IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 117 OF 2019

(Appeal from the judgment of the District court of Monduli at Monduli before Mkama-RM in Criminal Case No. 196 of 2018)

OSCAR PETRO.....1ST APPELLANT

ISAKA AYOUB.....2ND APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

18TH Nov 2020 & 10th Dec. 2020

GWAE, J.

Oscar Petro and Isaka Ayoub, the 1st and 2nd appellant respectively and two other persons namely; **Husna Juma** and **Hamida Juma** (3rd accused and 4th accused) were arraigned before Monduli District Court at Monduli ("trial court") of the offence of Trafficking in Narcotic Drugs c/s 15A (1) (c) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 9 of the Drugs and Enforcement Act No. 15 of 2017.

The prosecution alleged that both appellants and two others were found in unlawful Trafficking narcotic drugs to wit 22.25 kilograms of Khat Edulis commonly

known as Mirungi on a motorcycle with registration number MC. 748 BBS make Toyo on 27th day of March 2018 at Losirwa area within Monduli District and Region of Arusha. The appellants and their co-accused persons pleaded not guilty to the charge.

Upon hearing of the prosecution evidence, the trial court ruled out that the appellants' co-accused persons had no case to answer, they were therefore acquitted of the offence as per section 230 of the Criminal Procedure Act, Cap 20 R. E, 2019. The appellants who were found to have a prima facie case to answer, were afforded an opportunity to make their defence. After close of the parties' case, the trial court found the appellants' guilty as charged. They were sentenced to the term of thirty (30) years imprisonment.

In essence the prosecution evidence on record is to the effect that the appellants were seen riding their motorcycle speedily raising suspicion to the park rangers. The park rangers who suspected the appellants, traced them and eventually they managed to arrest them found trafficking the said narcotic drugs being parked into 8 bundles on the material date and places aforementioned. That, the appellants were searched on the spot and sent to police station by park rangers (PW1 &PW2) and they were re-arrested by a police officer (PW3), seizure note was then filled (PE1) and the said narcotic drugs plus motorcycle (PE3) were entered into an exhibit register (PE2).

Thereafter samples of narcotic drugs were sent to the Chief Government Chemist where the same was for verification and that the remaining narcotic drugs were destroyed through the order of the primary court (inventory -PE4). The Chemist confirmed the sample sent to him to be narcotic drugs make Khat Edulis and his report was tendered and received as PE5.

On the other hand, the 1st appellant seriously denied to have been found in possession of the narcotic drugs in question nor did he know how to ride a motorcycle. He added that, he was arrested on 28/3/2018 whereas the 2nd appellant defended his innocence by stating that he was arrested on 27/3/2018 at Kingongoni area Mto mbu on allegation that he was a poacher. He further contended that the prosecution testified that the motorcycle found in possession was red but the one produced was black. He then stated that the case against him is nothing but a fabrication.

Following dissatisfaction of the trial court decision, the appellants have now knocked the doors of this court by presenting a joint petition of appeal which is comprised of seven grounds of appeal, namely;

1. That, the learned trial magistrate erred in law and fact for convicting the appellants despite the failure by the prosecution to abide with the principles governing the chain of custody

2. That, the learned trial magistrate erred in law and fact when he failed to scrutinize the evidence of PW3 and exhibit P1 as a result arrived at a wrong decision
3. That, the learned trial magistrate erred in law and fact to convict and sentence the appellants relying on the evidence of PW1 and PW2 who are the park rangers as there was no independent witnesses according to the directives of the law
4. That, the learned trial magistrate erred in law and fact in not drawing an adverse inference against the prosecution for their deliberately failing to call the magistrate who ordered for the disposal of the said narcotic drugs
5. That, the whole trial court proceedings were marred by procedural irregularities which amount to the dismissal of the matter in total
6. That, trial court did not consider the appellants' defence
7. That, the learned trial magistrate erred in law and fact to enter conviction of the appellants while the offence was not proved beyond reasonable doubt

Relying on the above grounds of appeal, the appellants sought an order of this court allowing their joint appeal, quashing and setting aside the trial court's judgment, conviction and sentence and ultimately the appellants be released from prison forthwith.

At the hearing of this appeal before me, both appellants appeared in person, unrepresented whereas the DPP was duly represented by **Mr. Ahmed Hatibu**, the learned state attorney.

The 1st appellant merely relied on the ground of appeal contained in their joint petition of appeal whereas the 2nd appellant argued that, the prosecution evidence is not far from doubts since the alleged possession of the narcotic drugs to their destruction and that no handing over of the same and that the same were not tendered in court. Embracing his argument, the appellant cited the case of **Abuhi Omari Abdallah and three others v. Republic**, Criminal Appeal No. 28 of 2010 (unreported).

Arguing the 2nd ground, the 2nd appellant stated that seizure note was not prepared at the place where they were allegedly arrested (Engaruka area) but at Karatu police station which according to him it was contrary to the law. He further added that his cautioned statement was wrong received since the trial magistrate did not conduct trial within trial. The 2nd appellant went on arguing that the charge was not supported by the evidence of PW1 and PW2 particularly on the weight of 22.25 kilograms in the charge while PW3 said it was 23 Kilogram as well as PW3 who testified that it was 22.5 Kilogram adding that there was also contradiction on the place of arrest as it is not clear whether it was Engaruka or Losilwa area and that the prosecution was no precise on the color of the motorcycle allegedly found in possession of the appellants.

The learned counsel for the DPP, in his response to the appellants' oral submission admittedly argued that the seizure certificate against the 1st appellant was wrongly admitted as the same was filled in his absence as opposed to the 2nd appellant whose presence was secured.

The learned counsel argued that it was not fatal for failure to summon the Government Chemist as a witness for the prosecution since the trial magistrate properly invoked provisions of sec. 38 CPA and sec.58 and 59 of TEA adding that the narcotic drugs were produced through inventory (PE4).

Regarding the complained contradictions, the learned state attorney argued the contractions in question do not go to the root of the case nevertheless he admitted that failure by the prosecution to properly identify the scene of crime amounted to appellants' denial of a right to be heard.

In the last ground, Mr. Hatibu argued that the prosecution side generally proved its case at the required standard. He thus prayed for an order of the court dismissing this appeal.

In their rejoinder, the 2nd appellant reiteratedly stated that the Government Chemist presence was vitally important and that they were not involved in the destruction of the said narcotic drugs.

It is now for the court to determine the appellants' appeal the manner they were presented. Starting with the 1st ground of appeal on the complained chain of custody. The chain of custody being proper or chronological documentation of

exhibits be it physical or electronic must be adhered in order to ensure that was seized or retrieved and tendered in evidence is no other the one initially found, seized, stored/kept and eventually tendered in court for evidential value. Speaking of chain of custody, the Court to Appeal of Tanzania sitting at Dodoma had the following in the case of **Paulo Maduka and 4 Others v. Republic,** Criminal Appeal No. 110 of 2007 (Unreported)

> 'By chain of custody we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, 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...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." (Emphasis added)

(see also **David Athanas @ Makasi and another v. R** CAT Criminal Appeal No. 168 of 2017 and **Vuko Jack** (supra))

In our case, the 1st appellant objected the tendering of seizure certificate on the ground that section 38 (1) of CPA was not Complied with as there was no independent witness who was involved however the same was admitted by the trial court as PE1 on the ground that the place where the appellants were arrested was too remote to secure an independent witness.

Having probed PE1, I have observed that one Grayson Mgonja (PW3) did not sign PE1 as opposed to the trial court finding. More so the allegedly seized drugs were ordered to be destroyed and in lieu thereof an inventory was produced and received as exhibit P4 (PE4) but the appellants were not involved as there are no signatures of the appellants. I think interest of justice requires full involvement of the parties during search, seizure, destruction if the subject matter is perishable or subject of decay. Short of that there ought to be reason for such a failure. Fair hearing in criminal trials includes even pre-hearings of cases and related matters. The destruction made via order of a primary court magistrate dated 29th March 2018 ought to have involved the appellants.

It is really wanting in law that an accused should be incorporated in the destruction exercise vide an order of a court of law at the stage of preliminary hearing so that an accused can be availed a fundamental right of being heard. This is in adherence to the principles of natural justice, this position of law was rightly stressed by the Court of Appeal sitting at Tabora Registry in an appeal "**Emmanuel Saguda and another v. Republic**, Criminal Appeal No.433B of 2013" where it was held and I quote part of the decision;

> "The Government trophies found in possession of the appellants were required to be tendered in courts as exhibits. This was not done. Instead a certificate of valuation and inventory form were tendered and

admitted in court. The appellants did not have an opportunity to raise an objection".

I have also found that the appellants were not involved when samples were taken to the Chemist. Apart from the noted shortfalls yet to my firm view, the complained absence of an independent witness was, in the circumstances, justified as was correctly found by the learned trial magistrate since the appellants were arrested at the forest as explained by the PW2 though on the other hand there is contradiction in that PW2's assertion is to the effect that the appellants were arrested at forest while PW1 is found testifying that in that area there were only children that is why they did not involve any civilian ("There were no any other person other than kids"). The above determination also answers the appellants' grounds of appeal No. 2 and 3.

In the ground No. 4, I am of the established view, that, the inventory, PE4 was tendered by a person who prepared it (author), hence a competent person to produce as opposed to the appellants' complaints. In law, any person who is an author of such document or is aware of it or in custodian of an exhibit may tender it, is a competent witness to tender.

As to the complained contradictions and inconsistencies, I am not unsound of the principle that, in order the contradictions or inconsistencies in evidence by witnesses to be capable of vitiating the prosecution evidence such contradictions

or inconsistencies must go to the root of the case. I being the 1st appellate court judge, I should address the complained contradictions and inconsistencies. The issue of weight of 22.5 kilogram or 23 kilogram or 22.25 kilogram as appearing in the charge and testimonies by the prosecution witnesses and secondly, the appellants' complained contradictions in colors and registration number of the motor vehicle (PE3), to my considered view, do not go to the root of the case since recollections of witnesses are not always certain in a second or minute during trial due to lapse of time or level of literacy. The learned authors of SARKARS, THE LAW OF EVIDENCE. 16the Edition T page 48 which excerpt I find it worth recitation;

> "Normal discrepancies in evidence are those due 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 occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While discrepancies do not corrode the credibility of the party's case, material discrepancies do"

The same position was judicially stressed by the Court of Appeal in the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), it was held that human recollection is not infallible. A witness is not therefore expected to be right in minute details when retelling his story.

However, I have taken time to carefully examine the contradictions as to whether the appellants were arrested and found in unlawfully trafficking in narcotic drugs together and contradictions as to the place where the appellants were said to have been arrested go the root of the case (See judicial decision in **Mohamed Said Matula v Republic** [1995] TLR 3). The PW1 testified that the 1st appellant was arrested while alone ("We found you alone") and that he was arrested at **Losirwa** area as appearing in the charge while PW2 testified that the appellants were arrested at Engaruka area. These contradictions raise serious doubts as to whether the appellants were arrested while together or not and of course leading to a belief in evidence by the 1st appellant and 2nd appellant that they were arrested on 27/3/2018 and 28/3/2018 respectively.

Worse enough, as alluded herein above the prosecution evidence as far as the scene of crime is concern is not consistent, it follows therefore, the appellants were not availed an opportunity to properly defend themselves as rightly noted by the learned state attorney for the DPP regarding the area at which they were apprehended and found in unlawful trafficking of the Khat Edulis. Having observed as herein, the 5th ground is partly allowed and partly dismissed.

The complaint on the failure to summon the Government Chemist who examined and confirmed the substance sent to him to be narcotic drugs, though it is not mandatory requirement to summon the government chemist or expert as

envisaged under section 203 (3) of the CPA quoted by the trial magistrate which reads;

> "203 (3) When any report is so used in any proceeding other than an inquiry the court may, if it thinks fit, summon and examine the analyst as to the subject matter of that report"

But for smooth administration of justice, the Government chemist was a material witness who was to be summoned taking into account that the appellants strongly objected tendering of the chemist report. The names and signature of the chemist may not be contentious however by summoning the Government Chemist, the appellants would be availed an opportunity to cross examine him unless there is reason given for failure to procure him as a material witness during trial. Worse enough PE5 is a mere photocopy and no explanation that was given by the prosecution side.

That said and having examined each and every ground of appeal as shown above, I have the view that the prosecution evidence is doubtful due to lack of proper chain of custody of the narcotic drugs in question particularly to involve the appellants in the destruction exercise and in taking samples. Equally, the complained contradictions and inconsistencies particularly place of the appellants' arrest and if they were arrested together as well as failure to produce original chemist report and failure to summon the chemist

In the upshot, this appeal is allowed, the appellants shall be released from prison forthwith as soon as practicable unless withheld therein for other lawful cause.

I so order

M. R. GWAE
JUDGE
10/12/2020

Court: Right of Appeal explained.

M. R. GWAE
JUDGE
10/12/2020