IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J.A., KOROSSO, J.A., and KITUSI, J.A.)

CRIMINAL APPEAL NO. 84 OF 2017

1. KENEDY ELIAS SHAYO ..... 1ST APPELLANT

2. ATHUMAN MUSA . ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at MOSHI)

(Sumari, J.)

Dated the 10th day of March, 2017
in
Criminal Session Case No. 13 of 2015

JUDGMENT OF THE COURT

27th November & 12th December,2019

KOROSSO, J.A.:

The appellants, Kennedy Elias Shayo (1st appellant) and Athumani Musa (2nd appellant) were arraigned before the High Court of Tanzania Moshi charged with the offence of Trafficking in Narcotic Drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 Revised Edition 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 6 of 2012 (The Drugs

Act). The particulars of offence alleged that on the 3rd April, 2013 at Majengo area within the Municipality of Moshi in Kilimanjaro region, the 1st and 2nd appellants were found trafficking 83 Kilograms of "Khat" (Catha edulis) valued at Tanzania shillings four million one hundred and fifty thousand only (4,150,000/-).

The case constructed by the prosecution through eleven (11) witnesses summoned and a total of ten (10) exhibits tendered, was that on the 3rd April, 2013 **D6142 DSgt Benedict** (PW9), a police officer working at Central Police Station Moshi, while supervising a team of police officers on patrol around Moshi district, at around 13.00hours received information from an informer that there was a motor vehicle (Land Cruiser) white in colour with Registration No. T. 775 AMW with two people inside being driven from Moshi Town harbored unlawful items. PW9 shared this information to officers in his team and also alerted the second team on patrol which was supervised by one D/Cpl Ramadhani (now deceased).

Soon after, the suspected motor vehicle drove by where PW9 and his team were positioned and all attempts to stop it failed and the suspected vehicle drove away. The patrol team proceeded to chase using their vehicle

up to Majengo Nganga Mfumuni along Rau road when they managed to stop the said vehicle.

Upon reaching the suspected vehicle, PW9 and his team found the driver in the front seat who introduced himself as Kennedy Elias Shayo (1st appellant) after they had introduced themselves to him as police officers. The 1st appellant then disembarked from the vehicle, PW9 searched him and found him to be unarmed. At the back of the vehicle they found a man lying on the floor, and ordered him to get out of the vehicle, was thereafter searched and also found to be unarmed. This man introduced himself as Athumani Musa (2nd appellant). The vehicle driven by the 1st appellant was searched and under the place they had found the 2nd appellant lying down, six parcels wrapped in khaki coloured sheets were seen and retrieved. When the 1st and 2nd appellants were queried about the contents of the six parcels found they denied any knowledge of the parcels nor the contents. PW9 then opened one parcel and they saw it contained leaves which he suspected to be "*khat*" popularly referred in Swahili as "*mirungi*". PW9 took the six parcels and weighed them and found them to weigh 83 kilograms. Thereafter, PW9 prepared a certificate of seizure (Exhibit P10) itemizing all the items seized, that is, the six parcels containing narcotic drugs (Exhibit

P3) and the motor vehicle (Exhibit 9). Exhibit P10 was signed by the 2nd appellant (the 1st appellant refusing to sign it).

The 1st and 2nd appellants were arrested and taken to Police station Moshi with the seized items Exhibit P3 and Exhibit P9 which upon reaching the Police station were handed to the exhibit keeper **D4411 Sgt. Stephen** (PW7). Exhibit P3 was put in the exhibit store and Exhibit 9 was parked within the compound of the police station. On 25/4/2013 around 8.00hours F1219 D/Cpl. Frederick (PW8) took Exhibit P3 to the Government chemist office for analysis. The appellants were thereafter arraigned and charged and at the end of the trial were found guilty as charged, convicted and each sentenced to life imprisonment.

Dissatisfied with the decision of the trial court, the appellants lodged this appeal praying that the conviction be quashed and sentence set aside and they be set at liberty based on the following eleven (11) grounds:-

1. *That, the learned trial madam Judge grossly erred in law and fact in finding that the appellant were found in possession of the Prosecution Exhibit P.3 (The alleged six parcels containing the alleged drugs), having regard*

to the circumstances of the case and the contradictions in the evidence adduced by the prosecution witnesses

2. *That, the learned trial madam Judge grossly erred in law and fact by wrongly convicting and sentencing the appellants without considering the principles which have to be taken into account in respect to chain of custody and preservation of the exhibits.*

3. *That, the learned trial Judge erred in law and fact in convicting and sentencing the appellants using weak, tenuous, incredible, incoherent, uncorroborated and unreliable prosecution evidence.*

4. *That, the learned trial Judge erred in law and fact when she failed to consider the fact that, since the 1st appellant did not sign the alleged certificate of seizure (Exh. P. 10) and in the absence of civilians (independent witnesses) called for the purpose of witnessing the search, casts doubts as to whether the*

alleged Exhibit P.3 was not planted there. (Kindly see Chaaii Kiama v. R (1979) TLR 33)

5. *That, the learned trial Judge erred in law and fact when she failed to consider the credibility of prosecution witnesses which is essential factor before analyzing the evidence, Hence it is essential prerequisite in making a final decision and Judgment to any criminal law suit.*

6. *That, the Appellants maintains that the trial learned Madam Judge misdirected herself and consequently erred in law and fact when she relied on the alleged Oral confession alleged to be of 2nd Appellant as the basis of convicting and sentencing the 1st and 2nd appellants. Hence in criminal trial where the alleged cautioned statement has been rejected the Oral confession has no room.*

7. *That, the learned trial Judge erred in law and fact when she was formulating her Judgement by demanding that, it was crucial for the Accused Persons (Now the*

appellants) to come up at the earliest stage with their purported defence that the case was planted to them by Police due to the grudges. (See page 216 B of the court record). This was serious error in law since the burden of proof always lies to prosecution side and not the accused persons and the burden does not shift. (Kindly see Hassan Madenge v. R (1987) Unreported Criminal Appeal No. 50 of 1987.

8. *That, the learned trial Judge erred in law and fact by being adamant that the Discrepancies, inconsistencies and contradictions pointed out by the learned defence counsel of the appellants (Accused Persons) are not sufficient) serious and concern matters that are relevant to issues being adjudicated.*

9. *That, the learned trial madam judge erred in law and fact by being adamant that the defence of the appellants did not raise any reasonable doubts to the prosecution case.*

10. *That, the learned trial judge erred both in law and fact in convicting and sentencing the appellants with the charge which was not proved to the required standard by law against the appellants.*

11. *That, the 1st Appellants Maintains that, since the entire Judgement and Proceedings are void of merit, it is the 1st appellant's prayer that this Honourable court of justice order the release of this Appellant's property (Exhibit P.9- Motor Vehicle T. 775 AMV Toyota Land Cruiser) and be returned to him.*

On the day the appeal came for hearing, Mr. Jethro Turyamwesiga learned Advocate entered appearance for the 1st and the 2nd appellants and Ms. Akisa Mhando, Mr. Ignas Mwinuka and Ms. Lilian Kowero learned State Attorneys represented the respondent Republic.

The learned counsel for the appellants commenced his submissions stating that he will argue the 1st, 2nd, 3rd, 4th, 6th, 7th and 10th grounds while the remaining grounds, that is the 5th, 8th, 9th and 11th grounds will be argued and merged when amplifying the first set of grounds. With regard

to the 1st ground of appeal, that is, challenging the seizure of the six parcels allegedly containing narcotic drugs from the 1st and 2nd appellants, the counsel argued that the prosecution evidence failed to prove this fact. He argued that the prosecution witnesses especially PW9 and PW10 showed that it was only one packet which was opened at the place of incidence and it is this one packet which was found to contain leaves suspected to be "*khat*". That in the absence of any evidence to show the other remaining five parcels (not opened by PW9) also contained narcotic drugs then the prosecution side failed to prove that all the six parcels alleged to have been seized from the appellants did contain narcotic drugs in line with the charge the appellants faced. The counsel contended further that had this fact been considered by the trial judge, there would have been no finding by the trial court that all the six packets seized contained narcotic drugs.

The other issue raised in the grounds of appeal was alleged contradictions in the testimonies of the prosecution witnesses. Contradiction highlighted included evidence regarding the place the appellants were arrested and narcotic drugs seized. The counsel submitted that while PW10's evidence (at page 78 line number 10) revealed that the

appellants were arrested at Rau bridge and road in the afternoon hours, PW9 (at page 76 line 20) testified that they seized Exhibit 9 at Majengo Nganga Mfumuni along Rau road. He thus submitted that such contradictions on a place crucial to the case show that there is lack of clarity on where the appellants were arrested and also demonstrates that the said prosecution witnesses were untruthful. That the import of such contradictions should benefit the appellants.

The second ground of appeal was that there was a break in the chain of custody of the seized narcotic drugs, and Mr. Turyamwesiga contended that while he found no problem with the storage, transfer and recording of the exhibits from the time of seizure, there was a break with the chain of custody on the day the exhibits were sent to court for trial of the case. He contended that the record of appeal (at page 54 line 10) illustrates that the narcotic drugs were handed to F5878 D/SSgt Mtoo for him to take to court while it was D/Sgt Hashim (PW1) who tendered the narcotic drugs and there is no evidence showing the movement of the said narcotic drugs from S/Sgt Mtoo to PW1 on that day and this is spiraled by the fact that S/Sgt Mtoo was not called to testify. That at the same time, after the alleged narcotic drugs were admitted as Exhibit P3, the trial court did not

provide reasons why Exhibit P3 was ordered to be stored at the Police Station while it was already in the custody of the court upon being admitted.

The 3rd ground of appeal as expounded by the learned counsel for the appellants related to the fact that the learned trial judge relied on weak evidence on the part of the prosecution to convict them such as that addressing the arrest of the appellants. He contended that, PW9 and PW10 were police officers and it is their evidence which was relied upon by the trial court to determine the arrest of the appellants without taking into account that the two witnesses had an interest to serve, being the arresting officers and who without doubt wanted to ensure that the appellants were convicted. He contended that the prosecution failed to have an independent witness at the time of the appellants arrest and seizure of Exhibit P3 and Exhibit P9 and thus prayed that this being the first appeal, the Court should re-evaluate and assess the credibility and reliability of PW9 and PW10 evidence and find in favour of the appellants.

In respect of the 4th ground of appeal, the challenge was on there being no civilian involved in signing of the certificate of seizure (Exhibit 10). He

argued that the fact that the 1st appellant did not sign the certificate of seizure and the other witness F9878 GC Malim was not called as a witness this faulted Exhibit P10. That it was only PW 9 who testified about it and that this should lead the Court to draw adverse inference that the prosecution had something to hide.

Moving to the 6th ground of appeal, the learned counsel confronted the fact that the trial court considered the oral confession of the 1st appellant when determining the guilty of the appellants (as seen at page 214 of the record of appeal) arguing that this was not proper under the circumstances. On the seventh ground of appeal, the learned counsel challenged the trial court's finding that the appellants should have advanced their defence that PW9 and PW10 had grudges with the 1st appellant earlier in the trial arguing that this was unwarranted since the role of the defence is to raise doubts only. The decision of **Hassan Madenge vs Republic**, Criminal Appeal No. 50 of 1987 (unreported) was cited to fortify his stance.

Amplifying the tenth ground of appeal, the learned counsel for the appellants contended that the prosecution failed to prove their case to the

required standard alleging there being many doubts in the prosecution case, and that this was also the verdict advanced by the gentlemen assessors and thus implored this Court for a similar finding. He further submitted that the trial judge failed to properly evaluate the evidence before her and just reproduced the evidence by the witnesses. To buttress this assertion he referred the Court to the following decisions; **Zainab Nassoro@ Zena vs DPP,** Criminal Appeal No. 348 of 2015 and **DPP vs Shariff Mohamed @ Athumani and 6 Others,** Criminal Appeal No. 74 of 2016 (both unreported) and with regard to matters related to chain of custody, decisions referred to are; **Makoye Samwel @ Kashinje**, Criminal Appeal No. 32 of 2014 (unreported).

When asked by the Court, on whether or not common intention was proved, the learned counsel for the appellants conceded that this was not proved and that the appellants evidence was that they did not know each other and the 2nd appellant had just gone to repair the 1st appellant's car on the day he was arrested and denied knowledge of Exhibit P3. The appellants counsel sought the Court to allow the appeal in its entirety.

In reply, Ms. Akisa Mhando who led the team of the learned State Attorneys on the part of the respondent Republic, commenced by submitting her support for the conviction and imposed sentence for both appellants. She decided to address the appellants' grounds of appeal in a summarized form grouping them under three areas. The first area, related to the arrest of the appellants and matters surrounding chain of custody of the exhibits. The second area, was on credibility of prosecution witnesses and the third area on absence of independent witnesses during the search and arrest.

Tackling the first area, Ms. Mhando professed that the arrest of the appellants, seizure and chain of custody of Exhibit P3 and P9 is not in doubt, relying on the testimonies of prosecution witnesses and also documentary evidence tendered in court such as the handover notes, the exhibit register and certificate of seizure. The learned State Attorney submitted that there is evidence that the appellants were arrested and exhibit P3 and P9 seized as evidenced by the testimonies of PW9, PW10 and Exhibit P10 and argued there is no question on this.

With regard to chain of custody, she contended that after Exhibit P3 was seized by PW9 and his team, PW9 was the one who later handed it to the Exhibit Keeper, **Sgt. Stephen (PW 7**) as seen in the Handover certificate (Exhibit P2). That PW7 stored it until the 25th April 2013, when the exhibit was taken by **F1219 D/Cpl. Fredrick (PW8)** from the storage place as recorded in the handover register (Exhibit P7) to **Lulu Haynes Kiwia (PW2)** at the office of the Government Chemist at Arusha. That PW2 received the exhibits and took samples from the contents of each parcel of Exhibit P3 and handed back to PW8 the six parcels. The samples which PW2 took from each parcel were for the purpose of sending them to the Office of the Government Laboratory Headquarters in Dar es Salaam for further analysis. That PW8 having been directed to do so by his supervisor, took Exhibit P3 to PW1 the Exhibit Keeper at the RCO office as shown in the handover register (Exhibit P2).

She argued that the evidence reveals that PW2 remained with Exhibit P3 until when it was handed to DSgt Mtoo to take to court as recorded in the handover note (Exhibit P1). The learned State Attorney asserted that all these transactions divulge that Exhibit P3 was kept safe from the time it was seized up to the time it was tendered in the trial court on the

22/2/2017, and thus complied with the principles guiding proper chain of custody of exhibits as pronounced in various decisions, such as; **Chacha Jeremiah Murimi and 3 Others vs Republic,** Criminal Appeal No. 551 of 2015 and **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017 (both unreported). Thus from the above the learned State Attorney contended, chain of custody was not broken. At the same time, she argued there was no dispute that Exhibit 9 belonged to the 1st appellant who also conceded the same and the 2nd appellant was found inside Exhibit P9.

The learned State Attorney stated further that while it is true that on the day the appellants were arrested and Exhibit P3 was seized from Exhibit P9 it is only one parcel out of the six parcels which PW9 opened. The other remaining five parcels were left unopened because it is the Chief Government Chemist office which is mandated to determine whether the contents of suspected narcotic drugs are in fact narcotic drugs.

Addressing the concern raised on the credibility of witnesses, the learned State Attorney submitted that the learned trial judge considered this and in the judgment (at page 218 of the record of appeal) observed that PW9, PW10 and PW11 were credible and reliable. The case of **Vuyo**

Jack vs Republic, Criminal Appeal No. 334 of 2014 (Unreported) was cited addressing on matters to consider when addressing credibility of witnesses and that the trial court is the one to determine this.

With regard to concerns on failure of the prosecution to call independent witnesses during arrest of appellants, search and seizure of the exhibits, the learned State Attorney asserted that the witnesses who testified proved the prosecution case and they were found to be credible by the trial court. The testimonies of these witnesses related to the arrest of the appellants and seizure of Exhibits P3 and P9 and she cemented this argument making reference to the case of **Tangola Wambura vs DPP,** Criminal Appeal No. 212 of 2006 (unreported). She then prayed that the conviction and sentence be upheld.

The appellants counsel rejoinder was substantially a reiteration of the submissions in chief and a prayer for the appeal to be allowed.

We have carefully considered the record of appeal, the submissions of the learned counsel for the appellants and the respondent Republic, and aware of the principle of law that a first appeal is a form of re-hearing of evidence and thus imposes a duty on the first appellate court, to re-

evaluate the entire evidence on record in order to determine whether the conclusion reached upon by the trial court should stand. This position is settled and relevant decisions include those decided by the defunct Court of Appeal for Eastern Africa in **D.R. Pandya vs Republic** (1957) EA 336; **Okeno vs Republic** [1972] **EALR 33** and also by this Court in **Alex Kapinga and 3 others v. R, Criminal Appeal No. 252 of 2005** (unreported).

Delving into determination of the grounds of appeal before us, we have decided to encapsulate these grounds of appeal and group them in areas. First, we shall address whether the arrest of the appellants and seizure of the alleged narcotic drugs was proper as found in the first, fourth and seventh grounds of appeal. Second, we will consider whether or not the chain of custody was compromised alleged in the second and also the fourth grounds of appeal. Third, we shall deal with concerns on the credibility of witnesses and contradictions in evidence as alluded to in the fifth and eighth grounds of appeal. Fourth, we will explore into whether the prosecution proved the case against the appellants to the required standard propounded in the third, tenth and eleventh grounds of appeal.

Fifth, will be consideration of issues related to the appellants' defence as found in the seventh and ninth grounds of appeal.

With regard to whether or not the arrest of the appellants was improper, the evidence relied by the trial court was that of PW9 and **G6689 D/C Idrisa (PW10)**. PW9 gave evidence that on 3rd April, 2013 at around 13.00hours while on patrol in a vehicle within Moshi District, and supervising four other police officers he received information from an informer which led to the arrest the 1st appellant who was driving Exhibit P9 and the 2nd appellant who was in the back of Exhibit P9 at Majengo Nganga Mfumuni along Rau road. That the 1st and 2nd appellant were unarmed but a search of Exhibit P9 led to retrieval of six parcels wrapped in khaki papers (Exhibit P3) which were found in the back of Exhibit P9.

When asked, the appellants denied any knowledge of Exhibit P3. One of the parcels was opened by PW9 and leave suspected to be "*khat*" were found in leading to PW9 seizing the six parcels, then he weighed them and issued a certificate of seizure (Exhibit P10) which listed all the items found including Exhibit P3 and Exhibit P9. The 1st appellant refused Exhibit P10 while the 2nd appellant did sign it. PW10 evidence supported PW9 evidence

on the arrest and seizure and the appellants were then taken to the police station.

The 1st appellant confirmed that he was arrested on the 3rd April, 2013 around 11.30hours, when Exhibit P9, his vehicle got stuck in the mud while driving along Nganga Mfumuni highway. That at the time of his arrest a mechanic (2nd appellant) was repairing the vehicle. He denied allegations that six parcels containing narcotic drugs were found in his vehicle and stated that he saw Exhibit P3 for the first time in court. On the part of the 2nd appellant, he averred that he is a mechanic and that he was arrested when he was repairing Exhibit P9 at Nganga Mfumuni near the main road Moshi High way area which he found stuck in the mud. The 2nd appellant acknowledged to have signed a document a few days after the arrest and conceded that the signature in Exhibit P10 was his. He denied witnessing the police officers searching Exhibit P9 and retrieving any parcels nor seeing Exhibit P3 in the vehicle. He also stated that it is true he was found at the scene on the material day where he had been called to repair Exhibit P9. From this, we find that the defence has not raised any doubt on the evidence related to the arrest of the appellants on the material date at the scene of incident.

With regard to the seizure of Exhibits P3 and P9, apart from the evidence discussed above from PW9 and PW10, there is also the testimony of Sgt. Stephen (PW7), the exhibit keeper who stated that on the 3rd April, 2013 he received six parcels suspected to contain narcotic drugs from PW9 and the handover was recorded in Exhibit P8, a handover note and the seizure certificate (Exhibit P9) which shows the items seized. On concerns raised by the appellants counsel that it was only one parcel which was opened, and that the Court should draw an adverse inference that there could be a possibility that the remaining unopened five parcels contents were something else and not narcotic drugs as alleged.

Having considered the evidence pertaining to this issue, we are inclined to agree with observations made by the learned State Attorney that police officers are not the experts in analysis of prohibited drugs, this mandate befalls on the Chief Government Chemist office. That therefore it was the duty of the investigating officer upon seizing items and confirming his suspicions on the contents (by opening one parcel) on the possibility of containinig narcotic drugs, his duty was to quickly send the contents to those mandated to analyse narcotic drugs. We find that in the present case PW9 played his role of the arresting officers, which is to investigate and

arrest the suspects and thereafter, sent for further analysis the contents of exhibits seized to confirm or dispute his suspicions. We find nothing in the actions of PW9 to lead this Court to infer that it prejudiced the rights of the appellants.

The other concern raised by the appellants counsel related to failure of the prosecution to call independent witnesses during the arrest of the appellants and seizure of the narcotic drugs. Arguing that this should be considered in favour of the appellants since it vitiated the process of the appellants arrest and seizure of Exhibit P3 and P9. Having considered rival submissions, it is noted as rightly put by the learned State Attorney and to our minds rightly so, there is no particular number of witnesses required by law to prove any fact. What is important is the credibility of the witness. Section 143 of the Law of Evidence Act, Cap 6 Revised Edition 2002 (The Evidence Act) reads:

> "*Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact.*"

Our understanding of the appellants' claims was that PW9 and PW10 who testified on the arrest and seizure had a common interest. There are decisions which have addressed claims of witnesses having common interest, for instance where witnesses are relatives. In **Abdallah Teje @ Malima Makula vs Republic**, Criminal appeal 195 of 2005 (unreported) and the Court observed that what matters is the credibility of their evidence and the weight to be attached to such evidence and that such evidence has to satisfy the following conditions: first, whether such evidence was legally obtained; second, whether it was credible and accurate; third, whether it was relevant, material and competent; and fourth, whether it met the standard of proof requisite in the particular case, that is, its believability.

Having prudently assessed the evidence adduced before the trial Court on the arrest of the appellants and seizure of Exhibits P3 and P9 we are satisfied that the case at hand met the four conditions set out in **Abdallah Tefe's case** (supra). That being the case and the credibility of these witnesses not being doubted by the trial court, we find that though it is desirable to do so under the circumstances there was no need to call for independent evidence as argued by the learned counsel for the appellant.

At the same time, there is no law which forbids two or more investigators from testifying in court for the same cause, thus we are of the view that the counsel for appellants argument lacks credence.

Thus for reasons stated hereinabove, we find that the 1st and 2nd appellants arrest was proper and that exhibit P3 and P9 were seized on the material day at the scene of arrest. Thus, the first and fourth grounds of appeal have no merit on the part of the 1st appellant. But we also find that there are still doubts on the connection to the seized narcotic drugs with respect to the 2nd appellant. This is because, the prosecution failed to discount his evidence that he was a mechanic and that he was at the scene for that purpose, evidence supported that of the 1st appellant.

There was also a challenge raised by the appellants' counsel doubting the credibility of prosecution witnesses as expounded in the fifth and eighth grounds of appeal. The trial court had occasion to address this issue and observed that the evidence of PW9 and PW10 is "*direct and straightforward*" and at page 218 stated that:

> "*I had an opportunity of observing the credibility of prosecution witnesses, especially PW9, PW10 and*

PW11 just to satisfy myself of the arrest and the handling of the accused person. I found these three witnesses credible witnesses..."

We are aware that the credibility of a witness is monopolized by the trial court in so far as demeanour is concerned, in **Goodluck Kyando vs Republic** [2006] TLR 363 it was stated;

"*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*".

Thus, having considered their testimonies as already alluded to herein, we find no reason to depart from the findings of the trial judge with regard to the credibility of PW10 and PW9, there being no good reasons revealed or discerned for not believing them. Alleged contradictions exposed by the learned counsel for the appellants, such as difference in narration of the exact place or name of the specific street where Exhibit P9 was found and the appellants arrested. After consideration of the relevant evidence, we find no apparent contradictions. PW9 and PW10 stated that they arrested the appellants near the main high way Majengo Nganga

Mfumuni along Rau Road. With regard to the time of arrest, all witnesses including the appellants stated that it was between 11.30- 13.00hours. Even if for the sake of argument, the presented contradictions were there, there are very minor not going to the material of the issue before us. We are aware that existence of contradictions and inconsistencies in the evidence of a witness is a basis for a finding of lack of credibility, but the discrepancies must be sufficiently serious and concern matters that are material to the issue being determined to warrant an adverse finding by a court, as observed by this Court in **Said Ally Saif vs Republic,** Criminal Appeal No. 249 of 2008 (unreported)

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

We thus dispose grounds of appeal on credibility of prosecution witnesses on the arrest and seizure of appellants and Exhibit P3.

On whether or not the chain of custody of the exhibits (narcotic drugs) was broken addressed in the second ground of appeal is a question

of evidence and law. Whilst the counsel for appellants had no quarrel with the sanctity of the chain of custody from the time Exhibit P3 was seized to when it was stored in the RCO exhibit room after return from the Government chemist office Arusha, he faulted the chain of custody on the 22nd February 2017, when the exhibit was taken to court. This is because from the evidence meted, it is S/Sgt. Mtoo who was handed the exhibits by PW1 after removal from the strong room of the office of Regional Crimes Officer's as testified by PW1 and also Exhibit P2. But it is PW1 who tendered this exhibit in court (Exhibit P3). The appellants counsel argued that the prosecution side failed to provide any explanation on where and how PW1 got the said exhibit from, and why he was the one to tender it in court. That this shows there was a break in the chain of custody.

The learned State Attorney controverted this assertion arguing that there was no break in the chain of custody in Exhibit P3 relying on the evidence of PW1 and Exhibit P2, and stating that Sgt. Mtoo's role was to take the said exhibit to court and hand it to the prosecuting attorney who was the one to hand it to PW1 to tender it as it the usual practice. That it was therefore proper for PW1 who was the exhibit keeper and previously handled the exhibit to tender the said exhibits in court.

Delving into the evidence on record related to chain of custody of Exhibit P3 we start with the testimonies of PW9, PW10 and Exhibit P10 on seizure of the six parcels with narcotic drugs packed retrieved from Exhibit P9, on the 3rd April, 2013 at Majengo area along Rau road. It is in evidence that after opening one parcel out of the six parcels and suspecting that the contents were "*khat*" after weighing the parcel, PW9 prepared Exhibit P10 and then put the parcels in sack (sulphate bag) and took them to Moshi central police station and handed the exhibits to PW7, the exhibit keeper. The handing over was recorded in the handing over certificate Exhibit P8. PW7 removed the exhibits (Exhibit P3) from the store on the 25th May, 2013 and handed them over to PW8 from the RCO's office for the purpose of taking them to the Government chemist office as revealed in the handing over certificate Exhibit P7. PW8 testified that the exhibits he was given were six parcels covered in khaki coloured papers and he placed each parcel in an envelope, tight roped and then sealed each of the six parcels with a yellow cello-tape and then labeled each parcel MOS/IR/3175/2013 and then marked the parcels starting with A1 to A6 in the presence of PW7.

PW8 took the parcels to the Government chemist office Arusha and handed the exhibits and a covering letter to **Lulu Kiwia (PW2).** PW2 upon leading the letter she took the exhibits and opened each parcel to verify the contents inside and the directives in the covering letter. PW2 then weighed each parcel and recorded the total weight of 83 Kilograms. She then registered the exhibits in a form acknowledging receipt of the exhibit and gave the parcels a laboratory number NZ 22/2013. PW2 took a sample from each parcel and put in separate envelopes and then repacked the remaining samples and marked each one A1 to A6 and then stamped and signed on each parcel and handed the exhibits back to PW8. This was again recorded in the handover note (Exhibit P4).

PW8 then took back the exhibits to Moshi and handed them over to PW1, the exhibit keeper at the office of Regional Crimes Officer (RCO) who put them in the strong room. This was recorded in the exhibit register which was tendered in court as Exhibit P1 and also handover certificate is Exhibit P2. The said exhibits stayed in the strong room until the 22nd February, 2017 when the same were taken from the strong room and handed to D/Sgt. Mtoo (according to PW1's testimony) to be taken to court

for the appellants trial and later tendered in the trial court by PW1 and admitted as Exhibit P3.

The fact that PW1 handed D/Sgt. Mtoo the exhibits upon removal from the strong room on the day taken to court is not disputed and can also be discerned from the evidence of PW1 and Exhibit P1 and also no dispute that it was PW1 who tendered Exhibit P3 in Court. We have considered all the cited cases by counsel for the appellants and the respondent Republic related to chain of custody. The duty to ensure the integrity of chain of custody of exhibits has been restated in various decisions of this Court and provisions of section 39 of the Drugs Act, which require investigating officers who seize suspected drugs to make a full report of all the particulars of such arrest or seizure to his immediate supervisor.

All these procedures are meant to ensure that the seized suspected narcotic drugs are the same as those sent to Government chemist for analysis and up to the time they are tendered in court during trial and to also ensure the integrity of the chain of custody and to eliminate possibility of tempering with the exhibits. Decisions reinforcing this stance are

numerous, they include; **Paulo Maduka and Others vs Republic**, Criminal Appeal No. 110 of 2007; **Swahibu Ally Bakari vs Republic**, Criminal Appeal No. 309 of 2010; **Zainabu Nassoro @Zena vs Republic**, Criminal Appeal No. 348 of 2015; **Abuhi Omar Abdallah and 3 Others vs Republic**, Criminal Appeal No. 28 of 2010 and **Makoye Samwel @Kashinje and 4 Others vs Republic**, Criminal Appeal No. 32 of 2014 (all unreported).

The case of **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017 (unreported) discussed and distinguished the holding in **Paulo Maduka vs Republic** (supra) and stated;

> *"In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in **Paulo Maduka** would apply. In cases relating to items which cannot change hands easily and therefore not easy to temper with, the principle laid down in the above case can be relaxed".*

The Court also cited the decision of **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 (unreported) where we stated:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonable show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case".*

We subscribe to the above holding, and applying it to the case under scrutiny we find that the handling, transfer and storage of the Exhibit P3 from the time of seizure to the time it was sent to the Government chemist

can be traced and there is no broken chain up to the time it was tendered in court during the trial. Under the circumstances and having regard to the fact that the exhibits under scrutiny are 83 kilograms of "*khat*", which are allegedly narcotic drugs, that is, items which we are of the view cannot change hands without difficulty and not easily tempered with falling within the ambit of exceptions in **Paulo Maduka's** case (supra) set guidelines on chain of custody as stated **in Kadiria Saidi Kimaro vs Republic** (supra) and **Joseph Leonard Manyota vs Republic** (supra). We also find that the fact that PW1 was the one who tendered Exhibit P3 in court instead of D/Sgt Mtoo who was the one handed the exhibits at the police station, cannot by itself lead us to a conclusion that the chain of custody was broken.

This is especially in light of the fact that, the handing over from PW1 to D/Sgt Mtoo was testified in court through PW1 and also by documentary evidence (Exhibit P1) which shows that on 22nd February, 2017 at 9.00hours, D/Sgt Mtoo, was handed Exhibit P3 to take to court. Exhibit P1 is stamped to have been produced by F1157 D/Sgt Hashim (PW1) in Criminal Case No. 13 of 2015 on the 22nd February, 2017. For those

reasons we find that there was no break in the chain of custody of Exhibit P3 and thus the second ground of appeal fails.

The other challenge founded in the sixth, seventh and to some extent the tenth grounds of appeal relates to failure of the prosecution to prove their case. The issues raised are first, the trial judge's consideration of alleged oral confession of the 2nd appellant in conviction and sentencing the appellants and second, the trial judge's failure to consider the 1st appellant's defence that alleged that the case was fabricated against him because PW7 and PW9 had grudges against him. With regard to the trial court's consideration of 2nd appellant's oral confession, we will reproduce the relevant parts in the judgment (at page 216 backside 3rd paragraph) stating:

> *"In their evidence prosecution, however, brought evidence that 2nd accused person orally confessed to PW11 that he committed the offence. As it is clear from the proceedings of this case at the stage of committal this accused admitted to the court that he made a cautioned statement and in so doing he*

mentioned certain persons who he was complaining were not reflected... My rejection of the cautioned statement of the 2nd accused was only due to compliance of the law which strictly calls upon the recording officer to abide with in the words it was overridden by legal technicalities. However, fortunately enough in this case even with the absence of the said cautioned statement, there is direct evidence that accused persons were red handed and in the day time arrested and found trafficking the drugs, khat (mirungi)."

From the above extract, we find that the trial judge did not rely on the alleged oral confession to convict the appellants and reveals that the supposedly oral confession was discussed in passing and in the end she relied on the other evidence before the court to convict the appellants and thus the allegations by the appellant's counsel have no legs to stand on.

Moving to the next complaint that the trial judge failed to consider the 1st appellant's defence at the trial that the police framed the case

against him because of prevailing grudge, the trial judge in addressing this point stated:

> *"Despite the fact that defence have come up with a defence showing that PW9 and PW10 had grudges against the 1st accused, I find that the defence by both accused persons is nothing but an afterthought. It is an afterthought because throughout the proceedings such defence did not crop up from cross examination by defence. If at ail there was such an allegation questions reflecting the grudges would come up at the earliest stage..."*

In this extract, the trial judge found the said defence an afterthought and that it would have been more believable if the said defence would have been discerned from the questions asked by the appellants and thus discerned earlier on. We are of the view that the stance taken by the trial judge cannot in any way be inferred to mean that it was shifting the burden of proof to the appellants which is what the appellant counsel submissions wanted us to believe. What is revealed is that the said defence

was considered and that the trial court was in the best position to evaluate the credibility or weight to be given to the said assertions and we thus find no need to interfere with the finding of the trial judge on this point and find the said contention has no merit in light of the reasons stated.

On whether or not the charges were proved against the 1st and the 2nd appellant to the required standard. Starting with the 1st appellant faced with charges of Trafficking in narcotic drugs contrary to section 16(1)(b) of the Drug Act as amended as outlined in the charge filed on the 5th June, 2015. The evidence on seizure of the narcotic drugs (Exhibit P3) and in a vehicle (Exhibit P9) owned by the 1st appellant on the material date we find for reason stated above is not in doubt. There is also evidence that Exhibit P3 was narcotic drugs, discerned from the evidence of PW2 and PW6 and the Analysis report (Exhibit P5), revealing that Exhibit P3 contain "Khat (Catha edulis)" also known as "Mirungi" which is part of plants in the group of "Amphetamines" and are narcotic drugs as listed in the First Schedule to the Drug Act. As stated above, the chain of custody of Exhibit P3 was not compromised. Therefore from the evidence there is no question that the 1st appellant was found with narcotic drugs "khat" weighing 83 kilograms. But the question to ask ourselves is whether the evidence reveals that the 1st

appellant was found trafficking the narcotic drugs as per the charge he faced, was convicted of and sentenced by the trial court.

In tackling this issue, it is pertinent to understand the meaning of the word "trafficking" as defined by section 2 of the Drugs Act to mean:

> *"the importation, exportation, manufacture, buying, sale, giving, supplying storing, administering, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer..."*

At the same time "illicit traffic" includes transportation of narcotic drugs, while transportation means taking the narcotic drugs from one place to another within the country. There is evidence that the 1st appellant was arrested while he was driving Exhibit P9 within Moshi District and Exhibit P3 seized in that process. Therefore for reasons stated there is no doubt that the charge against the 1st appellant was proved. The sentence imposed is one which is mandatory upon conviction of the offence charged

as provided by the law. In the premise, we find no merit in the appeal by the 1st appellant and dismiss it accordingly.

On the part of the 2nd appellant, the evidence reveals that he was found in the vehicle where the narcotic drugs were seized as already discussed above. His assertion that he was just a mechanic called to repair the vehicle we find has not been challenged to the required standard. The 1st appellant evidence was that he did not know the 2nd appellant and just met him when he came to repair his vehicle. We have also failed to gather any evidence that revealed common intention or purpose between the 1st and 2nd appellant as stated in section 23 of the Penal Code Cap 16 Revised Edition 2002 (The Penal Code). In the case of **DPP vs ACP Abdallah Zombe and 8 Others**, Criminal Appeal No. 358 of 2013 (unreported), where this Court had an opportunity to discuss the import of section 23 of the Penal Code and stated:-

> *"On the other hand S. 23 of the code creates another scenario altogether vis - a - vis S. 22 of the code in that the parties to the crime must have first intended to commit an offence. But in the execution of that*

plan they committed another offence which was in the ordinary cause of events was a probable result, then in such situation the parties are taken to have a common intention".

In the present case the 1st and 2nd appellants are in effect taken to be principal offenders under section 22 of the Penal Code. To fall under this an accused must fit in one of the scenarios stated. The relevant section reads:-

"22(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing, namely:-

a) Every person who actually does the act or makes the omission which constitutes the offence;

b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

c) Every person who aids or abets another person in committing the offence;

d) Any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence".

Taking into consideration the evidence on record, we have failed to find a scenario which the 2nd appellant fits that he participated in the offence charged together with the 1st appellant, especially since as alluded to earlier the prosecution failed to fill the doubt raised by the 2nd appellant that he was only there as a mechanic to repair the 1st appellant's motor

vehicle. The doubts we have invariably must favour him in this case. In the end we find merit in the appeal by the 2nd appellant and we accordingly quash the conviction and set aside the sentence. The 2nd appellant should be released from prison forthwith unless otherwise held for other lawful purposes.

DATED at **ARUSHA** this 11th day of December, 2019

K. M. MUSSA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2019 in the presence of Mr. Yoshua Mambo/Jethro counsel for the appellants and Ms. Naomi Mollel learned State Attorney for respondent/Republic, is hereby certified as a true copy of the original.

G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL