IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 473 OF 2017

ALBERTO MENDES.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Matogolo, J.)

dated 20th day of September, 2017
in
(Criminal Session Case No. 132 of 2016)

JUDGMENT OF THE COURT

17th March, & 8th May, 2020

MZIRAY, J.A.:

The appellant, Alberto Mendes, a citizen of Guinea Bissau, was charged in the High Court of Tanzania at Dar es Salaam with trafficking in narcotic drugs in breach of section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffick Drugs Act, [Cap 95 R. E. 2019], herein after to be referred as the Act.

The prosecution alleged that the appellant on 15/4/2012 at Julius Nyerere International Airport within Ilala District in Dar es Salaam Region, was found trafficking 1277.40 grams of narcotic drugs namely; Heroin hydrochloride valued at Tanzania Shillings fifty seven million four hundred eight three thousand four hundred fifty only (TZS.57,483,450.00). The appellant was found guilty as charged and convicted to serve a sentence of twenty two (22) years imprisonment and in addition, was ordered to pay a fine of TZS. 144,965,700.00.

At the trial court, when the information was read over to the appellant, he strongly protested for his innocence. To prove the information, the prosecution paraded fourteen (14) witnesses and tendered seven exhibits while on the defence side, the appellant was the only witness who testified.

A brief background of the case as could be discerned from the record of appeal is as follows. On 15/4/2012, ASP Denis Moyo (PW13) who on the fateful date of the incident was on duty at Julius Nyerere International Airport (JNIA) Dar es Salaam City, was tipped by an informer that there was a Guinea Bissau National who would travel with Ethiopia Airlines

during the night on that day at 00.00 hours. The informer described to him the appearance of the appellant and disclosed that the said person was engaging in illicit drugs whose name was Alberto Mendes. Following the tip, PW13 arranged for a trap to net the appellant. Due to the descriptions given earlier on by the informer, it was easy for PW13 to arrest the appellant when he arrived at the Airport. He seized the appellant's ticket and passport and informed the staff of the Ethiopia Airline to cancel his flight. Subsequently, the appellant was taken to the police post at the Airport for interrogation. PW13 alerted the Anti-Drug Unit where upon SSgt. Dacto (PW5) and SSP Salmin Shelimo (PW10) were dispatched to the scene to assist in the investigation of the case. At around 07.40 p.m the appellant requested PW5 to be taken for a call of nature and he was sent to a special toiled used by drug suspects where the appellant defecated six pellets in the presence of PW5 and two other witnesses. Later on, at around 08.00 p.m, the appellant defecated eleven (11) pellets in the presence of Fundisha Ezekiel Moyomobola (PW8) and two witnesses. Again, at around 10.12 p.m, the appellant defecated four (4) pellets. During all these occasions, the appellant signed in the observation forms and the witnesses counter signed thereon.

Still under observation, on 16/4/2012 at around 07.13 am the appellant defecated 11 pellets. On the same day, PW5 took the emitted 38 pellets together with the appellant's ticket and passport to SP Neema Andrew Mwakagenda (PW2) at the Anti-Drugs Unit Offices at Kurasini and the latter registered them in the exhibit register. In the evening of the same day, the appellant defecated 16 pellets in the presence of John David Kamara (PW4), Jefferson Deus (PW9) and Stanslaus Aloyce Ngasoma (PW14). The defecation process continued until the pellets reached 85 in number.

It is to be noted that in each interval of the defecation the appellant and the respective witnesses signed in the observation forms and all the pellets were handed to PW2 who made entries in the exhibit register. Later on PW2 labelled them and with a letter of request for the exhibits to be analysed, she handed the 85 pellets to Ernest Lujuo Joseph Isaka (PW1) of the office of the Chief Government Chemist for analysis.

Upon analysis, the results confirmed that the samples presented for test and analysis were illicit drugs, namely heroin hydrochloride weighing 1277.40 grams. The report and the confirmed drugs were returned in the

office of Anti Drugs Unit for other necessary steps including estimation of their value. It was Christopher Joseph Shekiondo (PW3) who carried the estimation and issued a certificate to that effect showing that the drugs seized from the appellant valued TZS. 57,483,000.00.

On 17/4/2012 which was two days after the arrest, the appellant was further questioned of the allegation and upon caution, he volunteered to give his cautioned statement. It was SSP Salmin Shelimo (PW10) who recorded the appellant's cautioned statement. Subsequently, the appellant was charged with the offence of trafficking in narcotic drugs.

In his defence, the appellant denied all the allegations of the prosecution witnesses and contended that the whole case was framed against him.

After the evaluation of the evidence, the trial High Court was satisfied that the prosecution had proved the case beyond reasonable doubt and as a result, as pointed out earlier, it convicted the appellant of the offence charged and sentenced him to a term of twenty two (22) years in jail and in addition, to pay a fine of TZS. 144,965,700.00. Aggrieved, the appellant now appeals to this Court against both conviction and sentence.

On 1/8/2019 the appellant lodged a memorandum of appeal comprising fourteen (14) grounds of complaint. In the course of arguing the appeal, grounds No. 2,3,5,6,9,11 and 14 were dropped. Under rule 81 of the Tanzania Court of Appeal Rules, 2009, Mr. Jeremiah Mtobesya, learned advocate who appeared for the appellant sought leave of the Court to add a new ground of appeal. The application was not resisted by Mr. Apimaki Patrick Mabrouk, learned Senior State Attorney who appeared for the respondent Republic assisted by Ms. Veronica Matikila, learned Senior State Attorney and Ms. Clara Charwe, learned State Attorney. The new ground of appeal added reads: -

> *"The evidence adduced by the prosecution did not prove the offence under which the appellant is charged under section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffick in Drugs Act".* [Cap 95 R.E. 2002].

After the abandonment of some of the grounds in the filed memorandum of appeal, the remaining grounds, which we reproduce them with their numbers read as hereunder:-

> *"1. That, your lordship, the learned trial judge erred in law and fact to convict the appellant*

relying on repudiated/retracted cautioned statement (exhibit P7) that was recorded illegally by PW10

2. *Abandoned*

3. *Abandoned*

4. *That, the learned trial judge erred in law and fact to convict the appellant believing on incredible and unreliable prosecution witnesses (PW4, PW5, PW6, PW8, PW9, PW11, PW12, PW14 and PW15) who failed to exactly identify in court, the number of pellets they witnessed the appellant emitting under observation at the airport as they were not marked at the point of seizure contrary to paragraph 8 of PGO No. 229.*

5. *Abandoned*

6. *Abandoned*

7. *That, the trial High Court erred in law and fact to believe exhibit P2 (CGC report) and proceeded to convict the appellant while the same was incomplete report for not being attached to the original printout from confirmatory test machine and revealed that*

exhibit P1 contained narcotic drugs called heroine hydrochloride while in fact the alleged chemical doesn't appear in the First Schedule list of the Drugs and Prevention of Illicit Trafficking in Drugs Act, Cap. 95 R.E. 2020.

8. *That, the learned trial High Court judge erred in law and fact to accord weight to exhibit P6 (certificate of value) prepared by PW3 pursuant to powers conferred and vested to him under section 27(1) (b) of the Drugs and Prevention of Illicit Trafficking in Drugs Act No. 9 of 1995 while in fact the mentioned section does not give such powers.*

9. *Abandoned*

10. *That, the trial High Court erred in law and fact to convict the appellant without considering that proper handling and marking of exhibit P1 was not done contrary to mandatory procedures laid in PGO No. 229*

11. *Abandoned*

12. *That, the learned trial judge erred in law and fact to convict the appellant without considering that the charge/information's particulars of offence didn't disclose the*

element and mode of trafficking that took place and the destination where the alleged narcotic drugs were trafficked to and /or from was not disclosed.

13. *That, the learned trial judge erred in law and fact to convict the appellant based on the prosecution witnesses PW7, PW11, PW12 and PW13 whose evidence during the trial materially contradicted with their former statements admitted as exhibits D1, D2, D3, D4 and D5 respectively.*

14. *Abandoned."*

Submitting on the new ground added, Mr. Mtobesya contended that based on the evidence adduced the prosecution failed to establish an offence under section 16 (1)(b)(i) of the Act. He argued that one of the important ingredients of the offence charged is the importation of the drugs. In his view, this ingredient was not established because at the time of the arrest at JNIA on 15/4/2012, the appellant had not taken the drugs outside the country. He argued that the offence was incomplete as the appellant was intercepted while still in the preparation stage. He

concluded that the evidence does not support the charge hence the conviction should be quashed and the sentence set aside.

Going back to the memorandum of appeal, the learned advocate chose to start with the twelfth ground, obviously because it is somehow related to the added ground. He submitted that the particulars of the offence in the information was not exhaustive enough to disclose whether the appellant was exporting or importing the alleged narcotic drugs. He argued that the omission to include such particulars in the information filed rendered the charge sheet defective. He further argued that the particulars of the offence must be explicit to enable the appellant know what he is actually charged with and the seriousness of the allegation before him. Such a disclosure was necessary to assist the appellant to plan for his defence. To strengthen his argument, he referred us to the case of **Isidori Patrice v. R**, Criminal Appeal No. 224 of 2007 (unreported). Based on the above submission, Mr. Mtobesya prayed the Court to declare the charge sheet defective with the consequences of quashing the conviction and setting aside the sentence imposed.

On the complaint in respect of chain of custody in ground No. 10, Mr. Mtobesya submitted that witnesses who testified in relation to exhibit PI being police officers were supposed to record each and every movement of this exhibit in conformity to PGO No. 229 which requires each movement of the exhibit from the scene to the time when it lands in the hands of the court to be documented. He pointed out that paragraph 3 of PGO No. 229 stresses on the importance of the police officer who shifts the exhibit from the scene of the crime to the police station to record the particulars of the exhibit, the reason for the shift and in case he hands it over to another police officer, then to record the movement and change of hands in form No. 145 of the PGO No. 229. In addition, he submitted that in terms of paragraph 16 of PGO No. 229 a police officer who handles a seized exhibit has an obligation to put the particulars of the exhibit in his notebook and enters it in an exhibit register (PF.16), something which was not done in this case. He argued that in this case the prosecution witnesses merely mentioned the register and note book but unfortunately these documents were not tendered as exhibits before the trial court.

As a whole, the learned advocate insisted on the need for documentation showing the seizure, custody, control, transfer and analysis of the exhibit until the exhibit finally is tendered in court. He argued that the intention of documentation is to guard the exhibit from being tempered and also it guards the integrity of the chain of custody. To back up this assertion, he referred us to the cases of **Zainabu Dotto Nassoro v. R,** Criminal Appeal No. 348 of 2018, **Paulo Maduka and 4 others v. R,** Criminal Appeal No. 110 of 2007 and **Abuhi Omari Abdallah and 3 others v. R,** Criminal Appeal No. 28 of 2010 (all unreported). He asserted that the chain of custody in this case was broken for lack of documentation showing movement of the exhibit from the time it was seized until it was eventually tendered in court as an exhibit. He ended by stating that this ground alone if considered in favour of the appeal is sufficient to dispose of the appeal.

The learned advocate then shifted to ground 13. His complaint in this ground is that the conviction of the appellant which was based on the evidence of PW7, PW11, PW12 and PW13 was not sound in view of the fact that their testimonies during the trial, materially contradicted with their

statements to the police which apparently were tendered at the instance of the defence and admitted as exhibits D1, D2, D3, D4 and D5 respectively. It was the contention of the learned advocate that these material contradictions tainted the credibility of the witnesses which in all fairness has to be resolved in favour of the appellant. He did not agree with the assertion by the trial judge that the contradictions were minor and did not taint the prosecution case.

Regarding the admissibility of the cautioned statement the subject of the complaint in ground 1, it was the view of the learned advocate that the learned trial judge erred in convicting the appellant relying on repudiated/retracted cautioned statement (exhibit P7) that was recorded illegally by PW10. He submitted that the cautioned statement was recorded two days after the appellant had been arrested, which was outside the four hours period stipulated under section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). There was no reason to take the statement out of the prescribed time to justify the extension as provided for under section 51 of the CPA, he argued. He further argued that if the cautioned statement was not taken on time for the reason that

the appellant was under observation of the defecation process, still this cannot be a valid excuse because the appellant continued to defecate even on 18/4/2012 after the cautioned statement had been recorded on 17/4/2012. He cited the case of **Omary Said @ Habibu Omari and Another v. R**, Criminal Appeal No. 302 of 2014 (unreported) in support of the proposition that, section 50 and 51 of the CPA are meant to safeguard the attainment of justice and not otherwise. Due to the cited shortcomings, he prayed for the cautioned statement to be expunged and in his view, once that is done, the remaining evidence is insufficient to sustain a conviction.

The learned advocate then moved to argue ground No. 4. Amplifying on this complaint, the learned advocate submitted that in their testimonies, PW4, PW5, PW6, PW8, PW11, PW12, PW14 and PW15 were unable to identify the exact number of the pellets defecated by the appellant on account of the fact that the pellets were taken to the Chief Government Chemist unwrapped and later mixed together. His argument is that each of the witness who witnessed the defecation process could not have been

able to identify the set of the pellets he witnessed being defecated. In his view, this lacuna tainted the prosecution case.

Concluding with ground No. 7, the learned advocate challenged the substance of exhibit P2, a report from the Chief Government Chemist. He submitted that the way exhibit P2 is composed appears to be a letter rather than a report because it does not contain the essential details to explain how the analysis was carried out. He prayed that exhibit P2 be expunged because it does not qualify to be a report to be acted upon by the Court.

In reply, Mr. Mabrouk opposed the appeal. He preferred in his response to start with ground No. 10 in respect of chain of custody. He submitted that the chain of custody was established by the evidence of PW2, PW6, PW7 and PW15. He explained that these witnesses explained thoroughly the movement of exhibit P1 from the time it was seized up to the time it was handed to the Chief Government Chemist until when it was finally tendered in court. With this consistent evidence, there was no need of paper trail as submitted by Mr. Mtobesya, he argued. He continued submitting that the evidence of the above aforementioned witnesses did

not leave for exhibit P1 to be intercepted or tempered with. He submitted that these witnesses should be relied upon as far as the issue of chain of custody is concerned because persons like PW4, PW5 and PW5, witnessed the defecation process and the remaining witnesses were involved in the taking of the drugs to the Anti-Drug Unit for custody while others participated in taking the drugs to the Chief Government Chemist for analysis. It was his contention that the evidence of these witnesses was most reliable and there was no need of having any paper trail in the circumstances of the case. To cement his argument, he cited the case of **Charo Saidi Kimilu and Another v. R**, Criminal Appeal No. 111 of 2015 (unreported). The learned Senior State Attorney distinguished the case of **Zainabu Nassoro** (supra) stating that the scenario in that case is quite distinct from the instant case as in **Zainabu Nassoro** (supra), the chain of custody was broken while in this case there is an unbroken chain of custody.

In response to ground No. 13 on contradictions, he disputed presence of any contradiction on what the witnesses stated in their statements to the police and their oral testimonies in the court. He

submitted that if there were any contradictions, they were minor and did not go to the root of the matter. In his view witnesses being human beings, it is not expected that what was recorded in their statements should tally exactly with their testimonies in the court. Minor discrepancies here and there are bound to happen, he argued. To underscore the point, he cited the case of **Abdallah Rajabu Waziri v. R**, Criminal Appeal No. 116 of 2004 (unreported).

Reverting to ground No. 1 in relation to the cautioned statement tendered, the learned Senior State Attorney conceded that the statement was not recorded within the prescribed time and even extension of time was not sought. However, considering the nature of the case, the complications in the investigation, and the prolonged uncertain process of defacation, it was not possible to take the statement within a period of four hours as required by the law. He invited the Court to consider the exception as stated in the case of **Chacha Jeremiah Murimi and 3 others v. R**, Criminal Appeal No. 551 of 2015 (unreported). Reacting on the point that the cautioned statement preceded the defecation made on 18/4/2012, he argued that when the statement was taken the investigators

reasonably believed that there were no more pellets remaining in the stomach of the appellant.

In answer to the complaint raised in ground No. 4, the learned Senior State Attorney submitted and maintained that PW4, PW5, PW6, PW8, PW9, PW11, PW12, PW13 and PW15 each witnessed different intervals of defecation and testified to what they observed. He argued that as pellets are items which cannot change hands easily, they were identified by the witnesses in their shape and colour without difficulties. He invited the Court to find these witnesses credible and reliable and dismiss the assertion that the chain of custody was broken. To support his contention, he referred us to the case of **Kadiria Said Kimaro v. R**, Criminal Appeal No. 39 of 2017 (unreported).

The response in respect of the additional ground raised was made by Ms. Matikila, learned Senior State Attorney. She combined this ground and argued it jointly with ground No. 12. She maintained that the charge sheet was proper and had cited the relevant provisions of the law. She submitted that the wording of section 16(1) of the Act clearly establishes three elements which are; one, who is involved in the crime; two, the

subject matter involved; and three, the *actus reus*. While making reference to page 57 of the record of appeal in respect of the particulars of the offence, she confirmed that all the three aforementioned ingredients are well articulated in the charge sheet. She submitted that, one of the essential element was to convey the narcotic drugs and not importation and exportation of the drugs as submitted by Mr. Mtobesya. She referred us to section 2 of the Act which defines trafficking to include conveyancing. She explained that the method of trafficking in the instant case was through conveyancing; in other words the appellant used his stomach to carry the narcotics. Having argued to that extent, she criticized the submission of Mr. Mtobesya to be irrelevant and misleading. She also criticized the assertion that the offence should be reduced to that of an attempt to commit an offence under section 23 of the Act. She emphatically stated that there was no attempt of any kind whatsoever but a complete crime.

Still on this ground, the learned Senior State Attorney submitted that the omission to state the mode of trafficking did not in any manner occasion injustice to the appellant. She argued that as the case went

through committal proceedings, then the appellant had ample time to know the nature of the evidence the prosecution intended to rely upon and he was even supplied with the proceedings which enabled him to know the nature of allegations laid against him. It was the contention of the learned Senior State Attorney that the charge sheet was perfect and in her view, if there were any irregularities, they were minor and for that reason curable under section 388 of the CPA.

In respect of ground No. 7 concerning the Analyst report, her immediate reaction was that there is no prescribed format of how the report should look like but what is paramount is that the report should contain a detailed account of the substance brought for analysis and the result of the examination made. She maintained that the report tendered passed this test. It is for that reason she was of the view that what was tendered was a report and not a letter as alleged.

As a whole, she prayed for this Court to dismiss the appeal as the grounds raised by the appellant have no merit at all.

In a brief rejoinder, Mr. Mtobesya submitted that the variance in the witnesses' statements and their oral testimonies in court cannot be

considered as a minor discrepancy as it goes to the root of the matter. Secondly, he submitted that due to change of hands, the chain of custody was broken and it could not be established with certainty that the seized pellets were exactly the same which were tendered in court as exhibit. It is for this reason that documentation was necessary to track the movement of the exhibit, he argued. Lastly, he argued that the mode of trafficking was not revealed in the prosecution case. He then reiterated his prayers.

On our part, we have carefully gone through the record of appeal and the submissions by the learned counsel. Starting with the additional ground of appeal, it is apparent from the record that the appellant was charged under section 16(1) (b) (i) of the Act which provides that: -

> *"Any person who*
>
> *(b) trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance commits an offence and upon conviction is liable..."*

There is no dispute that the appellant was apprehended at JNIA on 15/4/2012 while intending to travel outside Tanzania. The argument of Mr. Mtobesya is that as the appellant did not succeed to take the drugs outside Tanzania, then the offence was not complete and for that reason he was supposed to be charged of a lesser offence of attempt to commit an offence under section 23 of the Act. With respect we don't agree with Mr. Mtobesya in his line of argument. It would have been an attempt if the appellant was still at an initial stage in preparation to commit the offence. But the situation here is quite different because the appellant was arrested while he had already swallowed the drugs and was carrying them in his stomach. He was also about to board a plane which was destined in a foreign country. With all these facts which are not disputed it cannot be said that an offence committed was an attempt. It was a complete offence and for that matter we are settled in our minds that the charge preferred to the appellant under section 16(1)(b)(i) was correct in the circumstances of the case. We find that the additional ground raised lacks merit and we dismiss it.

Connected to this additional ground is ground 12 on which the complaint is that the particulars of the offence in the charge sheet did not disclose the element and mode of trafficking that took place and the destination where the alleged narcotic drugs were trafficked to. The argument of Mr. Mtobesya in this ground is that the particulars of the offence were not explicit in the information and therefore there was no fair trial on the side of the appellant. It is his contention that the particulars of offence were insufficient to disclose the offence. We think that at this particular juncture it is important for ease of reference to reproduce the particulars of the offence as stipulated in the charge sheet at page 1 of the record of appeal. They are couched in the following words: -

> *"ALBERTO s/o MENDES on the 15th day of April 2012 at Julius Kambarage Nyerere International Airport within Ilala District in Dar es Salaam Region* ***was found trafficking*** *from the United Republic of Tanzania 1277.41 grams of Narcotic Drugs namely Heroin valued at Tanzanian shillings fifty seven million four hundred eighty three thousand four hundred and fifty only (57,483,450/=)"*
>
> [Emphasis added].

The charge sheet as it appears herein above has included the word trafficking to demonstrate that the appellant was charged with trafficking. The word trafficking has been defined under section 2 of the Act to mean;

> *"trafficking means 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..."*

The above definition is very wide and covers a variety of situations. Among the situations covered, which apparently is reflected in the particulars of the offence in the charge which was facing the appellant at the trial court is on the aspect of conveyance and storing. As rightly pointed out by Ms. Matikila in her submissions, the appellant used his stomach as a carrier to convey the narcotic drugs. And as he was intercepted while in the process to board a plane to an abroad destination, then for all purposes and intents, he was exporting the drugs to a foreign country. We therefore agree with the assertion by the learned Senior State

Attorney that the particulars of the offence in the charge sheet were too clear for the appellant to know the allegations against him and for that matter we hold that the appellant was not prejudiced in any way to arrive at a conclusion that he was not tried fairly. We likewise find this ground wanting in merit.

We now move to discuss ground 1 on which the complaint is on the validity of the cautioned statement. It is contended that it was taken outside the prescribed time and therefore contravening the provisions of section 50 of the CPA which states:-

> *"Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence".*

There is no doubt that the cautioned statement was taken out of the prescribed time taking into consideration that the appellant was arrested on 15/4/2012 at about 1.00 hours and the cautioned statement was taken on 17/4/2012 at 15.00 hrs a period of two days after the incident. The reason for delay given is that the investigation was complicated due to the

process of defecation taking long. It is true the process of defecation was done in intervals from 15/4/2012 up to 18/4/2012 when the last defecation took place. The witnesses involved in the defecation process i.e PW5 and PW10 were police officers who had long experience in investigation of the cases of this nature. Save for the process of defecation taking long, it has not been shown by the prosecution the complications involved in the investigation of this case. We have reasons to believe that the law was not properly applied by the investigators of the case. PW5 and PW10 who had vast experience in investigating cases of the nature, knowing that the defecation process will take long, were expected to exercise due diligence and would have applied for extension of time in terms of section 51 of the CPA. Failure to do so shows laxity on the part of the investigators. We also fail to understand why they opted to take his statement on 17/4/2012 while the defecation process was still in progress. The reason given by the learned State Attorney to the effect that the defecation process was unpredictable is not convincing to us.

The learned Senior State Attorney tried to convince us to follow the ratio in our earlier decision of **Chacha Jeremiah Murimi** (supra) stating

that prevailing conditions in that case are similar to the instant case. With respect we don't agree. The circumstances at hand are completely different and distinct from those in **Chacha Jeremiah Murimi** (supra). The investigation in that case was complicated as the case involved the killing of a person with albinism and the investigators had to find the culprits with the bone of the deceased, while in the instant case the appellant was right in front of the investigators waiting for the pellets to be emitted. There is nowhere in the record where the investigators complained of complications in the investigation.

It is because of the above stated reasons we find that the case of **Chacha Jeremiah Murimi** is distinguishable. In our view, there was a chance for the prosecution to apply for extension of time under section 51 CPA but they failed to utilize it. The cautioned statement was illegally obtained and it deserves to be expunged from the record as we hereby do. In the circumstances, we sustain the appellant's complaint in ground one and hold that the learned trial judge erred in relying on the illegally obtained cautioned statement.

We will now briefly discuss the complaint in ground No. 13 in respect of the alleged contradictions in the witnesses statements and what they testified before the trial court. Going direct to the point, we agree with the submission by Mr. Mtobesya that there were material contradictions in the witnesses statements when compared to their oral testimonies before the trial court.

We will show few examples. PW7 at page 135 of the record appeal is recorded stating that:-

> *"I explained here in court that Neema packed the pellets in Khaki envelope sealed by wax seal. These words were not recorded in my statement..."*

Likewise PW11 at page 192 of the record of appeal stated that: -

> *"On my statement, it appears I erred to record the date instead of recording on 17.04.2012 I recorded on 18.04.2012"*

PW12 at page 197 of the record of appeal stated that;

> *"... according to this statement the one who told me to go to witness discharge pellets is A/Insp. Siame."*

And PW13 at page 205 stated that: -

> *"In this statement I did not state that I introduced to him before arresting him you may be correct to say that I did not introduce myself to the accused before arresting him using my statement.."*

Deducing from the evidence of the above witnesses, there is no doubt that their statements at the police differ with the oral evidence they gave in court. In our view, the contradictions cannot be termed to be minor as observed by the learned trial judge as they go to the root of the matter. Such contradictions have tainted their credibility hence they cannot be believed.

In **Goodluck Kyando v. R** [2006] TLR 363 it was stated that: -

> *"It's a trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Based on the above decision we are satisfied that the evidence of the aforementioned witnesses was tainted and cannot be believed because

their statements to the police varied with what they testified in the trial court. We find merit in this ground and allow it.

We proceed now to ground No. 4 and 10. The thrust of these grounds is on the subject of chain of custody. In resolving the issue of chain of custody we wish to point out that each case will depend on the prevailing circumstances. We are aware that there are circumstances where the evidence of witnesses is sufficient to prove the chain of custody without any paper trail. However the circumstances prevailing in this case and taking into consideration that most of the witnesses who handled the movement of exhibit P1 were police officers, we are constrained to agree with Mr. Mtobesya that they were duty bound to adhere to the procedure laid down in PGO No. 229. We strongly hold the view that it was proper to have documentation of the movement of exhibit P1 from the time of seizure until when it landed in the hands of the Chief Government Chemist until finally it was received as exhibit in court. In that regard the case of **Paulo Maduka and 4 others v. R**, Criminal Appeal No. 110 of 2007 (unreported) become relevant where this Court stated that: -

"By chain of custody we have in mind 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, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulent to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and it be provable that nobody else could have accessed to it."

The above position is in line to what has been stipulated in PGO No. 229 which in a nutshell requires that a police officer who moves the exhibit from the scene of the crime has to record the particulars of the exhibit, the reason why he moves the exhibit from the scene and if he hands over the exhibit from the scene and if he handover the exhibit to another officer he has to insert his name and signature. Particulars of the exhibit to be put in his note book, the exhibit has to be entered in an exhibit register,

paragraph 31 stresses recording of the movement of the exhibit and that the exhibit has to be conveyed to the office of the Chief Government Chemist through a special form PF.180.

The above procedure cannot be accomplished successfully without a paper trail. As can be revealed from the evidence adduced by the prosecution, the above procedure was not adopted by the witnesses who handled exhibit P1. That failure had a tremendous effect on the substance of the case for the prosecution.

Apart from that, in each occasion when the appellant had defecated, the pellets were supposed to be wrapped and labelled. Paragraph 8 of the PGO No. 229 emphasizes that:

> *"The investigating officer shall attach an exhibit label (PF 145) to each exhibit when it comes into his possession. The method of attaching labels differs with each type of exhibit. In general, the label shall be attached so that there is no interference with any portion of the exhibit which requires examination."*

In the instant case, in every occasion the pellets were defecated, they were not sealed and labelled, rather the police officers collected them and handed them to PW2 who registered them. This is clearly seen in the evidence of PW5 at page 116 of the record of appeal when he was cross-examined he stated that: -

> *"There are other exhibits which requires labelling, others not. The exhibit keeper is the one who put the label on the exhibit myself, I had no label where I go the exhibit (sic). There is no one who came with the label."*

On the part of PW6 at page 125 of the record of appeal he is recorded testifying that: -

> *"I was labelling the envelope in which the exhibit are kept. I labelled the envelope not exhibit."*

Considering the requirements of paragraph 8 of PGO No. 229, the requirement of labelling the exhibit is inescapable. It was important for PW5 and PW6 to label the exhibits at each stage of defacation before handing it over to PW2 with the documentation explaining the contents

therein. Had that been done, it would have assisted PW1 to know which pellets were defecated in each process and that would have assisted to confirm that the 85 pellets tendered were actually those defecated by the appellant. The only available evidence was the general description, shape and colour of the pellets which in our view was not sufficient and conclusive as there was no link between the description made and exhibit P1.

As a whole we find that due to the gaps we have pointed herein above, there were chances for exhibit P1 to be tempered with. We say so because the movement of the exhibit was not documented to guard the whole process of chain of custody. As rightly pointed out by Mr. Mtobesya in his submissions, exhibit P1 deserves to be expunged as we hereby do. Once this exhibit is expunged, what remains is the contradictory oral evidence which in our view did not prove the case for the prosecution beyond reasonable doubt entitling the appellant to an order of acquittal. There will be no evidence to link the appellant with the narcotic drugs the subject of the charge against him. This is more so because the cautioned statement is no longer part of the record and worse still, the oral

testimonies of PW7, PW11, PW12 and PW13 is too unreliable to be acted upon proving the case against the appellant on the required standard.

Before concluding, we find it compelling to say something in relation to the custodial sentence meted out to the appellant. After convicting the appellant, the trial court imposed a custodial sentence of 22 years to run from 15/04/2012 the date on which he was put under custody. With respect, that was wrong as it contravened Article 13(6) (b) of the Constitution of the United Republic of Tanzania, 1977 which states that: -

> *"No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence."*

In the spirit of the above provision, from the date of restraint until the date of the conviction, the appellant was presumed innocent. Thus, the sentence meted by the trial court should have started to run from 20/9/2017 when he was convicted. Similar position was taken in the case of **Vuyo Jack v. R**, Criminal Appeal No. 334 of 2016 (unreported) where the Court stated the following: -

"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."

In the light of the above, we cannot but hold that the sentence imposed to the appellant was illegal.

As a whole, considering the doubts in the prosecution's case, which we resolve them in favour of the appellant with the net effect that the case against him was not proved beyond reasonable doubt.

In consequence, the appeal is allowed, conviction entered by the High Court is quashed and sentence of twenty two years imprisonment and

the fine of TZS 144,965,700/= are hereby set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 15th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 8th day of May, 2020 in the presence of the Appellant in person and Mr. Kacandid Nasua, learned State Attorney for the respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL