**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MOSHI**

**AT MOSHI**

**CRIMINAL APPEAL NO. 72 OF 2021**

*(Original Criminal Case No. 30 of 2020)*

**TUPA SEIF @ TUPA.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

*13/6/2022, 10/8/2022*

**JUDGEMENT**

**MWENEMPAZI, J:**

The appellant was arraigned in the trial court for committing the offence of unlawful trafficking in narcotic drugs contrary to section 15A(1) and 2© of the Drug Control and Enforcement Act, No. 5 of 2015 as amended by section 9 of the Drug Control and Enforcement (Amendment) Act, No. 15 of 2017. It was alleged that the accused(appellant) on the 5th day of February, 2020 at or 23:00 Hours at Mnoa Village within Mwanga District in Kilimanjaro

Region, was found in unlawful possession of 11.5 kilograms of Narcotic drugs Khat commonly known as Mirungi.

Upon hearing of the case, the Court found the accused guilty and convicted him as charged. He was sentenced to serve a term of thirty (30) years imprisonment. The appellant is aggrieved by the decision, conviction and sentence. He has filed this appeal raising eight (8) grounds of appeal. The same are as follows:

1. That, the learned trial magistrate grossly erred in law in failing to note that, there were no receipt issued pursuant to section 38(3) of the Criminal Procedure Act, after completion of what was said to be search and seizure of mirungi. Since, the alleged seizure form (Exh. P1) cannot be equated to a receipt stipulated under the above cited section of law.
2. That, the learned trial magistrate grossly erred in both law and fact in convicting the Appellant basing on Exh. P1(seizure form) but failed to note that, the said Exhibit P1 was in respect to the sulphate bag and not the seized mirungi.
3. That, the learned trial magistrate grossly erred in law in relying on the cautioned statement allegedly given by the appellant (Exh. P2) despite

the same being taken outside the time of four (4) hours as prescribed under section 50(1) (a) of the CPA. As the Appellant was arrested on 5.2.2020 at 23:00 hours. And alleged Exh.P2 was said to be recorded on 6.2.2020 at 7:17Hours.

4. That, the learned trial magistrate grossly erred in both law and fact in failing to note that the inventory from Exh. P7 was wrongly and unprocedural acquired, as the appellant was not taken before the magistrate who ordered the disposition of the said exhibits so as to be heard.
5. That the learned trial magistrate grossly erred in both law and fact in failing to note that, what was disposed of and subsequently filled in the inventory form (Exh. P7) was "Mfuko wa sulphate Rengi ya Kijani" and not the alleged seized Mirungi.
6. That, the learned trial magistrate grossly erred in both law and fact when she wrongly relied on the government chemist report (Exh. P10) to find that, what was alleged to be seized was actually mirungi despite the said report being produced and tendered in evidence by an incompetent witness (PW4) who was neither an Expert nor the maker

of the report. Therefore, he (PW4) was not capable of being cross examined on the said report.

7. That, the learned trial magistrate grossly erred in both law and fact in failing to draw an adverse inference to the prosecution for failure to summon the very essential witnesses, i.e the magistrate who ordered the disposition of the said exhibits, the government chemists who is alleged to have conducted the analysis of the said Mirungi and other witnesses who were said to be present during the search and seizure of the alleged Mirungi who could have rendered credence the PW1's evidence.
8. That, the learned trial magistrate grossly erred in both law and fact in convicting the appellant despite the charge being not proved beyond reasonable doubt and to the required standard by the law against the appellant.

At the hearing the appellant appeared in person and he prayed the appeal to proceed by way of written submission. The respondent was enjoying the services of Ms. Mary Lucas, State Attorney and basically, she did not object to the prayer. Hence, this court issued an order allowing parties to file their submission. Both parties duly complied to the scheduling order.

In the submission the appellant has submitted that the appellant has complained that in dealing with this case the investigation (PW1) did not comply with the provisions of section 38(3) of the Criminal Procedure Act, Cap. 20 R.E.2019.

According to the record the appellant after a charge was read over and explained to him, he denied that he has committed the offence. The prosecution called four (4) witnesses. The evidence which was led in court showed that the appellant was found by the Police who were at Mnoa Village. He was carrying a luggage, a sulphate with green and red stripes. They suspected him and when they searched him they found 260 khaki envelopes with fresh leaves which they suspected it was 'khat' (Mirungi). The event took place at around 23:00 hours on the 5th February, 2020.

The arrest was done under one Inspector Daudi Kwiashi (PW1) who handled the exhibit and a certificate of seizure which was admitted as exhibit P1. On the night of arrest the appellant was taken to Police Station Mwanga. The appellant (the accused) was interrogated on the 6th February, 2020 at 7:00 hours. Recording of the statement started at 7:17 hours. The caution statement was admitted as exhibit P2. The statement was recorded by J15 DC LINUS who testified as PW2.

PW3 G. 6772 PC Graciano is an exhibit keeper. He received a sulphate bag with 260 envelopes with fresh leaves suspected to be Mirungi. It was for the Case MWN/R/191 of 2022. The exhibit was received from inspector Daudi Kimashi (PW1) it was done under 'Hati ya Makabidhiano' and they signed. The exhibit was then labeled No 14 of 2020.

The same was taken by F 7097 D/CPL Chande, who testified as PW4, on the 12/2/2020 to Arusha Government chemist. He was handed over by Hati ya Makabidhiano and on the same day it was returned with a label No NZL 114 of 2020. PW3 testified that he prepared an inventory form for the exhibit to be destroyed. On 22/02/2022. The accused refused to sign and the magistrate ordered the exhibit to be destroyed. The exhibit was destroyed and the copy of P.F 16 registered as No. 14 of 2022 was admitted as exhibit P3. Hand over notes (Hali ya Makabidhiano) from Inspector Daudi Kimashi to PW3, PW4 to Chande and then from D/CPL Chande to PW3 admitted in court as exhibit P4, P5 and P6.

PW4 F. 7097 D/CPL Chande took the exhibit to the Government Chemists on the 12/02/2022. He received from PW2 and at the Government Chemist office he was received by Saile Malegesi, Government Chemist. There it was

weighed and found to be 11.15kg. After samples were taken, it was returned with a label NZL 114 of 2020.

At the Court the witness tendered form No DCEA 01 which was used to take exhibit to Arusha. It was received as Exhibit P8. Form proving weight is form number GCLA 001 showing the weight to be 11.15kg. It was admitted as exhibit P9. A report also confirming exhibit to be khat, Mirungi was issued. It is labeled NZL 114 of 2022. It was admitted as exhibit P20.

The trial court found the case against the appellant has been made. He defended himself as DW1. He denied to have been found with the sulphate Bag as alleged. Instead, he testified that he went to irrigate his farm. They have a Well which they share with other farmers in the village as on the date it was his turn. On the way home he met three guys who introduced themselves as police officers and arrested him. He met another person in the police motor vehicle near the railway. The latter had a sulphate bag with green and red stripes. He testified to have resisted the arrest. He was beaten by the police. He was interrogated to disclose his particulars which they wrote down and forced him to sign. He was told if he refuses, they will beat him. He was locked up from 5th to 7th (I understand as dates of February 2020) then he was taken to be interrogated by certain police who asked him

his personal details and later told him to sign. Then he was taken to court, with the other person he found in the police motor vehicle, where he was charged with the offence of trafficking of drugs.

At the hearing of an appeal the appellant prayed to present his submission by way of written submission. That prayer was not objected to by the respondent. A scheduling order was issued and both parties complied with the same.

The appellant in his submission complained first on the way seizure and the search were conducted. He submitted that the way the alleged search and seizure of the alleged Mirungi was conducted, flouted the mandatory provisions of Section 38(3) of the CPA, Cap 2019. There was no receipt which was produced, issued and tendered in evidence as an exhibit so as to prove and substantiate the claims by the prosecution witnesses that indeed the appellant was really found in unlawful possession of what they claimed to be Mirungi. As a proof the prosecution tendered seizure form, Exh. P1 but the same was not procedurally issued as what was required was the receipt as per section 38(3) of the Criminal Procedure Act, Cap. 20 R. E. 2019. Among other things, at the completion of the search, if any property is seized a receipt must be issued which must be signed by the occupier or owner of

the premises and the witnesses around, if any. The appellant cited the case of ***Selemani Abdallah and others v. The Republic, Criminal Appeal No .384 of 2008, Court of Appeal of Tanzania***(unreported). The following was the observation of the Court concerning section 38(3) of the Criminal Procedure Act, Cap. 20 R.E. 2019:

> *" The above cited section of law is couched in mandatory terms and the whole purpose of issuing the receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed the complaints normally expressed by the suspect that evidence arising from such search is fabricated will to a great extent be minimized."*

Further, the appellant cited the case of Patrick Jeremiah V. Republic, Criminal Appeal No. 34 of 2006, Court of Appeal of Tanzania, where the court held:

> *"Failure to comply with section 38(3) of the Criminal Procedure Act, is a fatal omission."*

It was also a submission by the appellant that in the case of **Andrea Augustino @Msigara and another V. Republic, Criminal Appeal No.**

**365 of 2018, Court of Appeal of Tanzania at Tanga** (unreported) the Court faced similar situation. The respondent therein tried to convince the court that the Certificate of Seizure issued to that case amounted to the receipt mentioned under section 38(3) of the Criminal Procedure Act, Cap. 20 R.E.2019. The respondent had the view that a certificate of seizure can be considered as a receipt. But the Court of Appeal of Tanzania in its decision stated held that:

> *" Following the above section and taking into account that in the case at hand there were no receipts issued by PW2 and PW3. There is no doubt that, the procedure was flawed. Again, as rightly put by Mr. Kibaha, the interpretation of the word receipt given by Mr. Mauggo is unfounded as there is no way the Certificate of Seizure or seizure form can be equated to a receipt."*

The appellant prayed that this court find that the prosecution did not comply with the legal requirement in seizing the alleged drugs found with the appellant. He prayed this court disregard the said evidence of Exhibit P1.

On another point, the appellant has complained that the learned trial Magistrate failed to grasp that the admitted Exh. P1 was in respect of the

sulphate bag with green colour and not the alleged 'Mirungi' when PW1 was testifying he alleged that they arrested and searched the appellant whereby inside the sulphate bag they retrieved what they suspected to be 'Mirungi'. After that they filled a certificate of seizure/ seizure form, Exh. P1. During tendering the same it was clarified whether it contained anything in it.

The appellant has also complained that the Magistrate in convicting him relied on Exh. P2, a cautioned statement. He submitted tha the same was recorded outside the time of four (4) hours as stipulated by section 50(1) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2019. He has submitted that he was arrested on the 5th February, 2020 at 23:00Hours and the statement was recorded on the 6th February, 2020 at 7:17hours. That escaped the attention of the trial magistrate and therefore he prays the court to disregard the said evidence.

The appellant also complains that the subject matter of the case is Mirungi. They were destroyed via an inventory Exh. P7. But that was done without following mandatory procedure. The appellant was never taken before the Magistrate who is said to have ordered the destruction of the alleged Mirungi. That was also not testified by PW3 that he took the appellant to the Magistrate who gave an order for disposal. In short, the regulation 25 of the

PGO was never followed. The appellant referred to the case of ***Mohamed Juma@ Mpakama V. The Republic*, Criminal Appeal No. 385 of 2017, Court of Appeal of Tanzania**, (unreported) where the court underscored the importance of taking the accused persons before the Magistrate who are ordering the disposition of the perishable exhibits and the need to taking photos of the same, the court held as follows:

> *"While the Police investigator, Detective Corporal Saimon(PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form(Exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the Primary Court Magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO."*

The appellant has argued that it was wrong and prejudicial for the learned trial Magistrate to rely upon Exh. P7 which was the crux of the case at hand to convict the appellant. He prays this court to amplify and resolve this issue in his favour.

The appellant has also submitted that was was disposed was *'Mfuko wa sulphate rangi ya Kijani'* and not the alleged 'Mirungi". Therefore, it cannot be said safely with certainty that what was alleged to be disposed off was Mirungi.

Lastly, the Government Chemist's report, Exh. P10 was tendered in court by the witness, PW4 (F7097 DC Chande). This is a police officer who is not an expert in chemical analysis nor was he a maker of the report. It is the argument by the appellant that he was denied a chance to cross examine the witness on the content. He prayed that the same be disregarded.

On the last point, the appellant complains that important witnesses such as the Magistrate who ordered disposal of the said Mirungi and the Government chemist who conducted the analysis were not called to testify. He prays that this court draws an adverse inference.

The Respondent is supporting the appeal on the main ground that the prosecution failed to prove the offence beyond reasonable doubt. In submitting to clarify the position they are holding the counsel for the Republic, Ms. Mary Lucas, State Attorney, stated that the appellant therein has been found in unlawful possession of Narcotic drugs as testified by PW1

who is the person who arrested him. Section 36(2) and (3) of the Drugs Control and Enforcement Act, as well as **Drugs control and Enforcement (General)Regulations, 2016. G.N. No. 173 of 2016** provides for the procedure to be followed by the arresting officer who seized the Narcotic drugs. Among other things, the arresting office is required to prepare a certificate of seizure containing the seized drugs, he must make proper document of how the drugs are handled, need to prepare an inventory which will contain details relating to such seized narcotic drug including its description of quantity, mode of packing etc. Then he is required to make an application to the Magistrate certifying the correctness of inventory prepared, taking samples and photograph in the presence of the Magistrate, and basing on the nature of the seized drugs, an inventory is mandatorily and must be done immediately after the completion of other procedures. In the present case the inventory was made after the lapse of ten (10) months.

In this case, it is testified that the sulphate bag with 260 envelop was seized and taken to the exhibit keeper. No special mark is said to have been made by PW1 to differentiate it from other items. According to the record in evidence the marking was done after the exhibit had been taken to the Government chemists, where it was marked NZL 114/2020 as Per PW3. An

inventory was prepared on the 22nd December, 2020. According to the testimony of PW3 no special mark was put on the exhibit before keeping it. The whole of it was given to PW4 who took it to the Government Chemists for analysis. In a whole, the record of the chronology of events was not recorded to save the trail of events so that no suspicion is raised as to the veracity of the allegations against the appellant.

The counsel for the Respondent has submitted that there is no coherent or chronological movement of handling of exhibits from the time of seizure up to the disposal of the exhibit as required by law. On the bases of the nature of the item seized, it is easily tempered. Hence proper chain of custody needs to be proved; not only from documentation but also in the testimony of witnesses who allege to have been involved. She cited the case of **Paulo Maduka & others vs. Republic, Criminal Appeal No. 110 of 2007.**

It is testified by PW4, F7097 DC Chande that he took the exhibit from Same to Arusha. There it was examined and later he was called to collect the report, Exh. P10. The report shows the examination was conducted at Dar es salaam. hOw did the samples arrive there it is not testified. Even the person who collected the samples was not called to testify. This is non other than Saile Malegesi. The learned state Attorney concluded that the

prosecution did not comply to the procedure of sample collection, storage of the seized exhibit, as set out in the relevant law. Lack of proper documentation of the chain of custody and oral evidence to explain the same vitiates the trial. They are supporting the appeal.

I have read the record and also the written submission by the parties in this case. It is clear as complained by the appellant and also the submission by the learned state Attorney, there is no clear demonstration of the chain of custody of the exhibit from the time of the alleged seizure to the reception of the time of testimony in court after the chemical analysis is done by the Chief Government Chemists. In the case of **Jason Pascal and Antidius Pascal v. The Republic, Criminal Appeal no. 615 of 2020, Court of Appeal of Tanzania at Bukoba[2022]TZCA 448 (19 July 2022)** it was held that:

> *"The rationale behind the rule is to establish nexus between the exhibit and the crime and thereby preventing possibility of the exhibit being fabricated to incriminate the accused."*

The position pronounced in the quote above was pronounced in detail in the case of ***Paulo Maduka & another v. Republic, Criminal Appeal No. 110 of 2007*** (unreported) where the court observed that:

> *"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, is to establish that the alleged evidence is in fact related to the alleged crime-rather that, 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."*

In our case, we have a doubtful dealing with the exhibit from arrest to the first handing over to the exhibit keeper, PW3. It is not clear whether the possibility of tempering with the contents of the exhibit was in check. Again, it may be said that the collection of the exhibit from the police Same was in check with no possibility of tempering it. What about the transfer from Arusha to Dar es salaam. No evidence was adduced in the trial court how

the exhibit reached there. We have a report being tendered in court as exhibit P10. Even the person who extracted the samples was not called to testify. The appellant has prayed that the evidence be disregarded.

Another serious complaint in my view is that the appellant denies to have been involved in the disposal of the exhibit. PW3 G. 6772 PC Grasiano testified that: -

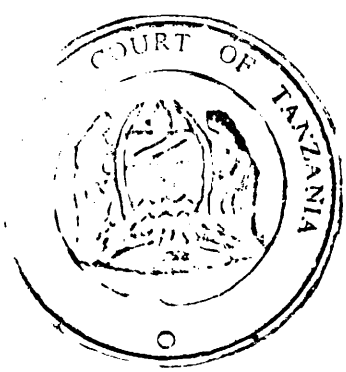
> *"On the 22/12/2020 I prepared the inventory form for the exhibit to be destroyed and took it to the Magistrate. Accused refused to sign the inventory Magistrate ordered to be destroyed, so it was destroyed. Inventory form proves the same it has court stamp and order on it."*

In this case the appellant attacked also that he was not involved in the disposal of the exhibit. The evidence quoted above does not show that the appellant was involved. In the case of **Mohamed @ Mpakama vs. The Republic, Criminal Appeal No. 385 of 2017, Court of Appeal of Tanzania** (unreported) it was observed that the inventory cannot be proved against the appellant because he was not given an opportunity to be heard by the Primary court magistrate. That position holds water in the present case.

Also, there was no receipt issued as per section 38(3) of the Criminal Procedure Act, Cap. 20 R. E. 2019.

For the reasons shown, the conviction of the appellant was vitiated with legal flaws which renders it to be unmaintainable. The appeal therefore haw merit and the conviction of the appellant is quashed, sentence set aside the appellant should therefore immediately be released from prison unless lawfully being held. It is ordered accordingly.

Dated and signed at Moshi this 10th day of August, 2022




**T. M. MWENEMPAZI**

**JUDGE**

Judgement delivered this 10th day of August,2022 in the presence of the appellant in person and Ms. Mary Lucas, State Attorney for the Respondent.

**T. M. MWENEMPAZI**

**JUDGE**