IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 292 OF 2016

SLAHI MAULID JUMANNE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)
(Sumari, J.)

dated the 17th day of March, 2016
in
Criminal Sessions Case No. 19 of 2015

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JUDGMENT OF THE COURT

27th June & 21st August, 2018

NDIKA, J.A.:

The appellant, Slahi s/o Maulidi Jumanne, was charged with trafficking in narcotic drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic Drugs Act, Cap. 95 RE 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No.2) Act No. 6 of 2012 (hereinafter referred to as the "Anti-Drugs Act"). The prosecution alleged that the appellant on 7th September, 2013, at the Regional Bus Terminal within the Municipality of Moshi in Kilimanjaro Region, was found trafficking 21 kilogrammes of khat (*catha edulis*) known in Kiswahili as *mirungi* valued at Tanzania Shillings One Million Fifty Thousand (TZS.

1,050,000.00). After a full trial featuring nine prosecution witnesses and the appellant testifying upon affirmation in his defence, the High Court sitting at Moshi (Sumari, J.) convicted the appellant of the offence as charged and imposed on him the mandatory life sentence. Aggrieved, the appellant now appeals against both conviction and sentence.

We find it pertinent to provide the factual background to this appeal at the outset. PW4 F.1219 D/Cpl. Fredrick, a police investigator attached at the Regional Crimes Office in Kilimanjaro Region, received information through a phone call that a certain person was conveying an unspecified amount of khat to Arusha on a bus bound to Arusha christened Simba Mtoto with registration number T.501 BRZ, which he had boarded at Himo. Having alerted his fellow police officers, including PW8 E.5589 D/Cpl Ramadhani, D/Cpl Nsangarufu and D/Cpl Fadhili, to the matter they all went to the Moshi Bus Terminal where the bus was expected to stop over before proceeding to its final destination. The bus having arrived shortly after 5:00 p.m., PW4 approached the bus conductor (PW5 Hamisi Zuberi) and introduced himself and his colleagues as police officers and then demanded to see the passenger that boarded the bus at Himo. Actually, the bus picked only one passenger at Himo; it was the appellant who sat at the back of the bus with his green bag loaded onto the luggage hold. PW5

alighted from the bus along with the appellant whereupon the police officers informed the appellant that they suspected him of conveying khat. Following their demand to inspect the appellant's baggage, PW5 opened the luggage hold and removed a green bag, which, the appellant admitted to be his property. On the bag being unzipped, it revealed 'grass' believed to be khat. There and then, the appellant was put under restraint and taken to the office of the Regional Crimes Officer (RCO) along with the bag in a taxi driven by PW6 Mfaume Bakari Amri. Apart from PW4 and PW6, the contingent in the taxi included PW5 and PW8.

At the RCO's office, PW4 opened the bag in the presence of the appellant, PW5, PW8, PW9 F.1157 D/Sgt Hashim and D/Cpl Fadhili. According to him, there were found 21 bundles of khat. Thereafter, PW4 handed over the bag to D/Sgt Hashim, the Exhibits Keeper, for safe custody. He tendered in evidence what he called a "search warrant" that he filled out and had it signed by PW5, PW8 and the appellant (Exhibit P.6). E.5589 D/Cpl Ramadhani (PW8) gave evidence which was significantly in line with that of his colleague, PW4.

The bus conductor (PW5) adduced that the appellant was the only passenger that got on the bus at Himo and that his green bag was put in

the luggage hold at the rear. He confirmed PW4's account on what transpired after the arrival of the bus at the Moshi Bus Terminal. He identified a green bag (Exhibit P3) and bundles of 'grass' (Exhibit P.4) as the items seized from the appellant on the fateful day. He also confirmed one of the signatures on the seizure certificate (Exhibit P.6) as his. The taxi driver (PW6 Mfaume Bakari Amri) gave a testimony supporting PW4's account on how the appellant was ferried from the bus terminal to the RCO's office.

F.1157 D/Sgt Hashim (PW9) recounted how the appellant was presented at the RCO's office by PW4 and his colleagues. He confirmed to have taken custody of the green bag and its contents seized from the appellant, which he then locked in the strong room/exhibits room at the RCO's office. He entered a corresponding entry in Form PF 16 - Exhibits Register (Exhibit P.8) to reflect the storage of the green bag and its contents in the strong room. PW9 testified further that he recorded the appellant's cautioned statement on the fateful day, between 17:20 hours and 18:10 hours. The statement indicates that appellant confessed to being found conveying the consignment of khat.

On 29th October, 2013, which was about 52 days after the appellant's arrest, PW9 took the green bag to the Zonal Office of the Chief Government Chemist (CGC) in Arusha along with a written request for the contents of the bag to be tested and analysed. At the office, PW2 Erasto Laurence, a Chemist, received the bag and registered it as "Lab. No. NZ77/2013". He then unsealed and opened the bag, and weighed its contents, which were found to be 21 kilogrammes. After taking a sample, PW2 returned the bag and the rest of its contents to PW9, which he then took back for storage in the strong room at the RCO's office. PW9 tendered a written acknowledgement from the Zonal Office of receipt of the sample. On 27th August, 2014, he received a letter from the CGC confirming that the sample presented for testing and analysis was khat.

Erasto Laurence (PW2) recounted that after he received the bag from PW9, he opened it and established the weight of its contents as 21 kilogrammes. He, then, took a sample (Lab. No. NZ 77/2013) and returned the remaining substance and resealed the bag using a masking tape. He tendered in evidence a written acknowledgment of receipt of sample/exhibit dated 29th October, 2013 – *Fomu ya Wakala wa Maabara ya Mkemia Mkuu wa Serikali* – which was admitted as Exhibit P.2. PW2 recognized a green bag and 21 bundles of 'grass' as the items he received

from PW9 on 29th October, 2013. He tendered them in evidence as Exhibits P.3 and P.4. As to what happened to the sample, PW2 testified that he took it to the CGC's Headquarters in Dar es Salaam on 5th November, 2013 where it was received and marked "Lab. No. 869/2013."

At the CGC's Headquarters in Dar es Salaam the sample was received by PW7 Elias Zakaria Mulima, a Chemist. According to PW7, having tested and analysed the sample he established that it was khat. He then prepared a report, which he signed on 6th August, 2014 and forwarded it to the CGC, Prof. Samwel Victor Manyele, on 22nd August, 2014 for certification. The report was subsequently dispatched to the Zonal Office in Arusha.

PW3 Joyce Laba Njisia, a Chemist and Acting Zonal Manager at the Arusha Zonal Office of the CGC, admitted receiving the report from the CGC in Dar es Salaam dated 5th August, 2014 with reference number 95/XXXII/60 stating that the sample, marked as Lab. No. NZ 77/2013, was tested, analysed and established to be khat or *catha edulis or mirungi*. She then forwarded that report to the RCO Kilimanjaro under a cover letter dated 25th August, 2014 referenced as NZA/L.10/03/89. Both the cover letter and the report were admitted collectively as Exhibits P.5.

To establish the value of the contents of the package alleged to have been seized from the appellant, PW1 Kenneth James Kaseke, a Commissioner from the Drugs Control Commission, tendered a certificate of value which he had issued on 29th August 2014 (Exhibit P.1). That certificate bears it out that the value the seized substance at TZS. 1,050,000.00.

In his defence evidence on affirmation, the appellant disassociated himself from the allegations against him. In particular, he denied to have been arrested in possession of any drug and repudiated the cautioned statement, saying he never made or seen any such statement.

After summing up to assessors, the first assessor opined that the appellant was not guilty on the ground that the prosecution case was riddled with contradictions and that the appellant made no cautioned statement. The other two assessors were minded of a different view; they thought that the charge had been proven beyond peradventure.

In convicting the appellant of the offence as charged, the learned trial Judge was satisfied that the evidence of PW4, PW5, PW6 and PW8, who were at the bus terminal on the fateful day, was credible and reliable that the appellant was found conveying 21 kilogrammes of khat in his

green bag. In particular, the evidence of PW5 and PW6 (the bus conductor and taxi driver respectively) was held on the whole to be unshakeable because it came from independent witnesses. In addition, the trial court acted on the appellant's confession contained in the cautioned statement to base the conviction, taking the view that the statement had neither been retracted nor repudiated by the appellant.

Dissatisfied by his conviction and sentence, the appellant now appeals to this Court upon a seven-point Memorandum of Appeal, which we have taken the liberty to paraphrase as follows: **One**, the bag of drugs allegedly recovered from the appellant was wrongly tendered in evidence by PW2 as Exhibit P.3 when PW2 was not its custodian. **Two**, the trial court miserably failed to scrutinize the prosecution evidence. **Three**, the trial court wrongly relied upon the evidence of PW4, PW5 and PW6 which was contradictory and inconsistent. **Four**, the trial court wrongly relied upon dock identification of the appellant. **Five**, the register of exhibits (Exhibit P.8) was erroneously relied upon even though the certificate of seizure of the alleged drugs was not admitted in evidence. **Six**, the chain of custody of the drugs was broken. **Seven**, the cautioned statement was wrongly admitted in evidence without conducting a trial-within-trial after its voluntariness was questioned by the defence.

At the hearing of the appeal before us on 27th June, 2018, the appellant appeared in person, unrepresented whereas Ms. Tamari Z. Mndeme, learned Senior State Attorney, teamed up with Ms. Verdiana Peter, learned State Attorney, to represent the respondent Republic.

In his short address to the Court, the appellant adopted all his grounds of appeal as well as the written submissions that he filed on 26th June, 2018. He then beseeched that his appeal be allowed and rested his case. It is noteworthy that in the written submissions he particularly expounded on the third, fifth, sixth and seventh grounds as his main grounds, without specifically addressing any of the other three the grounds. The nitty-gritty of the said written submissions will become apparent in the course of our analysis of the grounds of appeal.

Replying, Ms. Mndeme supported the appellant's conviction and the sentence imposed on him. She then addressed the grounds of appeal in succession. On the first ground, she submitted that the bag (Exhibit P.3) was correctly tendered by PW2 and properly admitted in evidence as shown at page 47 of the record of appeal. She argued that PW2 was competent to tender the exhibit because he was conversant with it; he had dealt with it, processed it and sealed it at the CGC's Zonal Office. Even

though he was not the custodian thereof, she added, he still was entitled to tender it in evidence. On this point, she relied upon this Court's decision in the **Director of Public Prosecutions v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016 (unreported). On the second complaint that the trial court failed to evaluate the evidence on the record, Ms. Mndeme contended that the Court duly evaluated the evidence on the record and found the appellant guilty. In this regard, she cited pages 8 through 10 of the impugned judgment showing what she believed to be a meticulous assessment of the whole body of evidence.

The learned Senior State Attorney denied the contention in the third ground of appeal that the evidence of PW4, PW5 and PW6 was contradictory and inconsistent. In her view, overall the evidence of these witnesses, far from being contradictory, complemented each other. However, she pointed out that what may seem like a contradiction can be found at page 54 of the record when PW4 (the arresting police officer) stated that while he was in the taxi with the appellant and others on the way to the RCO's office the "bag was within my hands." But, Ms. Mndeme argued that the said statement simply meant that the bag was under his command in PW6's taxi as they drove to the RCO's office. Besides, she was of the view that even if that fact were deemed contradictory, it was minor

and that it does not go to the root of the case. To buttress her argument, she cited decision of the Court in **Maramo s/o Slaa Hofu & 3 Others v. Republic**, Criminal Appeal No. 246 of 2011 (unreported) for the proposition that minor contradictions or inconsistencies on trivial matters do not affect the case for the prosecution.

On the complaint in the fourth ground that the trial court wrongly relied upon dock identification of the appellant, Ms. Mndeme retorted that evidence of identification was a non-issue in the matter at hand as the appellant was arrested in broad daylight at the bus terminal in Moshi in the act of trafficking in the drugs. She added that in any event the matter was an afterthought; it was not raised before the trial court.

Ms. Mndeme submitted that the fifth ground was evidently inarticulate and incomprehensible but she dealt with it anyway on the assumption that its thrust was the contention that the register of exhibits (Exhibit P.8) was erroneously relied upon in view of the absence the certificate of seizure of the alleged drugs that was not admitted in evidence. She countered that the certificate of seizure (Exhibit P.6) was tendered in evidence by PW4 and that PW6 was not competent to tender it. She was emphatic that Exhibits P.6 and P.8 were correctly relied upon.

Addressing the sixth complaint that the chain of custody of the drugs was broken, Ms. Mndeme argued that the documentation of the chain of custody tendered at the trial sufficiently proved that the chain of custody was uninterrupted between the seizure of the drugs at the bus terminal in Moshi and their exhibition at the trial. Elaborating, she said that PW4 tendered Exhibit P.6 – certificate of seizure but noted that it was on the record wrongly referred to as the search warrant. Exhibit P.6 was followed up by exhibits tendered by PW2 (Exhibits P.2, P.3 and P.4). She added to the chain Exhibit P.8 – an extract from the exhibits register documenting the movement of the exhibit in and out of the strong room at the RCO's office. Most importantly, she argued that all persons who dealt with the seized drugs were paraded in court as witnesses. On this point, reliance was placed on **Charo Said Kimilu & Another v. Republic**, Criminal Appeal No. 111 of 2015 (unreported).

Finally, the learned Senior State Attorney delved into the seventh ground questioning the admissibility of the cautioned statement (Exhibit P.7). She contended that since the statement was objected to by the appellant on the ground of non-compliance with the provisions of section 57 (3) (a) and (b) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) that objection did not need to be resolved by conducting a trial-

within-trial (page 72 of the record). Citing the decision in **Nyerere Nyague v. Republic**, Criminal Appeal No. 292 of 2016 (unreported), she insisted that as the voluntariness of the statement was not in issue trial-within-trial was unnecessary. She went on to submit that after the objection was overruled (page 74 of the record), the statement was admitted in evidence and then read out in court by the witness (PW9). She submitted further that the appellant was cross-examined on the statement in his defence but he did not deny the content of the statement. In conclusion, Ms. Mndeme urged us to dismiss the appeal in its entirety on the reason that all seven grounds of appeal are wanting in merit.

In a brief rejoinder, the appellant maintained PW2 was not competent to tender the bag (Exhibit P.2). He also reiterated his protest that the evidence of PW4, PW5 and PW6 was contradictory. Expounding, he said that the witnesses differed rather materially on the time the bus arrived at the terminal in Moshi. It was unclear whether it was 16:00 hours or 17:00 hours. He further claimed that PW4 said the bus was inspected, but later said it was not. The same witness, he added, adduced that he held the bag as they drove in the taxi to the police, a fact which was not true.

Having summarized the submissions of the parties, we are now in a position to delve into the grounds of appeal in succession while mindful that this being a first appeal from the High Court, the Court is enjoined to re-evaluate the evidence and arrive at its own conclusions. This stance was reiterated in **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported):

> *"This is a first appeal. It is trite law that it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the entire evidence and our own decision thereon: see,* ***D.R. Pandya v. R.*** *[1957] E.A 336."*

In view of the submissions of the parties, we think that this appeal, in essence, turns on the third, fifth, sixth and seventh grounds. We thus propose to deal, at first, with these grounds one after the other and then turn to the rest of the grounds.

Accordingly, we begin with the complaint in the third ground of appeal, which is to the effect that the trial court wrongly relied upon the evidence of PW4, PW5 and PW6 which was contradictory and inconsistent.

Elaborating the ground under consideration in his written submissions, the appellant assailed the evidence of PW4, PW5 and PW6 on

several aspects. First, he contended that the three witnesses contradicted each other on how the green bag was recovered from the luggage hold; while PW4 said that the conductor (PW5) led the search party to the rear part of the luggage hold which, he then, opened and removed the green bag (p.54 of the record), the conductor (PW5) himself simply adduced that the appellant was ordered to alight from the bus and show his baggage (p.58 of the record). Secondly, he contended that whereas PW4 adduced that after the bag was seized he is the one who unzipped it right at the bus terminal in the presence of others whereupon the 'grass' was laid bare (p.54 of the record), PW5 said the discovery was made after the appellant opened bag presumably after he was required to descend from the bus and show his baggage (p.58 of the record). Finally, it was argued that the three witnesses differed on who carried the bag while on the taxi on way to the police station. While PW4 remarked that the "The bag was in my hands", PW6 adduced that the bag was in the boot of the taxi. The appellant was of the view that these were material contradictions or inconsistencies that ought to have not been brushed aside by the trial court as minor discrepancies not going to the root of the prosecution case.

As already indicated, Ms. Mndeme countered that overall the evidence of the three witnesses, far from being contradictory,

complemented each other. She said the statement by PW4 that the "bag was within my hands" simply meant that the bag was under PW4's command in PW6's taxi as they drove to the RCO's office. In any event, she was of the view that the alleged contradictions were minor.

Admittedly, the contradictions in the testimonies of PW4, PW5 and PW6 as pointed out by the appellant exist on the record except the claim that PW6 adduced, as against PW4's evidence, that the bag was placed in the boot of the taxi, which fact is not on the record. It implies that PW4's evidence that "the bag was in my hands" was not contradicted. Be that as it may, we note at page 10 of the judgment that the trial court considered the contradictions, albeit generally, and concluded that they were minor. In determining the effect of these contradictions to the prosecution case, we are conscious, as we held in **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported), that:

> *"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."*

We also wish to echo what we held in **Maramo s/o Slaa Hofu** (supra), cited to us by Ms. Mndeme, that:

"... 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. Minor contradictions or inconsistencies, embellishments, or improvements, on trivial matters which do not affect the case for the prosecution should not be made a ground on which the evidence can be rejected in its entirety."

Now the question we are enjoined to answer is whether the contradictions pointed out by the appellant are material such that they go to the root of the prosecution case. We do not think that they are material. The essence of the prosecution case on the basis of the evidence of PW4, PW5 and PW6 is that the appellant was on 7th September, 2013 aboard Simba Mtoto bus bound for Arusha. After the bus stopped over at the bus terminal in Moshi, he was forced to alight from it and a green bag alleged to be belonging to him was retrieved from the luggage hold and seized. He was immediately put under restraint and ferried to the police station in a taxi driven by PW6 under PW4's command. In other words, despite the variations in the testimonies, the common thread is that the appellant was travelling on the bus and that the green bag that was retrieved from the

luggage hold belonged to him. We think whether the bus arrived at the terminal at 16:00 hours or 17:00 hours or whether it was the appellant or PW5 who retrieved the bag from the luggage hold is, in the circumstances of this case, immaterial. The same holds true in respect of whether the bag was initially unzipped by PW4 or the appellant's himself. For that reason, it is our finding that the contradictions pointed out by the appellants were inconsequential and did not go to the root of the prosecution case. Accordingly, we dismiss the third ground of appeal.

We now delve into the fifth ground of appeal that the register of exhibits (Exhibit P.8) was erroneously relied upon even though the certificate of seizure of the alleged drugs was not admitted in evidence. Addressing this ground in his written submissions, the appellant raised several issues: first, he contended that the on the evidence that PW4 filled out a search warrant (Exhibit P.6) at the police station after he had been arrested and the green seized, the learned trial Judge failed to notice that the said exhibit could not be distinguished from a seizure note. Secondly, the search and seizure made by PW4 did not comply with section 38 (1) of the CPA in that they were conducted without any warrant; that PW4, being a Detective Corporal could not conduct a search without warrant in terms of section 38 (1) of the CPA.

As already intimated, despite the apparent opacity of the fifth ground as Ms. Mndeme perceived it, she dealt with it on the assumption that its thrust was the contention that the register of exhibits (Exhibit P.8) was erroneously relied upon in view of the absence the certificate of seizure of the alleged drugs was not admitted in evidence. She urged us to find Exhibits P.6 and P.8 to have been rightly relied upon by the Court.

At the outset, we wish to remark that having examined Exhibit P.6 we agree with Ms. Mndeme that the said document is a certificate of seizure rather than a search warrant. It seems the confusion arose from the misdescription of that document by the witness (PW4) who tendered it in evidence labelling it a search warrant even though he adduced that it was filled out to document the seizure of the bag and its contents from the appellant. In our view, however, we do not think that the absence of a search warrant would be a cause of concern in this matter as PW4 being a police officer as defined under the CPA was empowered to conduct a search in an emergency and seize any item so found without any warrant pursuant to the provisions of section 42 (1) of the CPA. We thus do not see any reason why the trial court could not rely on Exhibit P.6 as a certificate of seizure along with Exhibit P.8 documenting the movement of the seized

substance in and out of the strong room. This ground of appeal is devoid of merit; it stands dismissed.

Next for consideration is the sixth ground of appeal, which contends that the chain of custody of the drugs was broken. In his written submissions, the appellant assailed the following aspects on the chain of custody: first, there was no evidence that the green bag (Exhibit P.3) was ever sealed and labelled when it was kept at the police station under the custody of PW9. Secondly, the bag remained in the strong room unsealed and unlabelled for about 52 days from 7th September, 2013. Thirdly, no report of seizure of the drugs was made in consonance with section 39 of the Anti-Drugs Act. Finally, Exhibit P.8 shows that Exhibit P.3 was taken by PW9 for being tendered in court on 29th February, 2016 but there is no record of it on how it was handed over to PW2 who tendered it in evidence. Conversely, as already indicated the learned Senior State Attorney countered that that the documentation of chain of custody tendered at the trial established that the chain was unbroken.

The importance of the integrity of the chain of custody of exhibits to assure of their reliability has been stated and emphasized in numerous decisions of the Court, the oft-cited of which is **Paulo Maduka and Four**

Others v. Republic, Criminal Appeal No. 110 of 2007 (unreported). In that case, the Court observed that the chain of custody is:

> *"... **the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone guilty.** The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it..."*[Emphasis added].

The above position was echoed by the Court in **Zainabu d/o Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015 (unreported) that the underlying rationale for ascertaining a chain of custody is:

> *"to show to a reasonable possibility that the item that is finally exhibited in court as evidence, has not been tampered with along its way to the court."*

See also: **Baven Hamis & Two Others v. Republic**, Criminal Appeal No. 99 of 2014 (unreported).

Guided by the above stance, we intend to answer the question whether or not the chain of custody of Exhibit P.4 is continuous or uninterrupted from its seizure at the Moshi bus terminal on 7th September 2013 to the time when it was tendered in evidence on 29th February, 2016.

We think it is necessary that we revisit and summarise the relevant evidence on the question at hand. It is as follows: the appellant was arrested by PW4 at the bus terminal in Moshi on 7th September, 2013 after a green bag was retrieved from the luggage hold of the bus he was travelling in. The bag was opened and 'grass' believed to be khat was seen. Immediately thereafter, the appellant was ferried in a taxi, driven by PW6, to the RCO's office along with Exhibits P.3 and P.4. In that taxi too were PW5 (the bus conductor) and PW8 (D/Cpl. Ramadhani). We wish to let PW4 speak on how the appellant was ferried from the bus terminal to the RCO's office:

> *"... we took this passenger together with the bus conductor together with a taxi driver who was around. We used the taxi of this driver. The bag was within my hands. We seated in the back seat*

together with this passenger now the suspect and D/Cpl. Ramadhani. I was still carrying the bag. We arrived at the RCO's office and found D/Sgt Hashim and waited for our fellow policemen we left at the bus stand."

At the RCO's office, PW4 opened the bag in the presence of the appellant, PW5, PW8, PW9 and D/Cpl Fadhili. On what was found in the bag, PW4 adduced that:

"I removed all the bundles in the bag and counted them. They were 21 bundles. I returned them in the bag. I then filled in the search warrant and retained the bag and the mirungi inside it. The suspect signed and the conductor and D/Cpl Ramadhani."

It is noteworthy here that what was referred to as "search warrant" was actually a certificate of seizure (Exhibit P.6). In its operative part it indicates that PW4 seized a green bag containing 21 bundles of khat after searching Simba Mtoto bus on 7th September 2013 in respect of the suspicion that the appellant was trafficking in drugs. That document was duly signed by the appellant and witnessed by PW5 and PW8.

After the bag was inspected and its contents established, PW4 handed it over to PW9 D/Sgt Hashim, the Exhibits Keeper, for safe custody. PW9,

then, locked the bag in the strong room and recorded in the Exhibits Register all the necessary particulars. As already indicated, an extract from the said register was admitted as Exhibit P.8.

On 29th October, 2013, PW9 took the green bag with its contents to the CGC's Zonal Office in Arusha where it was handed over to PW2. PW2 opened it and weighed the contents before he took a sample labelled as Lab. No. NZ 77/2013. He returned the remaining substance into the bag, which he then resealed using a masking tape. A written acknowledgment of receipt of sample/exhibit dated 29th October, 2013 was admitted as Exhibit P.2.

PW2 took the sealed sample to the CGC's Headquarters in Dar es Salaam on 5th November, 2013 where PW7 Elias Zakaria Mulima, a Chemist, received and marked it as "Lab. No. 869/2013." On being tested and analysed by PW7, the sample was confirmed to be khat or *catha edulis*.

The final part of the chain was the exhibition of the bag (Exhibit P.3) and its contents (Exhibit P.4) in court. It is on record that PW2 tendered these two items in court on 29th February, 2016. The Exhibits Register

(Exhibit P.8) indicates that on that day at 11:00 hours the two items were taken to the trial court by PW8.

In our view, the above summary of evidence on the chain of custody of the bag containing the suspected illegal substance supports most of the disquieting issues raised by the appellant: first, PW9 is remiss in his testimony for he did not state whether the bag containing the suspected illegal substance was labeled and sealed in the presence of the appellant, PW4, PW5 and PW8 before he stored it in the strong room. While sealing of the bag would have assured the integrity of the bag and its contents, failing to label the exhibit was blatant flouting of the requirement of the law under Order 40 of the Police General Orders that any transfer of custody of an exhibit from one officer to another must be recorded on the exhibit label. Secondly, like the appellant we are also disturbed that the unsealed and unlabelled bag and its contents remained in the strong room for 52 days from when it was seized. Even though neither PW9 nor any other prosecution witness offered any explanation why it took such an unduly long time to transmit the suspected substance to the Zonal Office of the CGC in Arusha for collection of a sample, no evidence was led to assure of control of the strong room apart from tendering the exhibits register (Exhibit P.8). We think that the evidence that the bag and its contents

were locked in the strong room was not enough; more so because they lay there unsealed and therefore tampering cannot be ruled out. It should be recalled that the only moment the bag and its contents were sealed was after PW2 had collected a sample of the suspected substance on 5th November, 2013. In the circumstances, we are inclined to find that the chain of custody was noticeably broken before the sample taken by PW2. As a final point on the question at hand, we agree with the appellant that the presentation in court of Exhibits P.3 and P.4 in court on 29th February, 2016 also perfunctory; it exhibited another lapse in the chain of custody as the exhibits register was deafeningly silent on how they handed over to PW2 who tendered it in evidence.

We would add that we are mindful that the prosecution produced, commendably so, all officers who handled Exhibits P.3 and P.4 after the appellant's arrest. Nonetheless, it is our view that if the learned trial Judge had considered that the bag and its contents lay unsealed and unlabelled for a fairly long period and that no explanation was offered why that bag and its contents were not attended to without delay, she would have would have found the chain of custody broken and hence the integrity of the sample taken to the CGC Headquarters in Dar es Salaam would not have

been found beyond reproach. We thus find merit in the six ground of appeal.

We next consider the seventh ground of appeal contending that the cautioned statement was wrongly admitted in evidence without conducting a trial-within-trial after its voluntariness was questioned by the defence. It is the appellant's view, on this ground, that it was the duty of the trial court to conduct a trial-within-trial after his counsel had objected to the admissibility of the cautioned statement and that failure to do so was fatal. In opposition, Ms. Mndeme argued that since the statement was objected to on the ground of non-compliance with the provisions of section 57 (3) (a) and (b) of the CPA that objection did not need to be resolved by conducting a trial-within-trial.

Admittedly, it is on the record that when PW9 tendered the cautioned statement, he claimed to have recorded when he interviewed the appellant, its admissibility was objected to by the appellant's counsel on the ground of non-compliance with section 57 (3) (a) and (b) of the CPA in that the statement did not indicate whether the appellant was given an opportunity to read the statement and refused or that he failed to read it. Having fully heard the submissions of both parties on the matter, the trial

court overruled the objection. In its reasoning, the court observed that the statement had neither been repudiated nor retracted by the appellant. We must hasten to say that we agree with Ms. Mndeme that in these circumstances there was no need for a trial-within-trial to be conducted as the voluntariness of the statement was not at issue.

In **Nyerere Nyague** (supra), cited to us by Ms. Mndeme, we reiterated that a trial-within-trial would be indispensable only for determining voluntariness of a confessional statement. For easy reference, we wish to extract *in extenso* the relevant passage from that decision:

> *"Objections to the admissibility of confessional statements may be taken on two grounds.* ***First, under s. 27 of the Evidence Act that, that it was not made voluntarily or not made at all.*** *Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as sections 50, 51, etc. Where objection is taken under the Evidence Act, the trial court has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate court) to determine its admissibility. There the trial court only determines whether the accused made*

the statement at all, or whether he made it voluntarily." [Emphasis added]

Accordingly, we hold that there was no need to conduct a trial-within-trial in the instant case because the voluntariness of the maker of the statement was not challenged.

However, we would wish to add that because the objection was presumably taken under section 169 of the CPA, the trial court had absolute discretion to admit or not to admit the statement regard having been made to the considerations stipulated in section 169 (2) of the CPA. On this point, we stated in **Nyerere Nyague** (supra) that:

> *"It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in absolute discretion of the trial court and that before admitting or rejecting such evidence, the parties must contest it, and the trial court must show that it took into account all the necessary matters into consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced."*

In the case at hand, the appellant does not fault the admission of the statement on the ground of improper exercise of discretion by the trial

court. In view of that, we find no substance in the seventh ground of appeal, which stands dismissed.

Having dealt with the four main points of complaint, we now deal with the remaining three grounds, albeit briefly. We think that these grounds can be conveniently condensed into two issues: **first**, whether the bag of drugs allegedly recovered from the appellant was wrongly tendered in evidence by PW2 as Exhibit P.3 when PW2 was not its custodian; and **two**, whether the trial court wrongly relied upon dock identification of the appellant.

On whether or not it was proper for PW2 to tender the bag and its contents, we would make haste to endorse Ms. Mndeme's submission that PW2 was competent to tender the exhibit even though he had not custody of it at time. It is on the record that he had dealt with, processed and sealed the bag and its contents at the Zonal Office of the CGC, a fact making him competent to tender the two items as he was knowledgeable about them: see, **Kristina d/o Biskasevskaja** (supra). The final question that the trial court wrongly relied upon dock identification of the appellant is plainly a non-issue. Ms. Mndeme is right that the appellant was arrested in broad daylight in the act of trafficking in the drugs at the Moshi bus

terminal and that since then he remained in restraint. In view of the foregoing, we hold that the consolidated grounds have no merit as well.

Having dealt with all the grounds of appeal, it now behooves the Court to determine if the appellant's conviction is sustainable. In view of our finding that the chain of custody in respect of Exhibits P.3 and P.4 is irreversibly disjointed the appellant cannot, without a doubt, be linked to the seizure of the suspected illegal substance on Simba Mtoto bus on 7th September, 2013 solely on that evidence, built upon the testimonies of the prosecution witnesses and the aforesaid two exhibits as well as Exhibits P.1, P.2, P.5, P.6 and P.8. Nonetheless, the procedural lapses in the chain of custody apart, we think that the appellant's conviction of the offence as charged is, as also found by the trial court, sustainable upon his confession exhibited in the cautioned statement. It is manifest in the statement that the appellant confessed in substantial detail to have been arrested at the Moshi bus terminal while conveying on a bus 21 kilogrammes of khat placed in a green bag destined for his place of business in Arusha where he used to retail that substance. He was also recorded to have admitted purchasing the substance at Himo and acknowledged that the said substance constituted illegal drugs. We have no doubt that these admitted facts amount to a confession sufficient to ground conviction in respect of

the offence the appellant stood charged with. That must be so because a person who confesses voluntarily to have committed a crime is the best of all witnesses to the offence in issue: see, **Mohamed Haruna @ Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007; **Suguta Chacha and Two Others v. Republic**, Criminal Appeal No. 101 of 2011; and **Masanja Sesaguli v. Republic**, Criminal Appeal No. 108 of 2016 (all unreported).

In the final analysis, we find no fault in the appellant's conviction as well as the life sentence imposed on him, which is the mandatory punishment for the offence. We thus dismiss the appeal in its entirety.

DATED at **ARUSHA** this 25th day of July, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

G. A. M.NDIKA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

S.M. KULITA
DEPUTY REGISTRAR
COURT OF APPEAL