IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL No. 49 OF 2022

(*C/F Criminal Case No.46 of 2019 in the District Court of Babati at Babati*)

MOHAMED IDD @MUD .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order 09th November 2022

Date of Judgment 15th December 2022

BADE, J.

The Appellant herein was charged with an offence of trafficking in narcotic drugs, contrary to section 15A (1) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by section 9 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 before the District Court of Babati at Babati in Criminal Case No. 46 of 2019. Upon hearing of the case, he was convicted and sentenced to serve 20 years' term of imprisonment in jail.

He appealed before this Court against both conviction and sentence in the said decision, on the following grounds:

1. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant after failing to note and discover that, the arresting of an appellant was illegal, as it did not comply with the legal procedures for arresting an accused by police officers from another region, thus left some crucial matters unsolved.
2. That, the learned trial Magistrate grossly erred both in law and fact to convict the Appellant without the testimony of the material witnesses such as RCO of Manyara H. 8682 D/C Fahari and DET SGT Ramadhan who were involved by the Sgt Marijani in arresting the Appellant.
3. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant without considering that Nurdin Mohamed taken as an independent witness was also arrested by Police officers at the scene of crime while together with the appellant at one motorcycle where Nurdin was a passenger, hence he could not be an independent witness thus render the said certificate of seizure be null and void.
4. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant in contravention of section 50(1)(a) of the Criminal Procedure Act, cap 20 [RE 2022] in receiving

the alleged cautioned statement of the appellant which was out of the required time as per the provision of section above, hence left some crucial matters unsolved.

5. That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant without considering that the Police officer who tendered exhibit PE4 the weight report was not the maker or producer of the same, this resulted into the contradiction between the evidence on the weight as given by the Government Chemist officer that the drugs weighed 20 grams while D/CPL Noah testified that the drugs weighed 24 grams.
6. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant basing on caution statement, extra judicial statement and other evidences obtained in Singida region while the incidence occurred in Manyara region at Babati where there are Police stations and the Justices of Peace hence the said statements could have been recorded, the officers also had no movement order.
7. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant basing on the cooked and

fabricated case against the appellant by the Police officers who failed to get an independent witness during the arrest, they took Nurdin Mohamed as an independent witness while he was also arrested at the scene of the crime as one of the suspects.

8. That, the learned trial magistrate grossly erred both in law and fact to convict and sentence the appellant without enough evidence from the prosecution, it was not proper for the Prosecution to use the caution statement of one Nurdin Mohamed as an independent witness without his appearance before the court, and he was also among the arrested suspects.
9. That, the learned trial Magistrate grossly erred both in law and fact to convict and sentence the appellant on a charge which was not proved beyond reasonable doubts and to the required standard of law by the prosecution side.

The highlight of this case in facts is that, the Accused Mohamed Idd @Mud sometimes on the 18th September 2008 is alleged to have arranged the trafficking in heroine drugs to Singida. On the material date one F.1258 DET SGT Marijani, a police officer of Singida Police station was informed of such arrangement and he communicated with the RCO for Manyara region and

together they managed to set a trap. DET SGT Marijani was informed by the informer that an Accused was about to go to Sagrana village, the said F.1258 DET SGT Marijani headed to Sagrana village while accompanied by other Police Officers D/CPL Noah, D/CPL Thomas and D/CPL Enock, when they were on their way to the said village, they realized that the Accused has changed his plans of going to Sagrana village.

Following the change of the plan by the accused, DET SGT Marijani arranged with the RCO for Manyara Region for the arrest of the accused whose plan to go to Babati was known by the informer. DET SGT Marijani travelled to Manyara where he was accompanied by the Police officers in Babati Manyara one H 8682 D/C Fahari and DET SGT Ramadhan and they all altogether went to the appointed place - a location opposite NBC Bank at Babati. While there the accused was brought by Motorcycle (boda-boda) which was rode by one Nurdin Mohamed. On their arrival DET SGT Marijani ordered a search to take place, the accused and the motor cycle rider were both searched. The accused was found with two envelopes which were opened and found with 741 dices of what was believed to be heroin tied into soft plastic bags. Thereafter DET SGT Marijani filed a seizure certificate which was signed by the accused before D/CPL Noah and Nurdin Mohamed as witnesses.

The accused apprehension took place at Babati, and he was then taken to Babati Police Station where he was interrogated at which point he informed the police that the said drugs were from Singida. The accused was thus taken to Singida Region for the apprehension of 'the other' drug dealers. The accused was also interrogated at Singida and said to have confessed to being found with 741 dices of heroin, he was then taken to the Justice of Peace where he confessed to have been found in possession of the said dices of heroin on 20th September 2018. The drugs were taken for weighing where it is reported they weighed 24 grams, with a report signed by the Agent who weighed the drugs. As the investigation completed, the accused was returned to Babati on 26th February 2019 and was sent to court there where he pleaded not guilty.

When the appeal was called for hearing, the republic was being ably represented by Ms. Riziki Mahanyu - Senior State Attorney from the National Prosecution Services; while the Appellant was self-representing, and earnestly told this court to consider his grounds of appeal and come up with a fair judgment.

The Respondent thus made her replies by addressing herself to the grounds of appeal as presented in the petition of appeal. With regards to the 1st

ground of appeal, that the Magistrate erred because the accused was apprehended by the law enforcers away of their jurisdiction, the learned State Attorney submitted that, she finds the ground to be without much traction. She urges that PW1 F1258 Det Sgt Marijani is a police officer in Singida region. In his testimony he is recorded to have said that , after receiving information they came by the appellant on 09th September 2018, their informer scooped them that the accused was on his way to Itaga Singida for his drug dealing, which made PW1 and other Police officers to go to Itaga in Singida so they would apprehend the appellant. It happened that the Appellant changed his plan of going to the said place and resorted to go to Babati and meet with the said informer, thus she reasoned that under such circumstance it was imperative that they would cooperate with the Police officers at Babati. She further argued that it was in that mission with the police officers at Babati that they managed to apprehend and search the accused who was found with heroin in the envelopes found in his trousers, a fact in evidence which was not controverted.

Arguing the 2nd ground of appeal, which alleges that trial Magistrate erred because they did not consider that the RCO should have been made a witness in the case together with DC Fahali and Sgt Ramadhan. The learned

State Attorney submitted there is no harm to the prosecution's case since the officers who testified were enough. She cited section 143 of the Law of Evidence Act, Cap 6 of the Laws RE 2019 which provides that what matters is not the number of the witnesses but rather the coherence of the testimony, urging the Court that the 2nd ground lacks merit.

With regards to the 3rd ground of appeal, that the Magistrate erred by not considering the fact that the testimony of the independent witness was actually the ride for the appellant on the motor cycle, and thus he could not have testified against him. The learned State Attorney argued that, the accused and the motor cycle rider were all apprehended and searched. The Appellant was found with drugs and the rider had no drugs hence it was proper for him to be an independent witness, and thus stated that third ground also is meritless.

In support to the 4th ground of appeal, the learned Counsel for the Respondent conceded, that the Appellant's caution statement was taken in a period exceeding 4 hours, contrary to the provisions of section 50 (1) (a) of the Criminal Procedure Act Cap 20 RE 2019. She explained that PW3 one F4285 D/CPL Noah testified that the Appellant was apprehended on the 19th September 2018, and that soon thereafter the officers travelled with him to

Singida to arrest 'some other persons who were also in drug dealing business'. They made a search till morning on the next day and recorded his cautioned statement, that is the reason why they were late in taking his cautioned statement. The Counsel further stated that the taking of the Appellant's cautioned statement was not in contravention of the law as Section 48 of the Drugs Control and Enforcement Act provides that the Accused Persons be interviewed within the period of 24 hours and not the 4 hours as required under Criminal Procedure Act Cap 20 RE 2019. She urges that the Drugs Control and Enforcement Act is categorical on timings for taking of the cautioned statement beyond the 4 hour limit hence she urges that this ground is without merit.

On the 5th ground of appeal, that the trial Magistrate erred by considering that exhibit P4 tendered in court, which is the report on the weight of the drugs; was in fact tendered by a person who was not the author of the report. The person tendered the exhibit was PW3 D/CPL Noah, a Police officer. The learned State Attorney conceded it to be true that the one who tendered the exhibit did not create the said exhibit, but she urged that he had knowledge of it because he is the one who requested the drugs' specimen to be weighed. To substantiate her argument, the Learned State

Attorney cited the case of **DDP vs Mziray Haji, Criminal Appeal No. 493 of 2006** (unreported) in which it was held that a person tendering an exhibit does not have to be a maker or custodian of the report or exhibit as long as the witness has knowledge of the contents of the exhibit to be tendered in court. She concludes that this ground too lacks merit.

She elaborates further with regards to the weight of the drugs, that exhibit P4 shows that the drugs weighed 24 grams. PW5 explained that the drugs weighed 24 grams while in packages, but when weighing them without the packaging, the drugs had the weight of 20 grams, as shown at page 51 of the proceedings. She insists that there was no confusion between the weight of the drugs.

The learned State Attorney responds to the 6th ground of appeal, that the trial Magistrate erred in law and in fact to convict the accused basing on the cautioned statement, extra judicial statement and other evidences obtained in Singida Region while the incidence occurred in Manyara region at Babati and the Appellant was arrested in Manyara at Babati where there are so many Police stations with Police officers to record cautioned statements. The appellant was of the view that, the officers had no movement order for them to go to Manyara to arrest the accused. She responded that the truth of the

matter as per the evidence on record is that the incidence was to happen in Singida but the accused changed his mind and went to Manyara, which necessitated the police officers to travel quickly to effect the arrest; and that if they were to be held down by procedures, they would not have procured the said arrest. She maintains that the said police officers from Manyara were also involved in the said apprehension and hence the 6th ground lacks merit.

In support of the 7th ground of appeal, that the Magistrate erred since the prosecution could not procure the independent witness during the apprehension, instead they turned Nurdin Mohamed as an independent witness while he was one of the arrested suspects. The learned Counsel argued that, since the said Nurdin Mohamed did witness the said search and the appellant was found with drugs, Nurdin Mohamed qualifies to being an independent witness, and nothing is unusual on this particular matter so the 7th ground of appeal is without any basis.

On the 8th ground of appeal that, the Magistrate erred in law by considering the Statement of Nurdin Mohamed Exhibit P11 tendered in court without the witness being in court. PW9 at page 96 and 97 of the record of the proceedings stated that he is the one who took Nurdin Mohamed statement;

and were tendered in testimony since the said Nurdin Mohamed could not be found. Efforts to procure this witness had no fruition including calling his last known number and address, where the witness could not be found. They in fact attached summons with the witness testimony in exhibit P11. She further submitted that, section 34B of The Evidence Act, Cap 6 [RE 2019] allows the written testimony of a person who cannot be found to be admitted in testimony.

In arguing ground 9 of the grounds of appeal, that the Magistrate erred as the Prosecution could not prove the case beyond reasonable doubt, the learned State Attorney submitted that the case was proved beyond reasonable doubt since all the officers who apprehended the appellant testified in court. She submitted further that the said officers explained how they trapped the appellant, by using their informer who was communicating with an accused as a customer while also communicating with the Police Officers.

In further submission, she argues that even during the tendering of the certificate of seizure, the appellant's attorney did not object the admissibility of exhibit P1 (certificate of seizure) as well as the cautioned statement and

it is clear that the appellant admitted to have been found with the drugs heroine, and that the case was proved beyond reasonable doubt.

After the submission by the state attorney, the Appellant prayed to Court to make a response submission, and offered the hand written notes he had as he reiterated what he stated in his grounds of appeal.

On perusal of the hand written notes against the response submissions by the State Attorney, the appellant made replies to ground 3, 5, 6 and 8. In reply to ground 3 he insists that the search was illegal because the independent witness did not qualify as such, and as such the search and seizure report was also tainted with irregularity.

In response to ground 5, the appellant insists on the doubts regarding the weight of the drugs between PW3 contending 24 grams while PW5 putting it to 20 grams.

As for ground 8, he reiterated on the illegality of exhibit P3 being admitted without the witness being in Court.

The issue for consideration before this court is whether this appeal is maintainable in view of the procedural irregularities.

The 4th and the 6th grounds of appeal will be deliberated jointly since they are both on the issue of the cautioned statement, while the 3rd ,7th and the 8th grounds of appeal are also worth a joint consideration as they all raise complaints with regards to the independent witness. The remaining four grounds of appeal will be considered individually.

With regards to the 1st ground of appeal, it is this Court's view that a Police Officer needing to have a movement order so as to arrest outside the Region in which he is working is an administrative issue of the Police Force, and are guided by the PGOs since they are internal arrangements of the Police force which the Court need not interfere. Section 11(2) of the Criminal Procedure Act, Cap 20 [RE 2022] provides that;

11(2) Where the person to be arrested forcibly resists the endeavor to arrest him, or attempts to evade the arrest the Police officer or other person may use all means necessary to effect the arrest.

It is my considered view that, the Police Officer found it impossible to arrest the suspect at Singida following the Suspect's change of the venue where he could meet the police informer, having suggested to the informer that the meeting point be at Babati following the strictness of the Police officers at

Singida. The learned State Attorney submitted that the said PW1 F1258 Det Sgt Marijani informed the RCO for Manyara region to help effect such arrest by adding other Police officers to assist in arresting the Accused. It is the view of this Court that the Officer acted reasonably as required by section 11(2) **(supra)** which requires him to use any means possible to effect the arrest. That said, this Court subscribes to the Respondent's view that this ground has no merit.

The Appellant's 2nd ground of appeal that there was an error because the Trial Court did not consider the RCO for Manyara region, DC Fahali and Sgt Ramadhan as witnesses in proving that an Accused was apprehended with drugs. In consideration of this concern, this Court is convinced on the relevance and applicability of the oft cited **section 143** of The Law of Evidence Act, cap 6 [RE 2022] which provides that;

143. Subject to the provisions of any other written law no particular number of witnesses shall in any case be required for the proof of any fact

The Prosecution assured itself that the number of witnesses is enough as it has been submitted by the learned State Attorney, as clearly provided by the Respondent, it is also prudent to say there was no necessity of summoning

the said witnesses as demanded by the Appellant since what matters is the credence of the testimony not the number of witnesses. In any case, the Appellant had a right and was accorded opportunity to cross examine the witnesses summoned. Further, if the appellant felt that he needed to summon a witness he could have requested to do so on his own accord but not requiring other and further witnesses to be procured by the prosecution. It is pertinent to note and this Court firmly finds that the absence of the said witnesses did not affect the appellant. If anything, it should have affected the prosecution's case, and that is nothing of the appellant's concern. Moreover, it is the prosecution which have the right to choose which witness to call so as to give evidence in support of the charge. Such witness must be those who are able to establish the responsibility of the appellant in the commission of the offence. Cf **Abdalla Kondo vs Republic, Criminal Appeal No. 322 of 2015** (unreported). Also as rightly guided and held by the Court of Appeal in **Bakari Hamis Ling'ambe vs Republic, Criminal Appeal No. 161 of 2014** (unreported) that:

> "it suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case..... A Court of

Law could convict an accused person relying on the evidence of single witness if it believes in his credibility, competence and demeanor"

Regarding the 3rd, 7th and 8th grounds of appeal, which is being proposed to be deliberated upon together as they form a cluster on the same point of concern, this Court is aptly guided in applying its mind, by the case of **Director of Public Prosecutions vs Mussa Hatibu Sembe, Criminal Appeal No. 130 of 2021**, where the Court of appeal was of the view that

"An independent witness needs to be credible and impartial, he should not have interest in the matter, if it happens that he is interested in the matter then he cannot be a free witness for the search and seizure"

Basing on the above established principle, it is clear that the proper test for an independent witness is impartiality and credibility. Nurdin Mohamed was a Motor Cycle rider (commonly referred as bodaboda) who rode with the Appellant to the Nyota changa area nearby NBC to meet with the Police Informer that posed as a customer. Under such circumstance it cannot be said that he was impartial. He was most probably than not interested as he was hired by the accused. It is even open to perception that they could either be related or in knowledge of each other and that is why they came together.

It is even a probability on negative inference that he could be the owner of the drugs that is why he rode with the accused, and did not come to testify in Court when he was required to as a witness and his written statement had to be admitted without his appearance to be cross examined. In that regard he could not qualify to be an independent witness. On the other hand, the Appellant was apprehended at Nyota-changa area which is a busy CBD version of Babati township - during the day and at night, under such circumstances, there is always a movement of people and as such it was easy for the arresting officer to procure an independent witness for the sake of witnessing a search and seizure. This is in consideration with the fact that the trial court considered the statement of Nurdin Mohamed tendered in court as exhibit P11 while the said witness was not in attendance. There is no dispute that section 34B of The Evidence Act, Cap 6 [RE 2022] provides for the said allowance, but since the said statement was procured from an incompetent independent witness, it is not weighty and its evidential value is unworthy of consideration. In such consideration, I am inclined to find the 3rd, 7th and the 8th grounds of appeal to be meritorious and allow them. In consequence, the witness statement is expunged off the record of the case and the evidence is inconsequential.

At this point I find it tacit to pause and consider the consequence of the expunging of the independent witness's testimony which has now been rendered inconsequential. I take guidance from the Court of Appeal of Tanzania in the case of **Gaudence Mpepo vs Republic Criminal Appeal No 67 of 2018** (unreported) where the Court emphasized on the principle that where evidence contains contradictions and inconsistencies the court is duty bound to address them and decide whether they are minor or they go to the root of the case. The Court will have to address itself and try to resolve them where possible. Also see the Court of Appeal decision in **Mohamed Said Matula v. R [1995] TLR 3**.

It is my further finding that the independent witness testimony does not go to the root of the matter and thus it does not flop the prosecution's case, particularly because the other testimony were enough to hold the case.

As earlier observed, I shall look at ground 4 and 6 jointly because they both address the issue of recording of the cautioned statement. The appellant's complaint is that the cautioned statement was taken in contravention of section 50(1)(a) of the Criminal Procedure Act, it is the Respondent's argument that the cautioned statement was taken in time as prescribed under section 48 of the Drugs Control and Enforcement Act, cap 200 [R E

2019]. For easy reference, this court reproduced the said **section 48** of the Drugs Control and Enforcement Act, Cap 200 [RE 2019] which provides;

> *48(1) Subject to the provisions of this Act, the procedures and powers conferred to the officers of the Authority under this Part shall be followed, unless in all circumstances it is unreasonable or impracticable to do so.*
>
> *(2) For purposes of subsection (1), an officer of the Authority and other enforcement organs who (a) arrests a suspect shall*
>
> *(i) actually touch or confine the body of the person arrested unless he submits himself;*
>
> *(ii) inform the person arrested grounds or reasons for arrest and substance of the offence he is suspected to have committed;*
>
> *(iii) caution in writing and in a language which he understands, and, or inform that person of a right to or not to answer anything save for questions seeking particulars of his name and address, a right to call lawyer, relative or friend during interrogation; (iv) interrogate a person arrested about how he came about narcotic drug or psychotropic*

substance or precursor chemicals, or any other substances proved containing drug related effects

(v) ca use or require a person arrested to admit or deny the offence in writing within twenty-four hours or such other reasonable time and as it may be extended, and where necessary procure a statement before a justice of peace.

The above position is self-explanatory in matters concerning drugs control and enforcement, it provides for procedures to be applied in recording the required evidences including cautioned statements, hence the learned State Attorney's argument that the cautioned statement was properly taken within 24 hours holds water. This is so because the above position has ousted the applicability of Criminal Procedure Act Cap 20 RE 2019 including the procedures applied in recording cautioned statement. This Court has borrowed the wisdom in the case of **Jabril Okash Ahmed vs The Republic**, Criminal Appeal No. 331 of 2017, the Court of Appeal made an observation that, in matters of drugs control and enforcement, the applicable law is Drugs Control and Enforcement Act Cap 200 [RE 2019] and not the Criminal Procedure Act Cap 20 [RE 2019]. This Court is inclined to hold that

the Appellant's complaint concerning the cautioned statement is unmaintainable.

It is my considered view that, the appellant's cautioned statement was recorded properly as per the requirement of the law. The learned State Attorney took time to explain in submission that after the police had arrested the accused on the 19th of September, they travelled with him from Manyara to Singida to arrest other persons who are drug dealers, then on the 20th September 2018 during the morning is when they recorded the Appellant's cautioned statement. In any case, it is not in record of the lower court proceedings that the appellant retracted on the cautioned statement. The same was tendered and admitted in evidence without any resistance at the trial.

Further, on the concern that cautioned statement and extra judicial statement were taken in Singida while there were authorities competent to record the same in Babati, Manyara; and therefore the court erred in considering them, is not holding any traction with me. Section 48 (2) (a) (iii) and (v) (supra) do not provide specifically where such statements are to be recorded, the logic being that the Police force's mission is one in dealing with crimes countrywide. I subscribe to the Respondent's position that what

matters is the expediency and convenience in fulfilling such obligation, the Appellant has not substantiated the violation of the law and how that act has prejudiced his rights. This Court has not observed any miscarriage of justice resulting out of the said commission. That said, the 4th and the 6th grounds are both destitute of merit.

With regards to the 5th ground of appeal that PW3 D/CPL Noah was not proper witness to tender exhibit P4 which is the drugs' weight report and there was contradiction regarding the weight of the drugs, the officer from the Government Chemist's office told the court that the drugs weighed 24 grams while D/CPL Noah testified that the drugs weighed 20 grams. This court was guided by the case of **The DPP vs. Mirzai Pirbakhsh @Hadji and Three Others**, **Criminal Appeal No.493 of 2016** (unreported), the court of appeal listed the categories of people who can tender exhibits in court. It thus stated:

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in Kristina's case is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit*

therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question"

On the other hand on then pertinent issue of the contradiction on the weight of the drugs, it is this Court's view taking guidance from the Court of Appeal in **Said Ally Ismail vs Republic, Criminal Appeal No. 249 of 2008 (unreported)** where it was held that

"..not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory, then the prosecution will be dismantled"

Under this circumstance, the said D/CPL Noah had knowledge of the drugs' weight report, and the two statements regarding the actual weight of the drugs is explained in evidence. It suffices to say he was competent to tender the report as an exhibit, hence this ground is denied for lack of merit.

The Appellant's 9th ground of appeal is that, the prosecution case was not proved beyond reasonable doubts. It is my view that, the discussion of the

other 8 grounds of appeal have preempted the merit of the last ground since the consideration of the prior grounds have dealt with the reasonable doubts the Appellant has alleged and how the case was proved.

In the final analysis, this Court allows the 3rd ,7th and the 8th grounds of appeal, the testimony of the independent witness and the accompanying exhibits are hereby expunged. On the other hand, the Court denies all the other grounds of appeal as being unmeritorious.

The Trial Court's conviction and sentencing is hereby upheld in its entirety.

It is accordingly ordered.

DATED at **ARUSHA** on the 15th December 2022.

A.Z. BADE

JUDGE

The judgment is delivered this 15th day of December 2022, in the presence of the Appellant (in person) and Ms. Riziki Mahanyu learned State Attorney for the Respondent /Republic.

A. Z. BADE
JUDGE