IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: SEHEL, J.A., KIHWELO, J.A, And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 314 OF 2021

HAJI RASHIDI MATUNDU..... 1ST APPELLANT

AMINA ABDUL.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division sitting at Arusha)

(Luvanda, J.)

dated the 19th day of May, 2021

in

Economic Case No. 16 of 2020

JUDGMENT OF THE COURT

12th & 20th March, 2024

KHAMIS, J.A.:

The appellants were arraigned in the High Court of Tanzania, Corruption and Economic Crimes Division at Arusha, charged with trafficking in narcotic drugs contrary to section 15 (1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 [the DCEA] as amended by section 8 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 read together with Paragraph 23 of the First Schedule to sections

57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap. 200, R.E 2002, as amended.

The particulars of the charge were that, on 18th day of December, 2016 at Minjingu Village, within Babati District, Manyara Region, the duo were found trafficking in narcotic drugs namely, Catha Edulis commonly known as "mirungi" weighing 130.5 kilograms.

The appellants pleaded not guilty and the matter proceeded to trial. Record of proceedings indicate that, the prosecution case was built on five witnesses who tendered one physical, motor vehicle and seven documentary exhibits. The defence lined up three witnesses who did not tender any exhibit. Albeit briefly, we shall highlight the material pieces of evidence advanced by those witnesses.

PW1, Zuberi Miraji was the Assistant Officer Commanding Station (Assistant OCS) at Minjingu Police Station at the time of the incident. He told the trial court that, on 18th December, 2016, he was in the company of the OCS, the late Inspector Kilama whose informer told him over the phone that, the appellants' motor vehicle carried narcotic drugs and moved along Tarangire National Park.

Based on that information, PW1 accompanied Inspector Kilama and DC Kassim to the scene at the edge of the boarder of Minjingu village and

Tarangire National Park where they found a vehicle, Toyota Regius, silver in colour with registration no. T 566 ATK, struggling to pass on a path reserved for the national electricity grid.

The trio intercepted the vehicle and questioned the driver and a passenger who were inside. Upon search, they found six sacks made of sisal containing bundles of khat and each bundle was covered with used newspapers. After counting, they found a total of 244 bundles.

He testified that, Inspector Kilama prepared a certificate of seizure (exhibit P1) which was signed by the appellants but no independent witness was involved allegedly because the villagers were not cooperative to the police. Thereafter, the appellants were taken to Babati Police Station and the seized sacks of khat were kept in the exhibit room alongside the vehicle that remained in the police custody.

PW1 further testified that, on 27th December, 2016 in the company of DC Paschal, investigator of the case, he led the appellants to Babati District Court where an order for disposal of the exhibits was made by the magistrate. Prior to the order, the magistrate recorded particulars of the exhibit in the inventory form (exhibit P2) which was signed by PW 1 and the appellants. The exhibit was subsequently disposed in the presence of the magistrate, court clerk, the appellants and PW1.

PW2, No. E 3008 D/Sgt Dongoye, was a policeman stationed at Babati. On 21st December, 2016 he was instructed to prepare and present the seized khat to the office of the Chief Government Chemist Laboratory Agency (CGCLA), Arusha. He consulted WP Veronica (the investigator) and S/Sgt Masoud (exhibit keeper) and prepared the covering letter. Using a police vehicle, he carried the six sacks of khat to the CGCLA on 22nd December, 2016.

At the CGCLA, he was received by Joyce Njisya (PW5) who recorded the exhibit as MGG/IR/1383/2016 and counted the 244 bundles of khat. She also weighed the sacks and found to be 130.5 kilograms. He used the chain of custody form (exhibit P5) to hand over the exhibit.

According to the witness, PW5 collected samples from each sack for examination purposes. The collected sample weighed 0.5 kilogram. The samples were kept in six envelopes that were each marked NZ268/16. The remaining 130 kilograms were returned to him in the same sacks.

PW3, No. E 7586 DC Veronica was the investigator of the case. She interrogated the second appellant and recorded her cautioned statement (exhibit P7) in which she allegedly confessed to have committed the offence. On 19th December, 2016 she supervised the weighing of the seized khat done by the officer of the Weights and Measures Agency

(WMA). Following that exercise, a report was issued (exhibit P6) and co-signed by the appellants.

On cross examination by learned advocate Mr. Karata, she claimed to have attended the exhibit disposal proceedings at the Babati District Court. However, this allegation contradicts the evidence of PW1 who did not name her as one of the officers who attended the proceedings. At pages 86 and 87 of the record, PW1 testified that, he was accompanied by DC Paschal who did not testify in the case.

PW 4 D 7540 Masoud, was the custodian of exhibits at the Babati Police Station. He was responsible for storing the exhibits and periodically signed the chain of custody form (exhibit P5). The six sacks of khat and a motor vehicle were registered in exhibit register no. 45/2016.

PW5 Joyce Njisya, was the chemist at the (CGCLA) based in Arusha. She was involved in examination of the samples collected from the seized six sacks of khat that were presented to her by PW2. She testified that, upon receiving the samples and labelling them, she travelled to Mwanza where the actual examination was carried as the Laboratory in Arusha was out of service. Upon examination, she confirmed that, the samples were actually khat, a type of narcotic drugs which is harmful to human health. Her report was received in evidence as exhibit P8.

The appellants testified under oath as DW1 and DW3 respectively. They both disassociated themselves from the offence charged and the allegation made by the prosecution witnesses. According to them, the first appellant was the driver of the vehicle (exhibit P3) that was hired by the second appellant and other businessmen based in Arusha to ferry them to Minjingu Public Auction. As it transpired, other passengers alighted before arrival at Minjingu Village and therefore, at the time of interception and arrest, they were alone in the car.

DW1 and DW2 maintained that, the six sacks of khat were fabricated on them and that they were not involved throughout the investigation process. They disputed signing the various documentary exhibits received in evidence as exhibits P1, P2, P4, P5, P6 and P7.

DW 2 Ibrahim Rashid, is related to the first appellant and is well acquainted with his handwriting and signature. When exhibits P1, P2, P4, P5 and P6 were shown to him, the witness stated that none of them was signed by the first appellant.

The record of proceedings further indicates that, save for the motor vehicle (exhibit P3), the form for presenting the samples to the CGCLA (exhibit P4) and the chain of custody form (exhibit P5), all other prosecution exhibits were strongly objected to at the time of production.

When a certificate of seizure (exhibit P1) was sought to be tendered, the appellants objected to on the ground that, the signatures purported to be appended by the appellants did not belong to them and the finger prints were doubtful. The trial Judge ruled out that, issues of signatures not belonging to the appellants and doubtful fingerprints were matters of facts and would be addressed at the time of weighing the relevant document.

When PW1 sought to tender the inventory form (exhibit P2) the defence team resisted on the basis that, it did not conform with form no. 006 of the DCEA and was not signed by the appellants. It was further contended that, the signatures shown thereon did not belong to the appellants. At page 88 of the record, the appellants' counsel, complained that:

> *"...also in the schedule there is a place alleged to be signatures of the accused, at 5th column on the left hand side, but these signatures do not belong to them. Meaning that they did not sign. The alleged handwritings of signature of suspects resemble nearly with the handwriting used to record the whole content of this schedule..."*

The objection was overruled by the trial Judge as reflected at page 89 of the record who assigned same reasons as the ones assigned in relation to exhibit P1. When PW3 prayed to tender a report issued by the

WMA (exhibit P6), the defence team protested on the reasons that, the signatures shown thereon, did not belong to the appellants. The trial Judge assigned same reasons in overruling the objection.

When the cautioned statement allegedly recorded by the second appellant (exhibit P7) was sought to be tendered by PW3, the defence counsel expressed disapproval on the logic that, it was in contravention to section 58(4) and (6) of the CPA, and; that, the time for completion of recording the statement was unclear as it was informally erased and re-written differently. In reply, the Senior State Attorney conceded that, the statement was not certified as per the requirements of the law. However, the trial Judge admitted the document but reserved his reasons on the ground that, they will be incorporated in the final judgement.

At the time PW3 sought to introduce into evidence the CGCLA report (exhibit P8), the defence counsel rose to object on the basis that, it did not conform with form no. 009 prescribed in the DCEA. The trial Judge admitted the document with a promise of assigning reasons in the judgment.

Upon conclusion of the trial, both appellants were convicted as charged and the trial Judge [Luvanda, J] sentenced each of them to serve thirty years' in prison.

Aggrieved by both conviction and sentence, the appellants jointly preferred the present appeal advancing two sets of memoranda of appeal. The first set contained a total of nine grounds of appeal while the subsequently filed set carried two additional grounds.

For avoidance of doubt, we shall reproduce the eleven rephrased grounds of appeal as fused from the two sets, thus:

1. *That the learned trial Judge grossly erred in law and fact in failing to hold and appreciate that the signature and thumb prints appended on exhibits P1, P2 and P6 differs and did not belong to the appellants.*
2. *That the learned trial Judge grossly erred in law and fact in failing to note, hold and appreciate that, the inventory form (exhibit P2) was unprocedurally prepared, tendered and admitted in evidence since the appellants were not afforded an opportunity to be heard by the magistrate who made the disposal order. Furthermore, no photographs of the allegedly disposed drugs were taken and or certified by the magistrate as per the requirements of section 36(3) (b) of the DCEA.*
3. *That the learned trial Judge grossly erred in law and fact in relying on the irregular evidence of a Government Chemist (PW5) whose report (exhibit P8) showed the samples of fresh leaves contained cathenol and caffeine chemicals which are not listed as narcotic drugs in the DCEA.*

4. *That the learned trial Judge erroneously acted and relied on the prosecution evidence which failed to adhere and comply with section 48 (2) (c) (iii), (iv), (vi) and (vii) of the DCEA during the arrest, seizure and investigation of the offence.*

5. *That the learned trial Judge grossly erred in law and fact in finding that the chain of custody was not broken whereas in fact there was no proper documentation when the exhibit changed hands.*

6. *That the learned trial Judge grossly erred in law and fact in failure to observe that the prosecution evidence was contradictory, unreliable and with material inconsistencies which rendered its case highly improbable.*

7. *That the learned trial Judge grossly erred in law and fact in failure to make adverse inference against the prosecution for failure to call a material witness.*

8. *That the learned trial Judge grossly erred in law and fact in shifting the burden of proof from the prosecution to the appellants.*

9. *That the learned trial Judge grossly erred in law and fact in failing to hold that the prosecution failed to prove its case beyond reasonable doubts.*

10. *That the learned trial Judge erred in law and fact in not finding that the information read over to the appellants was at variance with the evidence and contradicted section 276(1) of the Criminal Procedure Act, Cap 20 R.E 2022 [the CPA].*

11. That the learned trial Judge erred in law and fact in failure to find that the first appellant was not committed for trial, instead one Rashidi Matundu was committed before the High Court contrary to rule 8(4) of the EOCCA.

At the hearing, the appellants appeared in person, unrepresented. Mses. Lilian Kowero, learned Senior State Attorney, Amina Kiango, Neema Mbwana and Eunice Makala, learned State Attorneys, appeared for the respondent, Republic. The appeal was traversed viva voce with the appellants opting to take the lead.

At the outset, the first appellant who also submitted on behalf of the second appellant, contended that, the appellants were wrongly convicted as the prosecution failed to discharge its burden of proof to the standard required by the law, namely, proof beyond reasonable doubt.

Narrowing on the first ground of appeal, he contended that, the signatures allegedly appended by the appellants on exhibits P1, P2 and P6 sharply differed which validated his assertion that, the documents were not signed by the appellants. He faulted the trial Judge for failure to scrutinize the three documents whose admission was objected to during trial.

On the second ground of appeal, the first appellant attacked the inventory form (exhibit P2) as irregularly prepared, tendered and received

in evidence. He contended that, the trial Judge failed to appreciate that, the magistrate who presided over the proceedings for the disposal of the six sacks of khat, acted in violation of section 36 (3) (b) of the DCEA which requires taking of photographs of the disposed exhibits and required presence of the suspects.

He asserted that, the manner of recording, tendering and admitting exhibit P2 also violated item 6 of the Police General Order (PGO) No. 353 as the remand register was not produced to show that, the appellants were taken in and out of the remand for the purpose of attending the exhibit disposal proceedings.

Relying on the Court's decision in the case of **Mohamed Juma @ Mpakama v. Republic,** Criminal Appeal No. 385 of 2017 [2019] TZCA 518 [26 February 2019], he drew our attention to pages 150, 151, 152, 153 and 154 of the record of appeal, which reflects the defence evidence, and contended that, had the trial Judge properly analysed the evidence on record, he would have found that, the appellants did not attend the alleged exhibit disposal proceedings.

On the third ground of appeal, the first appellant contended that, the evidence of the Government chemist (PW 5) was laden with irregularities as she testified on presence of cathenol and caffeine in the

disputed sample of fresh leaves, whereas such chemicals were not narcotic drugs under the law.

On the fourth ground of appeal, the first appellant faulted the trial Judge for grounding a conviction on the certificate of seizure in absence of a search warrant. He added that, the certificate of seizure irregularly omitted to disclose whether the search was urgently mounted or not.

Highlighting the fifth ground of appeal, the first appellant contended that, the trial Judge erred by unjustly finding a conviction in the absence of a chain of custody as to how the narcotic drugs changed hands. He explained that, the chain of custody was obviously broken giving example of PW5's testimony, whose oral accounts allegedly contradicted the chain of custody form (exhibit P5).

Further, the first appellant asserted that, PGO No. 140 was violated in that, exhibit P5 omitted to show signatures of the persons who allegedly exchanged custody of the exhibit at different intervals and left out the time during which the swapping occured.

Consolidating the sixth, seventh, eighth and ninth grounds of appeal, the first appellant contended that, the prosecution failed to lead evidence of Inspector Kilama who filled in a certificate of seizure and arrested the appellants before leading them to a police station. He said

that, PW1's evidence that Inspector Kilama died in the year 2007 was not supported by a death certificate or any other official documentation.

He averred that, by failing to cause appearance of a magistrate who allegedly made an order for disposal of exhibits and other key witnesses including D.C. Kassim, who arrested the appellants, WMA's officer who weighed the narcotic drugs and D.C Paschal, the prosecution failed to discharge its onus of proof against the appellants. Further, he faulted the trial Judge for failure to address a dispute as to where exactly the appellants were arrested.

On the first ground in the supplementary memorandum of appeal, the first appellant contended that, the information was defective for omission to show particulars of a vehicle that allegedly transported the narcotic drugs.

Further, he criticised validity of the trial Court's proceedings on the ground that, the motor vehicle (exhibit P3) did not feature in the list of exhibits which was read over to the appellants at the time of committal. He cited our decision in **Godfrey Simon & Another v. Republic**, Criminal Appeal No. 296 of 2018 [2022] TZCA 8 [11 February, 2022].

Referring to the second ground in a supplementary memorandum of appeal, the first appellant drew our attention to page 68 of the record

revealing *"Rashid Matundu"* and Amina D/o Abdul were committed for trial before the High Court. He contended that, since *"Rashid Matundu"* was a different person altogether, the first appellant was improperly tried and convicted by the High Court.

Finally, the first appellant implored us to find that, the evidence adduced by the prosecution did not establish a link between the appellants and the offence charged and thus, the appeal should be allowed. The second appellant had nothing to add. Rather, she entirely relied on the submissions by the first appellant.

In reply, Ms. Eunice Makala contested the appeal and strongly submitted in support of the appellants' conviction and sentence.

On the first ground of appeal, she contended that, the appellants' allegations are unfounded as the trial Judge properly found the disputed signatures on exhibits P1, P2 and P6 to be of the appellants. She added that, there was no room to investigate the signatures whose authenticity was only challenged at the trial and upon closure of the investigation.

On the second ground of appeal, the learned State Attorney contended that, PW1 sufficiently testified that, he led the appellants to Babati District Court where the exhibit disposal proceedings were

conducted in accordance with the law and the inventory form (exhibit P2) was duly signed by the appellants.

She drew our attention to the evidence of PW2 who collected the exhibit from the exhibit keeper (PW4) and presented it at the CGCLA where it was received by PW5 before it was subsequently disposed of as per the testimony of PW1 and PW3.

The learned counsel cited our decision in **Ex. G. 2434 PC. George V Republic**, Criminal Appeal No. 8 of 2018 [2022] TZCA 609 [6 October 2022] wherein we resolved that, the absence of photographs for the disposed exhibit would not vitiate the inventory if the suspect attended the disposal proceedings but refused to sign the inventory. He invited us to find this ground of appeal is without merit.

Ms. Makala banished the third ground as unfounded on the basis that, there is no any irregularity in the evidence of PW5 and exhibit P8, a report from the CGCLA. She insisted that, *Catha edulis @ khat* or popularly known as *"mirungi"* in Kiswahili, is listed as a narcotic drug under the DCEA.

Responding to the fourth ground, the learned State Attorney refuted the claims that, the prosecution witnesses failed to abide with the requirements of section 48 (2) (c) (iii), (iv), (vi) and (vii) of the DCEA. She

asserted that, the law was observed throughout the arrest, seizure, disposal of the exhibit and investigation of the case.

Referring to pages 80 and 161 of the record, the learned Counsel conceded that, the certificate of seizure (exhibit P1) omitted to state whether the search was emergency or not. However, she claimed that, the omission was cured with PW1's testimony to the effect that in about ten minutes before the appellants were intercepted and arrested, an informer divulged to Inspector Kilama on the appellants' whereabouts. She added that, in the circumstances, no search warrant could meaningfully be prepared.

Further, the learned State Counsel contended that, by virtue of his rank as the Officer Commanding Station (OCS), Inspector Kilama who intercepted the appellants at the scene, did not require any search warrant.

Ms. Makala strongly denied an assertion that, a chain of custody was broken. She led us through the pages of the record depicting how the prosecution witnesses documented the periodic change of the exhibit's custody.

In addition to the documented chain of custody form (exhibit P5), the learned counsel implored us to go along the stance expressed in **Ex.**

G. 2434 PC. George (supra) at page 16 wherein we scored that, the chain of custody may be proved otherwise than through paper trail.

Submitting on the consolidated sixth, seventh, eighth and ninth grounds of appeal, Ms. Makala elaborately analysed the evidence adduced before the High Court and asserted that, the evidence presented by the prosecution proved beyond reasonable doubt on all the ingredients of the offence preferred against the appellants, namely, identity of the seized fresh leaves as narcotic drug, its possession by the appellants and its conveyance. In the premises, she urged us to dismiss the appeal in its entirety for lack of merit.

Further, she referred us to section 143 of the Tanzania Evidence Cap, Cap 6, R.E 2022 [the TEA] which provides that, no particular number of witnesses is required to prove a fact, and contended that, upon admission of the inventory (exhibit P2), the prosecution found no need of summoning a magistrate who issued an order for the disposal of narcotic drugs. She submitted that, the oral testimonies of PW1 and PW2 sufficed to prove what transpired in the disputed proceedings.

As regards to disputation of the scene of crime, the learned counsel invited us to examine the evidence of PW1 who testified that, the appellants were arrested at Minjingu area.

Addressing the first ground in the supplementary memorandum, Ms. Makala asserted that, the Information read against the appellants carried no error whatsoever. On questioning by the Court, she conceded that, the motor vehicle allegedly used to ferry the narcotic drugs was neither mentioned nor its particulars given in the Information. She added that, the omission to particularise the vehicle details was cured by the evidence on record.

On the second ground in the supplementary memorandum, she conceded that, the committal proceedings inadvertently referred to the first appellant as Rashidi Matundu instead of Haji Rashid Matundu. However, she was quick to add that, the error is curable in terms of section 388 of the CPA.

In the premises, Ms. Makala urged us to dismiss the appeal in its entirety.

In rejoinder, both appellants maintained their innocence and reiterated the gist of their earlier submissions. The first appellant insisted that, the trial court did not properly address the issue regarding Inspector Kilama's failure to testify in the case and his alleged death.

This is the first appeal and therefore, this Court is bound to revisit, re-evaluate and analyse the evidence on record in order to come up with

its own conclusions [see rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009] (the Rules). We are further conscious that, in so doing, unlike the trial court, we do not have the benefit of seeing the demeanour of witnesses and of the appellants during the trial. In the circumstances, we can only rely on the evidence on record. We held so in the cases of **Makuru Jumanne & Another v. Republic**, Criminal Appeal No. 117 of 2005; **Juma Said & Another** v. Republic, Criminal Appeal No. 114 of 2005 [both unreported]; **Peter v. Sunday Post [1958] E.A 424**; and **Okeno v. Republic [1972] EA 32**.

We have examined the record, considered the grounds of appeal, and the parties' rival submissions. The main issues for determination are: whether the appellants' right to a fair trial was interfered; whether the chain of custody was broken down; and; whether the prosecution proved its case beyond reasonable doubt.

On the first issue, we intend to address the various grievances expressed by the appellants in the grounds of appeal, particularly: the irregular committal order made against the first appellant contrary to the provisions of the Economic and Organised Crime (The Corruption and Economic Crimes Division) (Procedure) Rules, 2006 [the CECD Rules]; the unlawful disposal of narcotic drugs and the irregular filling in of the inventory form (exhibit P2); non-compliance of the law in the process of

search, seizure and investigation; and finally, the allegation that the Information was defective.

The right to a fair trial was explained by this Court in **Mfaume Daudi Mpoto & 2 Others v. Republic**, Criminal Appeal No. 419 of 2020 [2023] TZCA 17568 (31 August 2023) wherein we echoed that:

> *"The constitution under Article 13(6), (b), (c), (d) and (e) further guarantees equality before the law for suspects and accused of criminal offences. As gleaned from that article, this right to a fair trial does not focus on a single issue but rather consists of a complex set of rules and practises. The rules applicable to the administration of justice are wide and as a minimum, refer to, inter alia: presumption of innocence, the right to be heard by a competent, independent and impartial court or tribunal; the right to be heard within a reasonable time, the right to counsel in respect of capital offences, the right to interpretation, the right to know nature of the accusation, the right to examine witnesses, the right of juvenile offenders, no punishment without law, the right to appeal and the right to due process."*

As our law stands, when a person is charged with a serious offence that must be dealt with by the High Court, he/she must first be committed to the High Court by a magistrate. This occurs by way of proceedings

known as committal hearing. At a committal hearing, a magistrate considers the prosecution case against the accused which includes reading the information and the contents of the statements of potential prosecution witnesses, recording of the statement by the accused, if any, and listing down the witnesses and exhibits to be relied by both sides before making an order committing the accused for trial to the High Court.

In the present case, we are invited to decide on whether or not the committal order that wrongly addressed the first appellant as Rashidi Matundu, instead of Haji Rashid Matundu, was incompetent to commit him for trial to the High Court. The applicable provision is rule 8 of the CECD which reads:

> *"8 (1) Upon receipt of the copy of the Information, the district or a resident magistrates' court shall, within fourteen days, cause the accused to appear before it for the purpose of conducting committal proceedings.*
>
> *(2) Upon appearance of the accused person before it, the district or a resident magistrates' court shall read and explain or cause to be explained to the accused person or if need be, interpreted in the language understood by him, the information brought against him as well as the statements or documents*

containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

(3) After complying with the provisions of sub-rules (1) and (2), the magistrate shall address the accused person in the following words or words to the like effect:

"You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the Information against you. Anything you say will be taken down and may be used in evidence at your trial."

(4) Having addressed the accused in accordance with sub-rule (3) and recorded anything that the accused might have said, the magistrate shall commit the accused for trial by the Court in the following words or words to the like effect:

"..... (names), you are now hereby committed for trial before the Corruption and Economic Crimes Division of the High Court."

(5) The warrant of commitment for trial shall be in the form set out in the Second Schedule to these Rules."

Since an accused person is formally and properly submitted to the jurisdiction of the High Court by a specific order of committal made at the conclusion of committal proceedings, there can be no doubt that, the procedure adopted by a subordinate court in committing the accused for trial to the High Court, must be done in accordance to the letter of the law and should not be irregular. In other words, the committal order must comply with the mandatory requirements of rule 8 of the CECD Rules.

In the present case, the appellants were present throughout the committal proceedings and heard the substances of the statements of intended prosecution witnesses read over and explained to them. In the events, referring the first appellant as Rashid Matundu instead of Haji Rashid Matundu was a slip of the pen that, in any case, did not prejudice him. We therefore find that, the first appellant was properly committed to the High Court.

Associated with this is the grievance on the defect of the charge. In the supplementary memorandum of appeal, the appellant contended that, the Information was defective for lack of particulars disclosing the nature

of the offence. This issue should not hold us as we tackled a similar hurdle in **Remina Omary Abdul v. Republic** (Supra).

In that case, we examined sections 2 and 15(2) of the DCEA which creates categories of offences falling under drug trafficking, namely, importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, delivery and distribution and reasoned that, there is no need to mention the specific type of trafficking in the charge because all types of trafficking defined under those provisions constitutes one offence of trafficking in drugs. In view of that position, we find no merits in this grievance which is rejected.

The appellants bitterly complained on the propriety of the search conducted at the time of their arrest. The prosecution maintained that, a proper search was conducted as it was made in an emergence situation and supervised by the OCS who did not require a search warrant. According to the record, the appellants did not dispute their vehicle being searched, but rather, contended that, the search was done by traffic police officers with a view to inspect the road worthiness of the vehicle. It was equally contended that, upon searching the vehicle, the said policemen found nothing to incriminate them.

Sections 38 (1) and (3) of the CPA deals with the procedure applicable in search and seizure. The same read:

> *"38 (1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-*
>
> *(a) Anything with respect to which an offence has been committed;*
>
> *(b) Anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
>
> *(c) Anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence,*
>
> *And the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.*
>
> *(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 power 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."

The then procedure for search and seizure in respect of offences falling under the DCEA was well addressed by the Court in **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 [unreported] wherein we pointed out that, the provisions of the DCEA relating to search and seizure were not intended to replace the CPA but rather subject them to it. We further held that:

"In our conclusion on the two related issues, there is no justification for the learned Senior State Attorney arguing that the search and seizure was under the DCEA and therefore a search warrant was not a requirement. This is because sub-section (4) and (5) of section 32 of the DCEA cited above, require that arrests and seizure be conducted in accordance with the law in force, specifically in this case, the CPA."

The legal posture expressed above was emphasised by the Court in **Remina Omary Abdul** (supra) where similar issues cropped up and the Court had this to say:

"...Given that stance of the law, possession of search warrants where search is not an emergence one, observance of time of conducting search and need for permission from magistrate when search is conducted beyond prescribed time as stipulated by the two legislations [the CPA and DCCEA] and the Police General Orders [PGO] 226 are matters which cannot be dispensed with. These provisions are therefore lending credence to not only the manner search and seizure is conducted but also to the property seized."

In the **Director of Public Prosecutions v. Mussa Hatibu Sembe**, Criminal Appeal No. 130 of 2021 [2022] TZCA 238 [6 May 2022], the Court addressed the requirements for search and seizure under section 48 (1), (2) (c), (ii) and (vii) (d) of the DCEA which deals with investigation and survey and finally, enunciated that:

"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: © 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."

Our examination of the record reveals that, there was non-compliance of the mandatory requirements of the law in a search purportedly conducted by the late Inspector Kilama, PW1 and DC Kassim. This is clearly reflected in the evidence of PW1 covered at pages 80 – 98 of the record, who on examination by the Senior State Attorney, stated that:

"...There was no need to summon an independent person, as those indigenous people there, are not cooperative to police, if you summon them they do not appear completely..."

In our view, PW1's testimony that there was no need to involve an independent witness was an express admission of the prosecution's failure to adhere with the requirements of section 48 (3) of the CPA which requires signing of a receipt and seizure certificate by an independent witness and section 48 (1), (2) (c), (ii), (vii) and (d) of the DCEA which requires presence of an independent witness during the search and seizure of exhibits.

In ground two of the memorandum of appeal, the appellant challenged validity of the inventory form (exhibit P2) on the basis that, it was unprocedurally prepared, tendered and received in evidence. This assertion was protested by the prosecution which maintained that, the exhibit was properly procured, tendered and therefore, of evidential value.

The starting point in addressing this disputation, in our view, is section 36 of the DCEA which deals with disposal of exhibits, *inter alia*, because of their perishable nature. The relevant provisions read that:

"36 (2) Where any narcotic drug or psychotropic substance has been seized the officer seizing such drug or psychotropic substances or precursor

chemicals or substances used in the process of manufacturing of drugs or other substances proved to have drug related effects shall prepare an inventory of such narcotic drug or psychotropic substance containing such details relating to-

a) Their description, quantity, mode of packing, marks, numbers;

b) Such other identifying particulars of the narcotic drugs or psychotropic substances or precursor chemicals or substances used in the process of manufacturing of drugs or other substances proved to have drug related effects;

c) Packing in which they are packed;

d) Country of origin; and

e) Other particulars as such officer may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act

(3) Any officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substances proved to have drug related effects shall make an application to any magistrate having jurisdiction under this Act, for the purpose of-

(a) Certifying the correctness of the inventory so prepared;

(b) Taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) Allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of sample so drawn,

Provided that, where it is not practicable to secure the presence of the magistrate, the requirement of subsection (3) (b) and (c), shall be dispensed with.

(3) Where an application is made under subsection (3), the magistrate shall as soon as practicable allow the application.

(4) Notwithstanding anything contained in the Evidence Act, or the Criminal Procedure Act, every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under subsection (3) and certified by a magistrate

court as primary evidence in respect of such offence."

The animating principle of the above provision seems to have been encapsulated by paragraph 25 of the Police General Orders No. 229 which was made by the Inspector General of Police under section 7 (2) of the Police Force Auxiliary Services Act, Cap 322 R.E 2019 [the PGO]. It reads that:

"25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the magistrate, together with the prisoner (if any) so that the magistrate may note the exhibits and order immediate disposal, where possible, such exhibits should be photographed before disposal."

In **Buluka Leken Ole Ndidai & Another v. Republic**, Criminal Appeal No. 459 of 2020 [2024] TZCA 116 [21 February 2024], this Court adverted to PGO No. 229, reconceived its earlier decisions on the issue and echoed its stance on the procedure applicable where need arises for disposal of perishable exhibits, thus:

"This Court however has had on multiple occasions pronounced its position on the issue of involvement of the suspect or suspects at the time of ordering a disposal of perishable exhibits, and

the effect of failure to procure participation of the suspect at the session seeking to secure a disposal order. In the case of ***Mohamed Juma @ Mpakama v. Republic*** *(supra) we observed that, the issue of presence of the suspect at the session seeking a disposal order is a requirement traceable from the Police General Orders [the PGO]. This Court referred to PGO No. 229 paragraph 25 relating to investigation and exhibits and held that, the presence of a suspect at that time is mandatory..."*

Snapping back to the instant matter, it is on record that, PW1 picked the disputed narcotic drugs from the exhibit room at Babati Police Station and proceeded to Babati District Court for the disposal proceedings. According to him, upon arrival at the District Court, he consulted a magistrate who made an order for the disposal of the exhibit after an inventory form was filled in and signed. On examination in chief, he averred that, the suspects were present and signed the inventory form (exhibit P2).

However, DW1 testified that, the signatures purported to be his on exhibits P1, P2 and P6 were fabricated. On examination by Ms. Magdalena Sylister, learned advocate, the first appellant who was shown the three exhibits as reflected at page 150 of the record, stated that:

"A thumb print is not mine, signatures are not ours. These signatures are not mine. In exhibit P1 and P2, handwriting which recorded my name resemble, handwriting used to record a form and the signature alleged to be mine, resemble. Therefore, the one who recorded this form is the one who appended this signature. Signatures in these three documents differ, does not resemble, they differ by large. This creates a serious doubt because signatures differ, does not resemble. In exhibit P2 it is not true, we did not attend an exercise of disposal of exhibits."

On cross examination by the Senior State Attorney as manifested at page 151 of the record, the first appellant maintained that, none of the appellants attended the exhibit disposal proceedings at the Babati District Court and or signed the disputed documents. That evidence was corroborated by DW 2, Ibrahim Rashid, who went on record that, exhibits P1, P2 and P6 were not signed by the first appellant whose handwriting and signature were well known to him. Further, it was cemented by DW3 who insisted that, the appellants did not sign any of the disputed documents.

Additionally, on cross examination by the Senior State Attorney, the second appellant denied to have been arrested in possession of narcotic

drugs or recording a confession statement (exhibit P7), exhibit P6 and exhibit P2.

We have taken note that, at page 217 of the record, the impugned judgment relied on the testimony of PW1 to find that, the disputed documents were signed by the appellants. We are of the view that, the assigned justification did not sufficiently address the issues in dispute as raised by the defence counsel. In any case, the decision to rely on the testimony of PW1 alone whereas some documents involved other witnesses to the case, had no justifiable legal explanation. This is to say that, validity of these documents remained unresolved.

We have carefully examined all those documents on record alleged to have been signed by the appellants in the course of investigation. These are a certificate of seizure displayed at page 159 of the record (exhibit P1); inventory form appearing at page 160 of the record (exhibit P2); the second appellant's cautioned statement at page 165 – 167 of the record (exhibit P7); and; a report from the Regional Manager of the WMA (exhibit P6) featuring at page 164 of the record.

In our view, there is a sharp contradiction of the signatures purported to be appended by the appellants. The contradiction is in terms

of the handwritings and spellings of their respective names. For instance, in exhibit P1, the name of the first appellant was written *"Haji Rashid"*. In exhibit P2, it was written *"H. Rashid"* while in exhibit P6, he was referred to as *"Hadji Rashidi"*.

We have taken note that, when the attention of PW1 was drawn on these contradictions, he conceded and suggested that, he could not choose a signature for the appellants.

In the circumstances, we are not convinced that, the signatures on the disputed documents were signed by the appellants. Under these conditions, we find that, there was non-compliance of the requirements of paragraph 25 of the PGO and section 36 (2) and (3) of the DCEA. Having found that the validity of exhibits P1, P2, P6 and P7 is at stake, we proceed to expunge them from the record.

This takes us to the next issue on the chain of custody. This has been defined as a chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. In **Jackson John v. Republic**, Criminal Appeal No. 515 of 2015 [unreported], we scrutinized the rationale for the doctrine of chain of custody and alluded that, it is meant

to establish whether the alleged evidence is in fact related to the offence in question or fraudulently planted to incriminate the accused.

In view of that, we are satisfied that, the chain of custody was not established in this case owing to defects in the seizure of the narcotic drugs as explained before. The report of the CGCLA (exhibit P8) which was produced by Joyce Njisya (PW5) appears ex-facie to be genuine in so far as what it purports to say. However, the lacunae in the chain of evidence which led to the production of the report as an exhibit by PW5 is that, there is no evidence to show how the alleged narcotic drugs were seized. That being the case, there is a doubt as to whether the narcotic drugs that were examined by PW5 were indeed seized from the appellants.

Having expunged exhibits P1, P2, P6 and P7 from the record, the remaining evidence for the prosecution is too remote because, the alleged seizure of the disputed narcotic drugs is wanting; the alleged disposal of the narcotic drugs is questionable; the weight of the alleged narcotic drugs under consideration is not ascertained; and the alleged confession by the second appellant to the commission of the offence is unfounded.

In the result, we join hands with the appellants that, the prosecution failed to prove its case to the required standard, namely, beyond

reasonable doubts. Consequently, we allow the appeal thereby quash the appellants' conviction and set aside the sentences meted against them. We order their release from prison forthwith unless held for other lawful cause(s).

DATED at **ARUSHA** this 20th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of the appellants appeared in person, unrepresented, and Mr. Alawi Miraji, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL