IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 184 OF 2005

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT
VERSUS
SHIRAZI MOHAMED SHARIF..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Vuga)

(Mbarouk, J.)

dated the 12th day of May, 2005
in
Criminal Appeal No. 19 of 2004

JUDGMENT OF THE COURT

13 & 17 November 2006

NSEKELA, J.A.:

In the Court of the Regional Magistrate at Vuga, Zanzibar, the respondent Shiraz Mohamed Sharif @ Jamal Masoud Ali, was charged with the offence of possession of dangerous drugs contrary to sections 25 and 32 (1) of the Dangerous Drugs Act 1986, Act No. 6 of 1986 as amended by Act No. 6 of 1991. He was convicted and sentenced to twenty (20) years imprisonment. He successfully appealed to the High Court, Zanzibar (Mbarouk, J.) on the ground that the prosecution had not proved its case beyond all reasonable

doubt. The appellant, the Director of Public Prosecutions, was aggrieved by this decision, hence this appeal to the Court.

At the hearing of the appeal, the appellant was represented by Mr. Shaaban Ramadhani Abdallah assisted by Miss Raya Mselem, learned State Attorneys. The respondent was absent but the hearing of the appeal proceeded in terms of Rule 73 (6) of the Court of Appeal Rules, 1979, since the respondent was served with notice of the hearing date by substituted service by publication in Nipashe Newspaper as ordered by the Court on the 2.12.2002. The appellant Director of Public Prosecutions preferred four grounds of appeal –

> "1. That the Hon. Judge erred in law on acquitting the appellant (sic) and disregarding the evidence of the eye witnesses;
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> 2. That the Hon. Judge erred in law on acquitting the appellant (sic) basing his decision on the number of witnesses

instead of the strength of their evidence and their credibility;

3. That the Hon. Judge erred in law on acquitting the appellant (sic) without giving any consideration to the voluntary statement of the accused (sic);

4. That the Hon. Judge erred by deciding that the prosecution failed to prove the case against the accused (sic) beyond any reasonable doubt and so acquitting the respondent."

Mr. Shaaban Ramadhani Abdallah argued the first two grounds of appeal together while the third and fourth grounds were each argued separately.

In the first two grounds of appeal, the appellant's complaint mainly revolved around the testimony of PW4 Z. 1842 D/Sgt. Mbarouk; PW5 C. 8573 Cpl. Khamis and PW6 D. 300 Cpl. Hamza Haji. The complaint by the learned State Attorney was to the effect that

the learned judge on first appeal did not evaluate their evidence and assess their credibility. He strenuously submitted that these were credible eye witnesses whose evidence should have been acted upon by the High Court. They witnessed at different times the respondent excrete the dangerous drugs from his bowels. To bolster up his case, the learned State Attorney cited Section 134 of the Evidence Decree, Cap. 5 to the effect that what matters is not the number of witnesses but the quality of their testimony. He also referred to the case of **Yohannis Msigwa v R** (1990) TLR 148. In a nutshell, he submitted that the testimony of PW4; PW5 and PW6 was strong and convincing and the learned judge on first appeal should not have entertained any doubts on their evidence as he did. The learned State Attorney also stated that there was an independent witness, one **Mr. Amour.** The third ground of appeal related to the voluntary confession of the respondent. He submitted that the High Court did not advance any reasons for not considering and acting upon that evidence. In support of his submission, he cited the case of **Tuwamoi v Uganda** (1961) EA 84 at page 90 C – D. As regards the last ground of appeal, the learned State Attorney faulted the learned judge in

doubting the prosecution evidence. Again he submitted that the doubts were not strong enough, as he put it, to warrant the acquittal of the respondent. The learned State Attorney submitted that there was strong evidence on the record and the case was proved beyond all reasonable doubt, citing the case of **Magendo Paul and Another v R** (1993) TLR 219.

We propose to start with the first, second and fourth grounds of appeal. Essentially, they cover the same ground of complaint. The learned State Attorney had challenged the learned judge's evaluation of the evidence that led to casting doubts on the cogency of the prosecution evidence. The learned judge lamented the absence of independent witnesses, and in particular one **Mr. Amour,** to testify before the trial court. He also questioned why witnesses were not summoned to testify on how police exhibits are recorded and kept for safe custody. This led the learned judge to entertain some doubts on the possibility of tampering with the tablets/capsules recovered from the respondent.

The sequence of events from the time the respondent was in the hands of PW4; PW5 and PW6 to the time PW7 was given a packet containing the tablets/capsules of allegedly dangerous drugs needs close scrutiny. PW4 testified that he witnessed the respondent at various times during the night of 7.5.2002 excrete thirty (30) tablets/capsules. On the morning of 8.5.2002, he handed over the respondent who was under his custody, including the excreted tablets/capsules to PW5. On this day the respondent excreted more tablets/capsules in the presence of PW5, who in turn handed over the respondent including a total of eighty five (85) tables/capsules to PW6. On the 13.5.2002, on orders from an undisclosed **"boss"** the tablets/capsules were counted, sealed and then put in a yellow plastic bag in the presence of the respondent and one **Mr. Amour** and then handed over to PW7. If we pause here for a moment, it is not known to whom PW6 handed the tablets/capsules on the 8.5.2002. What emerges from the evidence however is that on the 13.5.2002 the said tablets/capsules were counted in the presence of PW6, the respondent and Mr. Amour on instructions from the **"boss"** who was not disclosed by name. They

were given to PW7 D. 5023 Sgt. Juma Amir who was then detailed to investigate the case. Thus from the 9.5.2002 to the 13.5.2002, it is not known who had the custody of these eighty five (85) allegedly dangerous drugs. The prosecution failed to account for this period. The learned State Attorney did not explain the whereabouts of these tablets during this period. As was aptly observed by this Court in Criminal Appeal No. 17 of 2002, **Moses Muhagama Laurence v The Government of Zanzibar** (unreported) –

> "There is need therefore to follow carefully the handling of what was seized from the appellant up to the time of analysis by the Government chemist of what was believed to have been found on the appellant."

How did the trial magistrate deal with this issue. With respect, we can do no better than quote part of his judgment. He stated as follows –

> "On the question of mishandling the exhibit, that is not in accordance to PGO 228 and 283,

> the court is of the view that as the prosecution witnesses told the court that they do not know the note book or that the procedure was not followed or not, but let assume that the procedure was not followed of recording, the handling of the exhibit still it is the view of this court that it is the question of believing the PW4 and PW5 that what they found from the accused is what they gave to PW6, **I cannot rule out completely the possibility of mixing up the exhibits,** but in the absence of clear evidence, the court cannot merely rely on that omission to record, as also it is the view of this court that this is a minor irregularity of which in the absence of clear evidence, the court cannot rely on it, that therefore they have been tampering with the exhibit by the police witnesses." (emphasis added)

It would appear that the learned trial magistrate was looking for what he called "clear evidence" of tampering with the tablets/capsules. The trial magistrate on the evidence as he saw it, entertained doubts that there was a possibility of tampering with the

tablets/capsules: There was no evidence that police procedures in their internal regulations were followed. This is a serious matter. The trial magistrate did not discuss the fact that these same witnesses did not account for the whereabouts of the tablets/capsules from the 8.5.2002 to the 13.5.2002 when they were handed over to PW7. These are not by any stretch of imagination "minor irregularities". Compliance with internal police procedures was essential to ensure that the movement of the tablets was monitored to exclude the possibility of tampering of the evidence to the detriment of the respondent. We would like to stress the fact that we do not question the credibility of the witnesses up to the time they witnessed the respondent excreting the tablets/capsules from his bowels. What we are saying is that the whereabouts of the tablets/capsules was not accounted for for about five days and no explanation has been forthcoming from the prosecution witnesses. This is certainly not a minor irregularity as the learned trial magistrate would make us believe. With respect, like the learned judge on first appeal, for the reasons explained above, we entertain

doubts that the prosecution proved its case to the required standard in criminal cases. The benefit of doubt must go to the respondent.

Lastly, the third ground of appeal attacked the learned judge for not taking into account the respondent's confession to the commission of the offence. This issue was not before the High Court as a ground of appeal and was correctly not discussed by the High Court. More importantly however, in view of the conclusion we have reached, the issue of confession becomes irrelevant.

In the result and for the above reasons, we dismiss the appeal in its entirety. It is accordingly ordered.

DATED at ZANZIBAR this 17th day of November, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR