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

ARUSHA SUB-REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 61 OF 2023

(Arising from Criminal Case No. 134 of 2020, in the District Court of Karatu, before Hon. Y. O. Kiseng'erian date 24th day of April, 2022)

JOSHUA ISRAEL..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23rd October & 9th November, 2023

D. NDUMBARO, J.

The appellant Joshua Israel was convicted by the District Court of Karatu (trial court) of the offence of trafficking narcotic drugs contrary to section 15A (1) and 2(c) of Drugs Control Enforcement Act No. 5 of 2015 as amended 2019 and sentenced 20 years imprisonment.

Particular of offence for prosecution states that on the 4th day of September 2020 at 22:30 hours at Kilimanjaro Village Manyara Kibaoni area within Karatu District in Arusha Region was found trafficking Narcotic Drugs Named Cannabis Sativa (Bhangi) 670 rolls weighing 1.375-kilogram contrary to law. Dissatisfied with the Judgment of the trial court, appealed before this

Court against conviction and sentence by lodging a petition of appeal with 9 grounds and an additional three grounds to a total of 12 grounds as follows;

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1. That, the learned trial magistrate erred in law and fact in not finding that the prosecution side failed to issue a receipt of the said narcotic drugs alleged to be found in the possession of the appellant as it is required by law section 38(3) of the CPA.
2. That, the learned trial magistrate erred in law and facts in not finding that there was no chronological documentation or paper trail of how the drugs were dealt with from the time they were handed over to PW. 7 (A/ Inspector Humphrey) up to when it was taken to the Government Chemist.
3. That, the learned trial magistrate erred in law and facts in not finding that the prosecution side failed to summon Coprol Constantine who handed over the said drugs to PW. 7 and even the said drugs were not labelled by any mark as also in exhibit room there are numerous numbers of exhibits.
4. That, the learned trial magistrate erred in law and facts in not finding that the weight of the said drugs was not established.

5. That, the learned trial magistrate erred in law and facts in not finding that the persecution side failed to tender the registration number of the said bus alleged to be found in the appellant trafficking psychotropic substance.
6. That, the learned trial magistrate erred in law and facts in not finding that: -

(i)The caution statement of the appellant was not read to the appellant after being finished to be recorded as required by law section 57(3)(a)(l).

(ii) The caution statement of the appellant was made out of time as the appellant was arrested on 04/09/2020 during 10:00hts and the caution statement was made on 05/09/2020, hence should be expunged.

7. That, the learned trial magistrate erred in law and facts in not finding that there was no official letter issued by the investigation department acknowledging the Government Chemist to conduct scientific analysis on the said drugs alleged to be found from the appellant.
8. That, the learned trial magistrate erred in law and facts in not finding that, there was no bus ticket issued by the conductor of the said bus company to verify whether the appellant was among the passengers on the material day.
9. That, the learned trial magistrate erred in law and facts in not finding that the case against the appellant was not proved to the required standards of laws.

Additional Ground

1. That Learned trial magistrate erred in facts in not finding that there was an unexplained time interval between the arrest and appellant and the time whereby said the psychotropic substance was taken to the Government chemist
2. That the trial magistrate erred in law and fact in not finding that there was no search warrant tendered to verify whether the search was conducted legally
3. That the learned trial magistrate erred in law and fact in not solving the inconsistencies from the evidence adduced in favour of the appellant.

At the hearing of the petition appellant Joshua Israel was self-unrepresented; whereas Republic was represented by Mr. Alawi Hassan State Attorney.

On first ground appellant disputed on non-issuance of receipt during seizure and to have not owned the seized narcotic drugs contrary to section 38(3) of the Criminal Procedure Act Cap 20, as explained in the case of **Adrea Augustino Msigara and others Vs Republic Court of Appeal Tanga,** Criminal Appeal No. 365 2018, page 22 and case of Shabani Said Kindamba No. 390 of 2018 page 11,15 and 16, specifically on page 16.

On the second ground, the appellant faulted that there was no chronological documentation on how exhibit P3 (narcotic drugs) was handed from PW. 7 (Inspector Humphrey) to government chemist. He argued that the exhibit was not labelled, which brings suspicion as to the possibility of mixing the exhibits because there are several exhibits kept in police custody. further exhibit P3 was not read before the trial court when it was tendered. In supporting his argument cited a case of **Mirzai Pirbaki@Hadji and others vs Republic,** Criminal Appeal No. 493/2016 page 6,7and 8.

In 3rd ground, the appellant submitted that Copro Constantin who handled exhibit P3 to PW7, was not called to testify before the trial court. He considered Copro Constantin to be a key witness to cover the missing link on the prosecution side. Based on this fact court would have to draw adverse inferences against the prosecution side. In supporting his argument cited the case of Pascal Yaya Maganga Vs Republic Criminal Application No. 245 of 2017 pages 13 and 14.

In the 4th ground, the appellant faulted that, the weight of the drugs was not established, and the drugs were not testified by the Bureau of Standards, this led to a variation on the amount seized as to whether 670 rolls were equivalent to 1. 375 Kilogram or 1. 375 Kilogram and unrolled

drugs testified by PW1 and PW2 respectively. Measuring the drugs would help the court ascertain variations.

In 5th and 8th grounds Appellant submitted that he was charged with the offence of trafficking drugs but there was no bus ticket or bus registration number tendered to support the charge before him. PW2 one Severine Nasibu Menda (a Bus conductor) neither testified as to bus ticket nor bus number to prove that he was a passenger in the bus. He raised questions as to whether possession would amount to the charged offence of trafficking drugs, and if he was found with drugs why did they charge him with trafficking drugs.

On the 6th ground, Appellant argued that the caution statement (P.2) was not read over to him contrary to section 57(3) (a) (1) of CPA Cap 20, due to that he was denied the right of adding, delete or modify the caution statement. Further, the statement was made out of time contrary to sections 50 and 51 of CPA Cap 20., that is, accused was arrested on 4/09/2020 and the caution statement was made on 05/09/2020, despite the delay no application for an extension of time was made contrary to law.

on 7th ground appellant questioning the mandate of government chemist to conduct a scientific investigation on the drug without an official letter. Faulted that, no official letter was issued to the government chemist

by the investigation office requesting for scientific analysis on exhibit P3 (referred to on pages 39 and 40 of the trial court proceeding). He argued, the absence of the said letter makes the whole process void.

Appellant faulted in 9th ground that, the case was not proved on required standard. Statements of PW. 1 and PW.2 (found on pages 14 and 17 of the trial court proceeding) contradict to each other. PW. 1 testified, there were 670 rolls of drugs found with the accused, while PW2 testified that the accused was found with 670 rolls of drugs and unrolled with an identified amount. The variation creates uncertainty as to the evidence to be accorded in the required standard and is suspicious in the brokerage of a chain of custody. Supporting the argument, he cited the case of **Pascal Yoya Maganga Vs Republic,** Criminal Application No.248 /2017 page 14.

On additional ground no.1 appellant submitted that it took a long time for the said drug to be submitted to a government chemist for analysis. The accused was arrested on 04/09/2020 the said drugs were sent to a government chemist on 11/2/2022 one year later. The drugs were kept for such long without justification contrary to law, he further faulted that, he was detained in police custody for 13 days contrary to section 39 of Drugs Control Enforcement Act No. 5 2015, which requires that the accused of drugs should be brought to court within 48 hours after arrest, he supported

his argument with a case of **Zainabu Nasor @ Zena Vs Republic,** Criminal app 348/2015 page 25 and 26

On 2nd additional ground, the appellant argued that no search warrant was issued during the search, it was issued later, and was tendered as an exhibit before the court (referred to the evidence of PW. 2). Further it was not clear as to whether the search was conducted in the bus or the house. These bring suspicions that the search was not properly conducted.

On 3rd Additional ground, the appellant argued that the evidence of the prosecution witness contradicts each other. In the trial court proceedings page 37 PW1 testified that the accused was not involved during the sampling of evidence. However, on page 27 of trial court proceedings, PW 5 (PW 5 H 2551 -D/C Sat Nobert) testified that sampling was taken when the accused was around together with the Magistrate (Justice of Peace) and other Police officers. The appellant further faulted PW. 2 (bus conductor on page 17 of trial court proceedings) testified before the court that, the drugs were inside the blue bag while PW. 4 testified that the said drugs were inside a red bag. The contradiction creates doubt.

In reply, Mr. Alawi Hassan Learned State Attorney did not dispute the fact that no receipt was issued during the seizure of the said drugs. He argued requirement of receipt is not mandatory when the seizure certificate

is filled and signed by both parties. He recited the case of *Shaban Siadi Kindamba Vs R Crim. Appl No. 390 of 2019* CAT (unreported) and *Andrea Augustino and others Vs Republic No. 365/2018*, in supporting his argument that: -

> *In the filling of the seizure certificate, the requirement of receipt is not mandatory if the seizure certificate is filled and signed by both parties, that is accused and witness.*

On the issue of delay of investigation, Mr. Alawi State Attorney submitted that the nature offence and time when the accused was arrested necessitated such delay. The offence charged is of serious offence to require more time for investigation.

In reply to the second ground Learned State Attorney argued that the chain of custody was not broken. He made reference to trial court proceedings on pages 14 and 15 whereby P.W1 testified on how the accused person was arrested and how exhibit P3 was handled (which was not disputed by the accused in trial court), showing the chain of custody was intact. The appellant cited case of **Mirzai Pirbaki@Hadji and others Vs Republic** Criminal Appeal No. 493/2016 pages 6,7and 8 is distinguishable. The case is all about a competent witness to testify and not maintaining a chain of custody.

On the third ground, Mr. Alawi Advocate admitted the fact that Copro Constantine was not among the witnesses for the prosecution called to testify, because, the handling of Exhibit P.3 was properly done. The evidence as to ownership was corroborated, there was no gap to require additional evidence. The appellant (accused then) signed a seizure certificate showing ownership of Exhibit P3, the signing was supported by oral evidence of PW1 tendered before the court. The fact that the exhibit was not labelled is a misleading statement before this court, testimony of PW1 and PW6 (in trial court proceedings on pages 15 and 37) shows the exhibit was registered in exhibit register SPF 16 and marked PF3. As to summoning Copro Constantine to testify it is well articulated in Section 143 of Tanzania Law of Evidence Act Cap 6 that, the number of witnesses has nothing to do rather its credentials.

State Attorney in reply to the fourth ground faulted that, the exhibit was weighed by PW6 in the presence of the accused and PC Kambona and it was 1.375 kilograms (referring to pages 30 and 31 of trial court proceedings). He further faulted that the appellant did not quote any law in supporting the argument.

Learned State Attorney in 5th ground argued that, the matter in dispute is not a car, therefore there was no need to tender bus receipt or bus registration number. Evidence adduced by PW.2 (on pages 11, 17 and

18 in the trial court proceeding) shows how the accused was identified. The evidence adduced was sufficient to identify the appellant as having boarded Makara Bus.

On the 6th, It is a matter of fact that, the appellant was arrested during the night around 10.30, after arrest it was required to observe all police custody procedures, and most of the procedures were done the next day in the morning. It is true that section 50(1) of CPA cap 20 RE 2022, provides that the accused should be interrogated within four hours after arrest but the Court should consider section 50 (1) (b) of CPA Cap 20 RE: 2022 which provides exception as where the time accused undergoes other procedures. The nature of the case and the time when the accused person was arrested allow application of section 50 (1)(b). The arrest was conducted on 04/09/2020 around 10.30 pm other procedures including a caution statement were conducted the next morning 5/09/2022.

In reply on ground 7, Mr. Alawi submitted that there was an official letter issued to the government chemist. PW. 8 testified on page 9 of trial court proceedings that, on 11/02/2022 while on duty the government chemist office received PW.3 who came with two things, documents/ a letter and samples. The letter requesting an investigation of the exhibit was

brought to him. However, this issue was not raised during cross-examination and, therefore, has no merit.

on the 9th ground, the prosecution contested the case to have been proved on the required standard. That PW. 1 to PW8, together with exhibit P1 to P6 and trial court proceedings is the reference to have discharged the burden of proof on the required standard.

In reply to 1st additional ground Learned State Attorney contested that the appellant cited section 39 of Drugs Act Cap 5 RE: the section is not existing, however, there is section 39 (1) Cap 95 which is also not related to the matter. On the issue of delay of investigation and detention, he argued, cases differ depending on the fact and nature of the commission as previously stated. That offence charged requires serious investigation accompanied by several procedures to be followed before bringing the accused to court. The time was to facilitate the said procedures. Mr. Alawi further argued that lapse of time was not one of the appellant's grounds of appeal and, therefore has no merit.

On rejoinder, the applicant kept on arguing that, exhibit P3 was not labelled. No official letter was issued to allow government chemists to conduct scientific investigations. He was detained in police custody for a long

time without justification. He was not given the right to add, alter or delete a search warrant contrary to law. He was not involved during sampling. No bus number or ticket was procured before to prove that he boarded that bus to justify his conviction. The drug was not weighed, key witness Copro Costantin was not procured to testify before the court and variation on the identification of exhibit as to be in the blue colour bag and red colour bag.

Having gone through the evidence of the trial court and parties' submission drawn from 12 grounds of appeal, the Court squeezed the grounds into 3 grounds, with three hypotheticals to facilitate analysis:

1. Whether chain of custody was broken (grounds 1,2,3,4,6,7, additional grounds 1&2)
2. Whether the evidence connecting the accused to the charge of trafficking narcotic drugs and whether the prosecution evidence contradict each other to create doubt (grounds 5, 8 and additional ground 3).
3. Whether the case was proved beyond reasonable doubt (ground

On the issue of the issuance of a receipt as an acknowledgement of the ownership of the seized drugs (pages 14 and 15), it is clear that there was no receipt issued however the seizure certificate was witnessed by officers and the driver. The appellant in his submission drew the attention

of the court in section 38 (3) of CPA Cap 20 which provided: -

"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

This is to say, the mischief behind the requirement of issuing a receipt is proof of ownership of seized documents or exhibits.

The words "*.....and the signature of witnesses to the search,* ***if any.****"* from the above quoted section signifies that, if there is a witness to prove ownership, the requirement of receipt is given less weight.

The position is explained further in the case of *Shaban Siadi Kindamba Vs R Crim. Appl No. 390 of 2019* CAT (unreported) page 16 which provides: -

"The whole purpose of issuing receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized"

Considering the submission of parties in this ground and trial

court proceeding on pages 14 and 15 it is clear despite the fact no receipt was issued, the seizure certificate was witnessed by an officer and one driver. In the case of Said Kindamba Supra the gist of issuing a receipt is to get rid of claims that the evidence from search are fabricated. Going through page 15 of trial court proceedings, the accused did not object to having a signed seizure certificate, further, the said certificate was admitted before the court. Therefore, this ground has no merit.

On chronological movement of the exhibit and handling of the accused, this Court observed that the prosecution witness testified on how the accused and the exhibit (drugs) was handled (page 21-23 and 30-37), the exhibit was moved from one place to another, as to labelling, transferring to government chemist, storing and disposing before the court on which it was not objected by accused. The only objection he made was noninvolvement in sampling. The Court found this ground has no merit based on the adduced reasons.

Copro Constantine is to be summoned to testify before the court contrary to section 143 of Law of Evidence Act Cap 6. The Court analyzed the evidence of both sides and it is of the view that there is no gap or missing link in the evidence which may require Copro Constantine to be called to testify. exhibit P3 was supported by oral evidence of PW1 tendered before

the court, this is supported by the case of *Boniface Kundakile Tarimo v. R, Criminal Appeal No. 350 of 2008 (unreported)* it was held that:

> *"So, before invoking section 143 of the TEA regard must be to the facts of a particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on"*

Extracting from the case of Boniface Kundakieli Supra, if the witness is key to filling in gaps in a particular case or in a better position to explain some missing links in the case and is not called to testify without justifiable reason, then the court ought to draw an adverse inference against the part failed to call. However, this principle is not applicable in this case as there were no missing gaps. Therefore, found this ground also to have no merit based.

In the second group, the appellant disputed to have boarded the Makala bus and he challenged trial court evidence of PW2 (a bus conductor) not connecting him to the offence charged, no receipt or bus number was presented before the trial court to justify the offence of trafficking of drugs. He went on arguing that if he was found **possessing** drugs on the bus he would be convicted of the offence of trafficking of drugs and not **possession**.

On analyzing the submission by the appellant, this Court raised a question as to whether the evidence was sufficient to connect the accused to the charge of **trafficking of narcotic drugs.** PW1 and PW2 in trial court proceedings (on pages 14 and 17) testified that the accused was found **possessing** drugs in the bus belonging to Makara Company and he was convicted thereafter with the offence of **Trafficking Narcotic Drug**s Contrary to Section 15A (1) and 2(c)of The Drug Control and Enforcement Act, No. 5 of 2015

Section 2 of The Drug Control and Enforcement Act, No. 5 of 2015 defines Trafficking as: -

> *"Importation, exportation, manufacture, buying, sale, giving, supplying, storing,* ***possession****, production, manufacturing, conveyance, delivery or distribution, by any person of a narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer".*
>
> *Possession involves ownership and control. Implies that an individual has physical control or ownership of the narcotic drug. This can include having the drug physically, in your home, in your vehicle, or any location under your control.*

In the case of **Emmanuel Sweetbert vs Republic, Criminal** Appeal No. 37 of 2021 H.C Mwanza,

> *it is not a position of the law that to prove illicit trafficking it must be proved that there was movement of the drug from one place to another.* .....following the amendment of section 2 of the Drug Control and Enforcement Act, illicit trafficking includes possession of the drug.

Based on the analysis it is quite clear that, the definition of trafficking is extended among others to cover possession. Therefore, this ground has no merit.

The Court analyzed the evidence as to whether prosecution evidence contradicted to each other to create doubt. On pages 17 and 23 of the trial court proceedings, PW2 and PW4 were found to have testified on how the seized exhibit (drug) was identified. PW2 testified to be "**in blue color bag**" and PW4 testified to be "**in red color bag**" The applicant raised the discrepancies in his 3rd additional ground of appeal, on reply the Learned State Attorney Mr. Alawi argued that the color difference is minor discrepancies that can be cured. Mr. Alawi did not support his argument with any law.

Any reasonable doubt raised by accused needs to be cleared by prosecution. in the celebrated case of Pascal Yoya @Maganga Versus Republic, Criminal Appeal No. 248 of 2017(Unreported), it was held that: -

"It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence.

The evidence of witnesses contradicting each other is given less weight before the Court. A contradiction of Pw2 and Pw4 in a trial court proceeding on the identification of **core exhibit** (P3) affects the credibility of the materials substance of the case including chain of custody.

a "core exhibit" is the key piece of evidence presented in the trial court on which in its absence the charge or claims against cannot stand. The admissibility and presentation of core exhibits are critical elements of a case, as they can have a substantial impact on the outcome of the litigation.

There is no doubt that in this case, **Narcotic drug** is the core Exhibit. Variation in the identification of core exhibit P3 is observed, the variation creates doubt. Slight doubt created benefit appellant if not proved by the prosecution. PW2 in the trial court proceeding identified the **core exhibit** (a narcotic drug) to be in the **blue colour bag** while PW4 was identified to be in the **red colour bag**, this variation in the **core exhibit** cannot be ignored. Due to variation to the core exhibit, the case is resolved in favour of the Appellant. That being the case, I conclude that the offence was not proved in the required standard.

I, therefore quash and set aside the judgment of the trial Court on conviction and sentence imposed against the appellant. The appellant be released from prison unless lawfully held for any other lawful cause.

It is ordered accordingly.

DATED at **ARUSHA** this 9th day of November 2023.

D. D. NDUMBARO

JUDGE