IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 296 OF 2019

1. **JOSEPH THOBIAS**
2. **MATAMWE KUNJU** ..... **APPELLANTS**
3. **ALLY SELEMAN**

VERSUS

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

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Mkeha, J.)

dated the 10th day of July, 2019
in
Criminal Session Case No. 68 of 2016

JUDGMENT OF THE COURT

4th November, 2022 & 13th March, 2023

KENTE, J.A.:

The undisputed facts giving rise to this appeal are simple and straight forward. During the night of 6th April, 2014, the appellants together with one Rajab Ally who is not a party to this appeal, were travelling from Musoma to Dar es Salaam, via Mwanza. They were on board a motor vehicle with registration number T.586, AMZ make Scania Truck with a trailer bearing registration number T.650 AMZ.

When they arrived at Lamadi area within the District of Busega in Simiyu Region, they were intercepted by the Police Officers who had set

up a road-block. On being asked by the said Police Officers as to what they were carrying, the appellants told them that, the twenty-feet container on the trailer was loaded with sixty bags containing sardine. As the Police Officers became increasingly suspicious of the nature of the cargo on the truck and, in an undiminished will to establish the truth, they opened the container whereupon they found that it was loaded with fourty (40) bags of sardine and nineteen and half bags of marijuana. (The phrase "twenty bags" it should be noted, will be used hereinafter to denote what the prosecution witnesses referred to interchangeably as twenty or nineteen and half bags of marijuana). Upon this discovery, the said bags were seized, the truck impounded and the appellants together with one Rajab Ally who is not a party to this appeal, were formerly taken under restraint. These facts gave rise to the charges of illicit trafficking in narcotic drugs contrary to section 16 (1) (b) (i), 46 (1) and (2) (a) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 of the Laws as amended by the Written Laws (Mis. Amendments) Act (No. 2) Act No. 6 of 2012. To these charges, the appellants pleaded not guilty.

The prosecution evidence which the learned trial judge of the High Court believed as true, was briefly to the following effect. On the night in question, after stopping the approaching truck at the road-block, Police Constable Ally (PW1) and Assistant Inspector Kassim (PW2) who were the

key prosecution witnesses, were attracted by the unusual smell which according to the two witnesses, was not the well-known smell of sardine fish the cargo which the appellants had deceptively told them they were carrying. PW1 and PW2 also stated that, before they ordered the appellants to open the container after getting a sniff of bhang and becoming increasingly suspicious, the appellants allegedly told them that indeed they were carrying marijuana but, apparently in an effort to trivialize the matter, they said, it was in a very small quantity. However, as it turned out and as stated earlier, their (PW1 and PW2) discovery is that the appellants were carrying a big quantity of marijuana which was carefully parked in twenty bags weighing 950 kilograms in total. According to Kenneth James Kaseke (PW5) who was then Commissioner for Drugs Control, the value of the seized drugs was TZS.95,000,000.00.

According to PW1 and PW2, the said bags looked slightly different from the bags containing sardine fish. The above evidence regarding the nature and quantity of what the appellants were carrying was confirmed by the Government Chemist one, Tupeligwe Mwaisaka (PW4) whose findings posted on his report (Exhibit P4) showed that, indeed the item in the seized bags was marijuana.

In their respective defences, the appellants tried to distance and dissociate themselves from the twenty bags of marijuana. Each of them

gave evidence which substantially corroborated the evidence of his co-appellants. The first appellant is on record as having told the trial court that, he was ordinarily resident in Bunda District Mara Region and that, on 6th April, 2014 he received a telephone call from one Mama Bokhe @ Mama Gati who asked him to go to Makutano area in Musoma Municipality from where he would pick some bags of her containing sardine fish and take them to Mwanza. The first appellant went on telling the trial court that, since she used to hire him to accompany her business cargoes being transported to various places, he had nothing to suspect and, for that reason, he could not turn down her request. He accepted to do the assignment at the consideration of TZS.50,000.00 which as per their agreement, would be paid to him upon arrival in Mwanza.

The first appellant recounted further that, following that arrangement, he moved from Bunda to Makutano where he met the said Mama Bokhe. After paying fare for him, she showed him the twenty bags supposedly containing sardine fish which were then heaped by the roadside. Further that, thereafter Mama Bokhe left for Sabasaba area and after a short while, she came back accompanied by one man known as Matumbo. According to the first appellant, it was the said Matumbo who would afterwards stop the approaching truck from which the second and third appellants got off. Then Matumbo ordered some young men who

were around to put the twenty bags into the container being pulled by the trailer which had just stopped. The first appellant went on recounting how, after the twenty bags were loaded into the container, they left for Mwanza leaving behind Mama Bokhe who promised to follow them later by some other means of transportation. Asked if he knew that the twenty bags contained marijuana, the first appellant told the trial court that, he did not and remarked that, had he known, he would not have made an awful fool of himself to take the illegal cargo to Mwanza. He said that, he met his co-appellants for the first time at Makutano area and that, he did not inspect the twenty bags to verify the nature of the items contained therein before he accepted Mama Bokhe's request to take them to Mwanza.

For his part the second appellant had the following evidence to tell the trial court. That, on 6th April, 2014, he was at a place called Kiagata in Musoma: Further that, he owned a motorcycle which he then wanted to transfer to Dar es Salaam and, in the course of looking for the means of transportation, he came across the third appellant who was then driving a truck pulling a container. Having talked to him, the third appellant allegedly accepted to carry his motorcycle to Dar es Salaam. He (the third appellant) also asked him to look for some more goods due for transportation. That, in compliance with the third appellant's request, he

called one person who connected him to another person known as Matumbo. The second appellant recounted how he then called the said Matumbo who told him that there were fourty bags containing sardines at Mwigobelo area which they subsequently went to collect. The second appellant was very particular that, the said bags were each loaded with sardines in his presence and therefore he had no doubt that they could not turn around to contain marijuana. He went on saying that, after obtaining some documents and paying the necessary levy, they left but that was after Matumbo had told them that, there were other twenty bags to be collected at Makutano area. Then, they started moving to Makutano leaving behind the said Matumbo.

The second appellant went on narrating that, to their surprise however, when they arrived at Makutano area they found Matumbo already there and he stopped them. It was the second appellant's defence version that, Matumbo was then in the company of one woman and about five young men. As Matumbo went straight to talk to the driver (the third appellant), the second appellant told the trial court that, he himself got out of the vehicle and stood by the side of the road to relieve himself. Thereafter, he asked Matumbo if the bags then heaped by the roadside were the very cargo which he had mentioned earlier. To that question, Matumbo is said to have nodded his head. The second appellant went on

saying that, he witnessed as the five young men loaded the twenty bags into the container after which, another man who, as it turned out was the first appellant, joined them immediately before they got moving.

The second appellant was firm that, little did he know that the said bags would a few hours later be found to contain marijuana. For that reason, he said, he was incredulous when the police officers at Lamadi intercepted and told them that they were carrying twenty bags of marijuana. However, the second appellant could not tell the trial court as to when he eventually learned the truth. He only made piteous lamentations that he would not have been in what he called *"such disasters of untold proportions"* if it were not for the dodgy character Matumbo. He thus denied in the strongest possible words, to have been involved in the trafficking of the twenty bags of marijuana as alleged by the prosecution.

On his part, like his co-appellants, the third appellant had a more or less similar story to tell the trial court. While flatly denying the offence, he readily conceded that indeed he was the owner and driver of the impounded truck. He recounted how on the fateful day, the second respondent connected him to the first customer who had fourty bags of sardine fish which he had to take to Morogoro for the consideration of TZS.700,000.00. He went on saying that, while they were on the way,

the second appellant also asked him to stop at Makutano area to collect some parcels which Matumbo had said they would be ready for collection. The third appellant tried to distance himself from the 20 bags of marijuana by claiming that, when they arrived at Makutano area, he sent his assistant one Rajab Ally who got out together with the second appellant and went to examine the parcels. He claimed that, when Rajabu came back, he told him that, on a cursory look, the bags appeared as containing sardines. The third appellant went on saying that, essentially it was Matumbo who told Rajabu that the twenty bags were each loaded with sardine which were to be taken to Mwanza and the person assigned to accompany them was the first appellant.

The third appellant further maintained in his evidence that, he never knew that the said bags contained marijuana. Had he known, he said, he would not have carried them, instead, in the gesture of a good citizen, he would have reported the matter to the Police. Asked what he told the two Police Officers at Lamadi when they asked him what he was carrying in his vehicle, he told the trial court that, he told them he was carrying sixty bags of sardine. He also claimed that he was ordered to get out of the truck after the police officers had conducted search in his absence. He denied to have signed the search order and he was emphatic that, he had

carried sardine fish not marijuana. So, he refuted the charges levelled against him.

The learned trial judge, having considered the evidence which was before him, he was finally satisfied that, it showed that the appellants were in the common mission of trafficking in narcotic drugs. He rejected the appellants' similar defence version of blaming Matumbo. He found that, on the whole, the evidence against the appellants was overwhelming. The learned trial judge accepted the evidence of the arresting officers (PW1 and PW2) who told the trial court that, on being intercepted and asked what they were carrying, and, while on the horns of a dilemma, the appellants conceded that indeed they were carrying marijuana but in a small quantity. Dealing with the question of the chain of custody, the trial judge considered the evidence on the record in the light of our decision in the case of **Chacha Jeremiah Mulimi & Three Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported), particularly on the absence of documentation of the movement of an exhibit.

He subsequently rejected the claim by the then appellants' advocates that, there had been a serious break down of the chain of custody in the handling of the suspected bags of marijuana particularly when the Exhibit Keeper PW3 was transferred from Busega to another

duty station allegedly without there being a formal handing over between him and his successor in the office. Regarding the appellants' common defence version that they did not know that the twenty bags which they had collected at Makutano area contained marijuana, the learned trial judge concluded that, they knew what they were carrying and therefore they could not hide behind the veneer of the much-blamed Matumbo or Mama Bhoke. He found that, the prosecution case had been proved against the appellants beyond reasonable doubt. To that end, the learned trial judge found the appellants guilty and convicted everyone accordingly, hence the appeal now before this Court.

Initially, the first and second appellants who were then fending for themselves had filed a joint memorandum of appeal containing six grounds of complaint. For his part, the third appellant fending for himself as well, had lodged a memorandum of appeal consisting of eight grounds. However, sometimes later, joining forces, but still legally unrepresented, the appellants lodged a joint supplementary memorandum of appeal with five grounds of complaint.

In this appeal, after having procured legal services, the appellants had the following legal representation. Whereas the first appellant was represented by Mr. Kassim Gilla, learned advocate, the second appellant was represented by Mr. Makubi Makubi, also learned advocate. For his

part, the third appellant was represented by Mr. Edwin Aron learned advocate represented the third appellant. On the other hand, Mr. Shabani Mwigole and Ms. Verediana Mlenza learned Senior State Attorneys appeared to resist the appeal on behalf of the respondent the Republic.

Immediately before hearing of the appeal begun in earnest, Mr. Gilla who was the lead counsel among the appellants' advocates prayed in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to abandon the three memoranda of appeal filed by the appellants and in lieu thereof, he sought to argue five new grounds of appeal which were framed as follows:

1. That, the proceedings, judgment and orders of the trial court were a nullity for the fact that the information containing the charges against the appellants was based on a repealed law;
2. That, the trial court erred in law and in fact in relying on exhibit P1 (the certificate of seizure) to convict the appellants while the same was illegally procured;
3. That, the trial court erred in law and in fact in convicting the appellants relying on exhibits P1, P2 and P3 in the absence of a properly established chain of custody;
4. That, the trial court erred in law and in fact in convicting the appellants basing on the

testimony of PW1, PW2 and PW3 whose evidence differs and contradicts materially with their statements, that is exhibits, D1, D2 and D3 respectively; and

5. That, the trial court erred in law and in fact in convicting the appellants while the charge against them was not proved to the required standard.

For purposes of aesthetic presentation and, apparently in view of their preparation and strategy, the above-named three learned advocates who represented the appellants submitted and expounded on the grounds of appeal in the following order, but not without extending a helping hand to each other, here and there. Whereas the first ground of appeal was canvassed by Mr. Aron, Mr. Gilla took us through the second ground of appeal. The third, fourth and fifth grounds of appeal were argued by Mr. Makubi.

The issue which is raised in the first ground of appeal and further argued by Mr. Aron in his address to us, appears to be that, the appellants were charged, tried and finally convicted of an offence which was predicated on a repealed law. According to Mr. Aron, and this was not disputed by the learned Senior State Attorneys, the Drugs and Prevention of Illicit Traffic in Drugs Act (Cap. 95) had already been repealed by the Drugs Control and Enforcement Act (Act No. 5 of 2015) when the

information charging the appellants with illicit trafficking in narcotic drugs was lodged in court on 13th June, 2016.

Relying on the position which we took in our earlier decision in the case of **Thomas Lugumba @ Chacha v. Republic**, Criminal Appeal No. 400 of 2017 (unreported), Mr. Aron submitted further that, since there were no saving provisions express or implicit in the repealing law (the Drugs Control and Enforcement) Act, the appellants were charged tried and convicted unfairly. Like what we did in the above cited case, the learned counsel invited us to invoke our jurisdiction in terms of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Laws (the AJA) and nullify the proceedings before the High Court, quash the appellants' conviction and set aside the life imprisonment sentence meted out on them. Regarding the way forward, Mr. Aron submitted that, the order for retrial would not be viable in the circumstances. His main argument was that, even if the appellants were charged under a correct law, there was no sufficient evidence to support a conviction against them.

Locking horns with Mr. Aron, Ms. Mlenza submitted in respect of the first ground of appeal that, a charge is ordinarily based on the date of commission of the offence and, with regard to the instant case, the law that was in force on 6th April, 2014 when the offence charged was

allegedly committed, was the Drugs and Prevention of Illicit Traffic in Drugs Act Chapter 95 of the Laws. The learned Senior State Attorney reasoned that, in any case, the appellants could not be charged under the repealing law which was not in existence when the offence was committed. It also seems that, the learned Senior State Attorney based her argument on the fact that, it is usual in every repealing law to make it operate prospectively only and not retroactively.

First of all, we begin by declaring our position that, we entirely agree with both sides herein that indeed the erstwhile Drugs Prevention of Illicit Traffic in Drugs Act was repealed and replaced by the Drugs Control and Enforcement Act Cap. 95 which came into force on 15th September, 2015. But for the reason which will come into picture in the course of our judgment, by parity of reasoning, one would have gone further and found that, when the appellants were formerly arraigned and charged in court on 22nd April, 2016, the repealed Act was no longer in existence. Viewed from that point, one would quickly jump onto the conclusion that indeed, the appellants were unfairly charged, tried and convicted under a repealed law. As might be expected, that is what Mr. Aron would want us to find and accordingly hold.

However, we think that it must have been in contemplation of such and similar situations as the one obtaining in the case now under review that, in its wisdom the Parliament enacted section 32 (1) (f) of the Interpretation of Laws Act, (Chapter 1 of the Laws) which provides that:

> *"(1) Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –*
>
> *(a) NA*
>
> *(b) NA*
>
> *(c) NA*
>
> *(d) NA*
>
> *(e) NA*
>
> *(f)* ***affect any investigation, legal proceeding*** *or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation,* ***liability,*** *burden of proof penalty or forfeiture,*
>
> ***and any such*** *investigation,* ***legal proceeding*** *or remedy* ***may be instituted,*** *continued, or enforced, and any such penalty or forfeiture may be imposed and enforced* ***as if the repealing written law had not been passed or made****."*
>
> *[Emphasis added]*

Notably, ours is not a lone wolf piece of legislation. The above-quoted provision is in ***pari materia*** with section 4 (1) (e) and (f) of the West Pakistan General Clauses Act, 1966 which provides that:

> *"4 (1) Where this Act or any other Act repeals any enactment then, unless a different intention appears, the repeal shall not –*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and*
>
> *(f) any such investigation legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed* ***as if the repealing Act had not been passed.****"*
>
> [Emphasis added]

The Indian General Clauses Act 1897 also used to make similar provisions under s. 6 (e).

It is worth mentioning here that, the purposes of the above-cited provisions of the law, is to counteract what used to be called in England *"the drastic effect of a repeal"* before the enactment of section 38 (2) of the Interpretation Act 1889. Like many saving provisions, the purpose of section 32 (1) of our Interpretation of Laws Act, is to insert a saving clause keeping the repealed law in force to cover all pending prosecutions and

all violations of the repealed law already committed as it is in the instant case. Most importantly, it should be very elementary for one to appreciate that, in criminal law, the accused is to be punished according to the law applicable at the time when the offence was committed.

With the above exposition of the law, we are satisfied and we have no reason to hold otherwise than that, the appellants were charged, tried and convicted under a correct law which was in force on 6th April, 2014 the date of the alleged offence. We thus find the first ground of appeal to have no merit and accordingly, we dismiss it.

Regarding the second ground of appeal which challenges the trial judge for relying on the certificate of seizure (Exh. P1) which is alleged to have been illegally procured, Mr. Gilla contended in the first place that, whereas the search and seizure was conducted at the road block, there was no independent witness to the said search and seizure. The learned counsel went on contending that, to make matters worse, no receipt was issued to the appellants contrary to section 38 (3) of the Criminal Procedure Act (Chapter 20 of the Laws) (the CPA). Still on the subject, Mr. Gilla submitted that, this omission by the Police Officers was complained of during the trial but it was quickly brushed aside by the learned trial judge by holding that the omission did not make the search illegal because at the conclusion of the committal proceedings, the

appellants were issued with a copy of the said proceedings in terms of section 249 (2) of the CPA. Mr. Gilla also submitted, but without elaborating that, the omission to observe section 38 (3) on the CPA affected the chain of custody. Another shortfall in the search order according to Mr. Gilla, is the fact that, whereas the order for search was issued on 7th April, 2014, according to PW1, the search was conducted without a search order on 6th April, 2014, at the scene of the crime. According to the learned counsel, the net result of all these procedural flaws is the uncertainty as to when the search and seizure was conducted and in whose presence.

In answer to Mr. Gilla's submissions, Ms. Mlenza submitted correctly so in our respectful view, that, the facts and circumstances of this case did not bring it within the purview of section 38 of the CPA. Elaborating, the learned Senior State Attorney contended that, this was a case of emergency which fell under section 42 (1) of the CPA and therefore in essence, there was no need for documentation of the search and seizure process.

For his part, the learned trial judge did not specifically address himself and make any specific finding on the evidential value of the certificate of seizure which was conjointly admitted in evidence with the search order as exhibit P1. He was however satisfied that, the prosecution

witnesses had satisfactorily explained why the search was conducted without a warrant as the police officers at the roadblock had not anticipated that they would impound the appellants' motor vehicle which contained the alleged twenty bags of marijuana. Regarding the absence of an independent witness during the search, an infraction which was seriously complained of by the appellants, the learned trial judge was equally satisfied with the prosecution witnesses' explanation that the roadblock was very far (2km) from the nearest village while the awful episode occurred at night. As a fact of life, the learned trial judge found that, it was thus impossible for the police officers to procure an independent witness in the wee hours of the morning to witness the search and seizure. All in all, he was satisfied that, non-compliance with section 2 and 38 (1) to (3) of the CPA was satisfactorily explained and he accordingly held that, in any case, it did not make the search and seizure illegal.

As stated earlier, going by the evidence on the record, we do not think this was an ordinary case requiring a normal search to be conducted which would entail the strict adherence to the provisions of section 38 of the CPA. For, it must be accepted without further ado that, the two Police Officers who intercepted and impounded the truck, had no prior information or were otherwise tipped that the said truck would be passing

by. Instead, it is on the record that, after stopping it, PW1 and PW2 simply became suspicious and decided to conduct an emergence search apparently in terms of section 42 of the CPA. As would be noted from the foregoing circumstances, it was virtually impossible for PW1 and PW2 to conduct a thorough and prior arranged search in terms of section 38 of the CPA. In this connection, it should be obvious that, what PW1 and PW2 did, was not necessarily in their to do-list for that day. In such circumstances, we do not see the alleged illegality in the procurement of the certificate of seizure.

We also think, as submitted by Ms. Mlenza that, having conducted a search on 6th April, 2014 in a state of emergence, it was rather superfluous for the Police Officers to prepare the search order on the following day. We would therefore agree with the learned Senior State Attorney that, the second ground of appeal has no basis both in law and in fact. And if we were to take the argument any further, we would emerge convinced that in any case, there was sufficient oral testimony by PW1 and PW2 which was not materially controverted to prove that, indeed they conducted an emergency search and eventually seized the motor vehicle and the twenty bags of bhang.

In the light of the above discussion, we hold that, having amply demonstrated that there was no need for the Police Officers to record in

detail the search and seizure after having conducted search under a state of emergence for which it was not necessary for them to comply with section 38 of the CPA, the appellants cannot be heard to complain against the modalities of search and seizure. We are satisfied that the learned trial judge was correct in holding that the reason for non-compliance with section 38 of the CPA was furnished by the prosecution witnesses and that the said omission did not have the effect of rendering the entire search and seizure illegal. It follows therefore that, Mr. Gilla's criticism of the trial judge on this point is, with due respect, without any legal basis. We accordingly dismiss it.

Ground three concerns the chain of custody. On this, the gravamen of the appellants' complaint as presented by Mr. Makubi was that the learned trial judge was in error both in law and in fact to base the appellants' conviction on the search order (Exh. P1), the impounded trailer and the report by the Chief Government Chemist (Exh. P4) in the absence of a properly established chain of custody. In support of this ground, the following three arguments were advanced by Mr. Makubi. **One,** that, from 6th April, 2014 to the date when the disputed bags of marijuana were finally exhibited in court, there was no documentary evidence showing how they were stored. **Two,** that, there was no documentation to show the movement of the said bags, and **three**, that, while the appellants

were found in possession of a total of 59½ bags, there was no evidence to show where did the 40 bags containing sardine fish go.

Expounding on what he claimed to be wrong with the chain of custody in this case, Mr. Makubi contended that, the keeping of the twenty bags at the Police Station was so doubtful as to create the opportunity for any-one with bad intentions to either tamper with them or to plant evidence. For instance, the learned counsel claimed, whereas PW1 and PW2 told the trial court that, after seizing the said bags, they took and handed them over to PW3, there was no written proof to show that movement. Dealing with the fourty bags of sardine, the learned counsel submitted that, while the appellants were said to have been found in possession of 60 bags, there is no evidence showing how the 40 bags containing sardine either got lost or got to the place where they were taken and by who. Regarding the movement of 20 bags from the Police Station at Nasa to the office of the Chief Government Chemist in Mwanza, Mr. Makubi submitted that, not only that there was no documentary evidence to prove that fact but also there was no evidence showing that indeed the said bags were received by the Chief Government Chemist at Mwanza. The learned counsel also challenged the prosecution witnesses for not presenting all 60 bags to the Chief Government Chemist and

leaving him a wider option to analyse and come out with his own findings as to which bags contained bhang and which bags did not.

Another disquieting feature in the prosecution evidence according to Mr. Makubi, is the absence of the details on the handing over of the exhibit storage room between PW3 who was charged with the storage of the disputed twenty bags and the officer who took over from him as exhibit keeper when he was transferred to Maswa. Relying on our earlier decision in the case of **Agnetha Sebastian v. Republic,** Criminal Appeal No. 389 of 2020 (unreported), the learned counsel strenuously contended that, there was no proof of any linkage between PW3 and another Police Officer who took charge of the exhibit room after PW3 was transferred to Maswa. Given the missing link, it was Mr. Makubi's submission that the chain of custody was not sufficiently proved.

Submitting in reply, Ms. Mlenza sought to persuade the Court that, despite the missing link, there was sufficient oral evidence to establish the chain of custody. Referring to the oral testimonies of PW1, PW2, PW3 and PW4, the learned Senior State Attorney contended that, essentially the chain of custody did not break from the day of seizure to the day when the bags were finally exhibited in court. Ms. Mlenza's alternative argument was that, if the chain of custody got broken somewhere as contended by Mr. Makubi, we should then find that it was impossible for

anyone to tamper with or otherwise change the disputed twenty bags. In support of her argument, she relied on our decision in the case of **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (unreported) in which we took the stance that, even where the chain of custody was broken, the court has to go further and determine if the nature of the seized item could change hands easily and therefore, be prone to tamper with.

On our part, we would not demur at all from what Ms. Mlenza had said. But in the meantime, by way of an opening move, it will be incumbent upon us to fully explore the meaning of the chain of custody and what it entails in criminal trials.

In view of our earlier decision in the case of **Paulo Maduka v. Republic**, Criminal Appeal No. 110 of 2007 (unreported), it must be obvious among the legal fraternity that, a chain of custody is:

> *"a chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic."*

With regard to the idea behind recording the chain of custody, we went on stating in the above-cited case that:

> *". . . it is to establish that the alleged evidence is in fact related to the alleged crime rather than for*

instance, having been planted fraudulently to make someone appear guilty . . ."

And, regarding what the chain of custody entails, we finally held that:

". . . the chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."

As a general rule, and upon numerous decisions of this Court, it is common ground that, the desirable method of establishing a proper chain of custody is the documentation of the sequence of events in the handling of exhibit right from seizure, control, transfer and finally exhibition in court during the trial. (see for instance **Paulo Maduka and Four Others** (supra). However, a few words are necessary to qualify this statement and allow for a crystal clear image of the law.

Documentation is not always the exclusive requirement in dealing with exhibits. Accordingly, the authenticity of an exhibit and its handling will not fail the test of validity merely because there was no documentation. It is now trite law that, depending on the circumstances of each case especially where the tampering with exhibit is not easy, oral evidence may be accepted as being credible in establishing the chain of custody. (see **Joseph Leonard Manyota v. Republic,** Criminal Appeal

No. 485 of 2015, **Chacha Jeremiah Murimi and 3 Others v. Republic,** Criminal Appeal No. 551 of 2015 and **Abas Kondo Dege v. Republic**, Criminal Appeal No. 472 of 2017 (all unreported).

Two points emerge from the above brief-survey of the law. **One,** that documentation is, of general importance for the establishment of a proper chain of custody. However, it is not the only and exclusive method. It occupies but one half, in a constellation of the methods. Another half, and that is point number **two,** is occupied by credible testimonial account. We take a one-sided view of the law when we ignore, as did Mr. Makubi, the fact that, a proper chain of custody may also be established by oral testimony. Needless to say, in determining the third ground of appeal in the instant case, we shall have to be guided by the above common position in our contemporary jurisprudence.

Turning to the present appeal, the evidence shows that after impounding the trailer and seizing the suspicious sixty bags, PW1 and PW2 counted them and upon rigorous scrutiny, they established that whereas twenty bags contained marijuana, fourty bags contained sardine fish. According to PW2, on the morrow of the arrest, they took the said bags and handed them over to PW3 the then exhibit-keeper who after recording them in the exhibit register, he kept them in the exhibit storage room. The impounded trailer remained parked outside the Police Station

at Nasa. According to PW3, on 29th May, 2014 he issued the said bags to PW2 who took them to the Chief Government Chemist at Mwanza. PW3 recounted that, PW2 returned them back on the same day informing him that the Government Chemist had taken some leaf samples from each bag for purposes of analysis. He also told him that the twenty bags weighed 950kg in total and this was confirmed by the report issued sometime later by the office of the Chief Government Chemist. For his part, PW3 told the trial court that, after receiving them from PW2, he kept the said bags in the exhibit storage room as he had done before. However, for some obscure reasons, if not lackluster attitude towards work, the exhibit register was not exhibited before the trial court.

From his side, PW4 a Government Chemist based in Mwanza is recorded to have told the trial court that, on 29th May, 2014 he received a parcel containing the sealed twenty bags from the office of the Officer Commanding the Criminal Investigation Department (popularly known as the OC-CID) for Busega District. He said that, he received them from PW2. For identification purposes, he then assigned the said bags a registration number and used a scale to weigh them. As stated earlier, PW4 is said to have found the twenty bags weighing 950 kg in total. He told the trial court that, after collecting samples from each bag, he returned them to PW2 and that, after careful laboratory analysis, he

posted his findings in a report which was admitted in evidence as exhibit P4. It is needless to say that PW4's findings indicated that indeed the twenty bags contained marijuana.

We thought it right to apprise at this juncture that, the prosecution evidence is silent regarding the identity of the police officer who had the custody of the said bags after PW3 was transferred to another working station. The way it appears however is that, they remained in the exhibit storage room until the day when they were finally disposed off.

Having accepted as we hereby do that there is neither documentary nor oral evidence showing the handing over of the disputed bags between PW3 and his successor, we are however of the firm view that, the above omission notwithstanding, the remaining evidence was sufficient to establish a proper chain of custody, as we shall hereinafter demonstrate. In so holding, we have in mind the credible oral testimonies by PW1, PW2, PW3 and PW4 to the effect that, after being seized from the appellants, the twenty bags were taken to the police station at Nasa where they were handed over to PW3 who kept them in the exhibit storage room. Further, that on 29th May, 2014, PW3 issued them to PW2 who took them to PW4 for laboratory analysis and that on the same day, the said bags were returned and handed over to PW3 by PW2.

With the foregoing evidence, we do not see any shortcomings which could be said to be uncharacteristic in the handling of the disputed bags. We are satisfied in the circumstances of this case that, the lack of evidence showing who had the custody of the disputed bags after PW3 was transferred to another station was not sufficient ground to raise doubt that the exhibit might have been tampered with or otherwise planted. It must also be common-place that, the alleged breakdown in the chain of custody came after the bags were taken to the Chief Government Chemist and after PW4 had collected samples from each bag and conducted laboratory analysis which showed that all the bags contained bhang.

While we are mindful of the requirement that, before the exhibit can be used in court to convict a person of a crime, it must be handled in a scrupulously careful manner to prevent tampering, or contamination, we must also emphasize here that, the need for the prosecution side to establish a proper chain of custody in the legal context, does not necessitate the court to apply a mathematical formula. For, what is important and essential is for the prosecution to lead evidence establishing beyond reasonable doubt that, the exhibit presented during the trial is the same item that was in the possession or taken from the accused person. It must therefore be remarked that, in establishing a proper chain of custody, the prosecution is not required nor expected to

deploy a canonical formular. On the other hand, if we may add a caveat, it may not be enough for the accused persons in a criminal trial to just allege that there was a break down in the chain of custody and assume they were home and dry as did the appellants in this case. The accused are expected to go further and lead some evidence or pick holes in the prosecution case showing, that, as a consequence of the break down in the chain of custody, there is a possibility that the evidence or item forming the subject-matter of the charge may have been fraudulently planted to make them appear guilty.

We note in the present case that, unlike in the unreported cases of **Alberto Mendes v. Republic,** Criminal Appeal No. 473 of 2017 and **Agnetha Sebastian** (supra) upon which Mr. Makubi placed great reliance and in which the amounts of drugs involved weighed respectively only 1277.4 and 414 grams, in the instant case, it is not in dispute that the twenty bags of bhang forming the subject matter of the charges in this matter weighed 950 kilograms. By any standards, this was a substantial amount of drugs. When this evidence is considered together with some other evidence relating to the handling of the disputed bags as attested to by PW1, PW2, PW3 and PW4, it leaves no doubt that it would be like herding cats for anyone to tamper with, or plant such a sizeable amount of bhang just to make the appellants appear guilty. Given the

considerable amount of 950 kilograms of bhang, the subject matter of this dispute, and in view of our earlier decision in the case of **Kadiria Said** (supra) from which we find a kindred phenomenon, it strikes us as far-fetched that someone who had no grudge against the appellants could have tampered with or otherwise quickly obtained and planted 950 kg of bhang just to implicate them for no apparent reason. In the circumstances, we agree with the learned Senior State Attorney that in the peculiar circumstances obtaining in this case, a proper chain of custody was established by way of oral testimony. We therefore dismiss the third ground of appeal for want of merit.

What is foregoing said of the barren third ground of appeal is true also of the fourth ground which challenges the decision of the trial court for allegedly basing the appellants' conviction on the evidence of PW1, PW2 and PW3 which differs and contradicts materially with their statements to the police.

Expounding on the alleged contradictions which he claimed to be fatal, Mr. Makubi submitted that there were some material inconsistencies in the prosecution evidence regarding, **one,** the date of the appellants' arrest, **two,** the question as to whether PW2 had presented to PW4 either one big parcel or twenty bags containing bhang and **lastly,** the colour of the said bags.

Resisting, Ms. Mlenza sought to significantly downplay the said discrepancies and give the impression that they are so minor as not to form the basis for discrediting the prosecution witnesses. The learned Senior State Attorney attributed the alleged inconsistencies to the lapse of memory among the witnesses but she insisted that, they could not form the basis for criticizing the learned trial judge who had found PW1, PW2 and PW3 to be credible and reliable witnesses.

For his part, while admitting the existence of the above-said discrepancies, the learned trial judge was however convinced that, they were so minor as not to form the ground for rejection of the credible prosecution evidence. In so holding, the trial judge had in mind the evidence of PW1, PW2 and PW3. He based his stance on his firm conviction that, the said witnesses having testified after five years of the occurrence of the charged offence and the recording of their statements to the police, their evidence was bound to have some minor discrepancies on what he called *"subsidiary facts."*

Like the learned trial judge, we have anxiously considered the said inconsistencies. As opposed to Mr. Makubi, we agree with Ms. Mlenza who submitted in reply that the inconsisencies are minor in nature as they do not affect the credibility of the three witnesses. What is important for everyone not to lose sight of here, is the fact that, criminal trials usually

take place long after the events which gave rise to prosecutions. For instance, in the present case, certainly there is no gainsaying that the trial of the appellants took place after five years of the occurrence of the charged offence. In such circumstances, unless there are several rehearsals before trial among the prosecution witnesses, a practice which we strongly abhor and discourage, such discrepancies are bound to happen.

Indeed it would be unrealistic to expect human memory to be more veridical than it may actually be. But for a jurisprudential purpose, when the issue of discrepancies in the prosecution evidence has arisen, the court is obliged to take into account that:

> *". . . it is not every discrepancy in the prosecution's witness 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."*

(see **Said Ally Ismail v. Republic**, Criminal Appeal No. 241 of 2008, and **Yusuf Simon v. Republic,** Criminal Appeal No. 240 of 2008 (both unreported).

In view of the above observations, we respectfully hold that, the learned trial judge's finding was premised on a proper apprehension of the law and the true facts of life. For, we do not need to become the

disciples of any school on the science of human memory and its impact on witness evidence, so as to perceive the obvious fact that there are some limitations to the veracity of such evidence. As happened in the instant case, one of the manifestations of the fallibility of witness memory for the purposes of legal proceedings, is the discrepancies on the witnesses' recollection of minor events or things from the past.

As correctly remarked by the trial judge, when there is a general agreement on the consistency of the substratum of the prosecution case in a criminal trial, minor discrepancies on trivial matters which are bound to occur in the natural course but which do not affect the basic version of the prosecution case may be discarded. That is the course which we have decided to take in this matter. In the end, we join hands with the trial judge and hold that the inconsistencies in the testimonies of the three witnesses are so minor as not to be worth of any serious attention.

Before we take leave of this matter, as earlier pointed out, there is the issue of the appellants' oral confession to PW1 and PW2 which we have to address albeit, very briefly. According to the evidence on the record, both PW1 and PW2 were at one that, on reaching the road-block and being asked what was loaded in their motor vehicle, with a little bit of honesty, the second appellant told the two police officers that indeed they were carrying marijuana but in a small quantity. To be exact, the

record has this as the second appellant's honest reply to the question posed by PW1's who had wanted to know why the air was so heavy with a smell of bhang after the police officers had intercepted the truck. "Ni *kweli tumebeba ila iko kidogo sana".* And when he was asked a similar question by PW2, the second appellant is on record as having told him, in all sincerity, thus *"Ninao mzigo kidogo Mzee."* We find it pertinent to observe here that, the evidence of the prosecution had satisfied beyond reasonable doubt that, indeed these two oral statements which clearly amounted to confessions in terms of section 3 (1) (a) of the Evidence Act, Cap. 6 of the Revised Laws, were made as the two prosecution witnesses were not materially controverted on that point.

There is case law in abundancy to the effect that, an oral confession made by a criminal suspect is admissible and may be used to convict an accused person. (see The **Director of Public Prosecution v. Nuru Mohamed Gulamrasul** [1988] T.L.R. 82 and **Posolo Wilson @ Mwalyego v. Republic,** Criminal Appeal No. 613 of 2004 (unreported).

In the light of the foregoing authorities and many others, we find that, as such, apart from some other incriminating evidence, the appellants had voluntarily confessed to PW1 and PW2 as having committed the offence, we have no cause to differ with the trial court. For, otherwise, it has not been suggested to us that the said oral

confession was involuntarily made as would have led to its being rendered inadmissible in evidence. Considering the prosecution evidence as a whole, we are satisfied in the circumstances that, the appellants were deservedly convicted and properly sentenced.

All said and done, we find this appeal to have no merit and we accordingly dismiss it in its entirety.

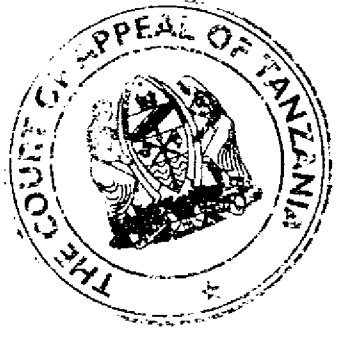
DATED at **DAR ES SALAAM** this 9th day of March, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of March, 2023 in the presence Mr. Makubi Kunju for the 1st appellant, also hold brief of Mr Selemani Gilla and Edwin Audon for 2nd & 3rd appellant and in presence of appellants connected via video link with Shinyanga High Court and M/s Wampumbulya Shanifor the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL