

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MBAROUK, J.A., MZIRAY, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO 76 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONAPPELLANT

Versus

KRISTINA D/O BISKASEVSKAJARESPONDENT ,

(Appeal from the decision of the High Court of Tanzania at ~~Moshi~~)

(Fikirini, J.)

dated 16th day of February, 2016

in

Criminal Session Case No. 1 of 2014

JUDGEMENT OF THE COURT

10th & 11th August, 2017

MZIRAY, J.A.:

The herein respondent is arraigned in the High Court of Tanzania, at Moshi with Trafficking in Narcotic Drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Drugs Act, (Cap.95, R.E.2002).

It is alleged that on the 28th day of August, 2012 at Kilimanjaro International Airport area within the Hai District in Kilimanjaro Region,

the respondent was found trafficking an amount of 3,775.26 grams of Heroine Hydrochloride valued at Tshs. One Hundred Sixty Nine Million Eight Hundred Eighty Six Thousand and Seven Hundred only (Tshs.169,886,700/=). She pleaded not guilty to this charge.

On 15/2/2016 when the trial of the respondent was still in progress, the prosecution led by Ms. Tamari Mndeme, Senior State Attorney, assisted by Mr. Ignas Mwinuka, State Attorney, sought to tender in the trial court an envelope which contained heroine hydrochloride weighing 3,700,035.26 grams as exhibit through PW1 Machibya Ziliwa Peter, a Government Chemist.

The respondent who was represented in the trial court by Gwakisa Sambo assisted by Patrick Paulo, learned advocates, raised an objection in respect of the admissibility of the envelope. The reasons for the objection are reflected in the record of appeal at page 27 and 28 as follows:-

- (a) The witness who purports to tender the envelope is not the maker.

- (b) He is neither the addressee nor the custodian of the alleged exhibit.
- (c) The envelope has not been shown to them or they have not seen it, and
- (d) There are questions that the witness cannot answer and also for the fact that the envelope was handed over to someone else.

The prosecution insisted that the witness (PW1) was a competent witness to tender the said envelope as exhibit because he was the one who conducted the analysis of the narcotics substance contained in the envelope and therefore conversant with its contents. In considering the arguments from both side, the trial court at the end sustained the objection raised by the defence.

The Republic was aggrieved by the decision of the trial court. They lodged this appeal seeking to challenge that decision on one point that '***the trial court erred in law and fact by rejecting the***

admission of the envelope which contains Heroin Hydrochloride weighing 3775.26 grams on the ground that Machibya Ziliwa Peter (PW1) is incompetent witness to tender the exhibit.'

When the appeal was called on for hearing Mr. Omari Abdallah Kibwana assisted by Hassan Nkya, both learned Senior State Attorneys appeared and argued the appeal for the appellant, whereas, like in the trial court, Mr. Gwakisa Sambo assisted by Mr. Patrick Paulo, learned advocates, represented the respondent.

Submitting in support of the ground of appeal, Mr. Kibwana pointed out that the trial judge misdirected herself on holding that PW1 was incompetent witness to tender in court the envelope. The learned Senior State Attorney citing the provision of Section 127(1) of the Tanzania Evidence Act and the case of **DPP V. Sharif Mohamed @ Athumani and 6 others**, Criminal Appeal No. 74 of 2016 [unreported] as authorities, submitted that a witness being a competent witness can tender exhibits in court as evidence. He

submitted further that so long as there is no hard and fast rule on tendering exhibits in court, he was therefore of the view that a person having knowledge of the exhibit can tender the same in court. Likewise, if a person is a custodian, possessor, owner, addressee, or arresting officer, can also tender the exhibits in court, he submitted.

The learned Senior State Attorney however pointed out that, in the case at hand, PWI apart from being the addressee, he was a person with full information and knowledge of the envelope to be tendered in court, as he was given the said envelope in order to examine it and its contents. He opened it and examined the substance in it and finally he re-packed, sealed, signed and stamped it. On that basis therefore, the learned Senior State Attorney was of the view that PW1 was the right person and competent witness than anyone else to tender the envelope and its contents.

Addressing the issue of chain of custody featured in the trial court ruling, the learned Senior State Attorney briefly stated that chain of custody cannot be decided by one witness and in the middle of his

testimony. He submitted that issue of chain of custody is resolved at the end of the prosecution case, and not before.

In his reply submission, Mr. Sambo submitted that the ground of appeal is of no merit as the trial judge was right to rule that PWI was not the addressee of the envelope purported to be tendered as exhibit. He asserted that though PWI was a competent witness to testify, still he was not competent to tender the said exhibit as at the material time he was not in control of the same. Citing the case of **DPP V. Sharif Mohamed @ Athumani and 6 others** (supra), he insisted that exhibits have to be tendered by the custodian and that, in this particular case Afande Hashim or the RCO-Moshi were the most competent persons to tender the said exhibit.

We have gone through the record of appeal and carefully considered the arguments advanced both in support and against the appeal. With respect, this appeal is really on the question of admissibility of evidence. As we all know, the basic prerequisites of

admissibility of evidence in the Court of law are relevance, materiality and competence of the person to tender the exhibit.

In this case there is no dispute that the envelope was addressed to the Government Chemist and that PW1, a Chemist with the Government was the **one who examined and analysed the substance** in the envelope on 3rd September, 2012 and that at the end, he re-packed, sealed, signed and stamped it.

Since the envelope was addressed to the Government Chemist and PW1, a Chemist in that Office is the one who analysed the same, we buy the argument by the learned Senior State Attorney that PW1 was in the circumstance, with full information and knowledge of the envelope and therefore, a competent witness than anyone else to tender in court, the envelope and its contents. As to the issue of chain of custody, we are in agreement with the learned Senior State Attorney that this issue can be in whatever circumstance conveniently established upon close of the prosecution case and not otherwise.

On that basis therefore, we are of the view that the exhibit was wrongly rejected. The appeal is therefore allowed. The record should be remitted to the High Court for admission of the exhibit and continuation of trial to where it ended prior to the appeal. For interest of justice, we direct that the record be placed before another judge for continuation of trial from where it ended. Taking into consideration the nature of the offence, and the fact that the respondent is in custody, a quick disposal of the case is necessary.

DATED at **ARUSHA** this 11th day of August, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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


A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL