IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 663 OF 2020

NABIBAKHSH PIRBAKHSH BIBARDE

MAHAMADHANIF NAZIRAHMAD DORZADE ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Banzi, J.)

dated the 6th day of November, 2020

in

HC Economic Case No. 14 of 2018

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JUDGMENT OF THE COURT

13th July, 2022 & 19th May, 2023

MWAMBEGELE, J.A.:

In the High Court of Tanzania, at Dar es Salaam Registry, the appellants Nabibakhsh Pirbakhsh Bibarde and Mahamadhanif Nazirahmad Dorzade who are Iranian Nationals, together with eleven others who were acquitted at the trial, were arraigned for two counts of, **first**, Trafficking in Narcotic Drugs and, **secondly**, unlawful possession of Narcotic Drugs

contrary to, respectively, section 15 (1) (b) and section 15 (1) (a) of the Drug Control and Enforcement Act, 2015 – Act No. 5 of 2015, read together with paragraph 23 of First Schedule to, and section 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 of the Revised Edition, 2002 as amended by the Written Laws (Miscellaneous Amendments) Act, 2016. It was alleged in the particulars of the offence that on 25.10.2017 in the Indian Ocean within the Tanzanian territorial waters, they trafficked in narcotic drugs namely Heroin weighing 111.2 Kilograms, in respect of the first count and, that they were found in possession of narcotic drugs namely cannabis sativa weighing 451.7 grams, in respect of the second count. After a full trial, the two appellants were convicted and each sentenced to a prison term of thirty years (30) years on each count. The sentences were ordered to run concurrently.

The appellants were aggrieved by the conviction and sentence. They have appealed to this Court seeking to challenge the decision of the High Court on five grounds of appeal lodged on 30.04.2021 by Mr. Jethro Turyamwesiga, learned advocate. Later, on 27.05.2021, the appellants lodged a Supplementary Memorandum of Appeal comprising nine grounds

of appeal. On 28.06.2022, the appellants added one more ground in a document they titled "the Appellants' Written Statement of Argument in Support of the Grounds of Appeal". However, at the hearing of the appeal, Mr. Majura Magafu, the learned advocate who appeared for the appellants, abandoned the first ground in the memorandum of appeal filed by Mr. Turyamwesiga and condensed all the remaining grounds of complaints into the following areas: **one**, that the charge was defective, **two**, that the appellants were not found trafficking in, and in possession of, the narcotic drugs, **three**, the chain of custody was broken and, **four**, that the case was not proved beyond reasonable doubt. We shall henceforth refer to these complaints as grounds of appeal or, simply, grounds of complaint.

The appeal was argued before us on 13.07.2022. As already stated above, Mr. Majura Magafu, learned advocate, appeared for the appellants. The respondent Republic appeared through Ms. Veronica Matikila, learned Principal State Attorney who was assisted by Mr. Apimaki Mabruki, learned Senior State Attorney and Ms. Tully Helela, learned State Attorney. As the appellants were not conversant with the language of the Court, Ms. Flora Washokera was sworn to interpret Persian Language (also known by its

endonym Farsi), a language of the appellants, into Kiswahili and vice versa. Ms. Washokera also played that role at the trial in the High Court.

It was Mr. Magafu who kicked the ball rolling. He started his onslaught with the second ground of complaint. He submitted that there was no sufficient evidence adduced at the trial to prove that the appellants were found in possession of the alleged narcotic drugs. The learned counsel went on to submit that the first appellant testified that at the time of their arrest, there was a small boat at the scene of crime in which about eight policemen were on board. Those policemen entered the appellants' vessel and put them under arrest. After the arrest the vessel belonging to the appellants was under the policemen. They could do whatever they wanted to, including planting the narcotic drugs which might have been in that small boat. That small boat was later released by the policemen. The prosecution did not bring any witness to testify why that boat was released. Mr. Magafu argued that this piece of evidence which was supported by the second appellant, was never challenged by the prosecution. He contended that on the authority of our decision in **Goodluck Kyando v. Republic** [2006] T.L.R. 363, the appellants were entitled to credence. Worse more, Mr. Magafu

went on, the prosecution did not cross-examine the appellants on that piece of evidence. On the authority of the Court's decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), it should be taken that the appellants are speaking but the truth, he argued.

Mr. Magafu submitted further that the appellants did not understand what was exactly going on as the interpreter at the scene of crime did not understand their language well. He stressed that the truth is that the alleged drugs were not found in the vessel of the appellants. He added that the appellants testified at the trial that they were previously arrested by Australian authorities who certified that their vessel had nothing dangerous on it by affixing a sticker to it. The learned counsel argued that the trial Judge should have considered this fact in favour of the appellants. Mr. Magafu also submitted that there was discrepancy of evidence in the testimonies of witnesses.

With regard to ground three, Mr. Magafu submitted that the chain of custody of the alleged drugs (Exh. P3 and P5) was broken in that Insp. Lubambe Kanyumbu (PW4) after the arrest, he handed over the same to Neema Andrew Mwakagenda (PW2) but the Exhibit Register was not

tendered in evidence to show how PW2 who was not at the scene of crime, received them. The learned counsel contended that he was aware that paper trail may not be necessary with regard to items which cannot change hands easily but he was quick to state that drugs change hands easily. He cited **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 and **Chacha Jermiah Murimi and Three Others v. Republic**, Criminal Appeal No. 551 of 2015 (both unreported) to buttress this argument.

On ground one of appeal, Mr. Magafu adopted fully what was submitted by the appellants in their written submissions. In their submissions, the appellants assailed the decision of the trial court that it erred in convicting them on an incurably defective charge. They argued that the particulars of the offence lacked the essential elements that would constitute the offence with which they were charged. They submitted that the category of the offence of trafficking in drugs and the specific scene of crime were not disclosed. They argued that failure by the prosecution to prove the category of the offence and failure to show the specific *locus in quo* was fatal and prejudiced the appellants as they could not prepare their defence well. They buttressed this argument with our decision in **Hamis**

Mohamed Mtou v. Republic, Criminal Appeal No. 228 of 2019 (unreported).

As for ground four, Mr. Magafu submitted that in view of the submissions in respect of grounds one, two and three, the case was not proved beyond reasonable doubt.

We prodded the appellants' counsel to comment on the sentence imposed by the trial court. He simply said the sentence in respect of the second count was excessive, it should have been twenty years.

Responding, Ms. Matikila submitted in respect of ground two that Exh. P3 and P5 were not planted in Exh. P9. The learned Principal State Attorney took us to pp. 474, 504 and 513 of the record of appeal where, she submitted, both appellants testified that the policemen who entered Exh. P9 did not have anything in their hands except guns. She argued that if at all the planting was done, it could be easy to see the consignment which consisted of 104 packets weighing 111.2 kilograms of Exh. P3 than guns which the policemen wielded.

With regard to the argument that the prosecution did not cross-examine the appellants, Ms. Matikila denied that allegation. She contended that the prosecution did cross-examine the first appellant as appearing at p. 475 of the record of appeal and the second appellant as appearing at p. 485 of the same record. She argued that the trial court directed itself to the complaint on planting the contraband at p. 1027 and was satisfied that the search by the Australian boat was not credible evidence and also that the affixing of the sticker on Exh. P9 would not preclude Tanzanian authorities from searching it. The learned Principal State Attorney added that the appellants signed the seizure certificates as appearing at pp. 988 and 990 of the record and the trial court analysed evidence at p. 1028 and was satisfied that Exh. P3 and P5 were found in Exh. P9. She thus submitted that there was no planting at all of the narcotic drugs and that the High Court rightly so found.

Responding to the argument by Mr. Magafu that the small boat was released by the arresting officer, Ms. Matikila simply submitted that the small boat under reference escaped.

The third ground of complaint is on the chain of custody; that it was broken. Ms. Matikila submitted that the chain was not at all broken. On failure to tender in evidence the Exhibit Register, she submitted that the infraction, if at all, was not fatal. The learned Principal State Attorney relied on **Marceline Koivogui** (supra) to argue that the contents of the Register could be proved by oral evidence and that the oral evidence of PW2 played that role in this case. The learned Principal State Attorney also cited our decision in **Yanga Omary Yanga v. Republic**, Criminal Appeal No. 132 of 2021 (unreported) for the proposition that it is not the law that a suspect is supposed to be present at every stage of investigation.

The learned Principal State Attorney also argued that Exh. P3 and P5 were not diagnosed that they were narcotic drugs at the scene of crime but were sent to the Drug Control and Enforcement Authority (DCEA) for that purpose and that PW2 so testified that she was not present at the scene of crime but that it was PW4 who was in charge of the investigation.

On the complaint that there was a discrepancy of evidence in the testimonies of witnesses, Ms. Matikila conceded that indeed Francis Hyasint Hyera (PW9) testified that he could not remember well some of the things

but she was quick to state that the discrepancy, in the light of **Marceline Koivogui** (supra) was not fatal because human recollection is not infallible since a witness is not expected to be right in minute details when retelling his story.

With regard to ground one, Ms. Matikila submitted that the charge was not defective in that the place of arrest was mentioned as Tanzanian territorial waters. Failure to mention the exact place where the appellants were found in possession of the narcotic drugs does not make a charge duplex, she submitted. She argued that possession, storage and transportation all are trafficking but admitted that the mode of trafficking is not mentioned in the charge sheet as that would amount to giving evidence in it. She thus contended that the particulars of offence in the charge sheet were self-sufficient. She cited to us our decision in **Mohamed Mtou** (supra) to reinforce the point that the particulars of offence and evidence were sufficient.

In response to the fourth ground of complaint, she submitted that given the arguments in respect of the other grounds of complaint, the

prosecution proved the case against the appellants to the hilt and prayed for the dismissal of the appeal.

We also prompted the learned Principal State Attorney on the propriety of the sentence imposed on the appellants. She responded that the sentence imposed on the two counts was legally apposite. She clarified that the Drug Control and Enforcement (Amendment) Act, 2017 – Act No. 15 of 2017 which enhanced the sentence to life imprisonment on the offences with which the appellants were charged, came into force in December, 2017 and therefore was not applicable to the appellants.

Rejoining, Mr. Magafu submitted that the appellants were not cross-examined on the evidence that the narcotic drugs were not found in Exh. P9. Mr. Magafu added that the narcotic drugs could be planted without the appellants seeing. He submitted that Exh. P9 purports to have signatures of the appellants but that they did not sign it. He submitted further that his complaint was not on a number of witnesses who were fielded but his was a requirement that the case should have been proved beyond reasonable doubt, the number of witnesses notwithstanding. He reiterated his

argument that the case was not proved beyond reasonable doubt and implored us to allow the appeal and set the appellants free.

In determining this appeal, we shall take the route taken by the appellants' counsel in prosecuting this appeal. That is, we shall start with determining ground two of the appeal, followed by ground three and then discuss ground one and finally the last ground, as condensed by the appellants' counsel.

The gravamen of the complaint in the second ground of grievance is that the alleged narcotic drugs might have been in the small boat which was at the scene of crime and perhaps planted in the appellants' vessel (Exh. P9). This is not the first time the appellants are bringing this episode to the fore. It also emanated in the High Court. The appellants' defence contained a statement that they saw Exh. P3 and P5 after policemen embarked on their vessel. They claimed that, before the arrest, they were searched by Australian soldiers and that nothing dangerous was found. The learned trial Judge addressed this issue at p. 1027 of the record of appeal. She analyzed the testimony of prosecution witnesses, juxtaposed it with the appellants' defence and found and held that Exh. P3 and P5 were found in the Captain's

cabin. We find nowhere to fault the learned trial Judge on her assessment and evaluation of evidence as well as her conclusion that the narcotic drugs were found in the captain's cabin of Exh. P9. The planting episode, in our respectful view, is not plausible and does not shake the basic version of the prosecution case.

As an extension to the above discussion, the appellants signed the two certificates of seizure in respect of the narcotic drugs; Exh. P8 and P10. That act of signing of the certificates of seizure meant they acknowledged that the narcotic drugs (Exh. P3 and P5) were found in their possession in Exh. P9 whose certificates of seizure (Exh. P11) they also signed. That is what we held in **Song Lei v. The Director of Public Prosecution**, Criminal Appeal No. 16A of 2016 and No. 16 of 2017 (unreported). The learned trial Judge addressed her mind to that case and found, rightly so in our view, that their signing of the certificates of seizure meant acceptance that the narcotic drugs were found in their possession. We endorse her finding and find the second ground of complaint lacking in substance and dismiss it.

The third ground of complaint is on the chain of custody. The appellants submit that it was broken and the respondent, on the other hand,

allege that it was not. The trial court analyzed the evidence of PW1, PW2, PW4, PW4, PW9 and PW10 and was satisfied that these witnesses were but credible. The learned trial Judge concluded at p. 1033 of the record of appeal that:

> *"From the evidence of PW1, PW2, PW4, PW4, PW9 and PW10 which I find credible, there is no shadow of doubt that, the substances that were seized, are the very ones which were examined by the Government Chemist and tendered in evidence."*

We go along with the finding of the learned trial Judge. The more so that credibility of witnesses is within the empire of the trial court. The reason why this is so is not far to seek; it is because a trial court is the one which had the advantage of observing and assessing the demeanour of the witnesses when they testified – see: **Marceline Koivogui** (supra), **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported) and **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (also unreported).

It may not be irrelevant to underline at this juncture that on the chain of custody, it is relevant to distinguish between items that change hands

easily and those which do not. In **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported) we stated:

> *"It is not every time that when the chain of custody is broken then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

We followed the principle in **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017, **Anania Clavery Betela v. Republic,** Criminal Appeal No. 355 of 2017 and **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (all unreported), to mention but a few. In **Kadiria Kimaro** (supra), we had the view that pellets of heroin weighting 1365.91 grams hydrochloride could not change hands easily. In the case at hand, the contraband of heroin weighed 111.2 Kilograms. In the light of **Kadiria**

Kimaro (supra), we are satisfied that the contraband in which the appellants were found trafficking, could not change hands easily. As such the strict principle established in **Paul Maduka and Four Others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported) regarding paper trail, could be relaxed.

We now turn to consider the first complaint by the appellants. The gist of the complaint in this ground is that the charge was fatally defective for, first, failure to mention the category of the offence of trafficking and secondly, failure to mention the exact place at which the appellants were found in possession of the narcotic drugs and arrested. With regard to the first limb, we do not think we will be detained much by this complaint. As rightly put by Ms. Matikila, possession, storage and transportation all are referred to as trafficking. The appellants complain that the charge did not indicate which mode of trafficking - possession, storage and transportation – was the subject of the offence committed by the appellants in respect of the first count. We have scanned the information levelled against the appellants. The same comprises all the ingredients of the offences with which they were charged. Admittedly, the charge does not unveil the mode

of trafficking; whether possession, storage and transportation in respect of the first count. However, it seems to us the omission, if at all, cannot make the charge fatally defective. This is so in our view because, the appellants were all along aware of the charges against them and marshalled their defence well. They were therefore not prejudiced by the omission. We do not find any substance in this complaint.

The second limb of complaint is about failure to state in the information the exact place at which the appellants were found in possession of the contraband. The information shows in the particulars of offence that they were found in the Indian Ocean within the Tanzanian territorial waters trafficking in and in possession of the illicit drugs. This too we do not think it prejudiced the appellants. We, like the learned trial High Court Judge, are of the view that the particulars of the offence in the charge contained sufficient information to make the appellants make a meaningful defence.

Having answered the first three grounds as above, the determination of the fourth ground of complaint becomes obvious – the prosecution marshalled evidence against the appellants sufficient enough to found a

conviction against them. The case for the prosecution was therefore proved to the required standard; that is, beyond reasonable doubt.

The above stated, we find no merit in this appeal and dismiss it entirely.

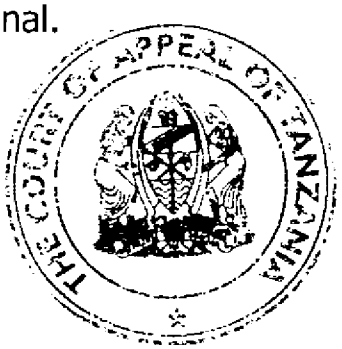
DATED at **DAR ES SALAAM** this 20th day of April, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 19th day of May, 2023 in the presence of the appellants in person vide video link from Ukonga and Mr. Mutalemwa Kisenyi, Edith Mauya, both Senior State Attorneys and Hamisi Katandula, State Attorney for the respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL