IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 73 OF 2016

HAMISI MBWANA SUYA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of

Tanzania at Moshi)

(Sumari, J.)

dated the 27th day of January, 2016
In
Criminal Session No. 46 of 2014

JUDGMENT OF THE COURT

5th & 14th Dec. 2017

MWANGESI, J.A.:

The appellant, Hamisi Mbwana Suya alongside two others namely, Mussa Ramadhani Mgonja and Abdulaziz Makuka, stood arraigned at the High Court of Tanzania Moshi District Registry, for the offence of trafficking in narcotic drugs contrary to the provisions of section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 R.E 2002 (The Drugs Act), as amended by Act No. 6 of 2012.

It was the case for the prosecution that, on the 27th day of November, 2012, at Same Police Station within the District of Same in Kilimanjaro Region, the accused persons were found trafficking 319.13 grams of Heroin Hydroxide valued at TZs One Hundred and Forty Three Million Six Hundred Thousand and Eight Hundred and Fifty (143,600,850/=). All the three did protest their innocence, which necessitated the prosecution to establish the offence against them. In so doing, the prosecution did parade nine witnesses whose testimonies were complimented by twelve exhibits. On their part the accused did rely on their own testimonies and two exhibits.

At the end of the day after the learned trial Judge, who was being assisted by gentlemen assessors had evaluated the evidence placed before them, were of the considered view that, the case had been established to hilt against the appellant who happened to be the second accused only. He was therefore convicted as charged and sentenced to the mandatory term of life imprisonment. The other accused persons were acquitted and set at liberty.

The appellant felt aggrieved by the conviction and sentence of the trial Court and has come to this Court seeking to challenge the decision of the trial High Court. In his memorandum of appeal, the appellant did raise seven grounds of appeal, which read as hereunder, that is:

1. *The learned trial Judge erred in law and fact, in holding that the charge was proved beyond reasonable doubt against the appellant.*
2. *The learned trial Judge erred in law and fact by wrongly convicting the appellant without considering the principles which have to be taken into account in respect to the chain of custody and preservation of the exhibits, because the settled proposition is that as custody of evidence move from one chain of custody to the next, the exhibits concerned must not only be properly handled, but each stage of custody through which the exhibit passes, must be documented till they are tendered in court, as the importance of the integrity of the chain of custody is to eliminate the possibility of the exhibits being tempered with.*

3. *The learned trial Judge erred in law and fact, when she misdirected herself in using the cautioned statement of the appellant which was extracted outside the time prescribed by the law and without lawful extension of time.*
4. *The learned trial Judge erred in law and fact, when she based her decision on exhibit P9 that is the statement of Kanasia Kimaro, which was unlawfully tendered and admitted. Furthermore, it was never proved if the said Kanasia Kimaro was amongst the passengers in the bus as there is nowhere in exhibit P3 (the bus manifest), where the name of the alleged Kanasia Kimaro has been shown.*
5. *The learned trial Judge erred in law and fact, by finding the appellant guilty by relying on inconsistency and contradictory statements by the prosecution witnesses.*
6. *The learned trial Judge erred in law and fact, when she failed to consider that circumstantial evidence must be incapable of more than one interpretation, cogent, compelling and convincing that upon no rational hypothesis can the facts be accounted for.*

7. *The learned trial Judge erred in law and fact for shifting the burden of proof from the prosecution to the appellant and found his defence weak.*

When the appeal came for hearing on the 5th December, 2017, the appellant who was present in person, had the services of Mr. Oscar Ngole learned counsel, whereas, Messrs Khalili Nuda and Martenus Marandu learned Senior State Attorneys, and Ms Amina Kiango learned State Attorney, appeared to jointly defend the respondent/Republic.

On taking the floor to address us, Mr. Ngole learned counsel, did abandon grounds number one, two, six and seven of the appeal and proceeded to argue on grounds three, four and five only, which we will now refer them as the first, second and third grounds of appeal.

Arguing on the first ground of appeal, the learned counsel did fault the learned trial Judge for admitting and using a cautioned statement of the appellant, which was recorded outside the time prescribed by the law. He submitted that while the appellant was arrested on the 27th November, 2012, his cautioned statement was recorded on the 28th November, 2012 at about 0800 hours, which was in contravention of the provision of section

50 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2002 (The Criminal Procedure Act). As the said statement was null and void, it was unlawfully used by the learned trial Judge, to find conviction of the appellant, he did submit.

The learned trial Judge has further been challenged by the learned counsel for the appellant in the second ground of appeal, in admitting under section 34 B of the Law of Evidence Act, Cap 6 R.E 2002 (The Evidence Act), a statement alleged to be of one Kanasia Kimaro (exhibit P9), and basing her conviction on it, while there was no evidence to establish that, such person was among the passengers in the bus on the material date as evidenced by the manifest of the bus (exhibit P3). In the said manifest, there was no passenger going by the name of Kanasia Kimaro. The learned counsel did add that, even if it were to be assumed that indeed Kanasia Kimaro was among the passengers in the bus on the fateful date, her act of seeing just once, the appellant pushing the bag which was later on found to contain drugs on the carrier of the bus, was not cogent evidence to conclusively establish that, he was the owner of the same.

In regard to the third ground of appeal, it was asserted by the learned counsel for the appellant that, there were discrepancies in the evidence tendered by the prosecution witnesses. While the arresting Police Officer (PW 3), told the Court that he was instructed by his boss to stop the bus christened Happy Nation Bus Transport at Same, and arrest a person seated on seat No. B2, such a seat did not exist in the bus as evidenced by exhibit P3, which contained the names of all passengers and their seats in the bus.

The learned counsel for the appellant argued further that, while in his testimony, Ernest Lutuo Joseph Isaka (PW1), an officer from the Government Chemist testified to the effect that, upon receiving the pellets suspected to be drugs, he measured their weight first. Assistant Inspector Herman Ngurukizi (PW 8), who sent the drugs to the Government Chemist, told the Court that, after PW1 had received the pellets of drugs, he eyewitnessed him counting them first.

Mr. Ngole learned counsel, concluded his submission by requesting us to find that, the case against the appellant was not proved to the standard required in criminal cases. He urged us to resolve the anomalies

which he has pointed out in favour of the appellant by quashing the decision of the trial Court, setting aside the sentence which was meted out to him and setting him at liberty.

In rebuttal to the first ground of appeal, Mr. Marandu did argue that, it was baseless and unfounded. While he was in agreement with his learned friend on the argument that, the cautioned statement was indeed recorded outside the prescribed period if calculated from the time when the appellant was arrested at Same, he did hasten to qualify it by stating that, there was time that had to be excluded in the computation, that is the time which was used to convey the appellant from Same Police Station where he was arrested, to Moshi Police Station where the caution statement was recorded. In fortification of his argument, he referred us to the holding in the case of **Oscar Josiah Vs Republic,** Criminal Appeal No. 44 of 2015 (unreported).

The learned Senior State Attorney submitted further to the effect that, since from Same Police Station, the arresting Officer and the appellant did arrive at Moshi Police Station at around 2300 hours, the computation of time had to commence from then. He added that, since on

the said date the appellant had been travelling the whole day from Dar es Salaam, it was evident that he was tired and therefore, his cautioned statement could not have been recorded instantly. In the circumstances, the learned Senior State Attorney did invite us to find that, the fourth ground of appeal is without any merit and it be dismissed.

The response to the second ground of appeal which was made by Mr. Nuda was to the effect that, the statement of Kanasia Kimaro was properly admitted in terms of section 34 B of the Law of Evidence Act after all procedures pertaining to admission of such statements had been complied with by the prosecution. This was done after all efforts to trace her so that she could appear and testify before the court had proved futile. Even though there was objection from the defence side during trial, the same was overruled by the Honourable trial Judge after finding that the objection was unfounded.

Countering the contention by his learned friend that, Kanasia Kimaro was not among the passengers in the bus on the material date, Mr. Nuda was of the view that such contention was not correct. He argued that, Kanasia Kimaro was a passenger on the material date occupying seat

number No. D3 as verified by exhibit P3. In that regard Mr. Nuda did argue, the learned trial Judge was justified to use the evidence contained in exhibit P3.

The learned Senior State Attorney did however concede to the contention by his learned friend that, seat No. B2, which according to the information relayed to the arresting officer (PW3) who was stationed at Same by his boss, was the one occupied by the suspected drug dealer (the appellant), was nowhere to feature in exhibit P3. He was however quick in pointing out that, such anomaly was cured by the testimony of Yusuph Mkwawa, the bus conductor, who told the court that such seat was in existence even though not shown in the manifest of the bus.

The learned Senior State Attorney did dismiss the claim by his learned friend that, there were discrepancies in the evidence from the prosecution witnesses. In his view such discrepancies did not exist, and even if they existed, they were minor as they did not go to the root of the case. In so asserting, he did seek refuge from the decisions of unreported cases of **Patrick Sanga Vs Republic,** Criminal Appeal No. 213 of 2008

and **Marmo Slaa Hofu and Three Others Vs Republic,** Criminal Appeal No. 246 of 2011.

Mr. Nuda did implore us to infer the conduct that was exhibited by the appellant as having corroborated the case against the prosecution in line with the holding in the case of **Pascal Mwita and Two Others Vs Republic,** [1993] TLR 295. He named such conduct of the appellant to include; giving contradicting versions regarding where he boarded the bus on the fateful day. While at one point in time during cross-examination, he claimed to have boarded it at Dar es salaam, there was a change of heart at a later moment during his defence, when he told the Court that, he boarded the bus at Segera in Tanga Region.

Another contradicting version given by the appellant was in regard to his signature and thumb print. While at one point in time, he disowned the signature and thumb print appearing in his cautioned statement. At a later moment, after some examination had been undertaken by a hand writing expert, he changed his mind and accepted them to be his. Such conduct was clear implication that, what the appellant was telling the Court were mere lies. The Court was asked to use such lies in his disfavor. In

conclusion, the Court was requested to dismiss the entire appeal by the appellant and uphold both the conviction and sentence of the trial Court.

In brief rejoinder, the learned counsel for the appellant did reiterate his submission in chief and added that, the failure by the Police Officer who recorded the cautioned statement of the appellant, to resort to section 51 of the Criminal Procedure Act after the time prescribed by the law had elapsed, was to be construed in favour of the appellant.

And with regard to the contention by his learned friends that, there were lies said by the appellant in Court, it was his view that, even if indeed it were to be established so, which he strongly disputed, the same did not remove the burden on the part of the prosecution, to establish the case against the appellant beyond reasonable doubt, a duty which they did fail to discharge. He humbly implored the Court to allow the appeal by reversing the findings of the trial Court and setting the appellant at liberty.

The issues that stand for our determination in the light of the three grounds of appeal presented by the learned counsel for the appellant are first, whether the cautioned statement (exhibit P1) of the appellant was recorded in compliance with the requirement under the law. Second,

whether Kanasia Kimaro was amongst the passengers in the bus on the fateful date. Thirdly, whether there were discrepancies in the testimonies of the prosecution witnesses. And lastly, whether on the face of the evidence on record, there was justification for the learned trial Judge to hold the appellant culpable to the charged offence.

We think it is desirable to begin our deliberations on the appeal with the third issue that is, as to whether or not there were discrepancies in the testimonies of the prosecution witnesses. It was argued before us by the learned counsel for the appellant that, the conviction of the appellant was founded on inconsistent and contradictory statements from the prosecution witnesses. He specified such testimonies to be that of PW3 and PW2 vis-a-vis exhibit P3, also the testimony of PW1 vis-a-vis PW8.

Upon going through the complained testimonies, we partly agree with the learned counsel for the appellant that, indeed, there were some discrepancies on what was testified by Ernest Lutuo Joseph Isaka (PW1), the officer from the Government Chemist and that of Assistant Inspector Herman Ngurukuzi (PW8), in regard to what was done to the pellets suspected to be drugs, at the time they were handed to PW1 for the first

time. Also there were some discrepancies in respect of the evidence on the seat occupied by the appellant in the bus as given by Yusuph Mkwawa (PW2) the bus conductor, ASP Allen Swai (PW3), the arresting officer, as well as the contents of exhibit P3. The question that was to be resolved is whether the discrepancies were fatal.

In answering the issue, we had to be guided by the position which the Court has taken in previous similar situations. In **Mamo Slaa Hofu and Three Others Vs Republic** (supra), the Court did observe that:

> *"In all trials, normal discrepancies are bound to occur in the testimonies of witnesses due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence."*

In an another case of **Said Ally Ismail Vs Republic**, Criminal Appeal No. 249 of 2008, which was followed in the above cited case, the holding of the Court was thus:-

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

Back to the case under discussion, we note that the discrepancy between the testimony of PW 1 and PW8 was in respect of the initial logistical steps that were taken by PW1 before he examined the pellets suspected to be drugs after they had been presented before him by PW8. We think the variance of the testimony by the two witnesses as to what was done first and followed by what in the process of examining the pellets was not crucial. In our view what was pertinent, was the issue as to whether they were drugs or not.

In the same vein, the discrepancy noted on the testimonies of PW2, PW3 and exhibit P3 on the seat which was occupied by the appellant in the bus on the material date is not to us fatal. What is crucial is the linkage between the appellant and the bag containing the pellets alleged to be drugs, which will be discussed later. In that regard, we answer the third issue in the negative and thereby, dismiss the third ground of appeal.

The second issue is whether Kanasia Kimaro, the author of exhibit P9 was a passenger in the bus on the fateful date. According to the submission of Mr. Ngole learned counsel for the appellant, the said person was not a passenger in the bus because her name did not feature in exhibit

P3. The basis of the argument by the learned counsel was founded on the testimony of Yusuph Mkwawa, the bus conductor, who told the Court that, the names of all passengers who travelled in the bus on the fateful date were contained in exhibit P3. On his part, Mr. Nuda did counter by arguing that, Kanasia Kimaro was a passenger who occupied seat No. D3 and that, her name was just slightly misspelled to read Atanasia instead of Kanasia. He did urge us to disregard such anomaly as it was a minor one.

On our part, we are inclined to join hands with the learned Senior State Attorney that, Kanasia Kimaro was among the passengers in the bus on the material date and that, her name had just been wrongly recorded. This fact is corroborated by the particulars of the person who occupied seat No. D3 in the bus, and the particulars of the person who gave the statement (P9), which are similar. To that end, we answer the third issue in the affirmative that, Kanasia Kimaro was among the passengers in the bus on the fateful date. That being the case, there was justification for the learned trial Judge to admit the statement (exhibit P9) in evidence after the efforts to secure her attendance to appear and give evidence in court had proved futile. We therefore dismiss the second ground of appeal.

We now turn to the first issue, which is whether the cautioned statement of the appellant was recorded within the time prescribed by the law. In principle both counsel are in agreement that, from the time when the appellant was arrested to when his cautioned statement was recorded, it was beyond the period of four hours which has been prescribed by section 50 (1) (a) of the Criminal Procedure Act. It was however asserted by the learned Senior State Attorney that, in the circumstance of the case at hand, they were protected by the stipulation under section 50 (2) (a) of the Criminal Procedure Act, which bears the following wording.

> *"(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence—*
> *(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;"*

There being no dispute to the fact that, the appellant arrived at Moshi Police Station at 2300 hours of the 27th November, 2012, the calculation of time had to commence from then, the learned Senior State Attorney has argued. Since the recording of the cautioned statement of the appellant commenced at 0815 hours of the 28th February, 2012, the question is as to whether by then it was within the prescribed period. By simple calculation, from 2300 to 0815 hours is a period of 9 hours and 15 minutes. Apparently, such period was beyond the period of four hours prescribed and the protection sought from section 50 (2) (a) of the Criminal Procedure Act, is of no avail. Under the circumstances, it was necessary to resort to the provision of section 51 of the same Act, which requires application for extension of time. The record discloses that, it was not done.

In the case of **Emanuel Malabya Vs Republic,** Criminal Appeal No. 212 of 2004 (unreported), this Court had an occasion to observe on non observance of the requirement of law while recording statements of suspects when it stated thus:

"The violation of section 50 is fatal and we are of the opinion that section 53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should therefore not be taken lightly or as mere technicalities. We therefore expunge exhibit P1."

A similar position to the one taken above was followed in the case of **Peter Kindole Vs Republic,** Criminal Appeal No. 69 of 2011 (unreported), where the holding in **Salim Petro Ngalawa Vs Republic**, criminal appeal No. 85 of 2004 was referred to where it was stated that:

"---Then there is the issue of cautioned statement of the appellant exhibit P4. Was it recorded within the provided statutory period? The appellant was arrested on the 26th February 2000 at 1300 hours and the statement was recorded on the 28th February 2000 that is after more than twelve hours and that contravened section 50 of the Criminal Procedure Act, which prescribes the basic period available for interviewing a person who is in custody of the police.

Therefore, that cautioned statement was inadmissible as the Court stated in ***Janta Joseph***

and Three Others Vs Republic, *Criminal Appeal No. 95 of 2005 wherein, the Court acquitted the appellants. We followed that case in this session in* ***Tumaini Mollei @ John Walker and Another Vs Republic,*** *Criminal Appeal No. 40 of 1994 (unreported)."*

What is apparent from the decisions cited above is that, compliance with the requirement of law in interviewing suspects under police custody is an issue which is not to be taken lightly because of its sensitivity that, it deals with rights of the suspects. In the instant matter, the holding in **Oscar Josiah Vs Republic** (supra), which was relied by the learned Senior State Attorney is inapplicable because even after excluding the time used in conveying the appellant to Moshi, still the cautioned statement of the appellant was recorded beyond the time prescribed by law. The failure by the officer who recorded the statement to resort to the provision of section 51 of the Act, was a serious irregularity which could not be taken lightly in line with the holding in **Emanuel Malabya Vs Republic** (supra). We therefore allow the first ground of appeal, the result of which is to expunge the cautioned statement of the appellant (exhibit P11) from the record.

The last issue is whether the prosecution did manage to establish the case against the appellant. From the established chain of custody, we reserve no doubt that, what was seized at Same Police Station and later examined by PW1, the officer from the Government Chemist and later tendered as exhibit P1 in Court, were Narcotic Drugs. The vital question that follows is who was the owner of the bag? After the appellant had strenuously denied ownership, in the absence of the expunged cautioned statement of the appellant, the evidence from the prosecution that implicated the appellant to the ownership was that contained in exhibit P9, the statement of Kanasia Kimaro. The statement reads in part that:

> *"Mnamo tarehe 27/11 2012 muda wa saa 0900 za asubuhi niliondoka Dar es salaam na gari ya Happy Nation No. T693 bus. Nilikaa siti No. D3. Baada ya kufika Mombo – Tanga tuliteremka kula chakula cha mchana. Baada ya kumaliza kula kaka mweupe ambaye amekamatwa au mmemkamata alichukua begi lenye rangi ya chuichui na kuliweka kwenye keria ..."*

Our literal translation in English would read:

[On 27/11/2012, about 0900 hours, I left Dar es salaam in the morning by Happy Nation bus with Registration No. T 693. My seat No. was D3. The bus stopped at Mombo in Tanga Region where we took our lunch. After finishing my lunch a light skinned brother whom you have arrested took a bag with leopard dots and placed it on the carrier of the bus.]

The question which we had to ask ourselves is whether with such piece of evidence, it could be stated in no uncertain terms that, the bag found with Narcotic Drugs was in possession or the property of the appellant on the fateful date. In our considered view, the mere fact of being seen only once, placing the bag on the carrier of the bus in the midst of the journey was not sufficient proof of possession or ownership.

The position of law in criminal proceedings is well settled that, it is the duty of the prosecution to establish the charged offence beyond reasonable doubt. This Court in **Mohamed Said Matula Vs Republic** [1993], did state that,

"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the

death but also the link between the said death and the accused; the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."

Even though in the above cited case the charge against the accused was that of murder, the position does not change in other criminal charges. See: **Joseph John Makune Vs Republic** [1986] TLR 49 and unreported cases of **Antony Mtafungwa Vs Republic**, Criminal Appeal No. 267 of 2010 and **Hussein Ramadhani Vs Republic**, Criminal Appeal No. 195 of 2015, just to mention a few.

The learned Senior State Attorney strongly urged us to infer the different lies said by the appellant in Court, as implied confession by him to the charged offence. With due respect, we are unable to buy such proposition for the obvious reason that, such lies by the appellant even if they were to be sufficiently established, did not shift the burden placed on the prosecution by the law that, it has to establish the case against the accused beyond reasonable doubt. Since such duty has not been discharged to the standard required we award the benefit of doubt to the appellant, by allowing his appeal. The conviction by the trial Court is

therefore quashed and the sentence meted out set aside. We order that the appellant be immediately released from custody unless he is lawfully held for some other justifiable grounds.

Order accordingly.

DATED at **ARUSHA** this 12th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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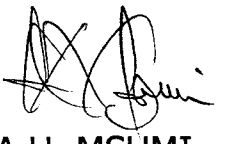

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL