IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., MZIRAY, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 334 OF 2016

VUYO JACK ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Chocha, J.)

dated the 7th day of June, 2016
in
Criminal Session Case No. 15 of 2013

JUDGMENT OF THE COURT

4th & 13th December, 2018

MUGASHA, J.A.:

In the High Court of Tanzania (Mbeya Registry), the appellant **VUYO S/O JACK and ANASTACIA ELIZABETH D/O CLOETE** who was acquitted, were charged with the offence of Trafficking in Narcotic Drugs contrary to section 16 (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act **[CAP 95 RE.2002].**

It was alleged that, on 18th day of November, 2010 at Tunduma area within Mbozi District in Mbeya Region the appellant and **ANASTACIA ELIZABETH D/O CLOETE,** jointly and together were found transporting 34660 grams of heroine hydrochloride/Diacetylmorphine in the motor vehicle with Registration No. CA-508-650 Make Nissan Hard Body the property of the appellant. The appellant was convicted and sentenced to imprisonment for twenty five years and ordered to pay a fine of Tshs. 3,119,760,000/= (three billion one hundred and nineteen million seven hundred and sixty thousand only).

Aggrieved, the appellant has come to Court challenging the decision of the trial court. In the Memorandum of Appeal he has raised five grounds as reproduced hereunder:

1. That the trial High Court erred in law and fact in holding that there was no interference of chain of custody of drugs between 18/11/2010 and 29/11/2010 when the trial court itself held six times in the judgment that there had indeed been fraudulent interference of the chain of custody between the two dates;

2. That the trial High Court erred in law and fact in convicting the appellant of drug trafficking when there was absolutely no chronological documentation and or paper trail of how the alleged drugs had been dealt with between Tunduma and Dar-es-salaam;

3. That the trial High Court erred in law and fact in holding that the appellant was responsible for concealing the drugs in his motor vehicle (Exhibit P9) when the trial court had held itself that when the appellant had named the BP Garage in Morogoro where he sent his motor vehicle for service for two days, the prosecution did not call even a single witness from the said garage in order to unveil the chain of custody;

4. That the trial High Court erred in law and fact in convicting the appellant of drug trafficking and holding that the appellant was found with drugs when there was no iota of evidence to that effect; and

5. That the trial High Court erred in law and fact in not realising that the case against the appellant was a farce as there was no explanation from the prosecution on where the 4th parcel of the drugs that was talked about in the evidence at the trial by PW5 came from when the

High Court itself had held that the parcels that were handed over by PW5 to take to Dar-es-salaam were only three.

The appellant as well filed written submissions in support of the appeal in which he abandoned the 5th ground of appeal.

At the hearing of the appeal, the appellant was represented by Mr. Victor Mkumbe, learned counsel whereas the respondent the Director of Public Prosecutions (the DPP) had the services of Mr. Joseph Sebastian Pande, learned Principal State Attorney and Mr. Basilius Namkambe, learned State Attorney.

In this appeal, we have to determine whether the conviction of the appellant was based on cogent prosecution evidence.

Before addressing the submissions of counsel for the parties the merits or otherwise of this appeal, it is crucial that we give a brief account of the evidence paraded by both sides.

To establish its case, the prosecution paraded eleven witnesses and relied on fourteen exhibits. As gathered from the evidence, on 17/11/2010 James Alfred (PW2) a Customs employee at Makambako received a tip from an informer that a motor vehicle with Registration No. CA 508650

make Nissan Hard Body from Morogoro to South Africa via Tunduma Border was carrying narcotic drugs. Having notified the Regional Manager and the Tunduma Customs Deport, PW2 was allowed to make a follow up and travelled to Tunduma. On arrival, PW2 found the very car parked at the Tunduma Customs Office with the driver/appellant and a half caste lady inside the vehicle. PW2 informed Mr. Magasso the Customs officer of Tanzania Revenue Authority (the TRA) that, the car which was being tracked had already arrived at Tunduma. Having interviewed the appellant he told them to be destined for South Africa and that he was awaiting customs clearance which was to be dealt with by the clearing agent Abubakar Mohamed Mahuru (PW8). In a bid to conduct the clearance, PW8 asked the appellant who obliged to drive the motor vehicle into the yard.

Since it was suspected that, the motor vehicle had the drug consignment, Francis Estomih Mboya (PW3) from Anti Drug Unit in Mbozi had to be notified and information was circulated to the members of the security Committee chaired by Maxmillian Denis Gogadi (PW7) the Immigration Officer in Charge at Tunduma. Having assembled, they resolved that the motor vehicle be inspected. On being informed that his

motor vehicle was suspected to be carrying drugs and that it had to be inspected, the appellant denied and claimed to be carrying diamonds. As the appellant's word could not be trusted, in his presence, PW3 led and conducted a search of the appellant's personal belongings inside the motor vehicle and found nothing. Then, using a special instrument which had a mirror and facilitated looking underneath the chassis of motor vehicle, PW2, PW3, PW7 and Rogasian Lakarau Shirima (PW10) a customs official saw a cloth hanging which could not be easily pulled down. They decided to call Leo Aldo Ngeta @ Nyonzo (PW4) a mechanic who assisted in pulling down the cloth down whereby several packets fell down from the motor vehicle and other packets were found hidden in the mudguard and the body. In a further search, the motor vehicle was overturned they found the chassis sealed and PW4; a mechanic unsealed it and other packets were retrieved all totaling 37. In the presence of the appellant, PW3 using a special kit, tested three packets and preliminary results showed its contents to be narcotic drugs. PW3 made it clear to the security committee members and the appellant that, the final verdict on the 37 packets being narcotic drugs or otherwise would be given by the Chief Government Chemist.

All the 37 packets were packed into boxes and together weighed at 42.5 kilogrammes. PW3 prepared certificate of search and seizure (Exhibit P7) showing that a total of 37 packets of narcotic drugs were found in the appellant's motor vehicle which was signed by the appellant being the person searched while Max Gogadi, (PW7) Magaso, Inspector Francis signed as those who witnessed the search. In addition, the appellant also signed the notice of seizure (Exhibit P13) prepared by PW10 a customs official indicating that his motor vehicle was found with a total of 37 packets of narcotic drugs. Then, the boxes containing the 37 packets of narcotic drugs were sealed and kept in the strong room at the Customs Office at Tunduma in the presence of the appellant to await further steps.

On being informed on what had transpired at Tunduma, after notifying the Regional Police Commander, SSP Anakleti Malindisa (PW5) Regional Crimes Officer disembarked to Tunduma accompanied by E. 2614 DSSGT William, (PW6) and A/Insp Joram Mtipe Magora, (PW9). On arrival, after being introduced to the Security Committee members, PW3 and PW7 narrated to PW5 on what had transpired which precipitated on the arrest of the appellant and that the drug consignment was kept in Customs Office of PW10. Before the consignment was handed over to PW5 and in the

presence of the appellant, the boxes were opened, packets counted and repacked into three boxes whereby PW5 added another red seal in addition to the one sealed by the Security Committee. In the respective handing over to PW5, PW10 prepared (Exhibit P14) a dispatch book and a handing over note (Exhibit P10) showing that, 37 packets of drugs; seized motor vehicle CA 508650 Chassis No. ADNJ860000E000929 Engine No. ZD30064499K Nissan D/Cabin Hard Body and travel passports of the appellant and another person. As the drug consignment was to be transported to Mbeya for storage, PW5 informed the Regional Police Commander to provide sufficient security. On the same day, the drug consignment, the appellant accompanied by PW3, PW5 and PW7 they travelled to Mbeya escorted by four armed policemen. All cars travelled in a convoy to Mbeya.

In a bid to secure a safe storage facility for the entire consignment, the armoury of the Field Force Unit was considered most safe as its outer gate had three padlocks. In the presence of the appellant, PW5 took the drug consignment to the armoury; he retained two padlocks keys and SP William Timoth Mwambagale (PW11) retained one padlock key. On the following day, that is 19/11/2010 new padlocks were bought to replace the

old ones and a similar arrangement of retaining the padlocks' keys remained. With this arrangement, none of them could access the armoury facility whose security was reinforced.

On 25/11/2010, in the presence of the appellant, verification exercise was conducted by PW5 and PW11 to facilitate carriage of the consignment to the Chief Government Chemist. In the said verification which was witnessed by PW6 and PW9, the boxes were re-opened packets counted while appellant who had been issued earlier with seizure note tallied with contents and the boxes were repacked in four boxes as follows: 1st box 19 pkts; 2nd box 7 pkts; 3rd box 8 pkts and 4th box 3 pkts with labels PF 180. The appellant did not register any complaint. After the verification, the boxes were tied with a special string, sealed and stamped, placed in one arms box and returned at the armoury under escort whereby the locking arrangement remained the same with PW5 retaining two padlock keys and PW11 retaining one padlock key. The RPC was informed that, the consignment was ready for transmission to the Chief Government Chemist and PW5 advised that the consignment be airlifted. However, the RPC declined having promised to avail sufficient security by road transport.

In the wake of threats, on 29/11/2010, at 01.00 hrs PW5 and PW11 opened the armoury and found the boxes intact as previously sealed; escorted by six armed policemen PW5 disembarked to Dar-es-salaam with the consignment of drugs to the Chief Government Chemist. At around 14.00 hrs he arrived at the Chief Government Chemist where the boxes were marked with label 811/2010 and PW5 submitted the four boxes containing 37 packets to Bertha Fredric Mamuya, PW1. On the same day, in the presence of PW5, PW1 conducted the test using a machine picked a sample from each packet and concluded that, 34 packets contained heroine hydrochloride while three packets tested negative. PW1 signed and initialed the packets and placed thereon the stamp of the Chief Government Chemist, packed in boxes and the entire consignment was entrusted to PW5. On the same day at 18.00 hrs under escort, PW5 travelled with the consignment to Mbeya via Morogoro and Iringa. On arrival at Mbeya, the consignment was kept at FFU armoury facility whereby, prior similar arrangements were retained with PW5 remaining with two padlock keys while PW11 remained with one padlock key. After PW5 informed the RPC on the results that the three packets tested negative, it was confirmed

that, at Tunduma, initially, only 3 packets were tested and not all 37 packets.

At the trial, PW1 informed the court that, upon receiving four boxes from PW5, she unsealed and found 37 packets. In the presence of PW5 using a machine she picked a sample from each packet, upon examination found 34 packets were heroine weighed at 34664 grams and three packets tested negative (Exhibit P5) whose weight she did not indicate. She identified the packets with her signature, initials and a rubber stamp of the Chief Government Chemist. The findings of PW1 after making a chemical analysis which she had conducted are contained in a report Ref. 95/XXIV/73 dated 29/12/2010 LAB No 811/2010 she had tendered as exhibit P1 to the effect that the contents were 34 packets of heroine while the three packets with blackish substance (Exhibit P5) had tested negative.

The appellant denied each and every detail of the prosecution account. He claimed to have visited Morogoro for memorial services at Solomon Mahlangu Camp of the deceased relatives who were freedom fighters. While at Morogoro where he stayed for ten days, on 15/11/2010 he took his car for intensive service at BP garage; collected it on 17/11/2010 and commenced his trip to South Africa via Tunduma. On

reaching Tunduma Border, he met one George and having inquired about declaration, was required to produce the passport, motor vehicle registration permit; his car was taken inside the yard and was required to come after one hour. On return he was told that something was found in his motor vehicle.

The appellant contended that, the case was planted on him because he had refused to sell his car to one of the TRA's official. He denied to have been present at the preliminary testing by PW3, the search led by PW3 and subsequent handing over of the drugs and the motor vehicle to PW5 by the Security Committee at Tunduma. He claimed to have seen the boxes purportedly containing drugs on 25/11/2010 and faulted the warrant to have been issued by an unauthorized person as he was not given a copy. He denied to have witnessed any repacking and faulted discrepancies on the weight of the drugs and claimed not to remember if the drugs were transmitted to the Chief Government Chemist. He faulted the report of PW1 to be discrepant on the basis of examination conducted on 29/11/2010 and Exhibit P1 being dated 29/12/2010.

The trial was conducted with the aid of three assessors. At the summing up only two of them were present and opined that the appellant

was not guilty. The Assessors disputed the prosecution evidence on the following:

1. The search of the appellant was not witnessed by independent persons other than the employees of the Government.
2. Drugs were not found in the motor vehicle at Tunduma since no photos were taken thereat.
3. The Clearing agent was planted.
4. The consignment of drugs found in the car is different from what the witnesses described.
5. The accused persons were not involved in the repacking, transportation to and testing of the drugs to the Government Chemist.
6. While PW1 tested the drugs twice one in the presence of the police, she remained with the sample and conducted the confirmatory test alone.

The trial Judge acquitted Anastacia Elizabeth Cloete at this stage; that is, after the opinion of assessors but later found the appellant guilty as charged on the strength of the credible prosecution account of PW2, PW3, PW4, PW7 and PW10 who witnessed the consignment of drugs being

retrieved from the body of the motor vehicle which belonged to the appellant. The trial Judge relied on such evidence to be direct and primary in terms of sections 61 and 62 of the Evidence Act which could not be overridden by whatever documentary and secondary evidence which he considered to be redundant.

However, the trial judge addressed the question of discrepancy between the weight which was put at 42500 grams at Tunduma and the weight of exhibit P1 (34660 grams) contained in the report of the Chief Government Chemist tendered by PW1 and exhibit P5 blackish substance which was not heroine hydrochloride. At page 380 to 382 of the record of appeal he considered the discrepancy to have fraudulently interfered with the drugs' chain of custody between 18th – 29th November, 2010 by the custodian whereby he concluded that, 7836 grams of drugs were withdrawn and directed elsewhere and three packets of charcoal were replaced in order to maintain the number of 37 packets.

The trial judge also faulted the prosecution for not having paraded a witness from BP Garage in Morogoro where the appellant claimed to have had taken his car for two days before departing from Morogoro.

In addressing the first and second grounds of appeal, it was submitted that, the chain of custody of drugs allegedly found with the appellant on 18/11/2010 was seriously broken before they were handed over to PW1, the Government Chemist on 29/11/2010 for analysis due to the following: **One,** the discrepancy of the drugs seized and what was transmitted to the Chief Government Chemist. **Two,** the unnecessary repacking of the drugs on 25/11/2010 by PW5 while he had ascertained the consignment together with the Security Committee members at Tunduma; **Three,** the lacking chronological documentation or paper trail of how the drugs were dealt with from the time they were handed over to PW5 up to when transmitted to the Chief Government Chemist apart from Exhibits P13 and 14. **Four,** not involving the appellant in the process which enabled easy tampering. To support the propositions we were referred to the case **PAULO MADUKA AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No. 110 of 2007 (unreported).

On the other hand, Mr. Pande from the beginning indicated to support the conviction of the appellant. In his reply to the 1st and 2nd grounds of appeal he submitted that, the chain of custody was not broken and that the appellant's complaints were based on mere assumptions of

the trial Judge other than the evidence on record. He pointed out that, while the trial judge assumed 42.5 kilogrammes to be the total weight of narcotic drugs seized from the appellant's car at Tunduma, that included the 37 packets of narcotic drugs plus the boxes in which the packets were kept after retrieval. He further pointed out that, according to the evidence of PW2, PW3, and PW7 out of 37 packets only 3 were subjected to preliminary test at Tunduma and the preliminary results indicated narcotic drugs; however, it was cautioned that the final verdict would be given by the Chief Government Chemist.

Furthermore, Mr. Pande added that, from the moment the drug consignment was handed over to PW5 by PW10 at Tunduma, the storage at Mbeya, and the repacking on 25/11/2010 for subsequent transmission to the Chief Government Chemist which was done in the presence of the appellant, PW5 remained under supervision and control of the consignment. He argued that, the appellant was not involved in the transmission of the drugs to the Chief Government Chemist because the process entailed expertise which did not require the presence of the appellant. Finally, what was entrusted to PW1 who after examining the 37 packets confirmed that 34 were narcotic drugs and 3 were not, having

tested negative. In this regard, he reiterated that since Exhibit P1 was purely under control and supervision of PW5 the case of **PAULO MADUKA** (*supra*) is distinguishable. He backed his proposition by referring us to the case of **ISSA HASSAN VS THE REPUBLIC,** Criminal Appeal No. 129 of 2017 (unreported).

In the 3rd ground of appeal, the appellant faulted the prosecution for not having summoned any witness from the garage at Morogoro where the appellant had sent his car for intensive service on 15/11 to 17/11/2010. It was argued that, it was very possible that the people at the garage planted the drugs in the private chamber of the appellant's car without his knowledge.

In replying the 3rd ground of appeal, Mr. Pande argued that, the prosecution was not obliged to parade the owner of the garage where the appellant claimed to have been a possible place where the drugs were implanted. He pointed out that, as the owner of the garage was not a material witness for the prosecution as concluded by the trial judge, it was incumbent on the appellant being the one who made the assertion to provide proof by parading such witness.

In the 4th ground of appeal, the basic complaint was that the appellant was not found trafficking narcotic drugs because neither the certificate of search and seizure warrant nor the notice of seizure (Exhibits P7 and P13) respectively were signed by the appellant to certify his presence at the time of search. It was argued that, since the appellant did not sign Exhibit P7, this contravened section 38 (3) of the Criminal Procedure Act and it supports the appellant's assertion that he never witnessed the retrieval of any drugs from within or any part of his motor vehicle. It was further argued that, as Exhibit P7 was never taken to a magistrate as required by section 38 (2) of the CPA, that was a serious omission which shows there is no iota of evidence that the appellant was found with any drugs.

In his reply Mr. Pande argued that Exhibit P7 the certificate of search and seizure militates against the appellant who signed the same being the person who was searched and found with narcotic drugs. He added that, the search was in compliance with the law having been conducted by PW3 was witnessed by PW7 and Mr. Magaso. He added that, Exhibit P13 the notice of seizure was as well signed by the appellant and it was at the trial admitted without any objection which tells that, the appellant did admit to

have been found with narcotic drugs. On the complaint raised by the appellant that Exhibit P7 was not taken to the Magistrate, Mr. Pande argued the same not fatal because the omission is curable under section 388 of the CPA. When probed by the Court on the mandatory requirement stated under section 38 (2) of taking Exhibit P7 to the Magistrate Mr. Pande was quick to point out that, if the omission is found to be fatal Exhibit P7 can be expunged. However, he maintained that there is still strong prosecution evidence to prove that the appellant was found trafficking in drugs.

When probed by the Court on the propriety of sentencing of the appellant ordered to commence from the date of arrest of the appellant, Mr. Pande faulted the same to be irregular on ground that it never fared as a mitigating factor. As such, he urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction, Cap 141, and impose the proper sentence in accordance with the law.

In rejoinder, Mr. Mkumbe reiterated his earlier stance that the chain of custody was interfered as found by the trial court. He added that, since the drugs were worth a billion sum, its audit trail ought to have been documented in the absence of which, the chain of custody was interfered

as found by the trial court. He opted not to comment of the propriety or otherwise of the sentence nor certificate of search and seizure (Exhibit P7 which he had earlier faulted in his submission that it was not signed by the appellant.

After a careful consideration of the record and the submission of the learned counsel, we are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. See **D. R. PANDYA v REPUBLIC** (1957) EA 336 and **IDDI SHABAN @ AMASI vs. REPUBLIC,** Criminal Appeal No. 111 of 2006 (unreported).

We are also aware that, the credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned. The credibility of a witness can be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness, **two,** when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See - **SHABAN DAUDI VS REPUBLIC**,

Criminal Appeal No. 28 of 2001 (Unreported). On the said account, in **GOODLUCK KYANDO VS REPUBLIC,** [2006] TLR 363, the Court laid down the following principle:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness."*

Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. (See **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported).

Guided by the said principles we have opted to dispose of this appeal by initially addressing the 4th ground of appeal, the 3rd ground of appeal and conclude by the 1st and 2nd grounds of appeal.

The complaint in the 4th ground of appeal is to the effect that the appellant was not found with any drugs. Having carefully considered the arguments for and against the appeal and the evidence on record we are alive to the fact that, the conviction of the appellant basically hinges on the

credibility of PW2, PW3, PW7 and PW10. These witnesses were present at the scene of crime and to be particular when the appellant was apprehended. The cumulative testimonial account of those witnesses is that, narcotic drugs were retrieved from the appellant's motor vehicle following a search which was conducted by PW3 in the presence of the appellant himself. Such evidence is direct as it was held in the case of **COMMONWEALTH VS WEBSTER** 1850 Vol. 50 MAS 255 where Shaw CJ stated:

> *"The advantage of positive evidence is that it is direct testimony of witness of a fact to be proved who if speaks the truth so it done. The only question is whether he is entitled to belief."*

As correctly found by the trial court, we find no cogent reasons to disbelieve the credible account of the eye witnesses on what transpired at the search and the retrieval of the drugs from the appellant's car. Moreover, such credible account of PW2, PW3, PW7 and PW10 is cemented by documentary evidence contained in Exhibits P7 and P13 whereby the appellant who was searched and signed those

documents, did acknowledge to have been found with narcotic drugs as opposed to what his counsel submitted. This militates against the appellant's account who claimed to have seen Exhibit P7 on 25/11/2010 because after appending his signature he inserted 18/11/2010 the date on which the search was conducted.

We also considered if the failure to submit Exhibit P7 to the magistrate in terms of section 38 (2) of the CPA, did impeach that piece of documentary evidence. Our answer is in the negative because the use of word "shall" is not always mandatory but relative and is subjected to section 388 of the Criminal Procedure Act – See **BAHATI MAKEJA VS THE REPUBLIC,** Criminal Appeal No. 118 of 2006 (unreported). As such, we disagree with the learned Principal State Attorney to expunge Exhibit P7 having been satisfied that, the failure to submit it to the magistrate did not impeach the creditworthiness of such document in which the appellant did acknowledge to have been found with narcotic drugs in his motor vehicle which is supported by Exhibit P13 which was not entirely faulted by the appellant be it in his evidence or written submissions. It was admitted without being objected. Moreover, we found the appellant's complaint on variance on dates when PW1 examined the drugs and authored her report

insignificant since the end result of what was examined and reported was Heroine. Besides, PW1 clearly stated that her report was made on 29/12/2010 as it had to be approved by the Ag. Chief Government Chemist. Thus, the appellant was not prejudiced in any manner.

We are satisfied that, the available credible account of PW2, PW3, PW7 and PW10 together with the documentary account contained in Exhibits P7 and P13, points to the guilt of the appellant to have been found trafficking in drugs in his motor vehicle on 18/11/2010. We thus dismiss the 4th ground of appeal.

In relation to the 3rd ground of complaint that the prosecution did not parade a witness from the garage where the appellant had taken his car for service for two days, this account came from the appellant in his defence. While it is a clear position of the law that he who alleges must prove, it is the appellant who was duty bound to parade such a witness. However, it is on record at page 177 of the record of appeal that, when the trial court addressed him to elect on the manner of defending he opted not to bring any witness. In this regard, raising this issue on appeal is indeed an afterthought and with respect, this complaint of the appellant was picked from the findings of the trial judge in his judgment. We are satisfied

that, the person from the garage was not material witness for the prosecution considering that, the appellant was arrested on 18/11/2010 at Tunduma trafficking narcotic drugs. We find this ground without merit and accordingly dismiss it.

We wish now to address the complaints on the discrepancy of weight if any, the alleged broken chain of custody and if there was fraudulent interference of the narcotic drugs as observed by the trial judge who at page 382 of the record of appeal concluded as follows:

> *" ... according to the certificate of value 34.6 kilogrammes of drugs were worth more than a billion. To be exact Tshs. 1,039,920,000/=. It follows therefore that, 7836 grams which constitute 18.4 % of the consignment's weight seized at Tunduma (42500 grams) would cost Tshs. 235, 080,000/= at that time. No stupid importer or trafficker would spend such a huge amount of money to import or traffic (charcoal). I am optimistic basing on the principle "buyer beware" the dealer ensured he had a genuine and proper*

substance commensurate with the money paid! "value for money".

For these reasons I am not impressed and I refuse to be persuaded to accept that "charcoal" was part of the consignment as from Tunduma. The Committee was too keen and curious to fail notice that. For that reason I find there was fraudulent interference of the drugs' chain of custody between 18th -29th November, 2010 by custodian whereby 7836 grams of drugs were withdrawn and directed elsewhere. To maintain the number of packets, three packets were replaced".

We found appellant's complaint on the discrepancy on weight to have been fuelled or rather instigated with respect, by the trial judge who did not properly evaluate the evidence on record. We say so because, according to the evidence of PW2, PW3, PW7, PW5 and PW10, none of them testified that, at Tunduma each of the 37 packets was weighed separately. What is vivid is that, the 37 packets were grouped into three and packed in three boxes which altogether weighed at 42500 grams.

Moreover, at page 52 to 53 of the record of appeal, PW3 categorically stated to have examined only three packets out of 37 and informed the Security Committee members that the final verdict would be given by the Chief Government Chemist. PW1's expert recount and her detailed report, did not weigh the 37 packets as packed in the boxes. She made the chemical analysis of 37 packets and concluded that 34 packets weighing 34660 grams to be narcotic drugs while 3 packets tested negative were blackish in substance. However, she did not give the weight of the three packets. From the cumulative evidence on record, since the processes to establish the weight of heroine was conducted solely by PW1 and no other person we are satisfied that, there was no discrepancy in the weight of heroine which was being found in the appellant's car and handed over to PW5 by PW10. We are in agreement with the learned Principal State Attorney that, since the examination of drugs by PW1 was an expert undertaking, the presence of the appellant was uncalled for.

We also found the aspect with respect, the trial judge's opinion who not being an expert introduced his own modality of testing by touching and seeing of the contents of the three packets as opposed to the evidence of PW1 an expert in the field who used reagents and conducted chemical

analysis to conclude that, the 3 packets which tested negative with blackish substance. The drug dealers as far as case law is concerned, use different tricks in order to confuse the security personnel or related experts into believing that what is in the consignment is not narcotic drugs. This happened in the case of **KILEO BAKARI KILEO AND 4 OTHERS VS THE REPUBLIC**, Consolidated Criminal Appeals No 82 of 2013 and 330 of 2015 (unreported). In that case, the appellants who were carrying 95 packets of narcotic drugs weighed at 92.2 kilograms, also carried more than 8 packets of cassava flour which they wanted to trick the arresting officers so that they could let them go through with a huge consignment of narcotic drugs. Having been satisfied with the evidence of the Chief Government Chemist, the Court was satisfied that, 95 packets were narcotic drugs and more than 8 packets were starch. It really tasked our minds as to what could PW3 concluded if he had tested at Tunduma what PW1 found to be blackish substance? He was obviously bound to conclude that, the appellant was not carrying narcotic drugs which was not the case. Thus, in the case at hand the trial judge ought to have been aware of the tricks played by the drug dealers instead of jumping to a conclusion that, there was fraudulent interference on what was actually seized at Tunduma. In our considered

view, on the basis of the evidence on record, the three packets with blackish substance were part of the 37 packets which were retrieved from the appellant's car at Tunduma. Thus, there was neither discrepancy on the weight of the narcotic drugs nor the implanting by PW5 as concluded by the trial judge.

We would also wish to make it clear that, 37 packets seized at Tunduma were handed over to PW5. This is according to evidence of PW10 an official of TRA where the seized drugs were initially kept for safe custody and Exhibits P10 and P14 (the handing over note and dispatch book). At Mbeya the consignment was not handed over to any other person since PW5 is the one stored the consignment in safe custody at the armoury facility at Mbeya and in the presence of the appellant. In the absence of any evidence that Exhibit P1 was mishandled or handled by any other identified person, we are satisfied that it was at all times under the control of PW5 who testified to have on 25/11/2010 supervised the verification and repackaging of the consignment into four boxes for onward transmission to the Chief Government Chemist. It is on record that, the appellant was involved in the verification and made the tallying as he had the copy of the certificate of search (Exhibit P7). Moreover, apart from

PW5, no other person handled Exhibit P1 until when it was handed over to the Government Chemist PW1 who after concluding that 34 packets contained narcotic drugs prepared a report with Lab No. 811/2010. In this regard, the chain of custody was never broken.

We are also of a considered view that, the chain of custody was not broken from the time of arrest, to the testing by the Chief Government Chemist and tendering in the trial court. This is in the evidence of PW2, PW3, PW5, PW7 and PW10 who all testified that the 37 packets found in the appellant's motor vehicle were handed over to PW5 who transmitted the same to PW1 who confirmed to have received 37 packets, tested them and found 34 of them to be narcotic drugs weighed at 34,664 grams valued at 1,039,920,000/= as per Exhibit P2 (Certificate of Value of Narcotic Drugs and Psychotropic Substances) which was not disputed at the preliminary hearing. Furthermore, the Exhibit P1 was through PW1 returned to PW5. Moreover, during trial all the officers who handled Exhibit P1 from arrest, storage, transmission to and from the Government Chemist, valuation and production were all paraded as prosecution witnesses. Besides, Exhibit P1 was tendered in the evidence and identified

by PW1 and PW5. As such, there was no fraudulent interference of the chain of custody as wrongly concluded by the trial judge who with respect we find to have mishandled the evidence. This is what made us re-evaluate the entire evidence in line with **PANDYA** and **IDDI SHABAN @ AMASI (*supra*).**

On the aspect of sentencing we have this to say; since the appellant was at the time of arrest not yet convicted, bearing in mind a legal maxim that an accused person is presumed innocent before conviction, he could not be subjected to serve any sentence. The time spent by the appellant behind bars before being found guilty, convicted and sentenced, would have been a mitigating factor in imposing the sentence but not (as erroneously imposed by the trial judge) to commence from the time of arrest as erroneously imposed by the trial judge. We thus invoke our revisional power under section 4 (2) of AJA to vary the erroneous sentence imposed by the trial judge. In this regard, as the penalty provided under section 16 (1) (b) (i) begins to run upon conviction, the appellant shall serve a period of twenty five (25) years from the date he was convicted; that is from 7th June, 2016.

The above said and done, we find this appeal is without merit and dismiss it in its entirety.

It is so ordered.

DATED at **MBEYA** this 12th day of December, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL