IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 47 OF 2021

(Originating from Criminal Case No. 79 of 2020 of the District Court of Moshi at Moshi.)

1. DAMIAN JANKOWSKI KRZYSZTOF

2. ELIWAZA D/O RAPHAELI PYUZA..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

12/11/2021 & 11/02/2022.

SIMFUKWE, J.

The Appellants Damian Jankowski Krzysztof and Eliwaza d/o Raphaeli Pyuza together with two others were charged before the District Court of Moshi with four offences: Cultivation of prohibited plants contrary to **section 11 (1) (a) of the Drugs Control and Enforcement Act, No. 5 of 2015,** Trafficking in narcotic drugs contrary to **section 15 A (1) (2) (c) of the Drugs Control and Enforcement (Amendment Act No. 17 of 2017),** which was alleged to have been committed twice on the same date on two different places at Shirimatunda and Himo area respectively, and Using narcotic drugs contrary to **section 18 (a) of the Drugs Control and Enforcement Act No. 5 of 2015.** The Appellants

were convicted on all counts and sentenced to thirty years imprisonment on the 1st, 2nd and 3rd counts, on the 4th count the 2nd Appellant was sentenced to pay a fine of Tzs four million (4000,000/) or serve three years imprisonment in default. Sentences on the 1st, 2nd and 3rd counts were ordered to run concurrently.

The brief history of the matter as gathered from the prosecution and the defence case in a nutshell, is to the effect that on 07/2/2020 PW5 Inspector Hassan Msangi a police officer working with **Drugs Control and Enforcement Authority** (DCEA) in Dar es Salaam he was assigned by his in charge to travel to Moshi in Kilimanjaro Region for arresting a foreigner who was dealing with cultivation of narcotic drugs commonly known as bhangi. Inspector Msangi was also informed that the alleged suspect was also dealing with narcotic drugs business like selling bhangi. The said information was from the private informer and needed to be acted upon immediately. On the same night they travelled from Dar es Salaam to Moshi. On 08th February, 2020, Inspector Hassan Msangi in the company of one Vailet and other police officers went to the homestead of the 1st appellant at Shirimatunda, where they found the 1st appellant together with two other persons who were the 3rd and 4th accused persons before the trial court, the house maid of the 1st appellant and the child of the 1st appellant aged two years. The 2nd appellant came back home later and found the 1st appellant under arrest.

After being arrested, the 1st appellant was ordered to take the police officers to Himo at their farm, leaving two police officers on guard of the homestead of the appellants. When they reached there the 1st appellant opened the gate, inside the said farm, they found among other things many plants alleged to be bhangi. Thereafter, they went back to the

homestead of the appellants where PW7 one Peter a street chairperson was asked to witness the search of the homestead of the appellants. In the said search various items including substances suspected to be bhangi and cash money were seized as evidenced by exhibit P19 which was tendered before the trial court. Also, exhibit P20 (certificate of seizure in respect of items seized at the farm of the appellants) was tendered to substantiate prosecution case. After taking some leaves from each plant, about 729 bhangi plants were destroyed at the scene. Then, PW2 a Government Chemist officer from Arusha collected and marked the exhibits which were to be examined in the Chief Government Chemist Laboratory at Dar es Salaam. The exhibits were subsequently taken to Dar es salaam by PW2 for examination. The urine of the 4 suspects was also examined at Dar es Salaam. The urine samples results proved that all of them were using (consuming) bhangi. Also, the examination of the leaves samples and suspected substances seized from the homestead of the appellants proved that the same were cannabis sativa commonly known as bhang.

In their defence before the trial court, in short, they denied to have committed the offences charged. The 1st Appellant alleged among other things that the plants found at their farm at Himo were flowers. He said he signed on the certificates of seizure ignorantly due to language barrier. The 2nd appellant in her defence alleged among other things that she was told by the 1st appellant that he had planted Madagascar trees in their farm at Himo, but she never went there to see the said plant. She participated in uprooting the said plants and witnessed the destruction of the same. The 2nd appellant also admitted that their house was searched in the presence of their ten-cell leader. Concerning the liquid substance

seized from the house of the appellants, both of them alleged that it was honey.

Before the trial court the following facts were not disputed:

1. *That the 1st appellant and the second appellant are husband and wife.*
2. *That, the farm situated at Himo belonged to the appellants herein which they bought in the name of their child.*
3. *That, 729 plants suspected to be cannabis sativa (bhang) were found planted in the farm of the appellants.*
4. *That, the 3rd and 4th accused persons were found at the homestead of the appellants herein.*
5. *That, the suspected liquid substance and substance in the form of cake suspected to be bhang were found at the homestead of the appellants.*

In its findings, the trial court after going through the prosecution evidence of 11 witnesses and 35 exhibits which were tendered before it, was satisfied that all the offences charged against the appellants were proved beyond reasonable doubts. That, chain of custody had been well maintained on both documentary and oral evidence from the point of arrest and tendering in court.

The Appellants were aggrieved by conviction and sentence. They filed the instant appeal on ten grounds:

1. *THAT, the Trial Court erred in law and in fact by relying upon exhibit P19 in relation to the Search and Seizure at the House, situate (sic) at Shirimatunda, Moshi which was conducted by PW5 and failed to*

hold that the alleged Search and Seizure was conducted in total violation of the Law relating to Search and Seizure.

2. *THAT, the Trial Court erred in Law and in fact by relying upon exhibit P20 in relation to the Search and Seizure at the farm, situate (sic) at Njia Panda, Himo Moshi which was conducted by PW5 and failed to hold that the alleged Search and Seizure was conducted in total violation of the Law relating to Search and Seizure.*
3. *THAT, The Trial Court erred in law and in fact by relying upon the testimony of PW8 and Exhibit P21 and P27 in relation to the alleged disposal Order which as (sic) issued in violation of the Law.*
4. *THAT, the Trial Court erred in Law and in fact by failing to hold that principles of Chain of Custody were not observed during the investigation up to the trial of the Appellants as required by the Law.*
5. *THAT, the Trial Court erred in Law and in fact by relying upon the evidence of PW6 and Exhibit P26 which evidence was obtained without a lawful order of the Court as required by the Law.*
6. *THAT, the Trial Court erred in Law and in fact when it convicted the Appellants based on suspicious evidence.*
7. *THAT, the Trial Court erred in Law and in fact when it relied upon speculative evidence which influenced its judgment and Decision.*
8. *THAT, the Trial Court erred in Law and fact by failing to hold that the prosecution had failed to prove the case against the appellants beyond a reasonable doubt.*
9. *THAT, the Trial Court erred in Law and fact when it conducted a trial and proceedings in the language which the 1st Appellant was not linguistically matured in it, hence he was denied with the right to be heard.*

10. *THAT, the Trial Court erred in Law and in fact when it miserably failed to accord the Appellants with the copy of the complainant statement and hence the whole trial against the Appellants was by ambush.*

The Appellants prayed that their appeal be allowed by quashing the whole Judgment, conviction and sentence and the Appellants be set at liberty.

The appeal was argued *viva voce*. The Appellants enjoyed the service of the senior learned counsel Mr. Median Mwale, while Mr. Kassim Nasir learned State Attorney represented the Respondent Republic.

Mr. Mwale submitted among other things that on 08th February, 2020 the Appellants were invaded at their homestead at Shirimatunda within Moshi Municipality by police officers who were led by Inspector Msangi who was from Dar es Salaam. That, the said police officers had no search warrant nor arrest warrant and that they spent a night at the homestead of the Appellants. When they woke up, they headed to Himo at the place of the Appellants which is fenced.

Mr. Mwale went on to state that on 09th February, 2020 at 20:00hrs, the said police officers searched at the homestead of the Appellants at Shirimatunda, while they knew that it was contrary to the law to conduct search at night. That, the acts of the said police officers were contrary to **section 38 (1) (a) (b) (c)** and the proviso of the same section of the **CPA** and the **Police General Order No. 226.**

The learned counsel was of the view that the said search was contrary to **section 40 of the Criminal Procedure Act, Cap 20 R.E 2019** which provides that:

"A search warrant may be issued and executed on any day (including Sunday) and may be executed between the hours of sunrise and sunset but the court may, upon application by a police officer or other person to whom it is addressed, permit him to execute it at any hour."

Mr. Mwale submitted further that, all police officers being led by Inspector Hassan Msangi had no order of the Court. More precisely, that the search was done at night, it is from the evidence of PW7 Peter William. Mr. Mwale quoted what PW7 said at page 117 of the proceedings of the trial court at the 4th paragraph:

"On 9/2/2020 at 08:00 night hours I was at my house. I do remember that same night police officer came to my house introduced himself being a police officer and requested me to go and witness search at the house of Damian.... (1st accused) ...."

Mr. Mwale also, contended that since the police officers did not have any court order, the illegal search and arrest without warrant gave birth to an illegal Certificate of Seizure which is exhibit P19 which shows that the search was done by Inspector Hassan Msangi. Moreover, without having a court order, they entered at the factory of the Appellants at Himo and conducted a search which gave birth to an illegal Certificate of Seizure, exhibit P20.

In support of his submissions, Mr. Mwale cited the case of **Director of Public Prosecutions versus Doreen John Mlemba, Criminal Appeal No. 359 of 2019**, Court of Appeal of Tanzania at Dar es Salaam at page 11- 20 the Court emphasized procedures of conducting a search by police officers.

Mr. Mwale insisted that, throughout the proceedings, evidence of PW5 was to the effect that he received information from an informer on 07/2/2020 while at Dar es Salaam. Then, they left together with other police officers and an informer to Moshi at Shirimatunda. That, they did not even report at Moshi Central Police, they proceeded to conduct a search. They seized various items as listed on exhibit P19. Likewise, at Himo they seized items listed on exhibit P20. The learned counsel for the Appellants referred to page 19, 2nd paragraph to page 20 of the case of **Doreen John Mlemba** (supra), where the Court of Appeal stated that:

> *"In this appeal by retracing our own steps in Badiru Musa Hanogi's case (supra) and Mbaruku Hamis and Four Others (supra), we hereby expunge exhibit P2, the narcotic drugs, which we have amply demonstrated that it constituted evidence illegally obtained by the police in clear breach and disobedience of the provisions of the CPA and the guidelines provided by the PGO for them to follow. Not only that the evidence was unlawfully procured, but also the same was admitted illegally in complete disregard of* ***section 169 of the CPA.***
>
> *Consequent to expunging the basic evidence (exhibit P2) upon which the conviction could only be based, any other evidence in support of the recovery of or trafficking in the same drugs, like exhibit P1 (the Report ascertaining that the substances were narcotic drugs), exhibit P6, (the Certificate of Seizure), and exhibit P4 (the certificate of value of the drugs) including any oral evidence accompanying such documentary exhibit spontaneously crumble under their own weight for having nothing to support.*

Subsequent to the above finding, we dismiss the third ground of appeal for want of merit, and hold that the High Court was right in holding that the case was not proved beyond reasonable doubts against the Respondent, albeit for different reasons."

Explaining the above quoted case, Mr. Mwale said that, in the cited case the DPP was not satisfied with the decision of the High Court which was to the effect that conducting a search without warrant was unlawful. Their appeal was dismissed. He said, the same applies to the present case. To cement his point, Mr. Mwale also cited the cases of **Badiru Mussa Hanogi V. R, Criminal Appeal No. 118 of 2020**, Court of Appeal of Tanzania at Mtwara at page 6 - 12 and 14 of the judgment and **Shaban Said Kindamba Versus the Republic, Criminal Appeal No. 390 of 2019**, CAT at Mtwara at page 9 – 20.

It was submitted further for the Appellants that PW5 never told the court that he was authorized by the in charge of Moshi Police Station to conduct a search at Shirimatunda at the homestead of the Appellants and at Himo. Mr. Mwale alleged that the said search was illegal and prayed this court to condemn that illegality which also touched the evidence of PW1 and PW2, who were Chemist Officers from the Government Chemist Office. PW1 was a Chemist Officer who examined the samples of exhibits presented to her by PW2 Erasto Lawrence.

In addition to that, Mr. Mwale also challenged the competency of PW1 and PW2 to conduct sampling examination within the office of the Government Chemist. He said pursuant to **the Criminal Procedure Act** and the **Government Chemist Act No. 8 of 2016,** powers of examining samples are conferred on two persons only, thus, the Chief Government

Chemist under **section 10 of Act No. 8 of 2016** and the Government Laboratory Analyst who is appointed by the Minister of Health under **section 13 of Act No. 8 of 2016.** The learned counsel quoted section 13 (1) of the same Act which provides to the same effect.

On the 3rd and 5th grounds of appeal, Mr. Mwale referred to exhibit P6, P19, P20, P21, P26 and P27 and submitted that exhibit P21, P26 and P27 as tendered by PW6 and PW8 were admitted into evidence without due regard to procedures prescribed by law. Thus, their admission was unlawful. It was also submitted that PW8 had no authority to issue an order to dispose exhibits which concerned illicit drugs pursuant to **Drugs Control and Enforcement Act**, and **the Criminal Procedure Act, R.E 2019.** The learned counsel referred to **section 2 of the Drugs Control and Enforcement Act,** which defines the "Court" to mean:

> *"(a) in respect of an offence for contravention of section 7, 11, 15A, 17, 18, 19, 20, 21, 22, 25, 34, 39, 42, 47, 51A, 54 or 65 means subordinate court.*
>
> *(b) in respect of an offence for contravention of section 15, 16 or 23, means the High Court."*

To cement his contention, Mr. Mwale also referred to **section 36 (1) (2) (3) of Drugs Control and Enforcement Act** (supra) which provide to the effect that an application for disposal of illicit drugs should be made by the arresting officer to the Magistrate having jurisdiction under the **Drugs Control and Enforcement Act.** In addition, he cited **section 353 (2) (4) (5) and (7) of the CPA, R.E 2019** which provides for procedures for issuing an order for disposal of items. He was of the view that the court which had jurisdiction was the District Court of Moshi

presided over by a competent Magistrate pursuant to **section 6 (1) (b) of Cap 11, R.E 2019.** Mr. Mwale went on to state that, assuming that PW8 had jurisdiction and the court was properly constituted, PW8 was not a compellable witness to testify in the proceedings before the District Court of Moshi, pursuant to **section 129 of the Evidence Act, Cap 6 R.E 2019.** That, otherwise he was supposed to be ordered by a competent Magistrate to testify.

Mr. Mwale also questioned the destroying of exhibits and admission of photographs of the scene of crime on allegation that the same were done contrary to the requirements laid down under **section 353 (2) and (7) of the CPA** and **section 2 and 36 (2) and (3) of the Drugs Control and Enforcement Act, Cap 95, R. E 2019.** He also submitted that PW8 who signed the photographs after PW10 had taken the same, were not competent witnesses to tender exhibit P26 on the reason that, PW10 was not appointed by the Attorney General of the United Republic of Tanzania. That, prior to admission of pictures, there should have been a certificate of a person appointed by the Attorney General pursuant to **section 202 of the CPA.** In support of his point, Mr. Mwale subscribed to the case of **Fundisha Omary alias Fundisha V. Republic, Criminal Appeal No. 592 of 2015,** CAT at Dodoma at page 1, 5, 6, 9, 10, 11 and 12 of the judgment; in which pictures were tendered by a photographer like it was done in this case. Thus, for the evidence of photograph to be admitted, there should be a certificate pursuant to section **202 (1) of the CPA.** That, in the cited case, the accused was released by the Court Appeal even before composing judgment. The cases of **Kennedy Yared Monko Versus Republic, Criminal Appeal No. 265 of 2015,** CAT at Dodoma and **Respicius Francis Vs Republic, Misc. Criminal Application No.**

53 of 2019, High Court at Bukoba; in which the Court's had the same scenario like in the instant matter.

It was insisted that, exhibit P19 and P20 were illegally admitted into evidence and the Court erroneously relied on the photographs.

Concerning the inventory of perishable goods in respect of the alleged so called "bhangi" which was tendered by PW8; it was submitted for the Appellants that the procedure is outlined under the **PGO No. 229 Paragraph 25** which was quoted in the case of **Michael Gabriel Vs Republic, Criminal Appeal No. 240 of 2017**, C.A.T at Arusha at page 13 and 14 of the judgment from 2nd paragraph, line number 8 from the bottom, it was held that:

> *"Normally, a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the Magistrate to be disposed of before hearing of the case after being taken before him in the presence of the accused person. That is in accordance with paragraph 25 of the Police General Orders No. 229."*

Mr. Mwale submitted further that the Appellants were also charged of planting prohibited plants. One of the key exhibits being the plant itself which has to be examined by the Government Chemist. He cited the case of **Aldo Kilasi Vs Republic, Criminal Appeal No. 466 of 2019,** CAT at Iringa at pages 7 – 10 of the judgment, in which at page 9 it was stated that:

> *"In the case at hand, the plant suspected to be of bhang (Exhibit S3) was not submitted to the Government Chemist's Laboratory*

Agency for analysis. The failure to do so renders the prosecution evidence that exhibit P1 is noxious, invalid."

From the above decision, Mr. Mwale commented that, in this case all prosecution witnesses did not testify to the effect that the suspected plant was examined by the Government Chemist. He prayed that ground No. 3 and 5 be allowed.

On ground No. 4 which concerns chain of custody, Mr. Mwale submitted that, it was evidence of PW5 in respect of exhibit P19 and P20 that he seized many items. Then, the seized items were taken into the motor vehicle by PW5 to Himo at the farm of the Appellants. He asked why PW5 did not take the seized items to the police station in order to have proper paper trail. That, PW2 said that he left the seized items in the motor vehicle. Then, the same were transported to Dar es Salaam.

It was submitted further that lack of paper trail caused possibility of interfering the originality of the seized items. Also, there was no document showing that the Appellants signed on the envelopes which had the seized exhibit pursuant to **Regulation 20 (1) and (2) of the Drugs Control and Enforcement Regulations of 2016** which provides that:

"20 (1) The sample in duplicate shall be kept in dry and clean sealed plastic bags or container, as it is convenient and safe.

(2) The plastic bags or containers shall be kept in a paper envelope and may be marked as original and duplicate."

It was contended that in this case there were no such envelopes at the scene of crime as required by the law. He supported his argument by referring to the cases of **Paul Maduka and 4 others Versus Republic,**

Criminal Appeal No. 110 of 2007, CAT at Dodoma (unreported) and **Zainabu d/o Nassor alias Zena Vs Republic, TLS Law Reports at page 83** particularly at page 84. It was Mr. Mwale's opinion that in this case, chain of custody was not observed by the trial court.

On the 10th ground of appeal, it was submitted that looking at the entire proceedings, the Appellants were not availed with a complainant's statement which led to the trial by ambush. As a result, the Appellants were denied right to be heard by failing to prepare their defence properly; in terms of **section 9 (3) of the CPA.** Reference was made to the case of **Nassor Hamis alias Kichombero versus Republic, Criminal Appeal No. 182 of 2017,** HC at Dsm (unreported) at page 8 and 9, in which **section 9 (3) of the CPA** was discussed. Mr. Mwale was of the view that since the Appellants herein were not availed with the statement of the complainant, they were not accorded fair trial.

On ground No. 9 it was submitted for the Appellants that, the 1st Appellant was not conversant enough with both Kiswahili and English as both languages are not his mother tongue. That, almost all the exhibits which were tendered before the trial court were reduced into record in Kiswahili language. There is nowhere that indicates that there was translation from Swahili language to Polish language, the language which the 1st Appellant was conversant with. Mr. Mwale was of the view that, all the documentary evidence which were tendered into court record in Kiswahili were not understood by the 1st Appellant who was not conversant with the languages. That even the translator who purported to translate from Kiswahili to English language was not adequate as the 1st Appellant was not linguistically matured in English language. If there was an interpreter to Polish language, that would enable the 1st Appellant

to understand the proceedings of the trial Court. Thus, the 1st Appellant was condemned unheard which was against the natural principle of the right to be heard. That, even the requirement of **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977** as amended from time to time was not complied with. Mr. Mwale insisted that the 1st Appellant was not accorded right to be heard or right of translation to Polish language. That, the Republic should have communicated with other Government organs like BAKITA who are experts of languages, so that the 1st Appellant could be given adequate opportunity to be heard. The 1st Appellant was charged and convicted of offences which were written in a language which was not conversant to him.

The learned counsel for the Appellants prayed that the entire proceedings of the lower court be nullified by quashing conviction and sentence and set the Appellants at liberty. He concluded his submissions in chief by praying to withdraw his submissions in respect of data messages (electronic evidence) as an officer of the Court, since the same were not raised by his learned sister before the trial court. His prayer was granted and submission in respect of data messages (Electronic Evidence) was expunged from the record.

Mr. Kassim Nasir the learned State Attorney in his reply, supported the conviction and sentence meted by the trial court. He opposed this appeal and all the grounds raised by the Appellants. On grounds No. 1, 2, 6, 7, and 8 which concerns legal issues, he submitted among other things that procedures of investigation of cases in respect of illicit drugs are provided under the **Drugs Control and Enforcement Act**. Other laws support

the said Act. In case of conflict, the **Drugs Control and Enforcement Act** takes precedence.

Concerning the allegation raised by the learned counsel for the Appellants that they were invaded on 08/2/2020 at their homestead at Shirimatunda, Mr. Kassim replied that the same was not true. That, PW5 testified how he arrived at the homestead of the Appellants and how he did. That, all the procedures were observed. The learned State Attorney referred to page 147 of the proceedings of the trial court where DW1 (1st Appellant) stated that their door was knocked and DW1 opened it.

The allegation that police officers who searched the homestead of the Appellants had no search warrant and arrest warrant was vehemently opposed by the learned State Attorney as the said search was lawful. He supported his point by citing **section 41 of the CPA** which provides 4 types of entry, search and seizure. That, in this case pursuant to PW5 what was done was entry, search and seizure immediately after arrest in accordance with **section 24 of the CPA** which provides that:

> *"24. Whenever a person is arrested –*
>
> *(a) By a police officer under a warrant which does not provide for taking of bail or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, or*
>
> *(b) Without a warrant, or by a private person under a warrant, and the person arrested cannot legally be admitted to bail or cannot furnish bail,*
>
> *The police officer making the arrest or when the arrest is made by a private person, the police officer to whom that private*

person makes over the person arrested, may search such person and place in safe custody all articles, other than necessary wearing apparel..."

Mr. Kassim submitted further that, according to the facts of this case, entry, search and seizure was done immediately after arrest. He referred at page 79 of the proceedings of the trial court where PW5 stated how they were informed about the incidence and how they went to the homestead of the Appellants. At page 82 of the proceedings, PW5 explained how the 1st Appellant took them to the scene of crime at Himo at his farm of bhang. Thus, in this case police officers had no complete information. They were prompted to search after being informed by the Appellants. The learned State Attorney cemented his point by citing **PGO 229 paragraph 7** read together with **section 32 (7) of the Drugs Control and Enforcement Act** which allows search to be conducted anytime. That, on 08/2/2020 it was Saturday; thus, it was not possible to go to court as it was not a working day. That, the exhibits were discovered in the course of investigation. Mr. Kassim contended that the search in this case was lawful and that the submission that exhibit P19 and P20 were procured illegally was not correct. Also, he was of the view that the submission that PW1 and PW2 worked on exhibits which were illegally procured was wrong.

Concerning the issue that PW1 and PW2 were not legally authorized to examine samples presented to them on the basis that they were not Government Analysts, but rather Chemist Officers; the learned counsel for the Appellants referred us to the law in respect of appointment of Government Analysts for examining samples, Mr. Kassim submitted that the same is misconception and misleading. That, **Act No. 8 of**

2016 designates powers of the Chief Government Chemist to all officers who work in the Government Chemist Laboratory. He cemented his point by citing **section 12 (1) of Act No. 8 of 2016** which provides that:

> *"12-(1) Function and powers of the Chief Government Chemist may be performed or exercised by any officer of the Authority."*

Mr. Kassim insisted that since it was obvious that PW1 and PW2 were officers from the office of the Chief Government Chemist, they had powers to examine the samples as Government Chemists.

Regarding the allegation that PW8 the Primary Court Magistrate had no powers of ordering disposal of exhibits and that the same should have been done by the Magistrate conferred with jurisdiction to preside in cases of illicit drugs; Mr. Kassim submitted that since PW8 is a Resident Magistrate, he can preside in the District Court or Resident Magistrate Court. That the law has provided that any Magistrate can perform that task not necessarily a presiding Magistrate. The learned State Attorney cited **section 6 (1) (a) (b) and (c) of the Magistrates Court Act, Cap 11 R.E 2019** which provides to the effect that a Resident Magistrate can preside in any subordinate court.

Concerning the issue that when PW8 issued an order for disposal of exhibits and witnessed when exhibits were photographed was not properly constituted, Mr. Kassim submitted that the same was grave misconception. He referred to **section 36 of the Drugs Control and Enforcement Act** (supra) which provides that an application is done to a Magistrate. That, the provision is very specific. It refers to a person not "Court." The learned State Attorney added that **section 353 of**

the CPA is not applicable in the circumstances of this case. That, the same is applicable after commencement of trial/proceedings. Prior to that you cannot use **section 353 of the CPA.** That's why they even referred to **PGO 229 paragraph 25** and the case of **Michael Gabriel V. Republic** (supra) which discusses the said **PGO.** He commented that, they did not explain the essence of the said **PGO.** He went further by explaining the essence of **PGO 229 paragraph 25** by referring to page 13 of the judgment of the case of **Michael** (supra) where the Court of Appeal stated that:

> *"Normally a valuation report or an inventory may be tendered in the case of perishable items but the same must have been ordered by the magistrate to be disposed of before the hearing of the case after being taken before him in the presence of the accused person. That is in accordance with paragraph 25 of the Police General Orders No. 229."*

Mr. Kassim submitted further that the Magistrate 'notes' the exhibits and order its disposal. That, it does not mean that there should be formal application.

On the issue that PW8 said that he signed on the pictures while PW6 alleged that the pictures were printed later, Mr. Kassim submitted that the same was misconceived as PW8 did not say that he signed on the pictures. PW8 was there just to witness what was being done in his presence. He was not investigating the matter nor directing what should be done. That, it was not true that at page 123 PW8 stated that he signed on the pictures. That, there was a typing error and incomplete reading by the learned counsel of the appellants. There are

other words in brackets after the alleged testimony of PW8 which are in respect of pictures and video certificate. He added that PW8 meant that he certified a CD which had photos and videos.

Regarding the issue that admission of exhibit P26 did not comply with **section 202 of the CPA,** Mr. Kassim submitted that **section 202 of the CPA** is not applicable to exhibit P26. That, in pictures of this nature in cases of illicit drugs the applicable provision is **section 36 (3) (b) of the Drugs Control and Enforcement Act** which provides that:

> *"36 (3) An officer seizing such narcotic drug, psychotropic substance, precursor chemicals or other substance proved to have drug effects shall make an application to any magistrate having jurisdiction under this Act, for the purpose of-*
>
> *(c) Taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true."*

Mr. Kassim stated that **section 36 (3) of the Drugs Control and Enforcement Act** (supra) is mandatory. He added that **section 48** of the same Act provides to the effect that the provision of the Act prevails over other laws. That, procedures under the **DCEA** are different from procedures prescribed under other laws.

Concerning the cited cases in respect of pictures, Mr. Kassim submitted that all the cited cases are distinguishable to this case. That, the applicable procedure of taking photos in cases of illicit drugs is provided under **section 36 (3) of Drugs Control and Enforcement Act.**

Regarding the allegation that the suspected plants were not taken to the Government Chemist for examination and that it was not certain whether the said plants were illicit drugs as alleged or not; Mr. Kassim submitted that the said plants were examined by the Government Chemist after receiving the samples from PW5. That, PW2 found that the said plants were bhang as evidenced by exhibit P2. The learned State Attorney added that, also, exhibit P1 was handed over to PW1. There are handing over documents to that effect.

Concerning the issues of chain of custody that there was no proper trail of exhibits, it was submitted for the Respondent that the same was not correct and that it was a misconception. It was stated that PW5 testified to the effect that he is the one who conducted the search and prepared exhibit P19 and P20. Then, PW5 handed over the said exhibits to PW2 together with the plants found in the farm of the Appellants. After examining the said exhibits, PW2 handed back the same to PW5. Thereafter, PW5 handed over the exhibits to PW4 who was a storekeeper of the illicit drugs office at Dar es Salaam. It was stated further that everything was documented as evidenced by exhibit P17 and P18. That, the allegation that the principle in the case of **Paul Maduka** was not complied with was not true as the whereabouts of the exhibits were at all times known. All the documents in respect of chain of custody were tendered before the trial court.

On the issue that samples presented to PW2 were presented contrary to the law because the appellants did not sign on the envelopes, Mr. Kassim submitted that the cited Regulations are not applicable to custody of samples presented to the Chief Government Chemist. The Regulations mention the authorized officer of the seized substance.

That, the same refers to police officers and the Drugs Control and Enforcement officers not Government Chemist.

On ground No. 10 that the appellants were not supplied with statement of the complainant, Mr. Kassim alleged that records show that the appellants did not request for the same. He said, the appellants were legally represented but never requested for the same. He commented that in the cited cases, the appellants requested for the statement and the same was availed to them. The learned State Attorney referred to **section 9 (1) and (3) of the CPA** which provides that:

> *"9 (1) Information relating to the commission of an offence may be given orally or in writing to a police officer or to any person in authority in the locality concerned.*
>
> *(3) Where in pursuance of any information given under this section proceedings are instituted in a magistrate's court, the magistrate shall, if the person giving the information has been named as a witness, cause a copy of the information and any statement made by him under subsection (3) of section 10 to be furnished to the accused forthwith."*

In addition, Mr. Kassim submitted further that evidence of PW5 shows that the informer in this case was not named nor called before the court to testify. Thus, there was no complainant's statement in this case.

On ground No. 9 of appeal that there was language barrier between the 1st appellant and the court, Mr. Kassim submitted that if the 1st appellant had language barrier, how did he defend himself? Apart from that, the 1st appellant had representation of the learned counsel Fay

Sadallah. In addition, at page 148 of the trial court proceedings the 1st appellant stated how he was communicating with police officers. He did not say that he was not grasping what was being communicated to him. Mr. Kassim insisted that evidence against the appellants is very strong. That, to a great extent, they admitted that they were cultivating bhang and all the exhibits were admitted (exhibit P5 and P6). The 1st appellant admitted that he was using the said exhibits. Exhibit P5 had bhang in it. Even the containers (madyaba) were admitted by the appellants that the same were found at their homestead. The search was also not disputed as the 1st appellant explained how he assisted police officers to open the rooms during the search.

In conclusion, Mr. Kassim prayed that all the grounds of appeal should be found to be devoid of merit. That, even the allegation that the search warrant and arrest warrant did not comply to the law were not true. Laws are enacted to safeguard rights of the people and obligations of the people. The learned State Attorney referred to **section 169 (4) of the CPA** which provide to the effect that:

> *"The court shall prior to exclusion of any evidence in accordance with subsection (1), be satisfied that the failure or breach was significant and substantial and that its exclusion is necessary for the fairness of the proceedings."*

Thus, it will not be justifiable to exclude exhibit P19 and P20 in this case as no right was infringed. That, the search and entry to the homestead of the appellants was done peacefully. Mr.Kassim prayed that **section 388 (1) of the CPA** should be complied with by this court. He suggested that if there is anything which was not complied

with, the court should consider whether it occasioned failure of justice. He subscribed to the case of **DPP versus Freeman Aikael Mbowe and another, Criminal Appeal No. 420 of 2018,** C.A.T at Dsm at page 13 and 14 in which the Court referred to the case of **Bahati Makeja** in which **section 38 (2) of the CPA** was discussed and it was concluded that:

> *"...though section 38 (2) of the CPA requires an exhibit seized pursuant to a search and seizure to be submitted to the magistrate, failure to do so would not impeach the piece of documentary evidence because the use of word "shall" is not always mandatory but relative and is subjected to section 388 of the CPA."*

The learned State Attorney went on to state that, the circumstances of this case are to the effect that there was no failure of justice as **section 38 of the CPA** is not mandatory. That, laws were complied with to a great extent. Thus, this Court should consider all that in determining this appeal. He prayed that this appeal should be dismissed, conviction and sentence against the appellants should be upheld.

In his rejoinder, Mr. Mwale submitted inter alia that, the learned State Attorney submitted as if he was praying the matter to be tried de novo. He said, they were not surprised as the proceedings of this matter had many irregularities. That, **section 41 of the CPA** which the prosecution alleged to have based on, is in respect of search and seizure of a person not a homestead of someone. Mr. Mwale quoted **section 41 of the CPA,** it provides that:

> *"41. A police officer may search the person or clothing that is being worn by, or property in the immediate control of a person and may*

seize anything relating to an offence that is found in the course of the search, if the search and seizure is made by the police officer."

Mr. Mwale was of the view that the learned State Attorney misdirected himself. He said that **section 41 of the CPA** is not applicable to our case, thus the interpretation of law was not correct. He added that pursuant to **section 38 (1) (3) of the CPA,** the police officers in this had no authority to search without warrant. He cited the case of **DPP Vs DOREEN JOHN MLEMBA** (Supra) in which the Court of Appeal had similar situation like in the instant matter. It was held that everything which was done contrary to the law was null and void.

Concerning the Government Chemist officers who testified, Mr. Mwale re-joined that one cannot just assume the powers without being delegated by the Chief Government Chemist after consultation with a responsible Minister. That, the learned State Attorney mislead this court. He referred to **section 12 (2) (3) of Act No. 8 of 2016** which is to the effect that the delegated person must have instruments and the same must be gazetted. Moreover, that there are only two people who are vested with the mandate under **section 18 (1) (2) (3) and 19 of Act No. 8 of 2016.**

On the issue that the appellants admitted to have planted bhang, Mr. Mwale disputed the same and stated that no cautioned statement was tendered as exhibit.

Concerning exhibit P19 and P20 as the basis of the case, Mr. Mwale submitted that it was not true that the appellants were found with 15.6 kgs of bhang. That, the second count of the charge is to the effect that the appellants were found in possession of 15.6 kgs of bhang at

Shirimatunda. However, the certificate of seizure does not indicate that the appellants were found in possession of that amount of bhang. That, exhibit P20 signed on 9/2/2020 does not show that the appellants were found with 1.6 kgs of bhang as indicated under the 3rd count of the charge sheet. The learned counsel insisted that, the appellants were convicted on the 2nd and 3rd count for the things which they were not found in possession.

Concerning the issue that **section 38 of the CPA** should not be considered by the court and the case of **Freeman Aikael Mbowe** (supra), Mr. Mwale submitted that the cited case is distinguishable to this case as it discussed **section 38 (2) of the CPA** which is irrelevant to this case.

Regarding PW8, Mr. Mwale submitted that the learned State Attorney submitted that they had to use PW8 because it was Saturday; that, if it was Saturday, how did they find PW8 who went there with a court seal? That, even PW8 never testified to the effect that it was not a working day. The learned counsel prayed that submissions of the State Attorney in respect of PW8 be disregarded.

On the issue that **section 202 of the CPA** was not applicable to narcotic drugs cases, Mr. Mwale submitted that the same should be disregarded as the learned State Attorney did not cite the relevant provision of the **Drugs Control and Enforcement Act** in respect of pictures. That the pictures should not be considered as the same were taken contrary to **section 202 of the CPA.** It was stated further that according to DW3 as stated at page 116 of the trial court proceedings, the alleged plants were ordered to be spread in the said farm. Also,

there was a person who was found residing inside the fence of the farm who jumped the wall upon their arrival at the said farm. That, pursuant to page 171 of the trial court proceedings, it is obvious that there was another person in the alleged farm who was not arrested by the police officers.

Mr. Mwale went on to submit that, the pictures were fabricated as the alleged bhang was taken there in the sacks. That, after spreading the said plants on 08/2/2020, the pictures were taken on 9/2/2020. He cemented that **section 106 of the Penal Code** prohibits using fabricated evidence. That, PW5 and PW8 fabricated exhibit P26 and tried to convince the court that the same was real. He referred to the case of **MAZIKU SHIJA Vs REPUBLIC, TLS, Law Report at page 109,** particularly at page 110, where the Court of Appeal discussed the issue where a suspect escapes and another person is arrested as escape goat.

Concerning the issue that the **Drugs Control and Enforcement Regulations** were not applicable to PW1 and PW2, Mr. Mwale submitted that the same should be disregarded. He supported his point be referring to the case of **ADO KILASI** (supra) at page 7 where it was held that:

> *"The requirement for any suspected narcotic drugs or psychotropic substance to be tested and proved as such, can be traced from* ***section 67 (1) of the Act*** *where the Minister is given powers to make regulations for carrying out the purposes of the Act and from subsection (2) of the said provision..."*

He stated further that the said Regulations are applicable to PW1 and PW2 in respect of count No. 1. That, no plant suspected to be bhang was taken to the Chief Government Chemist for examination. All the seized plants (729) were destroyed. On the strength of the case of **ADO KILASI,** he prayed that the appellants should be released.

Concerning the issue that **Cap 95** prevails over other laws in case of conflict, Mr. Mwale reiterated the cited case of **BADIRU MUSSA HANOGI Vs REPUBLIC** (supra) in which the Court of Appeal held that **Cap 95** was not intended to replace the **Criminal Procedure Act.**

On the issue of chain of custody and that there was paper trail in respect of exhibits, Mr. Mwale submitted that the conditions set in the case of **MADUKA** were not complied with. He reiterated his submissions in chief that chain of custody was not managed well.

Regarding an issue of the interpreter of the 1st appellant raised at page 127 of the trial court proceedings, it was submitted in rejoinder that what the interpreter was translating is not shown on the proceedings.

Concerning the issue of supplying complainant's statement that the same was not compulsory in cases of an informer, the learned counsel for the appellants submitted in rejoinder that the same was baseless as **section 2 of the CPA** defines who is a complainant. That, in this case the complainant was PW5. Thus, his statement was supposed to be supplied to the appellants.

Mr. Mwale concluded his rejoinder by praying that this appeal be allowed; judgment, conviction and sentence be set aside and the appellants be ordered to be released.

I have carefully gone through the submissions in chief of the learned counsel for the appellants, the reply submissions of the learned State Attorney and the rejoinder thereto, the grounds of appeal and the trial court's record. Basing on the well-known cardinal principle of criminal cases, the main issue for determination in this appeal is whether evidence tendered by the prosecution before the trial court proved beyond reasonable doubts the offences charged against the appellants. According to the grounds of appeal and the submissions of the learned counsel for the appellants, there are issues raised against the Respondent Republic for the sake of raising some reasonable doubts on part of prosecution. The said issues include among other things; **lack of warrant of arrest and warrant of search and seizure, non-adherence to principles of chain of custody, that disposal order of disposal of exhibit P21 and P27 was issued in violation of the law, language barrier of the 1st appellant and that the statement of the complainant was not furnished to the appellants as required by the law.**

Starting with the issue of warrant of search and seizure, Mr. Mwale for the appellants submitted among other things that on 08/2/2020 the appellants were invaded by police officers at their homestead at Shirimatunda within Moshi Municipality. That, the said police officers were led by Inspector Msangi PW5 from Dar es Salaam who had no search warrant nor arrest warrant. The police officers spent a night at the homestead of the appellants, in the morning they headed to Himo at the factory of the appellants which is fenced. The homestead of the appellant at Shirimatunda was searched on 9/2/2020. Mr. Mwale was of the view that both searches and seizures at Shirimatunda and Himo

were contrary to **section 38 (1) (a) (b) (c), 40 of the CPA** and **the Police General Orders No. 226.** Moreover, it was alleged that the said police officers had no court order for conducting a search at night as provided under **section 40 of the CPA.** In that respect, Mr. Mwale challenged the certificates of seizure which were a result of the alleged searches at Himo and Shirimatunda respectively. Thus, exhibit P19 and P20. In his reply, Mr. Kassim for the Respondent Republic, was of the firm view that procedures of investigation of cases in respect of illicit drugs are provided under the **Drugs Control and Enforcement Act.** Other laws support the said Act. In case of conflict, the **Drugs Control and Enforcement Act** takes precedence. The learned State Attorney vehemently opposed the allegation that the arrest and search in this case was unlawful. He supported his submission by citing **section 41 of the CPA** which provides 4 types of entry, search and seizure. He said, what was done in this case pursuant to PW5 was entry, search and seizure immediately after arrest in accordance with **section 41 (b)** and **section 24 of the CPA.** Referring to the evidence of PW5, Mr. Kassim stated that in this case police officers were prompted to search after being informed by the appellants in the course of investigation. Also, Mr. Kassim cited **PGO 226 paragraph 7** read together with **section 32 (7) of the Drugs Control and Enforcement Act,** which allows search to be conducted anytime.

This Court is in agreement with the learned State Attorney that the arrest, search and seizure in this case was done pursuant to **section 32 (7) of the CPA** read together with **PGO 226 paragraph 7,** thus the said search was lawful.

Section 42 (1) (b) (i) and (ii) of the CPA provides that:

"42 (1) A police officer may-

(b) enter upon any land, or into any premises, vessel, or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated, and may seize any such thing that he finds in the course of that search, or upon the land or in the premises, vessel or vehicle as the case may be-

(i) if the police officer believes on reasonable grounds that it is necessary to do so in order to prevent the loss or destruction of anything connected with an offence; and

(ii) the search or entry is made under circumstances of such seriousness and urgency as to require and justify immediate search or entry without the authority of an order of a court or of a warrant issued under this Part." Emphasis supplied.

PW5 in his testimony stated among other things that on 07/2/2020 they were assigned by the in charge of Drugs Control and Enforcement Agency at Dar es Salaam, that there was an arrest which was to be done at Moshi, due to secret information he had received that there was a foreigner who was dealing with business of cultivating bhangi. They travelled to Moshi and continued to communicate with the informer, who directed them where the said foreigner was living.

This Court is of considered opinion that the circumstances of search and seizure in this case were serious and in the nature of urgency, hence applicability of **section 42 (1) (b) (i) and (ii) of the CPA** (supra) was inevitable. Otherwise, in the circumstances of this case, other procedural processes like seeking an order of the court, arrest

and search warrant could leak information and make the whole exercise futile.

I subscribe to the case of **Marceline Koivogui V. Republic, Criminal Appeal No. 469 of 2017,** at page 29 in which the Court of Appeal of Tanzania held that:

> *"In addition, in the present case, the circumstances in which the search and seizure were effected, in our considered view,* ***befit emergency situation as envisaged by provisions of section 42 (1) of the CPA."*** *Emphasis added.*

On the issue of **non-adherence to principles of chain of custody,** the learned counsel for the appellants alleged that in this case there was no paper trail of exhibits. On the other hand, the learned State Attorney submitted to the effect that PW5 conducted the search and prepared exhibit P19 and P20. PW5 handed over the said exhibits to PW2 together with the plants found in the farm of the appellants. There is a document to that effect. PW2, after examining the said exhibits, he handed back the same to PW5, and some of the exhibits were taken directly to the Chief Government Chemist Laboratory at Dar es Salaam by PW2. Thereafter, PW5 handed over the exhibits to PW4 who was a storekeeper of the Illicit Drugs office at Dar es Salaam. Exhibits P17 and P18 were tendered to that effect. Mr. Kassim insisted that the whereabout of the exhibit were at all times known. All the documents in respect of chain of custody were tendered before the court. In his final written submission before the trial court, the learned State Attorney was of considered opinion that evidence of prosecution has well established and guaranteed the chain of custody as per

requirement of the law of all potential exhibits from point of arrest to the point of analysis and when tendered in court as exhibits. He said, all prosecution witnesses who were involved in arresting/seizing exhibits P4, P5, P6, and P7 together with the samples taken from 729 plants of bhang (cannabis sativa), thus PW5 Hassan Msangi, PW2 Erasto Lawrence, PW1 Joyce Njisya and PW4 A/Inspector Johari managed to prove the arrest, transfer, analysis and storage of the said exhibits. That, through the said chain of custody the prosecution managed to prove that the said items were seized from the domain/ possession of the appellants.

Having perused the proceedings of the trial court, it is evident that chain of custody in this case is documented systematically to the extent of leaving no shadow of doubt on part of the prosecution. There was no time when chain of custody in respect of all the seized items was broken. Exhibits P19, P20 (certificate of seizures in respect of seized exhibits DCEA 003), Exhibit P2 (Laboratory Submission Form DCEA 001), Exhibit P3 (The Government Analyst Report DCEA 009 indicating weight), Exhibit P28 and P29 (The Government Analyst Report DCEA 009 indicating the type of drugs) and exhibit P18 (exhibit Register) are relevant. Also, the marks and labels attached to the exhibits enhanced the assurance of chain of custody. In the circumstances, I hesitate to buy the story of the learned counsel for the appellants that there was no paper trail of exhibits. In the case of **Zainabu d/o Nassoro @ Zena V. Republic, Criminal Appeal No. 348 of 2015** at page 25 it was 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 ensure both the prosecution and the accused persons of the procedural justice in terms of fairness. In our re- evaluation of the evidence, we found no reason to doubt the integrity of the scientific analysis conducted by PW5."

On the basis of the above cited decision, in this case, I am of the same considered view that prosecution evidence on the record leaves no doubt in respect of chain of custody. Thus, ground of appeal No.4 is accordingly found to have no merit.

On the issue that the disposal order of disposal of exhibit P21 and P27 was issued in violation of the law as envisaged under the 3rd ground of appeal and that evidence of PW6 and exhibit P26 were procured without lawful order of the court as stated on the 5th ground of appeal; Mr. Mwale submitted to the effect that PW8 the Primary Court Resident Magistrate had no powers of ordering disposal of exhibits and that the same should have been done by the Magistrate conferred with jurisdiction to preside in cases of illicit drugs. He was of considered view that the said disposal order was contrary to the requirements laid down under **section 353 (2) and (7) of the CPA, section 2, and 36 (2) and (3) of the Drugs Control and Enforcement Act** (supra). In his reply, the learned State Attorney submitted that since PW8 was a Resident Magistrate, he can preside in the District Court or Resident Magistrate Court. He referred to **section 6 (1) (a) (b) and (c) of the Magistrate Courts Act, Cap 11 R.E 2019** which provides

to the effect that a Resident Magistrate can preside in any subordinate court.

Mr. Kassim was of the view that the allegation that when PW8 issued an order for disposal of exhibits and witnessed when the exhibits were photographed, he was not properly constituted is a grave misconception since **section 36 of DCEA** refers to a person not 'court'. He added that, **section 353 of the CPA** is not applicable in the circumstances of this case. That, the same is applicable after commencement of trial/proceedings. With due respect, I concur with the learned State Attorney as a matter of practice and procedure, an order for disposal of perishable exhibit is not procured through a formal application. Also, being a Resident Magistrate, PW8 was conferred with powers to issue a disposal order of exhibits and witness the disposal of the said exhibits. Thus, the 3rd ground of appeal is dismissed accordingly. In addition, this court is of considered opinion that, if the presiding Magistrate had witnessed the incidence on 9/2/2020, there was a danger of her being turned into a witness. Thus, it was safe and in the interest of justice that PW8 issued a disposal order and witnessed the said disposal which was done prior to commencement of trial.

Concerning the issue of language barrier of the 1st appellant during trial before the trial Court, the learned counsel for the appellants submitted inter alia that the 1st appellant was condemned unheard on the reason that he was not conversant with English and Kiswahili languages which were used during the trial before the trial court. That, there is nowhere that indicates that there was translation from Kiswahili language to Polish language, the language which the 1st appellant was conversant with. In opposition, the learned State Attorney submitted that if the 1st

appellant had language barrier how did he defend himself? That, at page 148 of the proceedings the 1st appellant stated how he was communicating with police officers.

Section 211 (1) of the CPA provides that:

> *"211 (1)- Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood by him."*

In this case, the 1st appellant had an interpreter. According to the record the trial was conducted through an interpreter one Miss Hawa Zuberi who translated Kiswahili to English and vice versa. It is also on record that the 1st appellant was represented by an advocate one Ms Faygrace Sadallah who never raised the issue of language barrier before the trial court. Moreover, it is not disputed that the 1st appellant is married to the 2nd appellant Eliwaza Raphael Pyuza who is Tanzanian and both of them resides at Shirimatunda in Moshi Municipality for quite some time. In her defence the 2nd appellant stated that she was communicating with the 1st appellant her husband by using English. In his defence the 1st Appellant alleged among other things that police officers communicated with him by using Kiswahili and English language. Among the seized items, there was a Tanzanian driving licence of the 1st appellant. It is in the light of the above findings that this court finds the issue of language barrier to be an afterthought and an attempt to evade justice which do not raise any doubt on part of prosecution. In other words, there was no language barrier in the trial of this case as alleged by the learned counsel for the appellants. There is no doubt that the 1st appellant was accorded right to be heard.

It is on that basis that I hereby dismiss the 9th ground of appeal for lack of merit.

Regarding the issue that the statement of the complainant was not furnished to the appellants as required by the law as raised on the 10th ground of appeal; Mr. Mwale vehemently challenged the Republic for failure to supply the statement of the complainant as required by the law rendering the trial against the appellants to be by ambush. In his reply, Mr. Kassim submitted that the records show that the appellants did not request for the same. They were legally represented but never requested for the said statement. Concerning the cited cases, the learned State Attorney was of the view that in the cited cases the appellants requested for the statement and the same was availed to them. Apart from that, pursuant to **section 9 (1) and (3) of the CPA,** Mr. Kassim was of the opinion that evidence of PW5 shows that the informer in this case was not named nor called before the court to testify. Thus, there was no complainant's statement in this case.

The issue for determination is whether the appellants were prejudiced by not being supplied with the statement of the complainant. As correctly submitted by the learned counsel for the appellants, the essence of furnishing the statement of the complainant to the accused persons is for them to understand the nature of the offences of which they are charged and prepare their defence. In the instant matter, I have gone through the defences of the appellants which they adduced before the trial court. The same is so detailed meaning that they understood the nature of the offence of which they were charged and convicted, hence they were not prejudiced. In that regard, the 10th ground of appeal has no merit.

The learned counsel for the appellants also raised the issue of competency of PW1 and PW2 to examine samples. He was of the opinion that pursuant to the **Criminal Procedure Act** (supra) and the **Government Chemist Act No. 8 of 2016,** powers of examining samples are conferred on two persons only. Thus, the Chief Government Chemist and the Government Laboratory Analyst. It was submitted further that examination of exhibits in this case was done by unqualified persons. The learned State Attorney submitted to the effect that **Act No. 8 of 2016** designates powers of the Chief Government Chemist to all officers who work in the Chief Government Chemist Laboratory. That, since it is not disputed that PW1 and PW2 were officers from the office of the Chief Government Chemist, then they had powers to examine the samples as Government Chemists. **Section 12 (1) and (2) of Act No. 8 of 2016** (supra) provides that:

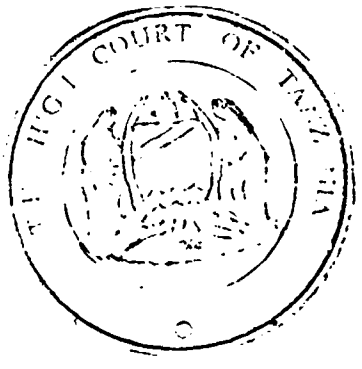
> *"12 (1)* ***Functions and powers of the Chief Government Chemist*** *may be performed or exercised by* ***any officer of the Authority.***
>
> *(2) The Chief Government Chemist may, in consultation with the Minister, and by notice published in the Gazette,* ***delegate*** *to* ***any other person, institution*** *or* ***body of persons*** *some of his functions or powers on such terms, conditions and limitations as may be specified in the instrument of delegation."* Emphasis mine

From the above quoted provision, this Court is of settled view that the literal meaning of the words 'any other person, institution or body' under **section 12 (2)** (supra) means other persons other than officers of the

Authority (Chief Government Chemist Laboratory Authority) mentioned under **section 12 (1) of Act No. 8 of 2016.** I therefore agree with the learned State Attorney that PW1 and PW2 had powers to examine samples of substances suspected to be narcotic drugs and the urine samples of the accused persons.

Mr. Mwale also alleged that the plants suspected of being narcotic drugs were not examined to prove the same, with due respect evidence of PW2 is crystal clear how he took leaves from each plant, labelled each one, registered the same and filled the forms to that effect. Then, the remaining fresh plants were disposed of at the scene of crime. PW2 prepared a report in respect of the samples he had collected. Then, the samples were taken to Dar es Salaam Chief Government Chemist's office where the samples were handed over to PW1 one Joyce Njisya. Thus, the allegations of the learned counsel for the appellants are unfounded.

In conclusion, having found all the raised issues by the appellants to have no merit, the instant appeal lacks legs to stand on. It is therefore dismissed forthwith for lack of merit. Conviction and sentence of the trial court upheld accordingly.



S. H SIMFUKWE

JUDGE

11/2/2022

Judgment delivered at Moshi this 11th day of February, 2022 in the presence of the appellants in person, Mr. Davis Elibariki Kyara learned

counsel for the appellants and Ms Nitike Emmanuel learned State Attorney for the Respondent Republic.

Right of further Appeal explained.

S. H SIMFUKWE

JUDGE

11/2/2022