IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 87 OF 2021

SWAIBU AMANI SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Court of the Resident Magistrate of Dar es Salaam at Kisutu)

(Hamza, PRM – Ext. Juris.)

dated the 17th day of December, 2020

in

Extended Criminal Appeal No. 50 of 2020

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JUDGMENT OF THE COURT

14th February & 10th March, 2023

MWAMBEGELE, J.A.:

The appellant Swaibu Amani Shabani was convicted by the District Court of Kigamboni (Bwakila, RM) for an offence of unlawful possession of prohibited plants contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act, No. 5 of 2015 (the Act) and sentenced to a prison term of thirty years. His first appeal to the Court of the Resident Magistrate of Dar es Salaam at Kisutu was barren of fruit, for Wanja Hamza, a Principal Resident Magistrate with extended jurisdiction to whom the appeal was

transferred for hearing in terms of section 45 (2) of the Magistrates Courts Act, Cap. 11 of the Laws of Tanzania, dismissed it in its entirety on 17.12.2020. The appellant has thus come to this Court on a second appeal. He has six grounds of grievance.

The facts giving rise to the appeal, as brought by the prosecution at the trial, may briefly be stated. A place known as Tandavamba, Ferry area, in Kigamboni District in Dar es Salaam Region has a fame for criminal activities. On 18.12.2018, No. E8426 Corporal Festo (PW2) and Insp. Mdaki, a police officer who testified as PW6, together with other police officers, decided to visit the area for inspection of any criminal activities. On arrival there, those around, allegedly including the appellant, took to their heels. The police officers ran after them and in the process, the appellant was arrested. He had in his possession a polythene bag which contained substances suspected to be bhang. He was taken to Kigamboni Police Station where they found Christian Cosmas Muhagama (PW3) at the Charge Room Office (CRO) to whom the appellant as well as the polythene bag, were handed. The parcel was taken to WP 5412 Corporal Mwaka (PW4), an exhibit keeper, for safe custody. On 24.12.2018, PW4 handed the same to F7219 Detective Corporal Khalid (PW5) who took it to Joseph Jackson Ntimba

(PW1), a Chemist who works with the office of the Chief Government Chemist, for examination. It was PW1 who examined the contents of the polythene bag (he described it as 4 pellets with leaves) and diagnosed it to be bhang. The appellant was then arraigned for the offence mentioned at the beginning of this judgment.

In his defence, the appellant testified that he was a fishmonger and had gone to the *locus in quo* to collect money from a person who owed him. While there, policemen appeared and those around started to run away. He remained there and after a short while one policeman asked him what was he doing there. He told him that he went for his money as one person there owed him. He was searched and found with only Tshs. 7,000/= in his person. Thereafter, another policeman came with a polythene bag which was left behind by those who ran away. Policemen said it was his parcel. He was taken to the Police Station and later arraigned.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Cecilia Mkonongo, learned Senior State Attorney who was assisted by Mr. Moses Mafuru, learned State Attorney.

At the hearing of the appeal before us, the appellant adopted his six ground memorandum of appeal. Ms. Mkonongo resisted the appeal with some force, expressing her stance at the outset that the appellant was rightly convicted by the two courts below and that the appeal should be dismissed entirely.

The gravamen of the first ground of appeal is that the appellant was charged under a dead law. The appellant stated that the law under which he was charged ceased to have the force of law on 01.12.2017. On ground one, Ms. Mkonongo submitted that the appellant was properly charged under section 11 (1) (d) of the Act because the provision was not affected by the Drug Control and Enforcement (Amendment) Act, 2017 – Act No. 15 of 2017. She submitted that the Act was not repealed but amended. On what constitutes the repeal of an Act, the learned Senior State Attorney referred us to our decision in **Thomas Lugumba @ Chacha v. Republic**, Criminal Appeal No. 400 of 2017 (unreported).

Determination of the first ground of appeal will not detain us. As rightly submitted by Ms. Mkonongo, the Drug Control and Enforcement (Amendment) Act, 2017 did not repeal the Act. What it did was to make

extensive amendments to it. The long title to the Drug Control and Enforcement (Amendment) Act, 2017 reads thus:

> *"An Act to amend the Drug Control and Enforcement Act, 2017."*

Likewise, the title as described under section 1 thereof reads:

> *"This Act may be cited as the Drug Control and Enforcement (Amendment) Act, 2017 and shall be read as one with the Drug Control and Enforcement Act ...."*

What the Drug Control and Enforcement (Amendment) Act, 2017 did was not to repeal the Act as the appellant would have us believe but to amend it. The appellant has thus misconceived the whole point. Section 11 (1) (d) of the Act was not touched by the amendments. He was thus rightly charged under that section. We dismiss this ground of appeal.

The complaint in the second ground of appeal is that the evidence of PW2 and PW6 was contradictory on material particulars. The appellant argued that PW2 and PW6 differed on how he was arrested. That they were not at one on whether the appellant was arrested while running away. He also complained that PW6 was not clear on where exactly was the alleged

bhang retrieved from. Ms. Mkonongo dismissed the appellant's complaint in the second ground of appeal as having no substance at all in that PW2 and PW6 had no contradictions complained of.

We have read the testimony of PW2 and PW6 and agree with Ms. Mkonongo that the complaint by the appellant has no substance at all. While PW2 testified that they ambushed the area and persons there ran away and in that process the appellant was arrested, PW6 testified that they ran away, he ran after them and when they went back to where they had initially been, they arrested the appellant. What we decipher from the testimonies of PW2 and PW6 is that the discrepancies on their testimonies is on details. The inconsistencies of evidence of PW2 and PW6, if any, did not go to the root of the matter as to occasion injustice to the appellant. We have, time and again, held in a plethora of our decisions that contradictions, discrepancies or inconsistencies that count are those that go to the root of the matter. In **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported), we reproduced an excerpt from page 48 of **Sarkar, The Law of Evidence**, 16th edition, 2007, and we cannot resist the urge of reciting it here. It is this:

"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and thoseare always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

The foregoing excerpt has stood the test of time. We have followed it in a number of our previous decisions – see: **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018, **Bujigwa John @ Juma Kijiko v. Republic**, Criminal Appeal No. 427 of 2918 and **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 (all unreported) and **Mohamed Said Matula v. Republic** [1995] T.L.R. 3, to mention but a few.

In the case at hand, we are settled in our mind that the purported discrepancies, contradictions or inconsistencies complained of are but trivial. They do not corrode the evidence of PW2 and PW6 and, as such, do not

shake the basic version of the prosecution case. After all, the record bears testimony that the trial court considered the testimony of PW2 and PW6 and found them to be witnesses of truth. That finding as to their credibility is generally binding upon us, unless there are circumstances before us which call for a re-assessment of their credibility – see: **Omari Ahmed v. Republic** [1983] T.L.R. 52 and **Dickson Elia Nsamba Shapwata** (supra). We find none in the appeal before us. In the premises, we find no merit in the second ground of appeal and dismiss it.

The complaint in ground three is on the chain of custody. That it was broken. The appellant complained that Exh. P2 was not wrapped to avoid tampering with it and no paper trail was established to establish its movement. On the other hand, Ms. Mkonongo countered that the chain of custody of Exh. P2 was fully established showing that the same was in possession of PW6 who arrested the appellant. He handed the same to PW3 at the CRO who also handed the same to PW4, the exhibit keeper. The exhibit keeper (PW4) handed the same to PW5 who took it to PW1 and later PW5 took it back to the exhibit keeper (PW4). She submitted that Exh. P2 was handled quite correctly in terms of PGO 229 (9) of the Police General Orders.

The complaint on the chain of custody of Exh. P2 seems to us to be wanting in merit as well. As rightly put by the learned Senior State Attorney, the same was in the hands of PW6 who arrested the appellant. When the appellant was taken to the police station, he was handed to PW3 at the CRO. So was Exh. P2. PW3 later handed the same to PW4, the keeper of exhibits. It was PW5 who took the same from PW4 to PW1 who examined it. Later, the process reversed and when PW1 testified, he was handed the same by PW5 who took it from PW4. We are of the considered view that the chain of custody was properly established and never broken. We reject the third ground of complaint.

The complaint in ground four is that the prosecution witnesses failed to identify Exh. P2. Ms. Mkonongo submitted that the exhibit was identified by witnesses accordingly. We agree with her. We fail to comprehend the appellant's complaint in this ground of grievance. At p.13 of the record of appeal, PW1 tendered Exh. P2 and at p. 19 thereof, PW2 identified the exhibit in the following terms:

> *"I can identify the pullies they were in black a nylon bag ... This is the one, It has 4 pullies of bhang and a black bag"*

Whatever the term *pullies* means, the witnesses identified Exh. P2.

Likewise, at p. 22 PW3 testified:

> *"I can identify four pullies of bhang, they are wrapped in a piece of newspaper and kept in a black Rambo bag. They are four in number."*

Also PW6 identified it at p. 36 in the following terms:

> *"I can identify the bhang which I found the accused in possession since it was kept into the plastic bag (black) where, inside, four bundles of plant covered with newspaper the same makes four pullies."*

Other witnesses identified it. PW 4 identified it as appearing at p. 24 of the record of appeal. So did PW5 as appearing at pp. 28 and 29 of the record of appeal.

In view of the above, we find no justification in the appellant's complaint in the fourth ground of appeal and dismiss it.

The complaint in ground five is that the appellant's defence was not accorded deserving weight. He stated that the appellant's defence raised a reasonable doubt on the prosecution case. Ms. Mkonongo submitted that at p. 54 of the record of appeal, the trial magistrate considered the appellant's

defence and found that it raised no doubt in the case for the prosecution and dismissed it. We agree with Ms. Mkonongo. The trial magistrate summarized the appellant's evidence at pp. 49 and 50 of the record of appeal and considered it at pp. 52 and 57 of the record of appeal and found it to be not capable of shaking the prosecution case. In our considered view, the complaint that the case for the appellant established reasonable doubt in the prosecution case, has no justification. We dismiss it.

For the avoidance of doubt, the complaint raised by the appellant at the hearing that he did not sign the certificate of seizure (Exh. P3) by thumb printing it but that there is no such thumbprint on Exh. P3, was resolved at the hearing. The original court record showed that the appellant signed the same by his thumbprint. After all, that was not disputed at the trial, for at p. 35 of the record of appeal, the appellant rejected its being admitted in evidence because he was forced to sign it. This complaint has no substance as well. We dismiss it.

In view of the above discussion in which we have found all the grounds of appeal to be devoid of merit, an answer to the last ground of appeal which is a complaint that the case against the appellant was not proved beyond

reasonable doubt, is obvious. We are settled in our mind that the prosecution proved the case against the appellant to the hilt.

The upshot of the above is that the appeal has no merit. We dismiss it entirely.

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

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2023 in the presence appellant in person through video link at Ukonga-prison; and Mr. Emmanuel Maleko, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL