IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 469 OF 2017

MARCELINE KOIVOGUI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Matogolo, J.)

dated the 6th day of July, 2017
in
HC. Criminal Session Case No. 151 of 2015

JUDGMENT OF THE COURT

15th & 26th May, 2020

MUGASHA, J.A.:

The appellant was charged and convicted of the offence of trafficking in illicit drugs contrary to section 16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [**CAP 95 RE.2002].** She was sentenced to pay a fine equivalent to three times the value of narcotic drugs she was found trafficking that is TZS. 48,321,900/=. And, in addition to serve twenty-seven years in prison.

A brief account underlying the arraignment and conviction of the appellant was as follows: On 19/5/2012 at the Julius Nyerere International Airport (JNIA), the appellant who was travelling to Guinea, her home country, as is the usual practice, placed her bag on the scanning machine for security check. The scanner operator Alexander Andrew who testified as PW5 detected an unusual object which he could not identify. He called a colleague one Rehema Milanzi (PW4) who obliged and as well, detected the unusual object with unusual colour. Having smelled a rat, they inquired and the appellants claimed that the bag had her mother's medicine. Then, in the presence of the appellant her bag was opened, each item therein was scanned and three brassieres were detected to contain the unusual objects. Suspecting the objects to be narcotic drugs, they alerted the police who happened to be in the vicinity of the departure lounge namely, WP. 3406 D/Cpl Victoria (PW8), D.1261 D/Sssgt Waziri (PW9) and E. 2926 Ssgt. Dacto (PW10). Having rushed to the scene, PW4 using a scissors did cut the three brassieres and found therein a total of 72 pellets. Subsequently, PW9 who was the officer In charge of the airport police station took the 72 pellets and the appellant who carried her bag was escorted to the airport police station. Upon a further body search of the appellant, nothing more

was retrieved. The appellant surrendered her Guinean passport, the electronic ticket and the Identification Card. Then, in the presence of the appellant, PW9 handed over the 72 pellets together with her other belongings to PW10 and the appellant was escorted to the Anti-Drug Offices (ADU) by PW10 and Inspector Monica (PW11). At ADU offices, again in the presence of the appellant, PW10 handed over the 72 and pellets and the appellant's belongings to the custodian of exhibit room one ASP Neema Andrew Mwakagenda (PW1).

Later, the appellant was taken to the hospital for further examination to establish if she had swallowed and drugs, but since she was found to be pregnant the X-ray examination was not conducted and she was returned at ADU offices. On the same day, in the presence of the appellant and Zainabu Duwa Maulana, a local leader who testified as PW6, PW1 sealed the 72 pellets for onward transmission to the Chief Government Chemist. Since the arrest was effected on 19/5/2010 which was a Saturday, on 21/5/2012, accompanied by PW10 and PW11, PW1 handed over the 72 pellets to Machibya Ziliwa Peter (PW3 in the presence of Ernest Lujuo Joseph (PW2) at offices of Chief Government Chemist for examination. The

consignment was accompanied by a documentary request from the police to have the pellets tested and PW3 initially labelled it with No. 321/2012.

The analysis of the seized pellets was done by PW3 in the presence of (PW2), and it established that, the pellets contained heroine hydrochloride weighing 1073.82 grams. Having sealed and signed the consignment PW3 handed it over to PW1 for safe custody. PW3 later prepared a report which was tendered in the evidence as exhibit P7. PW7 Christopher Joseph Shekiondo, the Commissioner of Drugs Control Commission valued the alleged narcotic drugs at TZS. 48,321,900/=. Subsequently, the appellant was arraigned in connection with the offence of illicit trafficking in narcotic drugs.

The appellant denied the accusations by the prosecution. In her sworn evidence she testified to be a Guinean national and arrived in Tanzania on 16/5/1012 to visit a friend called Salome. While returning to her home country through JNIA having placed her luggage at the scanning machine she saw a certain strange young man conversing with the Police who subsequently opened her luggage. According to her nothing was retrieved from the bag. She disowned the bag, brassieres and the drug

pellets and recounted not to remember what was found in the brassieres but that her bag was taken by PW10 together with unnamed Nigerian man and later she was shown brassieres and the drug pellets. She did not deny being the owner of the passport, the electronic ticket and the identity card.

After a full trial, the judge summed up the case to the assessors. One of them returned a verdict of guilt and two others opined that the appellant was not guilty. Ultimately, the appellant was convicted and sentenced as earlier stated.

Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. In the Memorandum of Appeal, a total of eight grounds of complaint were raised as follows:

> *"1. Having found that there was no need for certificate of seizure and or documentary proof on the chain of custody of exhibits the learned trial Judge erred in law and fact by admitting and relying on Exhibits: Passport of the accused (P1), Air ticket by Kenya Airways (P2), Safari bag in black colour (P3), Three brassieres black in colour (P5) and 72 pellets of heroin (P7) in the absence of full report disclosing the particulars of arrest and seizure.*

2. *That the learned trial Judge erred in law and fact by admitting and basing his judgment on exhibit P8 (the Government Chemist Report) in contravention of mandatory provisions of the law and in total disregard of the appellant's right to full hearing.*

3. *That the defence having objected to the admission of the cautioned statement, the learned trial Judge grossly misdirected himself in law in failing to conduct a trial within a trial before admitting the cautioned statement.*

4. *That, the learned trial Judge erred in law and fact in not finding contradictions among the arresting Police Officers and TAA Security Officers hence giving advantage to the doubts of the appellant.*

5. *That, the learned trial Judge erred in law and fact by relying on the caution statement (Exhibit P10) which was taken beyond the prescribed time and in contravention of the mandatory provisions of the law.*

6. *That, the learned trial Judge erred in law and fact in failing to find that there were irreconcilable contradictions in the prosecution case and in failing*

to resolve the said contradictions in favour of the appellant.

7. *That having regard to the circumstances of the case, the learned trial Judge misdirected himself in fact and law in failing to consider the defence given by the appellant at the trial and in deciding the case against the weight of evidence.*

8. *That having regard to the circumstances of the case, the learned trial Judge misdirected himself in fact and law in sentencing the appellant to a term of twenty-seven years in prison which is excessive."*

Also the appellant through her advocates, raised an additional ground of appeal as follows:

"1. The learned trial Judge misdirected himself in law and fact in failing to properly sum up to assessors

The appellant was represented by Messrs. Richard Rweyongeza, Joseph Sang'udi and Reuben Simwanza, learned counsel. The respondent Republic had the services of Ms. Anunciata Leopold, Senior State Attorney assisted by Mr. Salim Msemo and Ms. Clara Charwe, learned State Attorneys.

Since the appellant who hails from Guinea Bissau was conversant with French language only, one Gonzaga John Nyoni, an interpreter endorsed by the appellant, after being sworn facilitated the interpretation from Swahili to French and vice versa throughout the hearing of the appeal.

Before the hearing, Mr. Rweyongeza abandoned the 2nd and 7th grounds of appeal. The 1st, 3rd, 5th and 8th grounds and the additional ground of appeal were argued by Mr. Sangundi and Mr. Rweyongeza argued the 4th and 6th grounds of appeal.

In addressing the 1st ground, Mr. Sang'udi submitted that, although the appellant was arrested on 19/5/2012 at JNIA and upon being inspected she was found with 72 pellets in the bag which were seized together with her other belongings, she was not issued with a receipt as per the dictates of section 38 (3) of the Criminal Procedure Act (the CPA) which requires a police officer who seizes anything from the suspect to issue a receipt enlisting the seized items. He thus argued that, in the absence of the receipt the chain of custody was not set on motion. To back up the propositions, he cited to us the cases of **SELEMANI ABDALLA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 384 of 2008 (page 18 to 19)

and **PAULO MADUKA AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No. 110 of 2007 and (both unreported).

Moreover, Mr. Sang'udi added that, what transpired from the arrest of the appellant, search, her movement from the airport to the ADU offices and later to the hospital before she was taken back to ADU was not documented contrary to the Police General Order (PGO) No. 229. On this he argued that, since the matter was handled by the Police Officers, the omission is fatal and as such, he urged the Court not to accord any weight on Exhibits P1, P2, P3, P4, P5 and P7 or expunge them from the record. To support his propositions, he referred us to the case of **ALBERTO MENDES VS REPUBLIC**, Criminal Appeal No. 473 of 2017 (unreported).

In respect of the 3rd and 5th grounds which were argued together, the learned counsel faulted the trial court on the irregular admission of the cautioned statement of the appellant (Exhibit P10). On this, he pointed out that, while the appellant was arrested at 3.00 hours her statement was recorded at 17.00 hours which is beyond the prescribed 4 hours, let alone extension of time not being obtained contrary to the provisions of section 50 (1) of the CPA. He added that, since the appellant repudiated to have

made the cautioned statement, the learned trial Judge ought to have conducted a trial within trial instead of overruling the objection in his Ruling. He thus argued that, the cautioned statement was illegally obtained and urged the Court to expunge it from the record. To support his propositions, he referred us to the cases of **SELEMANI ABDALLA AND TWO OTHERS VS REPUBLIC** (supra) and **MAKOYE SAMWEL @ KASHINJE AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No 32 of 2014 (unreported).

On the 8th ground of appeal, the learned trial Judge was faulted in having imposed excessive sentence of 27 years without considering that the appellant was a first offender. The Court was thus urged to reduce the sentence.

On the additional ground of appeal, the learned trial Judge was faulted for not having properly summed up the case to the assessors. It was submitted that, the learned trial Judge did not address the assessors on vital points of law such as, the cautioned statement and its implications and the meaning of chain of custody. Mr. Sang'udi thus argued that, the omission vitiated the trial because the assessors were not fully involved in the trial as required by the law. On this account, he urged us not to order a

retrial and instead, set the appellant free due to weak evidence of the prosecution who may utilise the retrial as an opportunity to fill in the evidence gaps. He cited to us the case of **MARIUS SIMWANZA AND ANOTHER VS DIRECTOR OF PUBLIC PROSECUTIONS,** Criminal Appeal No. 389 of 2017 (unreported) (at page 7).

The 4th and 6th grounds of appeal were addressed by Mr. Rweyongeza who opted to argue them together. In those grounds, the trial court was faulted to have acted on the contradictory account relating to the search of the appellant and examination of the drugs at the offices of the Chief Government Chemist. He submitted that, notwithstanding that PW4 and PW5 both happened to be at the scene of crime, however, each gave a different account as to the scanning, detection of the drugs and the opening of the appellant's bag. While PW4 testified to have removed what was in the bag and scanned each item, PW5 as well stated to have scanned the entire bag. In this regard, he argued that since the opening of the bag was done by PW4 and considering that, the contents were not receipted and listed, assurance of the contents therein is questionable which clouds the prosecution case with doubt which has to be resolved to benefit the appellant.

Pertaining to what transpired after the drug pellets were entrusted to the offices of the Chief Government Chemist, he contended that PW2, PW3 and PW10, each gave a contradictory account as to how and what was weighed and it is not certain if the weighing was done to all pellets while packed or separately. He argued this to be an uncertainty surrounding what exactly transpired considering that the appellant was not present. He urged us to resolve the uncertainty in favour of the appellant. Ultimately, Mr. Rweyongeza urged the Court to allow the appeal and set the appellant free or else consider the excessive sentence and impose the appropriate sentence.

On the other hand, from the beginning the respondent supported the conviction and the sentence.

Responding to the 1st ground of appeal, Mr. Msemo contended that the chain of custody was not broken at all. He pointed out that Exhibits P1, P2, P3, P4 and P7 were all admitted without being objected by the appellant. He challenged the applicability of section 38 (3) of the CPA, in the circumstances of the case whereby there was no suspicion or prior information that the appellant was carrying drugs and the encounter by

PW4 and PW5 was in the course of executing their ordinary duties of scanning luggage of passengers at JNIA. In this regard, he argued that the cited cases of **SELEMANI ABDALLA AND TWO OTHERS VS REPUBLIC** (supra) and **PAULO MADUKA AND 4 OTHERS VS REPUBLIC**, (supra) are distinguishable.

Apart from conceding that there was no documentation and trail regarding Exhibit P7, he was quick to point out that the chain of custody was not broken in the wake of the evidence of PW5, PW4, PW8, PW9, PW10, PW1, PW6, PW2 and PW3 who testified on what transpired from the arrest, seizure, storage and safe custody at the police, packaging of the pellets and onward transmission to the Chief Government Chemist whereby exhibit P7 was labelled, pellets examined and confirmed to contain heroine hydrochloride, return of exhibit to the custodian of the exhibit who tendered it at the trial. He thus argued that, the exhibit was not tampered in any manner according to the credible account of the prosecution witnesses as found by the trial court and as such, they are entitled to credence. To support his propositions, he referred us to the case of **VUYO JACK VS THE DPP,** Criminal Appeal No. 334 of 2016 (unreported) and section 62 (a) and (b) of the **EVIDENCE ACT** [CAP 6 RE. 2002]. It was

further argued that, since the drug pellets could not easily change hands, it is not always that the chain of custody would be broken which invites the necessity in relaxing the rule in **PAULO MADUKA**. He relied on the cases of **KADIRIA SAIDI KIMARO VS REPUBLIC,** Criminal Appeal No. 301 of 2017 page 10 para 3 and **LEONARD MANYOTA** page 11. In this regard, he argued that the case of **ALBERTO MENDEZ** is distinguishable because in that case, there were contradictions in the account of prosecution witnesses on the evidence of the chain of custody which is not the case in the present case.

Grounds 3 and 5 were conceded by Mr. Msemo to the effect that the cautioned statement was recorded out of time and failure to conduct the trial within trial. He thus urged us to expunge the cautioned statement but maintained that, the remaining prosecution account did prove the charge beyond reasonable doubt.

Responding to the 4th and 6th grounds of appeal, Ms. Leopold challenged existence of any contradictions in the prosecution account. She submitted that, the cumulative testimonies of PW4 and PW5 address the manner of inspection of the appellant's bag after the unusual object was

detected which was done in the presence of the appellant. She added that, since the appellant did not make any cross-examination this implies the acceptance of truth of the prosecution account. (**ISSA HASSAN UKI VS REPUBLIC,** Criminal Appeal. No, 129 of 2017 (unreported). Moreover, in respect of what transpired at the offices of the Chief Government Chemist, she submitted the same at to have been addressed by the credible account of PW2 and PW3 who gave an expert account to the effect that, the testing revealed that 72 pellets contained heroine hydrochloride weighing 1073.3 grams. She thus argued that, the contradictions, if any, were minor and did not go to the root of the matter. To back up her propositions she cited to us the cases of **CHUKWUDI DENIS OKECHUKWU AND THREE OTHERS VS REPUBLIC,** Criminal Appeal No 507 of 2017 and **NYERERE NYAGUE VS REPUBLIC,** Criminal Appeal No. 67 of 2010 (both unreported).

Responding to the 8th ground of complaint on excessive sentence, the learned Senior State Attorney argued the same to be in accordance with the law which prescribes maximum sentence to be life imprisonment and as such, the imposed 27 years jail term is appropriate since the learned trial Judge had considered the mitigating factors of the appellant.

Challenging the additional ground relating to the improper summing up, she submitted that it was properly conducted and in compliance with the provisions of sections 265 and 289 of the CPA. In this regard, she argued that, the case of **MARIUS SIMWANZA AND ANOTHER VS REPUBLIC** (supra) is distinguishable because the point of law on dying declaration was not addressed to the assessor which is not the case in the present case. Finally, she concluded her submission by urging the Court to dismiss the appeal and uphold the verdict of the trial court.

In a brief rejoinder, Mr. Rweyongeza submitted that, since the record is silent on how the appellant's bag was moved from the JNIA to the police station and how it landed to PW9 Waziri, the documentation of the paper trail was crucial in absence of which the chain of custody was broken. He reiterated his earlier submission on what he considered to be a doubtful inspection of the appellant's bag and the weighing of the 72 pellets at the offices of the Chief Government Chemist. He added that, the defence was not duty bound to cross-examination. Finally, he urged the Court to step into the shoes of the High Court and impose minimum sentence to the appellant.

Having carefully considered the rival arguments for and against the appeal, the grounds of appeal and the record before us, our task is to determine this appeal. Before doing so, we restate salutary principles of law that, **One,** a first appeal is in the form of a re-hearing and as such, this being the first appellate court, it is duty bound to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. See **D. R. PANDYA v REPUBLIC** (1957) EA 336 and **IDDI SHABAN @ AMASI vs. REPUBLIC,** Criminal Appeal No. 2006 (unreported).

Two, the credibility of a witness is the monopoly of the trial court but only in so far as the demeanour is concerned. On the part of the first appellate court, the credibility of a witness can be determined in two other ways namely, when assessing the coherence of the testimony of that witness and when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See - **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 (Unreported). In that regard, 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.

Moreover, good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See - **GOODLUCK KYANDO VS REPUBLIC (supra),** [2006] TLR 363 and (See **MATHIAS BUNDALA VS REPUBLIC**, Criminal Appeal No. 62 of 2004 (unreported).

We shall be guided by the said principles in determining this appeal by initially addressing the additional ground, the 3rd and 4th grounds together, 1st separately, 4th and 6th grounds together and conclude by the 8th ground.

We have opted to commence with the additional ground of appeal because it is a threshold matter and if allowed it could warrant ordering a retrial.

Rival arguments were martialed by learned counsel as to the propriety or otherwise of the summing up to the assessors on account of not being adequately directed on vital points of law relating to meaning and effect of chain of custody and the cautioned statement of the appellant.

We begin with the position of the law as promulgated in the CPA and case law. The provisions of section 265 of the CPA mandatorily require a criminal trial before the High Court to be conducted with the aid of assessors. In that regard, section 298 (1) of the CPA stipulates as follows:

> **"298***(1) When the case on both sides is closed, the judge may* ***sum up the evidence for the prosecution and the defence*** *and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion.*
>
> *(2) The judge shall then give judgment, but, in doing so, shall not be bound to conform to the opinions of the assessors."*

In the light of the bolded expression, after the close of the case for the prosecution and that of the defence, the learned trial Judge is obliged to sufficiently sum up the evidence of both sides in the case to the assessors, explain the law and draw their attention to salient facts in relation to the law before requiring them to give their opinion. See-

WASHINGTON S/O ODINDO VS REPUBLIC [1954] 21 EACA 392.

The threshold of adequate summing up to the assessors was articulated in the case of **HATIBU GANDHI AND OTHERS VS REPUBLIC** [1996] TLR 12 where the Court apart from holding that the learned trial Judge's summing of the case to is prudent as a matter of practice, it said:

> *"It is sufficient for the learned trial Judge to state the substance or gist of the case on both sides to enable the assessors' opinions to be formed on the case in general or on any particular point required".*

In the case of **MARK KASMIRI VS REPUBLIC,** Criminal Appeal No. 202 of 2015 (unreported) the Court emphasized that the aid of assessors in a criminal trial can meaningfully be achieved if they understand the facts of the case in relation to the law. Thus, the learned trial Judge must adequately sum up the case to the assessors failure of which would amount to the trial not being conducted with the aid of assessors. The said principle was followed in the case of **SAID MSHANGAMA @ SINGA VS REPUBLIC,** Criminal Appeal No. 8 of 2014 (unreported) as the Court stated:

> *"Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without aid of assessors and renders a trial a nullity."*

Guided by the stated principles, the question to be answered is whether in the present case the summing up was properly conducted.

At page 239 of the record of appeal, while the learned trial Judge was summing up to the assessors at page 239 he addressed them on the evidence of PW11 who recorded the cautioned statement of the appellant as follows:

> *" ... Commissioner Nzowa assigned PW11 to record accused's statement. PW11 informed the accused that she was suspected of the offence of trafficking illicit drugs and informed her rights of having her advocate, relative or friend or witness while her statement being recorded. She said the accused told her that she was willing for her statement to be recorded while she was alone... She said in her statement, the accused explained how she travelled from Guinea and arrived in Tanzania on 15/5/2012. On 16/5/2012 she met with her host one Kelvin Malik who visited her at the hotel. During the night of 15/5/2010 host Kelvin Malik brought to her the 72 pellets in the bag. The same night she left to Julius Nyerere International Airport with a view to travel back to Guinea. She also said she was told to*

come to Tanzania to collect illicit drugs by Madam Susan of Guinea. Gentle assessors, that is also reflected in the accused's cautioned statement exhibit P10. ...

At page 246 the summing up continued as follows:

" ... You have heard the witnesses who told the Court with regard to 72 pellets alleged to have been possessed by the accused. The same was found to be heroin according to the report of the Government Chemist Another important thing the prosecution has to prove is the chain of custody. In order for the accused to be found guilty the chain of custody should not break to give room for the narcotic drug to be tampered with. It must be proved that from the point the accused was found possessing the narcotic drugs and the same arrested, the procedure or handling them from the arresting officer to the ADU, to the chief Government Chemist until when produced in Court must be clearly demonstrated. Gentle assessors, you have heard the prosecution witnesses explaining how the narcotic drugs in question... were apprehended up to the time they were sent to the Chief Government Chemist and how they were

stored at the ADU exhibit room until when produced in Court. I am sure you are able to see the chain of custody as decide (sic) whether it was broken or not. But also, you heard what the accused stated in her cautioned statement exhibit P10, the contents of which was (sic) read aloud in Court."

In the light of the quoted portion of the summing up notes it can be clearly discerned that, apart from the learned trial Judge stating the substance and the gist of the case on both sides, he as well adequately addressed the assessors on the meaning and effect of the cautioned statement and the underlying principle of the chain of custody. To that extent, in our considered view, the summing up was sufficient and assessors were enabled to form opinions on the respective points of law. We agree with the learned State Attorney that **MARIUS SIMWANZA AND ANOTHER VS DPP** (supra) where the learned trial Judge did not direct the assessors on a vital point of law relating to the dying declaration, is distinguishable from the present case. Thus, the additional ground of appeal is not merited and it is dismissed.

Next for our consideration is complaint in the 3rd and 5th grounds of appeal, on the erroneous admission of the cautioned statement of the

appellant which was acted upon by the trial court to convict the appellant. All learned counsel were at one that, apart from the cautioned statement being out of time it was repudiated and retracted by the appellant, necessitating conducting a trial within trial to determine if it was voluntarily made which was not the case.

We begin with the position of the law regulating the periods available for interviewing a person under restraint which is stipulated under section 50 of the CPA as follows:

> *(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–*
>
> *(a) 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;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*

(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence–

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

It is not disputed that, the cautioned statement was taken at 17.00 hours out of prescribed time taking in account that the appellant was arrested on 19/5/2012 between 03.00 hours and 16.00 hours, and by 11.00 hours she was already at Anti-Drug Offices at Kurasini. Four hours later, she was taken to the hospital for examination and went back to ADU offices by 16.45 hours. No reason for the delay was given. We found this to be a serious investigation flop because since PW11 the recorder was at the airport when the appellant was arrested, being aware of the prescribed time limits could have recorded the statement within the prescribed time

at the airport. If that was not possible, the statement could have been reasonably recorded between 11.00 hours and 15.00 hours when the appellant was awaiting to be taken to the hospital which was still not the case. We are thus satisfied that having been recorded out of time, the cautioned statement of the appellant was illegally obtained.

As to whether the statement was voluntarily made or not, gathering from the gist of the objection made by the defence counsel as reflected at page 154 to 155 of the record, among the complaints raised included the statement being obtained under duress because the pregnant appellant was tired having undergone gruesome investigation process which took about 20 hours. Moreover, the defence counsel was very particular in his submission that, although the appellant was asked to write the statement she never volunteered to offer it.

Apart from the Judge at page 162 of the record of appeal making a finding that retraction of the cautioned statement is among the factors necessitating conducting a trial within trial, yet he overruled the objection having concluded that it was upon the defence to specify which limb of objection they prefer to argue. With respect, we found this wanting

because once the voluntariness of the cautioned statement is put to question, a trial within trial follows so as to determine if the statement was voluntary made or not. See - **SELEMANI ABDALLA AND TWO OTHERS VS REPUBLIC** (supra) and **MAKOYE SAMWEL@ KASHINJE AND 4 OTHERS VS REPUBLIC** (supra).

To the extent that, the trial court did not comply with the requirements, the cautioned statement of the appellant was wrongly adduced into the evidence and we, accordingly expunge it from the record of the evidence. This renders the 3rd and the 5th grounds merited and are allowed.

We now turn to the 1st, ground of appeal in which the appellant faulted the trial court on having acted on the prosecution account not establishing that the chain of custody was not broken.

The complaint in this ground hinged on the chain of custody being broken due to failure to receipt and issue a certificate of seizure to the appellant, and, documenting in order to make the paper trail on what transpired from the time she was arrested contrary to the provisions of section 38 (3) of the CPA and PGO 229. The respondent challenged the

applicability of section 38 of the CPA on account that there was no suspicion or prior information that the appellant was trafficking drugs.

Having carefully considered the arguments for and against the appeal and the evidence on record we have gathered that, the conviction of the appellant basically hinges on the credibility of PW4, PW5, PW8, PW9 and PW10. These witnesses were present at the scene of crime and to be particular when the appellant was apprehended at JNIA and taken to the airport police station. The issue of not invoking the provisions of section 38 (3) of the CPA was dealt with by the learned trial Judge who at page 295 concluded that, a certificate of seizure could not be prepared because of the peculiar circumstances surrounding the occurrence of the offence whereby those who apprehended the appellant with the pellets did not have prior information on the matter in order to make requisite preparations in terms of section 38 (3) of the CPA. Thus, the learned trial Judge relied on the prosecution account which he found to be credible as to the apprehension of the appellant and retrieval and seizure of the 72 pellets.

We do not find any reasons to fault the trail Judge's finding. In addition, in the present case, the circumstances in which the search and seizure were effected, in our considered view, befit emergency situation as envisaged by provisions of section 42 (1) of the CPA which stipulates:

> "*(1) A police officer may–*
>
> *(a) search a person suspected by him to be carrying anything concerned with an offence; or*
>
> *(b) enter upon any land, or into any premises, vessel or vehicle, on or in which he believes on reasonable grounds that anything connected with an offence is situated,"*

This was emphasized in the case of **MALUQUS CHIBONI @ SILVESTER CHIBONI AND JOHN SIMON VS REPUBLIC,** Criminal Appeal No. 8 of 2011 (unreported) the Court said:

> *"We are aware of the law governing search warrants and seizure (PART II, A (d) of the Criminal Procedure Act, Cap 20 R.E. 2002, particularly sections 38 to 42). Sections 38 and 40 require, generally, that a search warrant be issued to a*

police officer or other person so authorized, before such officer or person executes the search. However, under exceptional circumstances, a police officer may conduct a search and seizure without warrant. Such circumstances are listed under sections 41 and 42 of Cap 20. Relevant to this case are the provisions of section 42(1) (b) of Cap 20."

The said principle was followed by the Court in the case of **MOSES MWAKASINDILE VS REPUBLIC,** Criminal Appeal No 15 of 2017 (unreported). The Court was confronted with a scenario whereby, while PW6 was on police patrol he received a call from the Regional Police Commander at 05:30 hours in the morning on 11th January, 2015 alerting him that he had received information that on board a Fuso bus with registration number T.664 BXQ (Exhibit P.2) travelling from Iringa to Mbeya a certain passenger was conveying marijuana. The Regional Crimes Officer instructed him to arrest the suspected passenger. Acting on that instruction, PW6 dispatched the police patrol vehicle to Inyala to wait for the bus and meanwhile he took a private car and drove to Inyala along with PW8 and another police officer. On appeal the mode of search was challenged and the Court said:

"According to PW6, the search that he supervised at Inyala was an emergency search under section 42 of the CPA, because it was not possible, in the circumstances of the case, to secure a search warrant and execute the search in terms of section 38 (1) of the CPA. We note that the learned trial Judge ruled, at page 77 of the record after the same issue was raised in the course of the trial, that the search was carried out as an emergency search under section 42 of the CPA. On our part, we wholly endorse the view of the learned trial Judge and find that, in the circumstances, the search was rightly carried out as an emergency search under section 42 of the CPA."

Also in the case of **SLAHI MAULID JUMANNE VS REPUBLIC**, Criminal Appeal No. 292 of 2016 (unreported) the Court was confronted with a situation whereby search was not conducted in terms of section 38 of the CPA. Thus the Court said:

"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."

In the present case we thus cannot fault the trial court in having relied on the credible oral account of the prosecution witnesses which was not impeached considering that: **One**, documentation is not the only requirement in dealing with an exhibits and it will not fail the test merely because there was no documentation and **two,** other factors have to be looked at depending on the prevailing circumstances in every particular case. See -**NYERERE NYAGUE VS REPUBLIC**, Criminal Appeal No. 67 of 2010 (unreported) and **MAKOYE SAMWEL @ KASHINJE AND KASHINDYE BUNDALA** (supra) and **JOSEPH LEONARD MANYOTA VS REPUBLIC,** Criminal Appeal No. 485 of 2015 (unreported). Therefore, the cases of **SELEMANI ABDALLA AND 2 OTHERS VS REPUBLIC** (supra) and **PAULO MADUKA VS REPUBLIC** (supra) cited to us by the appellant's counsel are distinguishable from the circumstances obtaining in the case at hand.

In the premises, with respect, we decline the invitation by the appellant's counsel to follow the decision in **ALBERTO MENDES VS REPUBLIC** (supra) and we shall give our reasons. In **ALBERTO MENDES VS REPUBLIC** (supra) a police officer arrested the appellant acting on a tip from the informer that there would be a Guinea Bissau National dealing in narcotic drugs who would be travelling aboard Ethiopian Airline flight. The appellant at different intervals, defecated a total of 85 pellets in the presence of observing witnesses who were police officers and the pellets were entrusted to the exhibit room keeper who forwarded the same to the Chief Government Chemist. In resolving the complaint on the propriety or otherwise of the chain of custody, the Court had to re-evaluate the unreliable prosecution account of witnesses who had failed to identify the number of pellets they had witnessed the appellant defecating while under observation. Having found that, there were material contradictions in the witnesses' statements when compared to their oral testimonies before the trial court, the Court said:

> *"In our view, the contradictions cannot be termed to be minor as observed by the trial learned Judge as they go to the root of the matter. Such contradictions have tainted their credibility hence*

they cannot be believed. 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 form 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 the above case, **one**, the fact that those who handled the drug consignment exhibit P1 were the police officers was not the only consideration there. **Two**, the Court in addition, considered the disharmony or contradictions in the oral and documentary account of the prosecution witnesses who were police officers, on the manner in which they handled exhibit P1 from the time of seizure until when it landed in the

hands of the Chief Government Chemist and its exhibition in the evidence at the trial. Such circumstances do not obtain in the present case in the wake of credible and oral account of the prosecution witnesses in the handling of Exhibit P7 from the screening and detection of the 72 pellets and retrieval, arrest of the appellant and subsequent handling of Exhibit P7 at ADU and Chief Government Chemist. Besides, all prosecution witnesses who dealt with the exhibit P7, recognized it at the trial and as such, the chain of custody was not broken. We say so because, in our considered view, the prosecution account was direct evidence which is in line with the provisions of section 62 (1) (a) of the Evidence Act [CAP 6 RE.2002] whose value was emphasized in the case of **COMMONWEALTH VS WEBSTER** 1850 Vol. 50 MAS 255 where Shaw CJ stated:

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

From the cumulative account of the said witnesses, as correctly found by the trial court, we find no cogent reasons to disbelieve the credible account of the prosecution's eye witnesses. Thus, the 1st ground of appeal is not merited and it is dismissed.

As to the 4th and 6th grounds of appeal, the trial court is faulted in having relied on contradictory account of the prosecution as to the manner of scanning and opening the appellant's bag and how the pellets were retrieved and contradictions on the modality of examining and weighing the 72 pellets.

We have already discussed in detail on how PW4 and PW5 scanned and detected the unusual objects which were later found to be 72 pellets. That apart, we found those witnesses to be coherent and consistent on the 36 pellets being found in the first brassiere; 15 pellets in the second brassiere and 36 in the third one. Besides, as earlier pointed out they as well, recognized the 72 pellets at the trial. Thus, we do not find any cogent reasons to fault the learned trial Judge who found them to be credible witnesses.

Next for consideration is the alleged discrepancies in the testimony of PW2, PW3 and PW10 as to what was weighed and packaged. We wish to point out that, the examination and weighing of narcotic drugs is an expertise which is the domain of the Chief Government Chemist. We say so because although PW10 was present when the testing was done, not being

an expert in the respective field, whatever he said in that regard is insignificant. In our considered view, from the cumulative evidence on the record, since the processes to establish weight of heroine was conducted by PW3, we are satisfied that the test revealed that the 72 pellets contained heroine hydrochloride weighing 1073.82 grams. Besides, we found no contradiction on the testimonial account of PW2 and PW3 both of whom testified on the scientific procedures and formulae used in weighing and testing the 72 pellets.

Thus, without prejudice, the discrepancies are minor and did not go to the root of the matter considering that, the prosecution witnesses were testifying after expiry of five years from the occurrence of the fateful incident. We are fortified in that account because human recollection is not infallible since a witness is not expected to be right in minute details when retelling his story. See- **EVARIST KACHEMBEHO AND OTHERS VS REPUBLIC** [1978] LRT n. 70. In the same line of reasoning, we observed in **JOHN GILIKOLA VS REPUBLIC,** Criminal Appeal No. 31 of 1991 (unreported) that, due to frailty of human memory and if the discrepancies are on details, the Court may overlook such discrepancies.

Having considered the contradictions or discrepancies complained of, we do not with respect, consider them to be material to the extent of impeaching the credible account of PW2, PW3, PW4 and PW5.

In view of what we have endeavoured to discuss, we are satisfied that, the available credible oral account of PW1, PW2, PW3, PW4, PW5, PW6, PW8, PW10 and PW11 together with the documentary account contained in Exhibits P1, P2, P3, P4, P6, P7, P8 and P9, point to the guilt of the appellant to have been found trafficking in drugs on 19/5/2012. We thus dismiss the 4th and 6th grounds of appeal for lacking merits.

On the aspect of sentencing which was a complaint in the 8th ground of appeal, parties locked horns on the propriety or otherwise of the imposed sentence of twenty-seven years from the date of arrest. 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, she 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 ordered by the learned trial Judge to commence from the time of her arrest. In this regard, since the

appellant was a youthful first offender she ought to have been given the minimum sentence. We thus vary the erroneous sentence imposed by the learned trial Judge and as such the appellant shall serve a period of twenty (20) years from the date she was convicted; that is from 6th July, 2017. Thus, the 8th ground of appeal is merited.

All said and done, we dismiss the appeal.

It is so ordered.

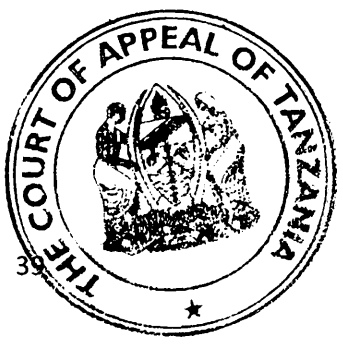
DATED at **DAR-ES-SALAAM** this 20th day of May, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

W. S. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of May, 2020 in the presence of Mr. Joseph Sang'udi, learned counsel for the appellant and Ms. Anunciata Leopold, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL