IN THE HIGH COURT OF THE UNITED REPULIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 1 OF 2021

(Originating from Criminal Case No. 119 of 2019 in the District Court of Longido at Longido)

KURWA RASHID .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

26/05/2021 & 23/07/2021

GWAE, J.

In the District Court of Longido at Longido, the appellant, Kurwa Rashidi was indicted and eventually convicted and sentenced to 30 imprisonment jail of the offence of being found in unlawful possession of prohibited plants to wit; Khat Plant (Cath Edulis) commonly known as 'Mirungi' weighing 4 kilograms, the act which contravenes section 11 (1) of the Drug Control and Enforcement Act No. 5 of 2015.

Particulars of the charge against the appellant were; that, on the 16th day of November 2017 at Longido village within Longido District in Arusha Region,

the appellant named herein was found in unlawful possession of the said prohibited plants.

Prosecution evidence that led the trial court to be stratified that the appellant's guilt was proved to the required standard in criminal cases is briefly as follows; that, the accused was found along Longido-Arusha Road near Longido Police station while carrying a bag. She was suspected and then instantly searched and found in possession of ten bundles of mirungi. The arresting officer (PW2) sent the appellant to Longido Police Station where certificate of seizure (PE1) was filled and appellant signed thereat. The seized prohibited plants were then handed over to a police officer (PW1) working at Charge Room office (CRO), That, the seized plants were kept in exhibits room till on the 20th November 2017 when PW5 handed the same to police officer, PW3, in order that he could submit the same before the court for final disposal. The plants were disposed and inventory was filled (PE2) and a sample weighing 02 kilograms from the plants was taken for the purpose of bringing the same to the Government Chemistry for examination.

The prosecution evidence is further to the effect that, the said sample was sent to Government Chemistry by a woman police (PW4). That, the sent samples of Khat plant was eventually confirmed by a Government Chemist (PW6) to be prohibited plants to wit; Khat plant vide Government Chemist Report (PE5).

The case for the defence, was that the appellant was arrested at Namanga area and detained at Namanga Police Station till on 17th November 2017 when she was brought to Longido Police as opposed to the prosecution assertion that she was arrested at Longido area. The appellant further defended that on the material date, she was with another person, Beatrice Shio who came to be released by police. She further contended that she was found in possession of fabric samples and not prohibited plants in question as purportedly asserted by the prosecution.

Having been aggrieved by the trial court's decision and sentence imposed thereof, the appellant is now before this court armed with three grounds of appeal, namely;

1. That, the trial court erred in law and fact in convicting and sentencing the appellant while the Republic did not prove its case beyond reasonable doubt as required by the law.
2. That, the trial court erred in law and fact in convicting and sentencing the appellant without properly evaluating the evidence as adduced during hearing
3. That, the trial court erred in law and fact in convicting and sentencing in condemning the appellant unheard

When this appeal was called on for hearing before me, **Mr. Sylivester Kahunduka** and **Mr. Hemed Hatibu** who are learned advocate and learned state attorney appeared representing the appellant and respondent respectively.

Supporting the appellant's appeal. Mr. Kahunduka argued only ground 1 and 2 and abandoned ground No. 3. His arguments were to the effect that, the prosecution evidence is doubtful since chain of custody was broken and the certificate of seizure (PEI) as filled at different place other than where she was arrested adding that worse still no explanation as to why the same was filled at Longido Police station and not at the scene of crime. Embracing his arguments, he urged this court to make a reference to section 38 CPA and a decision of the Court of Appeal in **Anord Kaoinde vs. Criminal Appeal No. 49 of 2019** (Unreported) and **Chacha and 3 others v. Republic** Criminal. Appeal No. 551 of 2015

Resisting this appeal, Mr. Hatibu strongly supported the trial court's conviction and sentence by advancing the following reasons; **firstly**, that, the appellant met the PW2 who suspected her and thereafter search was conducted at Longido Police Station by PW2 who had no seizure certificate at the scene of crime. Hence, according to the learned counsel for the respondent, it was therefore difficulty to fill the certificate of seizure at the place where the appellant was arrested and searched. He however added that while at police

station, there was an independent witness though he did not testify in the trial court and **secondly,** Mr. Hatibu was of the opinion that, the chain of custody was not broken as PW6 was handed over by an officer within the office of Chief Government chemist. Hence, an officer from chief Government Chemist at Arusha was not necessary witness. Therefore, Mr. Hatibu argued that the complained chain of custody did no prejudice the appellant in anyhow.

Making his rejoinder, the appellant's counsel stated that in accordance with the testimony of PW2 there was no resistance from the appellant at the scene of crime. In his opinion the certificate of seizure ought to have been filled at the area where she was arrested. More so, the one who witnessed the 2nd search was not qualified person. Furthermore, Mr. Kahunduka stated that, there is no evidence as to whose or custody of the prohibited plants immediately after the appellant's arrest. He also reiterated that there is a broken chain of custody as one Benard and B. Kaijunga were vital witnesses but were not summoned to testify. He finally prayed the doubts be resolved in favour of the appellant.

After I had briefly detailed what transpired during trial and on appeal, I should now determine ground No. 1 and 2 as presented and argued by the parties' counsel. As to the 1st ground which mainly touches on whether failure by the prosecution to fill the seizure note (PE1) at the scene of crime is fatal. My reading of section 38 of CPA, entails that, it is necessary whenever a search to a

person or vessel or building or place or any carriage as the case in our instant matter be made upon production of either search order or search warrant and after search the searching officer is required to fill a certificate of seizure or receipt acknowledging the seizure at the scene of crime involving the person searched and relatives or any other reasonable person. Thereafter, the searching officer, a person so searched and a witness thereof shall be required to sign on the search order or search warrant.

It is however under provision of section 38 (1) of CPA where there are situations in which search may be made without search order or search warrant especially when an officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life of arresting and searching officer or property.

In our case, PW2 did not tell the trial court as to why she did not fill the certificate of seizure at the scene nor did she explain if the lives of the arresting officers or the police motor vehicle or both were in danger. This is unprocedural as filling of certificate of seizure is usually done at the scenes of crimes. More so, the one Lucas Mollel, a civilian who is said to have played as a role of an independent witness during search at Longido Police Station as depicted in the seizure note was not summoned while in the eye of the law, he was a material witness. And above all no reason that was given by the prosecution side in failing

to have him appear and give evidence. The contention by the learned counsel for the Republic that, there was no certificate of seizure at the scene, in my view, is not attainable since the same is not backed with the trial court record taking into account PW2 did not testify to that effect. Hence, search in question is therefore doubtful.

Regarding the ground no. 2 on the complained broken chain of custody, according to the record it is undoubtedly clear that, one Brasy Kaijunga (working with Government Chemistry (GCLA) at Arusha) who was handed over the sample by PW4, WP Najimat, did not appear for testimonial purpose as contended by the counsel for the appellant nor did one Michael Bernard of GCLA- Northern Zone who sent the said samples to PW6, Elimiamini Mkenga of GCLA-Lake Zone appeared before the trial court to establish chain of custody. Without hesitation, the integrity of the sample is questionable considering the plain fact that PW6 though working at the GCLA at Lake Zone by then he was not the one who received the samples from police. In the case of **Zainabu D/O Nassoro @ Zena vs. The Republic,** Criminal Appeal No. 348 of 2015 (unreported CAT) at Arusha held that;

> "It seems to us, decisions of the Court reiterating the duty to ensure the integrity of chain of custody, provisions of section 39 of the Anti-Drugs Act which require the police officers who seize suspected drugs to make a full report of all the particulars

> of such arrest or seizure to his immediate official superior, the Police General Orders, and the HANDBOOK FOR THE POLICE OFFICERS, 2010; are all designed to assure both the prosecution and the accused persons of the procedural justice in terms of fairness. To apply the words the Court stated in **Paulo Maduka and Others vs. R. (supra)** to the instant appeal, fairness means ensuring that the suspected narcotic drugs found on the appellant on 31/12/2007, was the very one that was sent to the Government Chemist for analysis on 28/1/2008."

In our instant criminal matter, sample of Khat plant sent to GCLA for examination can easily change hand as opposed to those which cannot easily change hands. More so, PW2 did not specifically testify as to one who had been in custody of the seized prohibited plants immediately after arrest and search of the appeallant (See **Joseph Leonard Manyota vs. Republic**, Criminal Appeal No. 485 of 2015 whose decision was delivered by the Court of Appeal on the 4th April 2019) (unreported-CAT).

As the requirement of strength of the prosecution evidence is always persistent, that is to say, the duty to prove by the prosecution is not discharged merely because an accused person's version is not believed by the court but on the clear and satisfactory evidence adduced by the prosecution side as was rightly demonstrated by the Court of Appeal of Tanzania in **John Makolobela**

Kulwa Makolobela and Derick Juma alias Tanganyika v. Republic (2002) TLR 296 where it was stated;

> "A person is not guilty of a criminal offence because his defence is not believed, rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt".

As rightly sought by the counsel for the appellant, the doubts apprehended must be resolved in favour of the appellant as in the administration of criminal justice, it is safer to acquit nine (9) guilty persons than to convict one innocent person.

In the final analysis, the appellant's appeal succeeds. The trial court's decision and its sentence are quashed and set aside respectively. The appellant shall be released from prison as soon as practicable

It is so ordered

THE HIGH COURT OF TANZANIA

M. R. GWAE,
JUDGE
06/08/2021