IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: KWARIKO, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 130 OF 2021

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

MUSSA HATIBU SEMBE ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Corruption and Economic Crimes Division at Tanga)

(Mashaka, J.)

dated the 6th day of July, 2020
in
Economic Case No. 04 of 2019

.....

JUDGMENT OF THE COURT

25th April & 6th May, 2022

KWARIKO, J.A.:

In this appeal, the Director of Public Prosecutions, the appellant, was aggrieved by the decision of the High Court of Tanzania, Corruption and Economic Crimes Division (Mashaka, J) at Tanga (the trial court) in Economic Case No. 4 of 2019 dated 6th July, 2020. In that decision, the respondent Mussa Hatibu Sembe, was acquitted of the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) and (3) (1) (i) of the Drug Control and Enforcement Act No. 5 of 2015 as amended (the DCEA) (now CAP. 95 R.E. 2019), read together with paragraph 23 of the

First Schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [CAP. 200 R.E. 2002] as amended, (now Revised Edition 2019).

The particulars of the offence were that, on the 20th day of November, 2018 at Street No. 12 within the City and Region of Tanga the respondent was found trafficking in narcotic drugs to wit; 351.99 grams of Heroin Hydrochloride.

The respondent did not admit the charge hence a full trial was conducted. At the end of the trial, the trial court found that the prosecution had failed to prove its case beyond reasonable doubt and accordingly acquitted the respondent.

In order to prove its case, the prosecution paraded a total of six witnesses whereas the respondent was a sole witness in his defence.

We find it apposite at this point to recapitulate the material facts of the case which led to this appeal. On 20th November, 2018, while at the police station, SP Oscar Joshua Ngumbulu (PW4) who was the OC CID of Tanga District received an information from an informer that at Old Bus Stand, there was a person carrying narcotic drugs who was about to travel to Dar es Salaam. The informer described the person to be a male, tall

with dark complexion, wearing jeans and carrying a cream-coloured bag. Together with No. F. 7215 Defective Corporal Andelile (PW6), they went to the said place. As they were opposite the office of Tayassar coach booking office, they spotted a person fitting the given description holding a cream bag. PW4 approached and touched him who happened to be the respondent herein. The two officers introduced themselves to the respondent and told him that they suspected that he was carrying narcotic drugs, but he denied the allegations.

Thereafter, PW4 instructed PW6 to look for an independent witness to witness the search of the respondent. However, PW6 did not get anyone who was ready to witness the search. PW4 decided to search the respondent anyway in the presence of PW6.

According to PW4, upon search, he found that inside the bag the respondent was carrying, there were red coloured sneakers make converse all – stars, a packet covered by a khaki paper in the left foot sneaker. Inside the khaki paper, there was also a black bag and another black bag which had two packets in a soft nylon bag with powder materials in it. There were also clothes in the bag. The respondent was taken to Chumbageni Police Station where, upon interrogation, he confessed the allegations in the presence of PW6 and explained that he was bound to

travel to Zambia via Dar es Salaam to sell drugs after he had failed to sell it at Mombasa.

PW4 narrated further that, at the police station, he filled a certificate of seizure (exhibit P8) which was signed by the respondent and PW6. Upon further search by PW4 at the police station, the respondent was found in possession of a bus ticket (exhibit P6) and a passport (exhibit P7).

After those processes, PW4 handed over the drugs (exhibit P4 (a) and (b) and the sneakers (exhibit P5) to No. G. 4488 Detective Corporal Simai (PW3) to keep them in the exhibit room. The handing over was recorded in the occurrence book (PF 51).

Going forward, the following day on 21st November, 2018, No. F. 6698 Detective Corporal Godfrey (PW5) was assigned to investigate the case. He received the suspected drugs from PW3 and took the respondent from lock-up to another room for packaging the exhibit ready to take it for examination by the Chief Government Chemist and also recorded the respondent's cautioned statement.

Upon completion of the packaging, the exhibit was returned to PW3 who, on 27th November, 2018, handed it over to No. H. 6499 Detective Corporal Japhet (PW2) to take it to the Government Chemist for

examination. On the same day, PW2 arrived at the office of the Government Chemist and handed the exhibit to Joseph Ntiba (PW1) who examined the material and at the conclusion of the examination, he found it to be Heroin Hydrocholoride. The Chemist's report was admitted as exhibit P1, while two brown envelopes which contained the drugs were received as exhibits P2 and P3.

In his defence, the respondent having denied the charge, explained that he was born in Tanga and was working as a driver in Dar es Salaam. He averred that, on 20th November, 2018 he had arrived from Mombasa where he had transported a car and left it there. He had thus passed through his home at Tanga and whilst there, he learnt that Simba Mtoto Company was looking for a driver. He was interested in that post hence he took his documents to apply for that vacancy. On his way from photocopying the papers, he saw people running around and shortly thereafter, he was arrested by the police and taken to Chumbageni Police Station for allegations of loitering and the police demanded a bribe of TZS. 100,000.00 to free him, which he did not have, following which he was kept in custody and later was forced to sign a document whose contents he did not know. The following day, PW5 forced him to sign a document and an envelope. The appellant denied that he was travelling on that day

and the sneakers (exhibit P5) and bus ticket (exhibit P6) were not his possessions.

As indicated earlier, the trial court found that the prosecution evidence wanting hence acquitted the respondent. The court found that the certificate of seizure was filled in the absence of an independent witness as required by the law, the chain of custody was not complete in that paper trail was not proved and exhibits were not labelled as required under paragraph 15 of PGO 229.

Aggrieved by the trial court's decision, the appellant has approached this Court upon the following five grounds of appeal:

1. *That, the learned trial Judge erred in fact by acquitting the respondent on the ground that there was no independent witness during search and at the time of scaling and wrapping of exhibit P4 (a) and P4 (b) to be taken to the Government Chemist Office.*
2. *That, the learned trial Judge erred in law and in fact in holding that the chain of custody was not maintained on the ground that PGO was not complied with.*
3. *The learned trial Judge erred in law and in fact by according no weight to the certificate of*

seizure for the reason that it was signed in [the absence of an independent witness.

4. *The learned trial Judge erred in law and in fact by holding that the chain of custody was not maintained on account that the accused person [the respondent] was absent during the first handing over of exhibit P4 (a) and (b) by PW4 to PW3.*
5. *The learned trial Judge erred in law and in fact by disregarding oral confession of the accused [respondent] made to PW4 on the basis that the accused [respondent] was not cautioned by reading to him the rights accorded to a suspect.*

When the appeal was called on for hearing, the appellant was represented by Mr. Waziri Magumbo, learned Senior State Attorney assisted by Ms. Donata Kazungu, learned State Attorney. On the other hand, the respondent did not appear though duly served through publication in the Habari Leo Newspaper of 12th April, 2022. The appeal was thus heard in his absence in terms of rule 80 (6) of the Tanzania Court of Appeal Rules, 2009.

Upon taking the stage to argued the appeal, Mr. Magumbo abandoned the fifth ground of appeal. He combined the first and third grounds together and argued that though PW6 was not independent

witness, his evidence was valid. He added that PW6 and PW4 who were the arresting officers tried to look for independent witness in vain and because the respondent was about to travel, they decided to search him and PW6 witnessed and signed a certificate of seizure. He complimented his contention with section 48 (2) (c) (ii) (vii) and (d) of the Act which he said ought to be read together with section 42 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). In support of the foregoing, Mr. Magumbo cited the Court's Decisions in **Sophia Seif Kingazi v. R,** Criminal Appeal No. 279 of 2016, **Jibril Okash Ahmed v. R,** Criminal Appeal No. 331 of 2017 and **Popart Emmanuel v. R,** Criminal Appeal No. 200 of 2010 (all unreported).

In his response to our probing, Mr. Magumbo submitted that the trial Judge also discredited PW6 to witness the search because he was also one of the arresting officers.

For her part, Ms. Kazungu argued the second and fourth grounds together. She contended that although the paper trail was lacking thus contravening PGO 229 in respect of the chain of custody of exhibit P4 (a) and (b), the oral evidence by the prosecution witnesses was sufficient to prove it.

The learned State Attorney clarified that there is ample evidence on the record to demonstrate unbroken chain of custody of exhibits P4 (a) and (b) from PW4 to PW3 who handed it over to PW5 to have them parked and sealed. There is more so oral account to explain the return of the exhibits by PW5 to PW3 after parking and sealing as well as the handing over of the same from PW3 to PW2 who in turn handed them over to the Government Chemist for examination. Relying on the case of **Marceline Koivogui v. R,** Criminal Appeal No. 469 of 2017 (unreported), the learned counsel urged the Court to take into account the aforesaid oral account to establish the chain of custody.

Ms. Kazungu argued further that there is no law which requires either the presence of independent witness during packaging of exhibits or presence of a suspect when the exhibit is moved from one witness to another.

Based on the foregoing submissions, Ms. Kazungu contended that the prosecution evidence was sufficient to convict the respondent and urged us to allow the appeal.

Further, the Court wanted to satisfy itself on the issue of the identification of the respondent as the suspected narcotic drugs dealer, and invited the appellant to address it. Ms. Kazungu submitted that although

PW4 did not go to the scene in the company of the alleged informer, he acted on the descriptions given to him by the informer and accordingly arrested the respondent.

Having considered the grounds of appeal and the submissions by the appellant's learned counsel, the following two issues call for our determination. **One,** whether the trial court was right in holding that PW6 did not qualify as an independent witness. **Two,** whether the prosecution proved a chain of custody in respect of exhibits P4 (a) and (b).

However, before we decide those issues, we would like to restate from outset a principle of law that a first appeal is in the form of re-hearing where the court is mandated to revisit the evidence from both sides and if possible, to come out with its own finding. This principle has been embraced by the Court in its previous decisions including **Nicholaus Mgonja @ Makaa v. R,** Criminal Appeal No. 85 of 2020; **Trazias Evarista @ Deusdedit Aron v. R,** Criminal Appeal No. 188 of 2020; and **Ester Jofrey Lyimo v. R,** Criminal Appeal No. 123 of 2020 (all unreported).

As regards the issue of independent witness, the trial Judge held that there was no independent witness during the search of the respondent and

seizure of the suspected narcotic drugs. The court found that PW6 who was one of the team members who arrested the respondent was not qualified to witness the search and endorse the certificate of seizure.

To deliberate this matter and for easy of reference, we would like to reproduce the provisions of the law in respect of search and seizure. Section 48 (1) (2) (c) (ii) and (vii) and (d) of the DCEA which is relevant here provide thus:

> *"48 – (1) Subject to the provisions of this Act, the procedures and powers conferred to officers of the Authority under this part shall be followed, unless in all circumstances it is unreasonable or impracticable to do so.*
>
> *(2) For the purpose of subsection (1), an officer of the Authority and other enforcement organs who-*
>
> *(c) searches for an article used or suspected to have been used in commission of an offence shall-*
>
> ***(vii) record and issue receipts or fill in the observation form an article or thing seized in a form set out in the Third Schedule to this Act."***
>
> [Emphasis added]

Going through the cited provisions, presence of a witness during search and seizure features under section 48 (2) (c) (vii) where a witness is required to sign Form No. DCEA 003 used to record the seized article. The Forms to the Third Schedule to the DCEA have been mandated under section 48 (5) thereof to apply in carrying out the provisions of section 48 of the DCEA. Therefore, because there is a requirement for a witness to sign Form No DCEA 003, which is part of the DCEA, it is imperative that in the case of search and seizure of an article from a suspect, witnesses should attend and sign the Form.

The requirement of witnesses in the search and seizure exercise is also provided under section 38 (3) of the CPA which states:

> *"38.- (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

Though the phrase used in the above provisions is "a witness' and not "independent witness", it is a matter of prudence that, such a witness as a general rule should be independent. This does not mean however

that under exceptional circumstances as for instance where independent witness cannot be procured, a policeman cannot qualify as a witness. This seems to us to be the rationale in the case of **Jibril Okash Ahmed** (supra) cited by the learned State Attorney where in effect the Court observed that since the word used is a witness, the requirement for an independent witness is not absolute and indispensable. At page 39 of the judgment in particular, the Court stated as follows:

> *"It is an obvious fact that an independent witness is important because he is able to provide independent evidence. However, for the requirement to be absolute and indispensable, it should be backed by law. In the present case, the learned trial judge discussed sections 48(2) (c) (vii) of the DCEA and 38(3) of the CPA and found that the former does not imperatively provide for need of an independent witness while the latter requires an independent witness to sign the seizure certificate if present. That is the legal position."*

In the said case, the arrest and seizure were made *'in a place where there were no residential houses hence there was no other person.'* The search was conducted in the car and the drugs retrieved from the boot. In the circumstance, the Court accepted the signatures of PW1 and PW2, the

police officers as witnesses since the circumstance was such that an independent witness could not be procured.

In the instant case, the search was conducted during day time at a bus stand. The assertion by the prosecution that an independent witness could not be procured in such a usually busy place is highly improbable. In his evidence appearing at page 144 of the record, PW6 testified that he attempted to find out the chairperson or ten cells leader of the area but in vain. He did not claim to have made a similar attempt to procure for instance, a passenger, driver or bus conductor to witness the same. Instead, he himself signed into the certificate of seizure as a witness. The trial judge rightly in our view, doubted the credibility of his testimony because being one of the police officers who plotted the arrest of the appellant had interest to serve. In his own words PW6 is recorded to have said at page 143 of the record of appeal thus:

> *"On the 12/11/2018 around 1:00 pm I was at the Chumbageni grounds for exercises and parade. I was called by SP Oscar Ngumbulu and he told me to get into the car. He told me we were going to work at a certain place. We left the Chumbageni grounds and went straight to the 12th street, near the office of Tayassar Transport Company. When we reached there, SP Oscar was talking with mobile*

phone. He was directed that there was a person holding a cream bag in his right hand and was directed to arrest the person he was carrying narcotic drugs..."

This evidence shows that PW6 and PW4 were on the same mission which was to arrest a suspected narcotic drugs dealer. Therefore, PW6 could not have been a credible and impartial witness in the search and seizure exercise as he was one of the arresting officers, thus having interest in the matter.

Having said that, we do not find anything to fault the trial Judge who held that PW6 was an interested person hence for the interest of justice he could not be a free witness for the search and seizure. This omission leads to the conclusion that, it is doubtful whether the respondent was found trafficking in the narcotic drugs. The first issue is answered in the affirmative.

The bone of contention in the second issue is the chain of custody in relation to exhibits P4 (a) and (b). It is trite law that, chain of custody is established where there is proper documentation of the chronology of events in the handling of exhibit from seizure, control, transfer until tendering in court at the trial. See for instance **Paulo Maduka and Four Others v. R,** Criminal Appeal No. 110 of 2007; **Makoye Samwel @**

Kashinje and Kashindye Bundala v. R, Criminal Appeal No. 32 of 2014; and **Abas Kondo Gede v. R,** Criminal Appeal No. 472 of 2017 (all unreported).

In the instant case, the trial Judge found that the chain of custody of exhibits P4 (a) and (b), P5, P6 and P7 was not established because there was no documentation to that effect as required under PGO 229 paragraph 15. For her part, Ms. Kazungu conceded that there was no documentation of the exhibits but she hurriedly contended that the chain of custody was established by the oral account of the prosecution witnesses, PW2, PW3, PW4 and PW5.

On our part, we agree that there was no proper documentation in respect of exhibits P4 (a) and (b). We are also of the view that, chain of custody can be established by oral account of witnesses as we have held in our previous decisions, some of which have been cited to us by the learned State Attorney. However, in the instant case, the chain of custody was broken from the very beginning when the respondent was searched and alleged items seized in the absence of an independent witness. It is this initial stage of the process which would have set in motion the chain of custody if it was done to the dictates of the law. Therefore, even if the exhibit was properly handled when it left the hands of PW4, the exercise

lacked credibility because it was doubtful that exhibits P4 (a) and (b) was searched and seized from the appellant. Having held that, we find no pressing need to discuss the complaint relating to an independent witness during scaling and wrapping of the seized article, which the appellant has complained in the first ground of appeal. This is one of the stages which the authorized officers are supposed to comply in order to establish the chain of custody which we have found that it was flouted from the very beginning of the search and seizure.

During the hearing, we also wanted to satisfy ourselves whether the identification of the respondent was proved. When we called upon Mr. Magumbo to address this issue, he was candid enough to state that the alleged informer who was said to have divulged information to PW4 about a suspected drugs dealer did not accompany PW4 and PW6 to arrest that person. The learned counsel submitted that these witnesses only relied upon the description of the suspect provided by the informer to arrest the respondent. We have given this matter due consideration and found that, in the absence of the positive identification of the person who was alleged to be carrying narcotic drugs, the involvement of the respondent was doubtful. This is more so because the alleged suspect was said to be

travelling and was at a public area, a bus stand, thus there was possibility of mistaken identity.

In the event, we are settled in our mind that the prosecution case was not proved beyond reasonable doubt against the respondent and thus we uphold the trial court's decision. The appeal is without merit and we hereby dismiss it in its entirety.

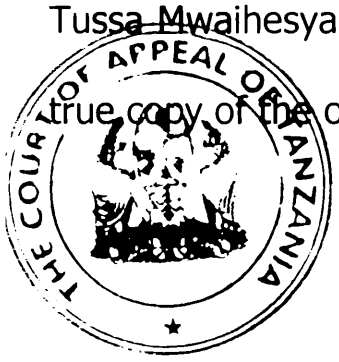
DATED at **TANGA** this 6th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 6th day of May, 2022 in the presence of Ms. Tussa Mwaihesya, State Attorney for the Appellant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL