when they were tendered in court. She also added that, all the witnesses were able to identify them in court so there was no tampering. Therefore, she urged us to dismiss this ground for lack of merit.

The question as to whether PW3 was a credible witness need not hold us much. It is settled position that credibility of a witness can be determined when assessing the coherence of the testimony of that witness and/or when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person, see- **Vuyo Jack v. The Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (unreported). The record of appeal in the present case is clear from page 67 to page 74 where PW3 stated how he received all the exhibits and handled them up to the time they were sent to the

Government Chemist and returned back to him and finally tendered in court as exhibits. At page 69 of the record of appeal, PW3 stated categorically that he had control of the exhibit room because he was designated by his commander to be the exhibit keeper. He tendered handing over certificate showing the movement of exhibit as correctly submitted by Ms. Wilson. At page 73 of the record during cross examination, PW3 was challenged by the counsel for the appellant that he did not state that he recorded the exhibit in exhibit register but he was firm that although he did not state so, that was the procedure and the said register was in existence had it been required in court, he would have produced it. Based on the coherence and plausibility of PW3's evidence, we do not find any cogent reason for not believing him, see - **Goodluck Kyando's** case (supra). The appellant's complaint in this ground of appeal is unfounded, we dismiss it.

In the eighteenth ground of appeal the appellant complained that that the trial judge misdirected himself to hold that Heroin Hydrochloride is one of the poisonous substances listed in the First Schedule to the DCEA No. 15 of 2015 while in fact, it is not. Arguing in response, Ms. Wilson argued that what is listed in DCEA is Heroin Morphine which is similar to Heroin Hydrochloride as stated in **Abasi Kondo Gede** (supra). Therefore, she argued further that since the appellant was charged with

being found with Heroin Hydrochloride which is similar to Heroin Morphine, this ground has no merit and thus urged us to dismiss it.

We have visited the law and the decision of the Court in **Abas Kondo's** case to find whether heroin hydrochloride is one of the substances listed in the First Schedule to the DCEA as drugs. We agree with Ms. Wilson that the DCEA does not specifically state about Heroin hydrochloride but Heroin Morphine which according to the explanation given in **Kileo Bakari Kileo and 4 Others v. Republic,** Consolidated Criminal Appeals No. 82 of 2013 and 330 of 2015 cited in **Abas Kondo Gede** (supra) (both unreported), Heroin Hydrochloride is a synonym of Heroin Diacetyl Morphine.

In the present case, PW1 testified at page 40 of the record that the result of confirmatory test which he conducted showed that all the 79 pellets contained among other components, Heroin Hydrochloride (see also exhibit P2) which is the synonym of Heroin Diacetyl Morphine as per the above decisions. In the circumstances, the trial judge was justified to hold that Heroin Hydrochloride is one of the poison substances in terms of the First Schedule of the DCEA and thus this ground of appeal cannot stand, we accordingly dismiss it.

The appellant's complaint in the last ground of appeal is general, that the charge was not proved beyond reasonable doubt against him. In

his elaboration the appellant complained that there was variance regarding the weight of Heroin Hydrochloride shown in the information and evidence on record especially exhibit P2. Also, he claimed that material exhibits like socks and pair of trousers where the alleged pellets were packed were not tendered in evidence for the trial court to satisfy itself that 56 pellets real fit in them.

In response, Ms. Wilson submitted that there was no variance of weight of Heroin Hydrochloride mentioned in the information and exhibit P2 as claimed by the appellant. She referred us to page 231 of the record of appeal where the weight of Heroin Hydrochloride was stated to be 947.57 grams. She continued submitting that when PW1 was conducting analysis, exhibit P6 had six envelopes containing pellets and the analysis was done in respect of each pellet as it can be seen from pages 230 to 231 of the record of appeal. Therefore, when the weight of each pellet is added up, gives a total of 947.57 stated in the information. Besides, she submitted, according to section 2 of Drugs Control Act, the phrase "anything containing" means the whole substance is Heroin Hydrochloride.

To buttress her argument against the appellant's complaint that material evidence was not tendered in court as exhibits, she cited the case of **Linus Uzo Chime Ajana** (supra) and submitted that, the items

which the appellant mentioned were actually not material evidence (socks and trousers) because their presence would not have added value of the substance the appellant was found with. Therefore, she was firm that the prosecution was able to prove the case against the appellant beyond reasonable doubt. Finally, she urged us to dismiss the entire appeal.

Regarding whether it was necessary for the socks and pair of trousers to be tendered as exhibit, we wish to restate what we stated in **Livinus Uzo Cheme Ajana's** case while dealing with an akin situation:

> *"With regard to the argument by Mr. Mtobesya that the socks and shoes in which the pellets had been wrapped were not tendered in evidence, we are in agreement with the learned Senior State Attorney, that their presence would have added nothing to the value of the evidence obtained from the direct oral testimonies of PW5, PW11 and PW12 who eye – witnessed the recovery of the narcotic drugs, the subject of the charge, from the bag of the appellant. We note that among those witnesses, there were some who were police officers, while others were not and therefore, the question that there was collusion did not arise".*

Likewise, in the present case, PW2, PW7 and PW8 were eye witnesses when the 56 pellets were retrieved from the appellant's bag. We are satisfied that their oral account was sufficient to prove that the

said pellets were seized from the appellant even without production of socks and a pair of trousers as it was decided in the above case. The second limb of the appellant's complaint in this ground regarding the weight of the components of pellets retrieved from the appellant has already been determined above and we do not see the need of making unnecessary repetitions.

In the upshot, based on the findings we have endeavoured to make above, we are satisfied that the case against the appellant was proved to the hilt and thus we do not see the need to disturb the findings of the trial court. Consequently, save for part of grounds two, six, twelve and fifteen; and, ground sixteen which we allowed, we dismiss the appeal.

DATED at **DAR ES SALAAM** this 15th day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 23rd day of December, 2021 in the presence of Appellant present in person and Ms. Monica Mbogo, Principal State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL